



# **Meth and Sex: What Does The Law Say?**

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# Legal proviso



- Laws applying to rape and sexual assault are subject to change.
- There is currently a national inquiry into current and proposed sexual consent laws, reporting back later this year.

## Current and proposed sexual consent laws in Australia

On 29 November 2022, the Senate referred an inquiry into current and proposed sexual consent laws in Australia to the Legal and Constitutional Affairs References Committee for inquiry and report by **13 September 2023**.

The deadline for submissions to this inquiry is 16 March 2023.

The deadline for submissions has been extended to **31 March 2023**.

Further detail about the scope of the inquiry is provided in the [terms of reference](#).

# Sex and meth

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- People who use methamphetamine in Australia are more likely to engage in casual sex and have multiple sexual partners than the general population [McKetin *et al* (2018)].
- Amongst certain groups, such as gay and bisexual men, "chemsex" or engaging in sex whilst high on meth is notably common.



# Potential questions

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- *Can someone legally consent to sex whilst high?*
- *Can I still get in trouble if I was high at the time?*
- *What if we were both high?*



# Our adversarial system

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# Sources of criminal law

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- *Crimes Act 1900* (NSW)
- *Crimes Act 1958* (Vic)
- *Crimes Act 1900* (ACT)
- *Criminal Law Consolidation Act* (SA)
- *Criminal Code Act 1899* (Qld)
- *Criminal Code* (WA)
- *Criminal Code Act 1924* (Tas)
- *Criminal Code Act 1983* (NT)



# Types of sexual offences

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- Rape (requires sexual penetration)
- Sexual assault or sexual touching
- Child related offences



# Key elements of rape

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1. Voluntary sexual penetration of another.
2. Without their consent.
3. With relevant mental culpability [NSW, Vic, SA, the ACT and NT] or without establishing the excuse of mistake of fact [WA, Tas and Qld].



# Without their consent



# Age of Consent

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16 years old

\*Victoria, NSW, ACT, Qld, NT and WA

17 years old

\*SA and Tasmania

Jumps to 18 years old in all jurisdictions in circumstances where the other party is in a position of “special care”. This includes relationships between young people and guardians, teachers, instructors, custodial officers and health professionals.

# What is sexual consent'?

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“free agreement”

\*Vic and Tas

“free and voluntary agreement”

\*NSW, SA, ACT, and NT

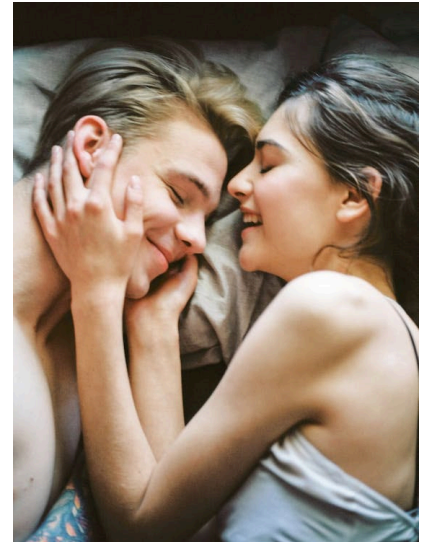
“freely and voluntarily given”

\*Qld and WA

# Components of sexual consent

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- Can be withdrawn at any time.
- Consent on one occasion is not to be taken as consent to future acts.
- Consent to one type of sexual activity is not consent to another type of sexual activity.



# When is it clearly not consensual?

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- Obtained through force or threats of force (in many jurisdictions includes threats against other people or animals).
- Obtained by fraudulent representation about the nature or purpose of the act.



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# When is it clearly not consensual?

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- A person is asleep or otherwise unconscious.
- A person is mistaken about the identity of the person.
- A person lacks capacity.



# Affirmative consent jurisdictions

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- In Tas, Vic, NSW and the ACT – if a person **does not say or do anything to indicate consent** to the act, there is no consent.
- Consent can be communicated in a variety of ways including verbally asking and receiving a “yes” in response, a physical gesture such as a nod or by reciprocating a move such as removing clothing.

