

## Appendix – Inconsistencies in Sexual Consent Laws Across Australia

Jurisdiction	The definition of consent	The definition of sexual intercourse	Circumstances where consent is vitiated	Knowledge about consent	The definition of a child	The age of consent for sexual intercourse
<p><b>New South Wales</b></p> <p><i>Crimes Act 1900 (NSW)</i></p>	<p><b>S 61HI:</b></p> <p>(1) A person <i>consents</i> to a sexual activity if, at the time of the sexual activity, the person <b>freely and voluntarily agrees to the sexual activity</b>.</p> <p>(2) A person may, by words or conduct, withdraw consent to a sexual activity at any time.</p> <p>(3) Sexual activity that occurs after consent has been withdrawn occurs without consent.</p> <p>(4) A person who does not offer physical or verbal resistance to a sexual activity is not, by reason only of that fact, to be taken to consent to the sexual activity.</p> <p>(5) A person who consents to a particular sexual activity is not, by reason only of that fact, to be taken to consent to any other sexual activity. (E.g. consent to sexual activity using a condom, is not by reason of that fact, consent to sexual activity without a condom)</p> <p>(6) A person who consents to a sexual activity with a person on one occasion is not, by reason only of that fact, to be taken to consent to a sexual activity.</p> <p>See more generally, <a href="#">S 61HF</a> which sets out the objectives of Subdivision 1A (Consent and Knowledge of Consent) including:</p> <ul style="list-style-type: none"> <li>every person has a right to choose whether or not to participate in a sexual activity;</li> <li>consent to a sexual activity is not to be presumed;</li> <li>consensual sexual activity involves ongoing and</li> </ul>	<p><b>S 61HH</b> defines sexual activity</p> <p>sexual activity means sexual intercourse, sexual touching or a sexual act.</p> <p><b>S 61HA</b> Meaning of “sexual intercourse”</p> <p>For the purposes of this Division, <b>sexual intercourse</b> means—</p> <p>(a) the penetration to any extent of the genitalia or anus of a person by—</p> <p>(i) any part of the body of another person, or</p> <p>(ii) any object manipulated by another person, except where the penetration is carried out for proper medical purposes, or</p> <p>(b) the introduction of any part of the genitalia of a person into the mouth of another person, or</p> <p>(c) cunnilingus, or</p> <p>(d) the continuation of sexual intercourse as defined in paragraph (a), (b) or (c).</p> <p>See also, <a href="#">S 61HB</a> for meaning of ‘sexual touching;’ <a href="#">S 61HC</a> for meaning of ‘sexual act.’</p>	<p><b>S 61HJ</b> Circumstances in which there is no consent:</p> <p>Provides a <b>non-exhaustive</b> list of circumstances where a person does not consent to a sexual activity.</p> <p>a) The person does not say or do anything to communicate consent;</p> <p>b) The person does not have capacity to consent;</p> <p>c) The person is so affected by alcohol or another drug as to be incapable of consenting to the sexual activity;</p> <p>d) The person is unconscious or asleep;</p> <p>e) The person participates in the sexual activity because of ‘force, fear of force, or fear of serious harm’ of any kind to the person;</p> <p>f) The person participates in sexual activity because of ‘coercion, blackmail or intimidation’ regardless of whether the coercion, blackmail or intimidation occurs;</p> <p>g) the person participates in the sexual activity because the person or another person is unlawfully detained; or</p> <p>h) the person participates in the sexual activity because the person is overborne by the abuse of a relationship of authority, trust or dependence;</p> <p>i) the person is mistaken about the nature of the sexual activity or the purpose of the sexual activity (including whether the sexual activity is for health, hygienic or cosmetic purposes);</p> <p>j) the person participates in the sexual activity because the person is mistaken about the identity of the other person;</p> <p>k) the person participates in the sexual activity because of a fraudulent inducement.</p>	<p><b>SS 61HK(1)</b> Knowledge about consent:</p> <p>The accused person is taken to know that another person does not consent to a sexual activity if –</p> <p>(a) the accused person actually knows the other person does not consent to the sexual activity; or</p> <p>(b) the accused person is reckless as to whether the other person consents to the sexual activity; or</p> <p>(c) any belief that the accused person has, or may have, that the other person consents to the sexual activity is not reasonable in the circumstances.</p> <p>SS 61HK(2) provides a belief that the other person consents to sexual activity is <b>not reasonable</b> if the accused person did not, within a reasonable time before or at the time of the sexual activity, say or do anything to find out whether the other person consents to the sexual activity.</p> <p>*Note that S 61HK(3) provides that S61HK(2) does not apply if the accused person shows that at the time of the sexual activity the accused person had a <b>cognitive impairment</b> (as defined by <a href="#">S 61HD</a>) or a <b>mental health impairment</b> (defined in <a href="#">S 4C</a>).</p> <p>SS 61HK(5) provides that in relation to any finding made under S 61HK in relation to the accused person’s knowledge about consent the trier of fact— must consider all the circumstances of the case, including what, if anything, the</p>	<p><b>No definition of ‘child’</b> in the <i>Crimes Act 1900</i> (NSW), including for the purpose of Division 10 (Sexual offences against adults and children) Offences (see right) are age-based.</p>	<p><b>SS 66C(3):</b> Any person who has sexual intercourse with a child who is of or above the age of 14 years and under the age of 16 years is liable to imprisonment for 10 years)</p> <p>However, there is an additional offence of Sexual intercourse—young person between 16 and 18 under special care (<a href="#">S 73</a>)</p> <p>Additionally, consent of a person who has a cognitive impairment is not a defence to a charge for an offence of Sexual intercourse: person responsible for care (<a href="#">S 66F</a>)</p>

**Appendix – Inconsistencies in Sexual Consent Laws Across Australia**

Jurisdiction	The definition of consent	The definition of sexual intercourse	Circumstances where consent is vitiated	Knowledge about consent	The definition of a child	The age of consent for sexual intercourse
	mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual activity.			accused person said or did, and must not consider any self-induced intoxication of the accused person.		
