

# Consent Position Statement

This policy paper addresses consent in relation to sexual activity between two or more people. This policy paper will inform Family Planning Tasmania's position on consent, informing how we teach and talk about sexual consent in a clinical setting, through our education programs and one-on-one education sessions. Further, this paper will inform our advocacy and how we talk about consent when proposing legislative reforms and public initiatives.

## Definition of consent to sex

Sexual consent is a free agreement between you and your partner(s) to have sex or participate in any kind of sexual activity. Sexual consent is about active communication, making sure everyone involved in a sexual situation actively and enthusiastically wants to have sex, and communicating through the experience.

Consent is an enthusiastic and freely given 'Yes!' to sexual activity, and is not just the lack of a 'No'. To say 'Yes' a person must be free to also say 'No' - and someone cannot be pressured into giving their consent. It is not enough to assume someone is consenting (wants sexual/intimate activity) just because they are present/participating. Everyone involved has to actively take steps to make sure everyone participating really wants to be there. The simplest way to establish consent is to ask. Everyone must honour the conditions of the consent - ie, it is considered rape to not wear a condom, damage or remove a condom without the person's permission if the person has consented to sex with a condom. This is called 'stealthing' and is illegal under the Criminal Code.

The Tasmanian Criminal Code Act 1924 recognises that there are circumstances where someone might be coerced into saying 'Yes' and consenting when they don't really mean it. Sexual coercion might be due to threats or the use of force, unlawful detainment or actual or perceived violence to themselves or others. The law also recognises that someone might submit to sex if one person is in a position of power over the other. This is particularly prevalent where there is a known or suspected physical or cognitive disability among one or more sexual partners.

There are four things to consider when assessing whether consent has been given:

1. Is it legal for the person to give consent?
2. Is consent given freely (without coercion)?
3. Is consent given in a way that is enthusiastically affirmative?
4. Is the person giving consent fully informed about the nature of the act?

There may be times when a person can't make choices about what happens with their body, and this means no consent is able to be given, that they cannot consent.

There are a number of ways this could occur, such as a person's age, due to the threat of violence, coercion (pressure or force), cognitive or physical ability, or being drunk or on drugs. The law in Tasmania establishes the age of consent as **17 years old**. However, the law tries to capture the increasing sexual agency and autonomy of teenagers by recognising that consensual sex between teenagers who are close in age can be a normal part of growing up. In these circumstances, being close in age may be used as a defence under the Criminal Code.

In Tasmania the law recognises:

- People under 12 cannot consent to sex, sexual touching or witnessing a sexual act at all (they are too young to consent under any circumstances).
- People between 12 and 15 years old cannot consent to sex, sexual touching or witnessing a sexual act with anyone more than three years older than them (this can be used as a defence)
- People between 15 and 17 years cannot consent to sex, sexual touching or witnessing a sexual act with anyone more than five years older than them (this can be used as a defence)

## Why it's important to get consent

Any kind of sexual activity without consent is sexual violence; sexual touching without consent is assault; and sex without consent is rape. Sexual violence, sexual assault and rape are against the law. Not only is assault illegal, it can also be traumatising. Assault can have lasting and harmful consequences on the person's mental health and future relationships.

Sexual violence can also include coercion, physical force, rape, sexual assault with objects, being forced to watch or engage in pornography, enforced prostitution or being made to have sex with other people. Non-consensual sharing of intimate images is also a form of sexual violence.

The reason why we have the concept of consent is so we can make sure everyone having sex feels safe and respected and no one is harmed. Sex should be an enjoyable and pleasurable experience for all involved.

Safety, respect and trust are fundamental to healthy, consensual sex in all forms of partnerships: from a one night stand, to a casual relationship through to a long-term relationship.

### **Family Planning Tasmania's position- Strengthening legislative and legal protections towards affirmative consent**

Some Australian jurisdictions are changing their definitions of consent towards enthusiastic, affirmative consent and expanding their legislative definitions of what constitutes consent and how to seek it.

