

Victorian Affirmative Consent Reforms

Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022

These legislative reforms were made in response to the **Victorian Law Reform Commission report – Improving the Justice System Response to Sexual Offences**.

The consent reforms will come into operation on 30 July 2023.

Disclaimer: This document is intended as a general overview only. The contents do not constitute legal advice, are not intended to be a substitute for legal advice and should not be relied upon as such.

Changes to the law

All changes are in light blue

How the definition of consent has changed

- A '**free and voluntary agreement**'. This reinforces that involuntary bodily responses are not an indication of consent.
- A person does **not consent merely because they do not resist verbally or physically**. This moves away from outdated notions of lack of consent, which is based on the amount of resistance rather than something that is positively communicated.
- A person does **not consent just because of previous sexual behaviour**. Consent can **not** be assumed based on past sexual behaviours, including past consent to a sexual act with the same or a different person.



Changes to: Objectives

a. To uphold the fundamental right for every person to make decisions about their sexual behaviours and to choose not to engage in sexual activity.

ab. To promote the principle that consent to an act is not to be assumed – that consent involves ongoing and mutual communication and decision making between each person involved (that is, each person should seek the consent of each other person in a way and at a time that makes it clear whether they consent).

b. To protect children and persons with a cognitive impairment or mental illness from sexual exploitation.

This new objective reinforces that assumptions have no place in consent or sexual offence trials – consent can only be based on a person's clear communication of their willingness and that consent isn't a 'one-off' conversation

Consent Law in Practice

Step 1.

Intent

Did Person A (the alleged perpetrator/respondent) intentionally carry out the act?

Yes – proceed to step 2

Step 2.

Consent

Did Person B (the alleged victim/complainant) consent to the act?

No – proceed to step 3

Step 3.

New

Requirement to do or say something

Did Person A do or say anything a reasonable time before or at the time of the act to find out if Person B consented?

No – go to step 3a

Step 3a.

New

Exception to requirement to do or say something

Did Person A have a cognitive impairment or mental illness that was a substantial cause of why they did not say or do anything?

(This exemption is for a specific cohort. The trier of fact must still determine if Person A's belief in consent was reasonable in the circumstances.)

Yes (for the accused to prove on the balance of probabilities) – go to step 4

Step 4.

Reasonable belief in consent

Did Person A have a reasonable belief that Person B consented to the act?

What is reasonable will depend on the circumstances. Directions can be given to the jury about what can be considered including characteristics of the accused

Changes to: Circumstances where there is no consent

The Act updates the list of legislative circumstances where a person does not consent to better recognise the diverse range of factors that can impact a person's ability to freely and voluntarily agree to a sexual act.

- A person does not consent if they submit because of force, harm or fear or force or harm of any type. The Act makes clear that more subtle types of harm, including emotional manipulation and economic abuse, can negate consent as well as coercion and intimidation. This is the case regardless of whether it is a 'one-off' occasion or an ongoing pattern of behaviour. This better reflects the complexity of consent and experiences of victim survivors, including in relationships characterised by family violence where there is a constant fear and a pattern of controlling/coercive conduct.
- The Act also makes clear that a person does not consent if they submit to a sexual act because they are overborne by the abuse of a relationship of trust and authority. A relationship of trust or authority may include an employee of a mental health facility and patient, employer and employee, person who provides care to a person with a disability. However, the mere existence of the relationship or a power imbalance is insufficient to prove the circumstance - it is intended to capture situations where a person misuses or exploits their power to cause the other person to submit to a sexual act.
- The Act makes non-payment of sex workers in fraudulent circumstances a circumstance where there is no consent. This might include situations where a person lies about making a payment or provides false bank details.
- The Act makes the intentional non-use, removal or tampering of a condom without consent ('stealth') a circumstance where there is no consent, if the act was consented to on the basis of a condom being used. The removal and tampering aspect will apply to any person involved in the act (e.g. group sex scenarios).



Changes to : Reasonable belief in consent

Whether a person reasonably believes that another person is consenting to a sexual act depends on circumstances:

- **A belief is not reasonable if, within a reasonable time before or at the time the act takes place, the person does not say or do anything to find out whether the other person consents.** This introduces affirmative consent and will place a greater focus on the actions of the accused person to seek consent rather than just on what the victim survivor did or did not say or do.
- **Requirement to say or do something does not apply if the person has a cognitive impairment or mental illness (other than the effects of self-induced intoxication) that was a substantial cause of them not saying or doing anything to find out if the other person consents.** This protects people who may have compromised communication skills because of their impairment or illness, but still requires them to have had a reasonable belief in consent in all the circumstances.