# Intoxication and consent

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- In all jurisdictions but Qld and WA a person being intoxicated is listed in legislation as a possible circumstance to ‘vitate’ consent.
- Still applicable in Qld and WA under broader definition of “consent freely and voluntarily given”.



# How intoxicated?

“so affected by alcohol or another drug as to be incapable of consenting”

Vic and NSW

“is incapable of agreeing to the act because of intoxication”

ACT

“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”

Tas

“intoxicated...to the point of being incapable of freely and voluntarily agreeing to the activity”

SA

“so affected by alcohol or another drug as to be incapable of freely agreeing”

WA

# Does this include meth? Yes

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- Although the vast majority of cases involve lack of consent on the basis of alcohol intoxication, this does extend to other drugs including methamphetamine.
- May encompass after effects of meth use, such as psychosis days later.  
(*R v Clough*).



# Notable effects of meth intoxication

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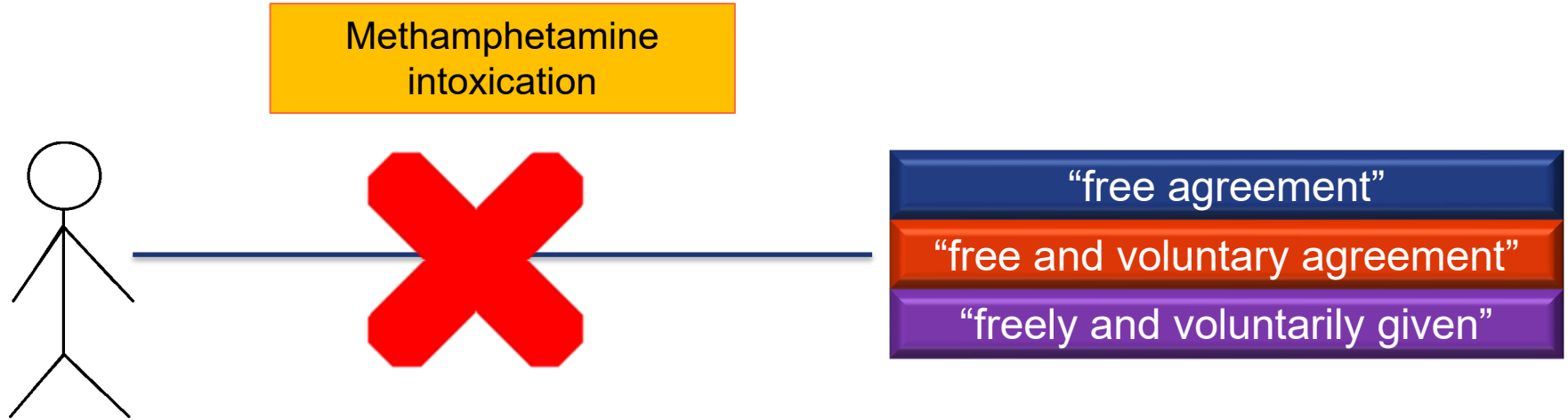
- **General effects on cognitive functioning** – including impaired memory, impulsivity and attention.
- **Effects of “overamping” or ”overdose”**– including a constellation of possible effects from unconsciousness to hallucinations.
- **Effects of sleep deprivation** – including impaired decision-making, unconsciousness and an inability to focus.
- **Hypersexual effects** – including increased libido, sexual risk taking and increased sexual regret.
- **Drug induced psychosis** – including agitation, delusions, paranoia, hallucinations and other psychotic symptoms.

# Does meth intoxication vitiate consent?

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- Being substantially intoxicated by drugs (whether licit or illicit) does **not** in itself render somebody incapable of consent [*Mitic v The Queen*].
- A distinction should be made between consent which is given in circumstances where inhibitions are reduced by intoxication and being **unable to consent** [*R v SAX*].