<p><b>Victoria</b></p> <p><i>Crimes Act 1958 (Vic)</i></p> <p><u>Pre commencement of Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022 (Vic) (Justice Legislation Amendment)</u></p>	<p><u>S 36 Meaning of consent</u></p> <p>Consent means ‘<b>free agreement</b>’.</p> <p>Reasonable belief in consent includes considering the circumstances a person has taken to find out whether the other person consents: <a href="#">S 36A</a></p> <p>In circumstances of self-induced intoxication, reasonable belief is assessed to the standard of a reasonable person not intoxicated but otherwise in the same circumstances: <a href="#">S 36B</a></p> <p>Note that interpretation must have regard to objects listed in <a href="#">S 37A</a> to uphold right of every person to make decisions about their own sexual behaviour to choose not to engage in sexual activity.</p> <p>There are also ‘guiding principles’ in <a href="#">S 37B of the Crimes Act 1958 (Vic)</a> which requires Courts to have regard to certain facts about the incidence of sexual violence (for example, that there is a high incidence of sexual violence within society; sexual offences are significantly under-reported).</p> <p><u>Directions on Consent</u></p> <p>There are directions on consent (<a href="#">S 46</a>) and reasonable belief in consent (<a href="#">S 47</a>) pursuant to Part 5 Division 1 of the <i>Jury Directions Act 2015 (Vic)</i>:</p> <p>In practice these directions are now given in every case where the issues arise.</p>	<p><u>S 35A: Sexual penetration</u></p> <p>(1) A person (A) sexually penetrates another person (B) if—</p> <ol style="list-style-type: none"> <li>A introduces (to any extent) a part of A’s body or an object into B’s vagina; or</li> <li>A introduces (to any extent) a part of A’s body or an object into B’s anus; or</li> <li>A introduces (to any extent) their penis into B’s mouth; or</li> <li>A, having introduced a part of A’s body or an object into B’s vagina, continues to keep it there; or</li> <li>A, having introduced a part of A’s body or an object into B’s anus, continues to keep it there; or</li> <li>A, having introduced their penis into B’s mouth, continues to keep it there.</li> </ol> <p>(2) A person sexually penetrates themselves if—</p> <ol style="list-style-type: none"> <li>the person introduces (to any extent) a part of their body or an object into their own vagina; or</li> <li>the person introduces (to any extent) a part of their body or an object into their own anus; or</li> <li>having introduced a part of their body or an object into their own vagina, they continue to keep it there; or</li> <li>having introduced a part of their body or an object into their own anus, they continue to keep it there.</li> </ol> <p>(3) A person (A) sexually penetrates an animal if A engages in <a href="#">conduct</a> with the animal that would involve sexual penetration as defined by subsection (1) were the animal another person (B).</p>	<p><u>S 36(2) Circumstances in which a person does not consent to an act:</u></p> <ol style="list-style-type: none"> <li>the person submits to the act because of force or the fear of force, whether to that person or someone else;</li> <li>the person submits to the act because of the fear of harm of any type, whether to that person or someone else or an animal;</li> <li>the person submits to the act because the person is unlawfully detained;</li> <li>the person is asleep or unconscious;</li> <li>the person is so affected by alcohol or another drug as to be incapable of consenting to the act;</li> <li>the person is so affected by alcohol or another drug as to be incapable of withdrawing consent to the act;</li> <li>the person is incapable of understanding the sexual nature of the act;</li> <li>the person is mistaken about the sexual nature of the act;</li> <li>the person is mistaken about the identity of any other person involved in the act;</li> <li>the person mistakenly believes that the act is for medical or hygienic purposes;</li> <li>if the act involves an animal, the person mistakenly believes that the act is for veterinary or agricultural purposes or scientific research purposes;</li> <li>the person does not say or do anything to indicate consent to the act;</li> <li>having given consent to the act, the person later</li> </ol>	<p><u>S 36A Reasonable belief in consent</u></p> <ol style="list-style-type: none"> <li>Whether or not a person reasonably believes that another person is consenting to an act depends on the circumstances.</li> <li>the circumstances include any steps that the person has taken to find out whether the other person consents or would consent to the act.</li> </ol> <p>See also, <a href="#">S 36B</a>—effect of intoxication on reasonable belief</p> <ul style="list-style-type: none"> <li>if the intoxication is self-induced, regard must be had to the standard of a reasonable person who is not intoxicated and who is otherwise in the same circumstances as that person at the relevant time; and</li> <li>if the intoxication is not self-induced, regard must be had to the standard of a reasonable person who is intoxicated to the same extent as that person and who is in the same circumstances as that person at the relevant time.</li> </ul>	<p>‘Child’ is defined by <a href="#">S 51A of the Crimes Act 1958 (Vic)</a> as a person <b>under the age of 18 years</b>.</p> <p><b>The legal age of consent in Victoria is 16.</b></p> <p>However, where a complainant is aged 16–17 consent is not a defence if the other person is in a position of supervision, care or authority”: <a href="#">S 49C</a></p>	

