

Affirmative model of consent and stealthing

Information sheet – September 2024

The information provided in this document is not legal advice and is designed to provide general information only. This document includes information on legislative amendments to adopt an affirmative model of consent in Queensland, amend the mistake of fact provisions and explicitly criminalise stealthing, which commenced on 23 September 2024. Should you require information about your particular circumstances or factual scenario, legal advice should be sought.

Affirmative model of consent

In March 2024, the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024* was passed by Parliament, strengthening sexual consent laws and driving change in Queensland towards a community free of sexual violence.

Moving Queensland to an affirmative model of consent, where consent must be mutually agreed and discussed, brings the state into line with other Australian jurisdictions.

Under the affirmative model of consent, consent to sexual activity must be mutually agreed – all participants have to say or do something to seek consent, and consent must be communicated back to the asking participant.

Consent cannot be assumed just because a person does not say no – consent must be communicated through words or conduct, for example, clear body language. Consent is also not assumed in circumstances where an individual does not have the cognitive capacity to consent or is so affected by alcohol or drugs that they are unable to consent or withdraw consent.

There is no consent if someone participates in the act because of force, fear of force or harm, whether to that person or someone else, animal or property.

When the sexual activity changes, consent must be sought and agreed for the new activity, and it cannot be assumed because a person has agreed in the past or has agreed to a different sexual activity. This also applies to the same or different act with a different person.

If it is not clear someone has communicated consent, you are legally required to say or do something to check the other person is consenting.

If consent is not given, the sexual activity is not consensual and may amount to an offence of sexual assault or rape, for example.

Queensland moved to an affirmative model of consent on 23 September 2024.

More information about this offence and the legislative amendments can be found [here](#).

Amendment to mistake of fact provisions

The mistake of fact provision in relation to consent allows a person to argue that they honestly and reasonably — but mistakenly — believed the other person consented to sex.

Under the new laws, a person cannot rely on the excuse of mistake of fact if they did not say or do anything immediately before or at the time to check their partner was consenting to the sexual activity. This requirement for a person to say or do something to check they have consent will not apply if the person had a cognitive or mental health impairment that was a substantial cause of them not to do or saying anything.

Clarifying 'stealthing' is non-consensual

'Stealthing' is the non-consensual removal of a condom or tampering with a condom before or during consensual sexual activity.

That means if a person consents to sexual activity with a condom, it does not mean they are consenting to a sexual activity without a condom.

You cannot remove or tamper with a condom without the other person's knowledge and agreement. If the condom comes off during sexual activity you should stop.

The new laws confirm that there is no consent if you participate in a sexual activity with another person on the basis that a condom is used and the other person does any of the following things before or during the act:

- does not use a condom;
- tampers with a condom;
- removes the condom; and/or
- becomes aware that the condom is no longer effective but continues with the sexual act.

Frequently Asked Questions

Who can and cannot consent?

In Queensland, people aged 16 and over can legally consent.

People who are asleep or unconscious cannot consent. People who are heavily intoxicated by drugs and/or alcohol may not be able to consent depending on their level of intoxication.

When talking about consent with your partner/s, you need to consider if they have capacity to consent.

People with a cognitive disability that impairs their ability to understand or clearly communicate exactly what they consent to may not be able to legally consent.

Are there reasons why someone cannot legally consent to sexual activities?

The new consent laws outline some of the circumstances where there is no consent.

These include where someone:

- did not say or do anything to communicate consent;
- does not have the cognitive capacity to consent;
- is so affected by alcohol or another drug they are incapable of consenting or withdrawing consent;
- is unconscious or asleep;
- participates in the act because of force, a fear of force, harm of any type or a fear of harm of any type, whether to the person or another person, animal or property, and regardless of whether it was a single incident or part of a pattern of behaviour;
- participates in the act because of coercion, blackmail or intimidation, regardless of when it occurs or whether it is a single incident or part of an ongoing pattern;
- participates in the act because the person or another person is unlawfully confined, detained or otherwise deprived of their personal liberty;
- participates in the act because the person is overborne by the abuse of a relationship of authority, trust or dependence;
- participates in the act because of a false or fraudulent representation about the nature or purpose of the act, including about whether the act is for health, hygienic or cosmetic purposes;
- participates in the act with another person because the person is mistaken about the identity of the other person or participates in the act with another person because the person is mistaken they are married to the other person;
- is a sex worker and participates in the act because of a false or fraudulent representation that the person will be paid or receive some reward for the act;
- participates in the act with another person on the basis that a condom is used for the act and the other person does any of the following things before or during the act: does not use a condom; tampers with the condom; removes the condom; or becomes aware that the condom is no

longer effective but continues with the sexual act ('stealthing').

