

Rape s 349¹ (Offences occurring after 27 October 2000²)

Legislation

“Consent” is defined in s 348 of the *Criminal Code* as follows:

- (1) In this chapter, **consent** means consent freely and voluntarily given by a person with the cognitive capacity to give the consent.
- (2) Without limiting subsection (1), a person’s consent to an act is not freely and voluntarily given if it is obtained –
 - (a) by force; or
 - (b) by threats or intimidation; or
 - (c) by fear of bodily harm; or
 - (d) by exercise of authority; or
 - (e) by false and fraudulent representations about the nature or purpose of the act; or
 - (f) by a mistaken belief induced by the accused person that the accused person was the person’s sexual partner.

Commentary

In *R v Makary* [2019] 2 Qd R 528; [\[2018\] QCA 258](#), Sofronoff P (with whom Bond J agreed) said of the definition of “consent” in s 348, which was inserted by the *Criminal Law Amendment Act 2000* that it required two elements:

[49] ...First, there must in fact be “consent” as a state of mind ... Second, consent must also be “given” in the terms required by the section.

[50] The giving of consent is the making of a representation by some means about one’s actual mental state when that mental state consists of a willingness to engage in an act. Although a representation is usually made by words or actions, in some circumstances, a representation might also be made by remaining silent and doing nothing. Particularly in the context of sexual relationships, consent might be given in the most subtle ways, or by nuance, evaluated against a pattern of past behaviour.

¹ As the offence is a prescribed offence under s 161Q *Penalties and Sentences Act 1992*, a serious organised crime circumstance of aggravation is applicable.

² For offences occurring prior to 27 October 2000, see 133 Rape s 347 (now repealed).

In *R v Sunderland* [2020] QCA 156 at [43], Sofronoff P said: “As it is now defined, ‘consent’ requires that consent be ‘given’. This aspect of the definition of consent must not be overlooked”. His Honour said at [45], footnote 8, that:

“In a case in which a complainant did not, as a matter of fact, intend to do anything to ‘give’ consent but in which the complainant’s actions, or failures to act, reasonably imply a giving of consent, the jury will have to be instructed about s 24 of the *Code* [mistake of fact]”.

At [55], his Honour set out directions that may have been adequate in that case, while emphasising that “[e]ach summing up must be tailor-made to fit the requirements of the case at hand”.

In *R v Mrzljak* [2005] 1 Qd R 308; [2004] QCA 420, it was held that a complainant’s intellectual impairment will be a relevant matter for the jury to consider when determining whether or not the complainant had the necessary cognitive capacity. Intellectual impairment itself does not deprive the complainant of the cognitive capacity to give or withhold consent.

See *R v Winchester* [2014] 1 Qd R 44; [2011] QCA 374, for a detailed examination of the subject of consent including whether consent is freely and voluntarily given where there is a promise of a gift.

An issue of mistake of fact may arise – see notes on mistake of fact ([Direction 79](#)).

Sample direction

The prosecution must prove the defendant:

1. Had carnal knowledge³ of or with [the complainant].
 2. Without her consent.
- OR
1. Penetrated the vulva, vagina or anus of the other person.
 2. To any extent.
 3. With a thing or part of the defendant’s body that is not a penis.
 4. Without the consent of the other person.

³ See definition s 1 and s 6 *Criminal Code*.

OR

- 1. Penetrated the mouth of the other person.**
- 2. To any extent.**
- 3. With the defendant's penis.**
- 4. Without the consent of the other person.**