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		<p>(4) A person (B) is sexually penetrated by an animal if B engages in <a href="#">conduct</a> with the animal that would involve sexual penetration as defined by subsection (1) were the animal another person (A).</p> <p>(5) In relation to sexual penetration of an animal, a reference to the vagina or anus includes a reference to any similar part.</p> <p>S 35A needs to be read in conjunction with the defs in <a href="#">S 35</a>: In particular, “vagina” includes the ‘external genitalia’ (see <a href="#">Austin Harrison (a pseudonym) v R 1 [2020] VSCA 157; BC202005363</a>) And for the purposes of Subdivisions (8A) (Sexual offences (general provisions)) to (8FA)(Other sexual offences), a reference to a part of the body includes a reference to a surgically altered part of the body</p>	<p>withdraws consent to the act taking place or continuing.</p>			
<p><b>Victoria</b></p> <p><i>Crimes Act 1958 (Vic)</i></p> <p>Post commencement of Justice Legislation Amendment (for most provisions 30 July 2023)</p>	<p>S 5 of the Justice Legislation Amendment substitutes new S 36 of the <i>Crimes Act 1958</i></p> <p>(1) Consent means <b>free and voluntary agreement</b>.</p> <p>(2) A person does not consent to an act just because they do not resist the act verbally or physically.</p> <p>(3) A person does not consent to an act just because they consented to –</p> <ol style="list-style-type: none"> <li>a different act with the same person; or</li> <li>the same act with the same person at a different time or place; or</li> <li>the same act with a different person; or</li> <li>a different act with a different person.</li> </ol> <p>Amendment to S 37A Objects addition of object at <a href="#">S 37A(ab)</a></p> <ul style="list-style-type: none"> <li>to promote the principle that consent to an act is not to be assumed—that consent involves ongoing</li> </ul>	<p>No change</p>	<p>new <a href="#">S 36AA</a> of the Crimes Act 1958 inserted by S 5 of the Justice Legislation Amendment, provides a modified <b>non-exhaustive</b> list of circumstances where a person does not consent. The material amendments are summarised below.</p> <ol style="list-style-type: none"> <li>the person does not say or do anything to indicate consent to the act;</li> <li>the person submits to the act because of force, a fear of force, harm of any type or a fear of harm of any type (this modified provision provides further specification of the meaning of harm by providing a list of harms that can be done to a person including for example, economic or financial harm; reputational harm; harm to the person’s family, cultural or community relationships, harm to the person’s employment);</li> <li>the person submits to the act because of coercion or</li> </ol>	<p>New <a href="#">S 36A</a> to substitute provision set out above</p> <p>(1) Whether or not a person (A) reasonably believes that another person (B) is consenting to an act depends on the circumstances</p> <p>(2) A’s belief that B consents to an act is not reasonable if, within a reasonable time before or at the time the act takes place, A does not say or do anything to find out whether B consents to the act.</p> <p>*Subsection 2 does not apply if A has a cognitive impairment or mental illness and that impairment or illness is ‘a substantial cause’ of A not saying or doing anything to</p>	<p>No change</p>	<p>No change</p>

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	and mutual communication and decision-making between each person involved		<p>intimidation regardless of when the coercion or intimidation occurs;</p> <p>f) the person is asleep or unconscious;</p> <p>m) the act occurs in the provision of commercial sexual services and the person engages in the act because of a false or misleading representation that the person will be paid;</p> <p>n) the person engages in the act on the basis that a condom is used and either— before or during the act, any other person involved in the act intentionally removes the condom or tampers with the condom; or</p> <p>o) having given consent to the act, the person later withdraws consent to the act taking place or continuing.</p> <p>s 36(2)(ka) inserted by <a href="#">S 3</a> of the Justice Legislation Amendment to address issue of stealthing – the person engages in the act on the basis that a condom is used and either</p> <p>I. before or during the act, any other person involved in the act intentionally removes the condom or tampers with the condom; or</p> <p>II. the person who was to use the condom intentionally does not use it;</p>	find out whether B consents to the act.		