Does someone with an impairment still have to seek consent for sexual activities?

Yes. Everyone should only participate in sexual activities when there is consent.

However, a relevant impairment may affect how the mistake of fact provisions operate.

To rely on the excuse of mistake of fact in relation to consent, a person must hold an honest and reasonable belief that the other person is consenting. A person will not be able to show this belief was reasonable if they did not do or say anything to check if the other person was consenting.

In some circumstances, people with cognitive impairments and mental health impairments affecting their ability to communicate may be unfairly disadvantaged by this requirement to take steps to ascertain consent.

Therefore, a person with a cognitive or mental health impairment does not need to show that they said or did something to ascertain consent to prove that they held a reasonable belief that there was consent, if they prove:

- they had a relevant impairment; and
- the impairment was a substantial cause of why they did not say or do anything.

This provision *does not* automatically give an accused person with a relevant impairment an excuse of mistaken belief as to consent.

Existing section 216 of the Criminal Code applies to the abuse of persons with an impairment of the mind.

What about using consensual violence during sexual activities?

Where consensual violence is used during sexual activity, such as spanking, participants should make sure that everyone involved understands and agrees to the use of force and understands what might happen.

However, if someone suffers grievous bodily harm during a sexual activity, this can be used as evidence there was no consent, unless proven otherwise.

In my culture, saying 'no' can be interpreted as an invitation to demonstrate my commitment or to pursue harder. Is this now illegal?

In some cultures, withholding consent can be interpreted as an invitation to continue to pursue and demonstrate commitment and/or desire.

In Queensland, consent is mutual and agreed, where all parties come to the agreement of consent together. If a participant says 'no' or withdraws their consent, the other party needs to respect this choice and stop the sexual activity immediately.

Failure to stop the sexual activity once consent has been withdrawn is an offence, and legal repercussions and penalties will apply.

What constitutes rape?

Rape is any sexual intercourse involving penetration without consent.

Sexual intercourse involving penetration includes:

- penile-vaginal intercourse;
- penile-anal intercourse;
- penetrating the vulva, vagina or anus of the other person with any object or part of the body, such as a finger or tongue; and
- penetrating someone's mouth with a penis.

Rape is a serious offence and carries a maximum penalty of life imprisonment.

What is sexual violence?

Any sexual behaviour without consent is sexual violence and it is illegal.

There are different offences involving sexual violence without consent in Queensland, for example, rape or sexual assault. The maximum penalty for sexual assault will be either 10 years imprisonment or 14 years imprisonment, depending on the circumstances of the case.

For more information on types of sexual violence and where to get help visit [here](#).

Do you believe you've experienced sexual violence?

No one has the right to make you do anything you don't want to do. That's why everyone must check for consent before and during any sexual activity.

If you or someone you know has had an experience where there was no consent, that is sexual violence. Know that is not your fault and help and support is available.

If you are in immediate danger, phone Triple Zero (000) or go to the emergency department at your local hospital. You can also phone the Sexual Assault Helpline on 1800 010 120 (7.30am to 11.30pm, 7 days a week).

For more help and support options visit [here](#).

Is consent required for sexual activities if we're married?

Yes. Seeking consent is an important part of all sexual experiences. Consent should be sought,

and consent should be freely agreed before engaging in any sexual activities.

This means new sexual partners, and people who have frequently engaged in sexual activities together, like married couples, need to ensure sexual consent is mutually agreed – all participants have to say or do something to seek consent, and consent must be communicated back to the asking participant.

[Visit here](#) to learn how to communicate sexual consent, and what to do if consent is withdrawn during a sexual encounter.

Is tampering with birth control pills, or other reproductive control methods, classified as stealthing?

Interfering, damaging or withholding reproductive control methods is not stealthing but it is a form of sexual abuse. This could also be a form of domestic and family violence.

Further information

For more information about changes to the laws, including penalties and sentences, visit www.qld.gov.au/NewSexualViolenceLaws2024