

## 59A. Consent for Offending Pre- 23 September 2024

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### 59A.1 Legislation

[Last reviewed: September 2024]

#### *Criminal Code*

[Section 347](#) - Definitions for chapter 32.

[Section 348](#) - Meaning of consent.

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

#### *Evidence Act 1977*

Part 6B, division 3, sub-division 3 (ss. 103ZS – 103ZW) - Directions to jury—consent and mistake of fact.

Section 161 - Application of part 6B, divs 1–3 to criminal proceedings.

### 59A.2 Commentary

[Last reviewed: September 2024]

#### *Consent – sexual offences*

This part of the *Criminal Code*, Chapter 32, was substantially amended on the proclamation of the relevant part of *Criminal Code* by the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024* (Qld) on 23 September 2024. The transitional provision, s 761 of the *Criminal Code*, provides in effect that the amended provisions apply only where the offence is alleged to have been wholly committed after the commencement date by proclamation of the amendments. This Benchbook Chapter therefore applies to offences committed wholly, or in part, prior to 23 September 2024.

The amending Act also introduced ss 103ZS to 103ZW and 103ZZA into the *Evidence Act 1977* (Qld). They too took effect on 23 September 2024. The transitional provision (s 161 of the *Evidence Act*), in effect, means that they apply to all proceedings on or after 23 September 2024, regardless of when the offending is alleged to have occurred. Sections 103ZS to 103ZW permit a trial judge to give directions concerning counter-intuitive reasoning in sexual offence trials. They broadly reflect ss 292A – 292E of the *Criminal Procedure Act 1986* (NSW), and the suggested directions have borrowed on those directions from the New South Wales Criminal Trial Courts Bench Book. Section 103ZZA is a mandatory direction, when the evidence raises its application as per s 103ZZA(1). The provision contains examples in the notes to it which might be used in appropriate circumstances.

Note that for the purposes of a charge of rape, pursuant to s 349(3) of the *Criminal Code*, a child under the age of 12 years is incapable of giving consent. In those circumstances, the suggested directions below are irrelevant and the jury should simply be directed as to the effect of that provision and that they must take the consent element as proven by the prosecution.

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 (at [49]-[50]):

[...] 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.

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.

In *R v Sunderland* [\[2020\] QCA 156](#), [43], Sofronoff P said: '[a]s 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 in sexual offences in **Chapter 80 – Mistake of Fact in Sexual Offences**.

Note that a person charged with rape may be alternatively convicted of the offence of sexual assault under s 352 of the *Criminal Code*, if established by the evidence, or of the other offences listed in s 578(1).

### *Consent – other than sexual offences*

The term ‘consent’ is not specifically defined in the *Criminal Code* for offences other than sexual offences in Chapter 32, and for some offences in Chapter 22. Where not specifically defined, it has its ordinary everyday meaning. In this context, consent may be tacit or implied: *Horan v Ferguson* [\[1995\] 2 Qd R 490](#). Force applied with the consent of the other person will be unlawful if the consent is obtained by fraud. See also *R v Gee* [\[2016\] 2 Qd R 602](#), dealing with an assault on an infant and what conduct will be deemed to be consensual.

## **59A.3 Suggested Directions**

[Last reviewed: September 2024]

### *Sexual Offences*

**For the purposes of considering this offence, the term ‘consent’ has a special meaning. ‘Consent’ means consent freely and voluntarily given by a person with the cognitive capacity to give consent, that is a person with the ability to know and understand what he or she is doing in giving consent.**

**This concept of ‘consent’ has [two/three] aspects:**

- 1. First, there must in fact be ‘consent’ as a state of mind held by the complainant; that is, a willingness to engage in the charged sexual act with the defendant.**
- 2. Second, that state of mind - that ‘consent’ – must also be ‘given’ freely and voluntarily by the complainant.**
- 3. Thirdly, the complainant must be a person capable of knowing and understanding what [he/she] is doing in giving consent.**

(Note: in a trial where there is no issue raised about the cognitive ability of the complainant, it will usually be desirable to not refer to the full definition and leave out this third aspect. In such a trial, later suggested directions are also affected).

**First, consider if the prosecution has proven beyond reasonable doubt that there was no consent, that is that the complainant was not willing to engage in the charged sexual act with the defendant.**

[Outline here the evidence touching on the complainant’s state of mind].

It is matter for you to decide if the prosecution has proven that there was no consent as a state of the complainant's mind.

Second, consider if the prosecution has proven beyond reasonable doubt that consent, if it existed, was not given freely and voluntarily.

What is meant by giving consent? The giving of consent is the making of a representation by the complainant, by some means, about a willingness to engage in the charged act.