<p><b>Queensland</b></p> <p><i>Criminal Code Act 1899</i> (QLD)</p>	<p><a href="#">S 348(1)</a></p> <p>For the purposes of Chapter 32 of the Criminal Code Act, ‘consent’ is defined in as “consent <b>freely and voluntarily given by a person with the cognitive capacity to give the consent</b>”.</p>	<p><a href="#">S 6</a> Carnal knowledge</p> <p>(1) If <b>carnal knowledge</b> is used in defining an offence, the offence, so far as regards that element of it, is complete on penetration to any extent.</p> <p>(2) <b>Carnal knowledge</b> includes anal intercourse.</p> <p><a href="#">S 347</a> Definitions for <a href="#">ch 32</a> <b>penetrate</b> does not include penetrate for a proper medical, hygienic or law enforcement purpose only.</p> <p><a href="#">S 349</a> Rape</p>	<p><a href="#">SS 348(2)</a> sets out a list of circumstances in which a person’s consent is ‘not freely and voluntarily given’ if it is obtained—</p> <p>(a) by force; or</p> <p>(b) by threat or intimidation; or</p> <p>(c) by fear of bodily harm; or</p> <p>(d) by exercise of authority; or</p> <p>(e) by false and fraudulent representations about the nature or purpose of the act; or</p> <p>(f) by a mistaken belief induced by the accused person that the accused person was the person’s sexual partner.</p>	<p>See <a href="#">SS 348(3)</a> and <a href="#">SS 348(4)</a></p> <p><a href="#">S 348A</a> mistake of fact in relation to consent</p> <p>S 348A applies in relation to deciding whether a person charged with a sexual offence did an act under an honest and reasonable, but mistaken, belief that another person gave consent to the act.</p> <p><a href="#">SS 348A(2)</a> states that in deciding whether a belief of an accused person as to consent</p>	<p><a href="#">S 1</a> Definitions</p> <p>In this Code—</p> <p><b>adult means a person of or above the age of 18 years.</b></p>	<p><b>16</b></p> <p><a href="#">S 215</a> Carnal knowledge with or of children under 16</p> <p>(1) Any person who has or attempts to have unlawful carnal knowledge with or of a child under the age of 16 years is guilty of an indictable offence.</p> <p>The separate offence of sodomy of a child under 18 years of age (previously found in s 208) was removed in 2016.</p>

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		<p>(1) Any person who rapes another person is guilty of a crime. Maximum penalty—life imprisonment.</p> <p>(2) A person rapes another person if—</p> <p>(a) the person has carnal knowledge with or of the other person without the other person's consent; or</p> <p>(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or</p> <p>(c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.</p>	<p><u>SS 348(3)</u> A person is not to be taken to give consent to an act only because the person does not, before or at the time the act is done, say or do anything to communicate that the person does not consent to the act.</p> <p><u>SS 348 (4)</u> If an act is done or continues after consent to the act is withdrawn by words or conduct, then the act is done or continues without consent.</p> <p>Judicial consideration of the amended provisions has been limited, however the following (which consider the section 348 prior to amendment) may be useful:</p> <p><i>R v Sunderland</i> [2020] QCA 156 at [42]: the definition of consent in S 348 applies to inform the element of assault in S 351 and S 352 in Chapter 32.</p> <p><i>R v Makary</i> [2018] QCA 258; (2019) 2 Qd R 528 at [32]–[61] and [88]</p>	<p>was honest and reasonable regard may be had to anything the person said or did to ascertain whether the other person was giving consent to the act.</p> <p><u>SS 348A(3)</u> states in deciding whether a belief was reasonable, regard may not be had to the voluntary intoxication of the person caused by alcohol, a drug or another substance.</p>		
<p><b>Western Australia</b></p> <p><i>Criminal Code Act Compilation Act 1913 (WA)</i></p>	<p>S 319 (2) defines "consent" as:</p> <p>(2) For the purposes of this Chapter —</p> <p>(a) <i>consent</i> means a consent <b>freely and voluntarily given</b> and, without in any way affecting the meaning attributable to those words, a consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit, or any fraudulent means;</p> <p>(b) where an act would be an offence if done without the consent of a person, a failure by that person to offer physical resistance does not of itself constitute consent to the act;</p>	<p>S 319—definition of sexual penetration:</p> <p><b>to sexually penetrate</b> means —</p> <p>(a) to penetrate the vagina (which term includes the <i>labia majora</i>), the anus, or the urethra of any person with —</p> <p>i. any part of the body of another person; or</p> <p>ii. an object manipulated by another person, except where the penetration is carried out for proper medical purposes; or</p> <p>(b) to manipulate any part of the body of another person so as to cause penetration of the vagina (which term includes the <i>labia majora</i>), the anus, or the urethra</p>	<p>See S 319(2)(a) consent is not freely and voluntarily given if it is 'obtained by force, threat, intimidation, deceit, or any fraudulent means.'</p> <p>See also, S 319(2)(c) a child under the age of 13 years is incapable of consenting to an act which constitutes an offence against the child.</p>	<p>If a person accused of sexual offences, under Section 325, 323 or 327 of the Criminal Code, held an honest and reasonable belief that the alleged victim was consenting, they can argue the defence of Mistake of Fact (Section 24). For this defence to succeed, the mistaken belief must have been based on reasonable grounds.</p>	<p>Is set out at sections 320(1), 321(1) and 322(1) of the <i>Criminal Code</i>.</p> <p><b>Definition dependant on age and relationship-based offences:</b> <u>Section 320. Child under 13, sexual offences against</u> (1) In this section <i>child</i> means a child under the age of 13 years. (max 20 years, alt offences available)</p>	<p><b>16 years of age</b>, except for under section 322 of the <i>Criminal Code</i> or 330 of the <i>Criminal Code</i> (which relates to incapable person, sexual offences against).</p>