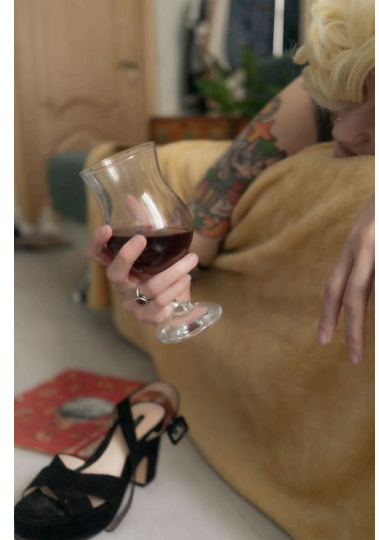
# Conceptualising intoxication and consent



# Clear cases of non-consent

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- Unconsciousness.
- Where intoxication mean a person does not understand the nature of what they are doing.
- Where exhaustion or other effects mean that a person cannot withdraw consent.



# Psychosis and capacity

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- Most cases involving lack of capacity refer to cognitive impairment, rather than drug-induced psychosis, however theoretically could apply if psychotic symptoms make it impossible for somebody to make decisions.

Key questions:

- *Did the person understand the sexual nature of the act?*
- *Did they understand they could refuse sex at any time?*

# What is sexual consent'?

---

“free agreement”

\*Vic and Tas

“free and voluntary agreement”

\*NSW, SA, ACT, and NT

“freely and voluntarily given”

\*Qld and WA



# Mental culpability



# Different approaches

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- In NSW, Vic, SA, the ACT and NT it is for the prosecution to prove that the defendant (the accused) was mentally culpable.
- In WA, Tas and Qld the offence will be proven if sexual intercourse occurred without consent. However, the defendant can raise evidence that a “mistake of fact” excuse (or defence) applies—which the prosecution will then need to disprove.



# Proving the defendant culpable

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- In NSW, Vic, SA, the ACT and NT the prosecution needs to prove that the defendant had knowledge of non-consent at the time of sexual intercourse.
- This knowledge can be actual or constructive.



# Knowledge of non-consent



Can encompass:

- Actually knowing the person is non-consenting.
- Being aware of the possibility that a person is non-consenting (advertent recklessness).
- Not considering whether someone is consenting at all (inadvertent recklessness).
- Having a belief that a person is consenting, but this is not a reasonable belief.

# Relevance of intoxication?

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- In all jurisdictions self-induced intoxication by alcohol or other drugs cannot be taken into account in determining whether a person had knowledge of non-consent.
- Knowledge is inferred from the perspective of a sober person.



# Mistake of fact excuse

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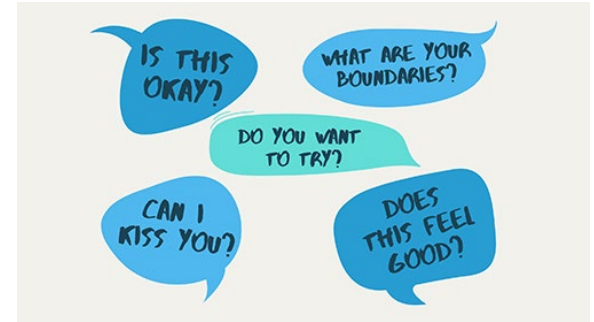
- In WA, Tas and Qld a defence is available if a person has an *honest* and *reasonable* but mistaken belief that a person is consenting.
- This mistaken belief **will not be reasonable** if it is merely the result of self-induced intoxication.



# Affirmative consent jurisdictions

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- In Tas, Vic, NSW and the ACT – if no steps are taken to ascertain consent, a person cannot have a reasonable belief in consent or be able to argue honest and reasonable mistake of fact.



# What about the insanity defence?

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- The effects of self-induced intoxication are **excluded** from insanity defences across Australia – including when there are symptoms of psychosis or other serious mental illness.
- Possibly could apply in cases of pre-existing mental illness triggered by methamphetamine use.





# In summary



# Answering our questions

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- *Can someone legally consent to sex whilst high?*  
**Yes, but only if they are still capable of freely and voluntarily agreeing to sexual activity.**
- *Can I still get in trouble if I was high at the time?*  
**Potentially, self-induced intoxication is not to be taken into account in assessing culpability.**
- *What if we were both high?*  
**Separate principles apply to questions of lack of consent vs culpability.**

# Questions

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