

145. Sexual assault: s 352

145.1 Legislation

[Last reviewed: December 2024]

Criminal Code

[Section 352](#) – Sexual assaults

[Section 245](#) – Definition of assault

[Section 347](#) – Definitions for ch 32 (assault)

[Section 348](#) – Meaning of consent

[Section 348AA](#) – Circumstances in which there is no consent

[Section 348A](#) – Mistake of fact in relation to consent

Evidence Act 1977

[Part 6B, Division 3](#) – Jury directions related to sexual offences

145.2 Commentary

[Last reviewed: December 2024]

The Defendant must have:

- (1) unlawfully and indecently assaulted another person; or
- (2) procured another person, without the person's consent;
 - a. to commit an act of gross indecency; or
 - b. to witness an act of gross indecency by the person or any other person.

Consent

Following amendments in 2021, s 347 of the *Criminal Code* specifies that 'assault has the meaning given by s 245 as if a reference in s 245 to consent were a reference to consent within the meaning given by s 348'.

The *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024* (Qld) substantially amended s 348 'Consent' and inserted s 348AA 'Circumstances in which there is no consent'. The amendments apply to offending committed after 23 September 2024. See **Chapter 59A – Consent for offending pre-23 September 2024** and **Chapter 59B – Consent for offending post-23 September 2024**.

In all cases trial judges should bear in mind the observation of Sofronoff P in *R v Sunderland* ([2020](#)) 5 QR 261; [\[2020\] QCA 156](#), [55] that '[e]ach summing up must be

tailor-made to fit the requirements of the case at hand'. This will require trial judges to consider the 2024 amendments carefully, particularly whether any of the directions to the jury on consent and mistake of fact contained in Part 6B, division 3, sub-division 3 of the *Evidence Act 1977* (ss 103ZS- 103ZW) arise on the facts of the case.

For a case involving therapeutic treatment, see *R v BAS* [\[2005\] QCA 97](#).

Indecency

In *R v Jones* [\[2011\] QCA 19](#), the Court of Appeal found that the trial judge erred in directing the jury that the appellant's motive was not relevant to whether the act was indecent in a case involving an ambulance officer found guilty of indecent assault while performing an ECG. White JA said at [32] that *'[t]he quality of "indecent" is pre-eminently a question for a jury and where there is evidence capable of casting doubt upon the sexual quality of the alleged assault, the motive of the alleged offender must go to the jury for their deliberation and decision'*.

See also *R v Rae* [\[2009\] 2 Qd R 463](#), where it was held that a direction that the acts had to be accompanied by an intention to gain sexual gratification was not required in that particular case. In *R v McCallum* [\[2013\] QCA 254](#), it was held that the decision in *Jones* did not require that a direction on the motive of the Accused be given in every case where indecent is an element of the offence (at [31]-[40]). In *R v McGrady* [\[2020\] QCA 192](#), Fraser JA explained, at [47], that it is not an element of the offence that a Defendant was motivated by sexual interest. Such a direction was necessary in *Jones* only because the issue at trial was whether the Defendant paramedic's conduct, in touching the breasts of the Complainant whilst attaching electrodes to her for the purposes of an ECG was indecent because it was motivated by sexual gratification, or whether it was instead not indecent because it occurred in the course of a legitimate medical examination.

Mistake of fact

Section 348A 'Mistake of fact in relation to consent' was inserted by the *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Act 2021* (Qld), which commenced on 7 April 2021. The transitional provision in s 754 provided that the former provisions continue to apply where the person is charged before the commencement date; and the new provisions apply where the person is charged after the commencement date, whether the charge is for an offence committed before or after the commencement. This Act did several things including inserting a definition of assault: ss 1 and 347; expanding the meaning of consent by adding s 348(3) and (4); and inserting s 348A relating to mistake of fact in relation to consent. See Chapter 80 'Mistake of fact in sexual offending committed pre-23 September 2024'.