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	(c) a child under the age of 13 years is incapable of consenting to an act which constitutes an offence against the child.	<p>of the offender by part of the other person’s body; or</p> <p>(c) to introduce any part of the penis of a person into the mouth of another person; or</p> <p>(d) to engage in cunnilingus or fellatio; or</p> <p>(e) to continue sexual penetration as defined in paragraph (a), (b), (c) or (d).</p> <p><u>S 325 offence of sexual penetration without consent</u> A person who sexually penetrates another person without the consent of that person is guilty of a crime and is liable to imprisonment for 14 years.</p>			<p><u>Section 321. Child of or over 13 and under 16, sexual offences against</u> (1) In this section, <i>child</i> means a child of or over the age of 13 years and under the age of 16 years. (max 20 years where the child is under the care, supervision, or authority of the offender, 14 years otherwise, alt offences available)</p> <p><u>Section 322. Child of or over 16, sexual offences against by person in authority etc.</u> (1) In this section <i>child</i> means a child of or over the age of 16 years. (max 10 years, less serious offences available)</p>	
<p><b>South Australia</b></p> <p><i>Criminal Law Consolidation Act 1935 (SA)</i></p>	<p><u>Section 46—Consent to sexual activity</u> (1) In this section—“sexual activity” includes <u>sexual intercourse</u>. (2) For the purposes of this Division, a person consents to <u>sexual activity</u> if the person <b>freely and voluntarily agrees</b> to the <u>sexual activity</u>.</p>	<p><u>S 5—Interpretation</u> (1) In this Act, unless the contrary intention appears—<b>“sexual intercourse”</b> includes any activity (whether of a heterosexual or homosexual nature) consisting of or involving—</p> <p>(a) penetration of a person’s vagina, labia majora or anus by any part of the body of another person or by any object; or</p> <p>(b) fellatio; or</p> <p>(c) cunnilingus, and includes a continuation of such activity;</p> <p>As to the difference between activity ‘consisting of’ and an activity ‘involving’ see <i>R v Turvey</i> (2017) 127 SASR 425 ; [2017] SASCF 28; BC201702625 at [34]–[37] per Hinton J.</p>	<p><u>S 46(3) non-exhaustive list of circumstances where a person is taken to not consent</u></p> <p>A person is <u>taken</u> not to freely and voluntarily agree to <u>sexual activity</u> if—</p> <p>(a) the person agrees because of—</p> <p>i. the application of force or an express or implied <u>threat</u> of the application of force or a fear of the application of force to the person or to some other person; or</p> <p>ii. an express or implied <u>threat</u> to degrade, humiliate, disgrace or harass the person or some other person; or</p> <p>(b) the person is unlawfully <u>detained</u> at the time of the activity; or</p>	<p><u>S 47 Reckless indifference</u></p> <p>A person is “recklessly indifferent to the fact that another person does not consent to an act, or has withdrawn consent to an act, if he or she—</p> <p>(a) is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but decides to proceed regardless of that possibility; or</p> <p>(b) is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but fails to take reasonable</p>	<p><b>Offences of unlawful sexual intercourse etc. (see right) are age based</b>, however there are definitions of ‘child’ for other child sex offences (e.g. s <u>50—Unlawful sexual relationship with child</u>, s <u>63B Procuring child to commit indecent act</u>, s <u>68 Use of children in commercial sexual services etc.</u>)</p>	<p><u>Section 49—Unlawful sexual intercourse</u> (3) A person who has <u>sexual intercourse</u> with a person under the age of <b>seventeen years</b> is guilty of an offence.</p> <p>(4) It shall be a <u>defence</u> to a charge under subsection (3) to prove that—</p> <p>(a) the person with whom the accused is alleged to have had <u>sexual intercourse</u> was, on the date on which the offence is alleged to have been committed, of or above the age of sixteen years; and</p> <p>(b) the accused—</p> <p>i. was, on the date on which the offence is alleged to have been committed, under the age of seventeen years; or</p>