The New South Wales Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021 in particular goes further than the Tasmanian Criminal Code in articulating the definition of consent, and that all people in the sexual experience must actively do or say something to determine whether the other person consents to the sexual activity.

This outlines a requirement to seek consent, and places the onus on the alleged perpetrator in a criminal trial to have taken action to establish consent. This means that prosecution would be focussed on the actions of the perpetrator rather than the actions of the victim-survivor in criminal trials. This would also help victims in feeling better supported to make complaints.

Language is a powerful way of establishing social precedent, and the language set out in legislation is likely to be replicated in the media, and then filters down to the public. This means that strengthening clarity on what consent means in legislation, and how to seek it, has a wider societal impact rather than just through criminal prosecution.

In New South Wales, the emphasis is that consent is not to be presumed, and that consent involves ongoing and mutual communication, and can be withdrawn at any time.

Family Planning Tasmania advocates for the definition of consent to be amended to reflect enthusiastic and affirmative consent principles in the Tasmanian Criminal Code Act 1924, and to go further in the explanation of consent.

Further comprehensive consent education is required across ages, cultures, sexual orientation, gender and ability.

The focus of consent education in Tasmania should go further than just school-aged students.

Consent education should extend to all Tasmanians, so everyone understands their rights and responsibilities under the law. Family Planning Tasmania advocates for a public awareness campaign on consent to be launched in Tasmania. Family Planning Tasmania would be well placed to undertake such a campaign, co-designed with other health promotion agencies in Tasmania.

Comprehensive, consent-focussed education is our most powerful prevention and empowerment strategy. In addition to legislative reforms, Family Planning Tasmania supports the prevention of sexual violence and sexual harassment (including technology-facilitated abuse) before it happens, through national and targeted initiatives that promote informed consent, bodily autonomy and respectful relationships (as per the Fourth Action Plan of the National Plan to Reduce Violence Against Women). This will help to increase the sexual and reproductive health literacy amongst all Tasmanians.

Comprehensive, consent-focussed education is our most powerful prevention and empowerment strategy.

Family Planning Tasmania teaches and emphasises enthusiastic, affirmative consent principles across all our services. Our education programs, particularly the Growing Up Program and our Comprehensive Sexuality Education program teaches school students about enthusiastic, affirmative consent and this position statement is both informed by and informs these programs in particular. We believe all Tasmanian students should have access to these programs.

An understanding around the legality of consent derived from this position paper is the basis for our professional learning workshops for carers of people with additional needs and/or disability and people in later life.

## **References**

*5 things you need to know about consent.* ReachOut Australia. 2022 Accessed online at <https://au.reachout.com/articles/5-things-you-need-to-know-about-sexual-consent>

*Sexual Consent.* Planned Parenthood Federation of America. Accessed online at <https://www.plannedparenthood.org/learn/relationships/sexual-consent>

*Tasmanian Criminal Code Act 1924.* Accessed online at <https://www.legislation.tas.gov.au/view/whole/html/inforce/current/act-1924-069>

*Age of Consent Factsheet.* Legal Aid Commission of Tasmania. 2016. Accessed online at <https://www.legalaid.tas.gov.au/wp-content/uploads/2016/03/Age-of-consent-for-sex-fact-sheet-Legal-Aid-Tasmania.pdf>

*Consent and Sex.* Family Planning New South Wales. Accessed online at <https://www.fpnsw.org.au/health-information/consent-and-sex/consent-and-sex>

*Affirmative Consent laws passed in NSW.* Lawyers Weekly. 2021. Accessed online at <https://www.lawyersweekly.com.au/politics/33113-affirmative-consent-laws-passed-in-nsw>

*Health and Wellbeing for Women Action Plan 2020-23.* Department of Communities Tasmania. Accessed online at [https://www.women.tas.gov.au/news/health\\_and\\_wellbeing\\_for\\_women\\_action\\_plan\\_2020-2023](https://www.women.tas.gov.au/news/health_and_wellbeing_for_women_action_plan_2020-2023)