Section 348A was subsequently substantially amended, and further provisions added, by ss 14-17 of the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024* (Qld) which amended the *Criminal Code*. All of those provisions were proclaimed to take effect on 23 September 2024. The effect of the transitional provisions (s 761 of the *Criminal Code* and s 161 of the *Evidence Act*) is

that the amendments to the *Criminal Code* apply only where the offence is alleged to have been wholly committed after the commencement date by proclamation of the amendments. See **Chapter 80A – Mistake of fact in sexual offending committed post-23 September 2024**.

Statutory jury directions related to sexual offences

The *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024* (Qld) also introduced Part 6B, Division 3 of the *Evidence Act 1977*, which makes provision for the giving of various directions calculated at reducing the extent to which ‘rape myths’ (i.e. common misconceptions about sexual violence) may influence juries about charges of a sexual nature: see **Chapter 66A – Jury directions related to sexual offences**. For reasons explained there, all of the Pt 6B Div 3 directions apply from 23 September 2024 regardless of the timing of the offence or prosecution, except for s 103ZX ‘Direction on mistake of fact in relation to consent’ which only operates in respect of an offence committed wholly after 23 September 2024.

Aggravations

The circumstances of aggravation for an offence of sexual assault are:

- (a) if the indecent assault includes bringing into contact any part of the genitalia or anus of a person with any part of the mouth of a person: s 352(2);
- (b) if immediately before, during, or immediately after, the offence, the Defendant is, or pretends to be, armed with a dangerous or offensive weapon: s 352(3)(a);
- (c) if the Defendant is in company with another person: s 352(3)(a) (~~see Benchbook direction no 124~~);
- (d) if the indecent assault includes the person who is assaulted penetrating the Defendant’s vagina, vulva or anus to any extent with a thing or a part of the person’s body that is not a penis: s 352(3)(b);
- (e) the offence of sexual assault is a ‘prescribed offence’ in schedule 1C *Penalties and Sentences Act 1992* and therefore the ‘serious organised crime circumstance of aggravation’ in s 161Q may be applicable.

145.3 Suggested Direction

[Last reviewed: December 2024]

(Judges should direct on relevant jury directions related to sex offences as and when apt during the trial and summing up – see **Chapter 66A – Jury directions related to sexual offences**).

(Note that this suggested direction only covers s 352(1)(a)).

The prosecution must prove that the defendant:

1. **Assaulted the Complainant.**

A person who strikes, touches or moves or otherwise applies force of any kind to the person of another either directly or indirectly without their consent is said to assault that other person and the act is called an assault.

‘Consent’ means [here insert directions re consent as appropriate from Chapter 59A ‘Consent for offending pre-23 September 2024’ or Chapter 59B ‘Consent for offending post-23 September 2024’.]

[Where mistake of fact about consent potentially arises insert directions re mistake of fact as appropriate from Chapter 80 ‘Mistake of fact in sexual offending committed pre-23 September 2024’ or Chapter 80A ‘Mistake of fact in sexual offending committed post-23 September 2024’].

2. The assault was unlawful.

An assault is unlawful unless it is authorised, justified or excused by law.

3. The assault was indecent.

The word ‘indecent’ bears its ordinary everyday meaning. It is what the community regards as indecent. It is what offends against currently accepted standards of decency. Indecency must always be judged in the light of time, place and circumstances.

(Depending on the case, the trial judge might also consider it is appropriate to elaborate along the following lines):

You should look at things like the relationship between the two parties, the ages of both the Complainant and the Defendant, [if appropriate, the place on the body where the Complainant was touched], the nature of any interaction between them, including what if anything was said between them at the time leading up to, during and immediately after the touching.

(If appropriate): **In looking at all factors, including those I have just mentioned, you must consider if the touching had a sexual connotation. I direct you that it is only if you accept beyond reasonable**

doubt that there was a sexual connotation to the touching, that is that the charged touching was motivated by a desire held by the Defendant to gain some form of sexual experience, pleasure or satisfaction that you would find that the conduct was indecent. What the Complainant thought of the conduct is not to the point. It is the motive or reason for the Defendant touching the Complainant in the manner that [he/she] did, as you find it to be, which is important in deciding if there was a sexual connotation to the conduct.

(If a circumstance of aggravation has been alleged, directions will need to be crafted accordingly).