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		<p><u>S 48 Offence of Rape</u> A person (the “offender”) is guilty of the offence of rape if he or she engages, or continues to engage, in sexual intercourse with another person who—</p> <ul style="list-style-type: none"> <li>a) does not consent to engaging in the sexual intercourse; or</li> <li>b) has withdrawn consent to the sexual intercourse,</li> </ul> <p>and the offender <b>knows, or is recklessly indifferent</b> to, the fact that the other person does not so consent or has so withdrawn consent (as the case may be).</p>	<ul style="list-style-type: none"> <li>(c) the activity occurs while the person is asleep or unconscious; or</li> <li>(d) the activity occurs while the person is intoxicated (whether by alcohol or any other substance or combination of substances) to the point of being incapable of freely and voluntarily agreeing to the activity; or</li> <li>(e) the activity occurs while the person is affected by a physical, mental or intellectual condition or impairment such that the person is incapable of freely and voluntarily agreeing; or</li> <li>(f) the person is unable to understand the nature of the activity; or</li> <li>(g) the person agrees to engage in the activity with a person under a mistaken belief as to the identity of that person; or</li> <li>(h) the person is mistaken about the nature of the activity.</li> </ul>	<p>steps to ascertain whether the other person does in fact consent, or has in fact withdrawn consent, to the act before deciding to proceed; or</p> <ul style="list-style-type: none"> <li>(c) does not give any thought as to whether or not the other person is consenting to the act, or has withdrawn consent to the act before deciding to proceed.</li> </ul>		<ul style="list-style-type: none"> <li>ii. believed on reasonable grounds that the person with whom he is alleged to have had <a href="#">sexual intercourse</a> was of or above the age of seventeen years.</li> </ul>
<p><b>Tasmania</b></p> <p><i>Criminal Code Act 1934 (Tas)</i></p>	<p><u>S 2A defines consent</u></p> <p><u>SS 2A(1) Consent</u> (1) In the Code, unless the contrary intention appears, “consent” means <b>free agreement</b>.</p> <p><u>Discussion:</u></p> <p>The above definition has been (subject to some slight amendment) in place in Tasmania since 2005. The effect of the definition in the context of criminal trial work has not given rise to many of the concerns raised at the time of the introduction of the definition. These included a diminishing of the likelihood of acquittal in cases where consent has been a legitimate jury question. The importance of appropriate directions in the context of the facts in issue as crucial to a fair trial, cannot be overstated.</p>	<p>This is also contained in the Code as follows:</p> <p><u>S 2B. Sexual intercourse</u> (1) In this Code – <b>sexual intercourse</b> means –</p> <ul style="list-style-type: none"> <li>(a) the penetration, to the least degree, of a person’s vagina, genitalia, anus or mouth by a penis; or</li> <li>(b) the penetration, to the least degree, of a person’s vagina, genitalia or anus by a body part of a person other than a penis; or</li> <li>(c) the penetration, to the least degree, of a person’s vagina, genitalia or anus by an object held or manipulated by, or attached to, another person; or</li> <li>(d) the continuation of an act of penetration referred to in paragraph (a), (b) or (c) of this definition.</li> </ul> <p>(2) In this section – <b>penetration</b> does not include penetration carried out for a proper</p>	<p><u>SS 2A(2)</u> (2) Without limiting the meaning of “free agreement”, and without limiting what may constitute “free agreement” or “not free agreement”, a person does not freely agree to an act if the person –</p> <ul style="list-style-type: none"> <li>(a) does not say or do anything to communicate consent; or</li> <li>(b) agrees or submits because of force, or a reasonable fear of force, to him or her or to another person; or</li> <li>(c) agrees or submits because of a threat of any kind against him or her or against another person; or</li> <li>(d) agrees or submits because he or she or another person is unlawfully detained; or</li> <li>(e) agrees or submits because he or she is overborne by the nature or position of another person; or</li> <li>(f) agrees or submits because of the fraud of the accused; or</li> </ul>	<p><u>S 14A and 14B obligations on defendants about any mistake of fact as to consent</u></p> <p><u>S 14A</u> (1) a mistaken belief by the accused as to the existence of consent is not honest or reasonable if the accused –</p> <ul style="list-style-type: none"> <li>(a) was in a state of self-induced intoxication and the mistake was not one which the accused would have made if not intoxicated; or</li> <li>(b) was reckless as to whether or not the complainant consented; or</li> <li>(c) did not take reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant was consenting to the act.</li> </ul>	<p><b>The Code does not define “child”</b> but provides for circumstances where acts of sexual intercourse become unlawful by reference to relative ages.</p> <p>The <i>Children, Young Persons and Their Families Act 1997 (Tas)</i> defines a child as: <i>child</i> means a person under 18 years of age: s 3</p>	<p>The Code consistently uses the age of “under <b>17 years</b>” in referencing unlawful acts as per the following example which also deals with the circumstances of consent.</p> <p><u>Section 124. Penetrative sexual abuse of child or young person</u> (1) Any person who has unlawful sexual intercourse with another person who is under the age of 17 years is guilty of a crime. Charge: Penetrative sexual abuse of a child [or young person]. (2) . . . . . (3) The consent of a person against whom a crime is alleged to have been committed under this section is a defence to such a charge only where, at the time the crime was alleged to have been committed –</p> <ul style="list-style-type: none"> <li>(a) that person was of or above the age of 15 years and the accused person was not more than 5 years older than that person; or</li> <li>(b) that person was of or above the age of 12 years and the accused</li> </ul>

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Jurisdiction	The definition of consent	The definition of sexual intercourse	Circumstances where consent is vitiated	Knowledge about consent	The definition of a child	The age of consent for sexual intercourse
		<p>medical purpose, for the purposes of hygiene or for any purpose that is authorised by law.</p> <p><u>S 185 Offence of Rape</u>                      (1) Any person who has sexual intercourse with another person without that person's consent is guilty of a crime.</p>	<p>(g) is reasonably mistaken about the nature or purpose of the act or the identity of the accused; or                      (h) is asleep, unconscious or so affected by alcohol or another drug as to be unable to form a rational opinion in respect of the matter for which consent is required; or                      (i) is unable to understand the nature of the act.</p> <p><u>SS 2A(2A) Stealthing</u>                      a person does not freely agree to an act of sexual intercourse with another person if the person says or does anything to communicate to the other person that a condom must be used for that sexual intercourse and the other person intentionally –                      (a) does not use a condom; or                      (b) tampers with the condom; or                      (c) removes the condom – before or during the sexual intercourse.</p> <p><u>S 2A(3) Grievous bodily harm evidence of lack of consent</u>                      (3) If a person, against whom a crime is alleged to have been committed under chapters <u>XIV</u> or <u>XX</u>, suffers grievous bodily harm as a result of, or in connection with, such a crime, the grievous bodily harm so suffered is evidence of the lack of consent on the part of that person unless the contrary is shown.</p>	<p>(2) absence of intention to commit the attempted offence is not a defence if it is established that the absence of intent was due to –                      (a) self-induced intoxication; or                      (b) a failure to take reasonable steps in the circumstances known to the accused at the time of the offence to ascertain that the complainant would have consented to the act constituting the offence</p> <p>See also, <b>14B</b> Mistake as to age of victim in relation to sexual offences</p>		<p>person was not more than 3 years older than that person.                      (4) This section is to be taken to be in force from 4 April 1924.                      (5) . . . . .                      (6) Nothing in <u>subsection (4)</u> impugns or otherwise affects the lawfulness of a conviction arising from conduct that occurred before the commencement of the <u>Criminal Code Amendment (Sexual Offences) Act 1987</u>.</p> <p>This should also be read in conjunction with the definition of consent at 2A of the Code above.</p>
<p><b>Australian Capital Territory</b></p> <p><i>Crimes Act 1900 (ACT)</i></p>	<p><u>S 50B</u> of the consent, to a sexual act, means informed agreement to the sexual act that is—                      (a) freely and voluntarily given; and                      (b) communicated by saying or doing something.</p>	<p><u>S 50C</u> defines sexual act                      Sexual act means                      I. sexual intercourse; and                      II. sexual touching; and                      III. any other act in circumstances where a reasonable person would consider the act to be sexual; but                      does not include an act carried out for a proper medical purpose or otherwise authorised by law.</p>	<p>See definition in S 67.</p>	<p>SS 67(2), (3), (4) and (5),                      (1) A person who does not offer actual physical resistance to <u>sexual intercourse</u> shall not, by reason only of that fact, be regarded as consenting to the <u>sexual intercourse</u>.                      (2) If it is established that a person who knows the consent of another person to <u>sexual intercourse</u> or the committing of an act of indecency has been caused by any of the</p>	<p>The <u>Dictionary of the Crimes Act 1900 (ACT)</u> defines a child as a person who <b>has not attained the age of 18 years</b>. However, the sexual offence provisions specify different ages depending on the particular offence. For example, 10 years of age is the age of no defence, whereas</p>	<p>The age of consent for sexual intercourse in the ACT is <b>16 years</b>.                      However, there are two defences available for defendants charged with having sexual intercourse with a person under the age of 16 years, but of or above the age of 10 years. The first is a mistaken belief as to the child being of the age of consent. The second is a similarity of age defence, in which the defendant may have sexual intercourse with a person under the age of 16 years, but of or above the age of 10 years, provided the age difference between them is not more</p>



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		<p><b>Sexual intercourse</b> is defined in S <a href="#">50(1)</a> of the <i>Crimes Act 1900 (ACT)</i> as:</p> <ul style="list-style-type: none"> <li>(a) the penetration, to any extent, of the genitalia or anus of a person by any part of the body of another person, except if that penetration is carried out for a proper medical purpose or is otherwise authorised by law; or</li> <li>(b) the penetration, to any extent, of the genitalia or anus of a person by an object, being penetration carried out by another person, except if that penetration is carried out for a proper medical purpose or is otherwise authorised by law; or</li> <li>(c) the introduction of any part of the penis of a person into the mouth of another person; or</li> <li>(d) fellatio; or</li> <li>(e) cunnilingus; or</li> <li>(f) the continuation of sexual intercourse as defined in paragraph (a), (b), (c), (d) or (e).</li> </ul>		<p>means set out in subsection (1) (a) to (j), the person shall be deemed to know that the other person does not consent to the <a href="#">sexual intercourse</a> or the act of indecency, as the case may be.</p> <ul style="list-style-type: none"> <li>(3) An accused person is taken to know that another person does not consent to an act mentioned in a sexual offence consent provision if any belief that the accused person has, or may have, that the other person consents to the act is not reasonable in the circumstances.</li> <li>(4) For subsection (4), without limiting the grounds on which it may be established that an accused person's belief is not reasonable in the circumstances, the accused person's belief is taken not to be reasonable in the circumstances if the accused person did not say or do anything to ascertain whether the other person consented.</li> </ul>	<p>there are defences available for offences committed against children under 16 years but of or above the age of 10 years—see right.</p>	<p>than 2 years, and the person is consenting.</p> <p>These defences are captured in section <a href="#">55(3)(a)</a> and (b) of the <i>Crimes Act 1900 (ACT)</i>, which reads:</p> <ul style="list-style-type: none"> <li>(3) It is a defence to a prosecution for an offence against subsection (2) if the defendant establishes that— <ul style="list-style-type: none"> <li>a. he or she believed on reasonable grounds that the person on whom the offence is alleged to have been committed was of or above the age of 16 years; or</li> <li>b. at the time of the alleged offence— <ul style="list-style-type: none"> <li>i. the person on whom the offence is alleged to have been committed was of or above the age of 10 years; and</li> <li>ii. the defendant was not more than 2 years older;</li> </ul> </li> </ul> </li> </ul> <p>and that that person consented to the sexual intercourse.</p>
Northern Territory	<p><i>Schedule 1 of the Criminal Code Act 1983 (NT)</i>, S <a href="#">192(1)</a></p> <p>'Consent means <b>free and voluntary agreement</b>':</p>	<p><a href="#">S 1</a> Definition of Sexual Intercourse</p> <p>The definition of <b>sexual intercourse</b> is contained in the definitions section (<a href="#">Section 1</a>) of the Criminal Code reproduced below:</p> <p>"sexual intercourse" means:</p> <ul style="list-style-type: none"> <li>(a) the insertion to any extent by a person of his penis into the vagina, anus or mouth of another person;</li> <li>(b) the insertion to any extent by a person of any part of the person's body or an object into the vagina or anus of another person, except for the purpose of performing a medical examination or</li> </ul>	<p><a href="#">S 192(2)</a> Circumstances where consent vitiated</p> <p>sets out particular circumstances in which a person does not consent to sexual intercourse:</p> <p>(2) Circumstances in which a person does not consent to sexual intercourse or an act of gross indecency include circumstances where:</p> <ul style="list-style-type: none"> <li>a. the person submits because of force, fear of force, or fear of harm of any type, to himself or herself or another person;</li> <li>b. the person submits because he or she is unlawfully detained;</li> </ul>	<p><a href="#">S 192(3)</a> knowledge of accused person</p> <ul style="list-style-type: none"> <li>(3) A person is guilty of an offence if the person has sexual intercourse with another person: <ul style="list-style-type: none"> <li>a. without the other person's consent; and</li> <li>b. knowing about or being reckless as to the lack of consent.</li> </ul> </li> </ul>	<p>'Child means a <b>person who is not an adult</b>' (<a href="#">Definitions s 1 the Criminal Code NT</a>)</p> <p>'Adult means a person of or over the age of 18 years' (<a href="#">Definitions s 1 the Criminal Code NT</a>)</p> <p>Which effectively means a child is a person under the age of 18 years.</p>	<p>The age of consent in the NT is <b>16 years</b> of age (<a href="#">s 127</a> the Code)</p> <p>There are further sections in the <i>Criminal Code NT</i> which provide for sexual offences against children over 16 in special care (<a href="#">s 128</a>) and sexual offending against persons including children who are mentally ill or handicapped (<a href="#">s 130</a>).</p>

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		<p>administering medical treatment; or</p> <p>(c) cunnilingus or fellatio, and continues until the withdrawal of the part of the body or object from the mouth, vagina or anus into which it was inserted or the cessation of cunnilingus or fellatio, as the case may be.</p> <p>Vagina is defined in s 1 (Definitions) of the <i>Criminal Code</i> as “the internal and external female genitalia and includes a surgically constructed vagina”.</p>	<p>c. the person is asleep, unconscious or so affected by alcohol or another drug as to be incapable of freely agreeing;</p> <p>d. the person is incapable of understanding the sexual nature of the act;</p> <p>e. the person is mistaken about the sexual nature of the act or the identity of the other person;</p> <p>f. the person mistakenly believes that the act is for medical or hygienic purposes; or</p> <p>g. the person submits because of a false representation as to the nature or purpose of the act.</p>			