(If appropriate, add the following text) **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. That might particularly arise in the context of sexual relationships where consent might be given in the most subtle ways, or by evaluation against a pattern of past behaviour. I will speak more about this shortly.**

(If appropriate, and adjust the list below to those matters raised on the evidence) **Consent will not in truth be given unless it has been given freely and voluntarily. While the means by which it can be proven that consent was not freely and voluntarily given are not limited in number and depend on the allegations in the case at hand, our law specifically provides that a person's consent to an act is not freely and voluntarily given if it is obtained—**

- a. **by force; or**
- b. **by threat 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.**

(If there is an issue at trial as to the ability of the complainant to know and understand what he or she is doing in giving consent, the following text may be added) **The third aspect to be considered by you is whether the prosecution has proven beyond reasonable doubt that the complainant did not have the capability to know and understand what [he/she] was doing in giving consent.**

[Outline here the evidence relevant to the complainant's cognitive ability].

**Based on that evidence, the prosecution contends that [here outline the prosecution's argument], while the defendant argues that [here outline the defence argument].**

**It is insufficient for the prosecution to merely show there was some degree of impairment. It must prove beyond reasonable doubt that, at the time the complainant apparently gave consent, [he/she] had no capability of knowing or understanding what [he/she] was doing in giving that consent.**

(Where appropriate, add the following text on lack of objection/resistance):

**In this trial there is evidence suggesting that the complainant did not resist the defendant's conduct.**

[Outline here that evidence].

**Although I have observed that in the context of some relationships consent may be given by doing nothing or remaining silent, that will only arise where it is able to be evaluated against a pattern of past established conduct. You must remember that the absence of an objection is not necessarily the same as giving consent. Further, just because consent has been given in that manner in the past does not mean that it was given on this occasion.**

**I direct you that, as a matter of law, a person is not 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.**

**It is a matter for you to decide whether the prosecution has proven that consent was not given on this charged occasion, in light of all of the evidence.**

(Where appropriate, add the following text on submission):

**In this trial there is evidence that the complainant initially resisted and objected to the defendant's conduct, but then stopped that resistance or objection and the charged act occurred.**

[Set out that evidence].

**Do not automatically assume that the complainant's eventual lack of objection or resistance amounts to the giving of consent. That is not necessarily the case, as mere submission is totally different from consent. A person may submit to conduct, but feel repulsed about that conduct.**

**Submission may be caused by one of the factors referred to earlier, meaning that consent would not have been freely and voluntarily given. On**

**the other hand, it may evidence a change of heart and evidence the giving of consent. It is a matter you must consider in detail.**

(Where appropriate, address s 103ZS of the *Evidence Act*):

**In this trial there is evidence that [set out the relevant evidence]. You must bear in mind that non-consensual sexual activity can occur in many different circumstances and between different kinds of people including (adjust the list below as appropriate to the circumstances of the trial):**

- **people who know one another;**
- **people who are married to one another;**
- **people who are in an established relationship with one another;**
- **people of the same or different sexual orientations; and**
- **people of any gender identity, whether or not their gender identity corresponds with the sex assigned to them at birth.**

**You must not act on the basis of any preconceived ideas you may have or have heard about concerning whether non-consensual sexual activity can occur as between different kinds of people.**

(Where appropriate, address s 103ZZA of the *Evidence Act*):

**In this trial there is evidence that [set out the relevant evidence, by reference to s 103ZZA(1)]. You must bear in mind that experience shows that (adjust the list below as appropriate to the circumstances of the trial):**

- a) **people may react differently to non-consensual sexual activity and there is no typical, normal or proper response to non-consensual sexual activity; and**
- b) **some people who are subjected to non-consensual sexual activity will never again contact the person who subjected them to the activity, while others—**
  - (i) **may continue a relationship with that person; or**
  - (ii) **may otherwise continue to communicate with that person; and**
- c) **there may be good reasons why a person who is subjected to non-consensual sexual activity—**
  - (i) **may continue a relationship with the person who subjected them to the activity; or**
  - (ii) **may otherwise continue to communicate with that person.**

***Examples of good reasons—***

1. The person was overborne by the abuse of a relationship of authority, trust or dependence.
2. The person fears family dissolution.
3. The person has a fear of ostracism from their community.

**You must not act on the basis of any preconceived ideas you may have or have heard about how people respond to non-consensual sexual activity.**

(Where appropriate, address s 103ZT of the *Evidence Act*):

**In this trial there is evidence that [set out the relevant evidence]. You must avoid making an assessment about whether or not the complainant consented to the sexual activity the subject of the [charge/s] on the basis of any preconceived ideas you might have about how people respond to non-consensual activity. There is no typical or normal response to non-consensual sexual activity and people may respond to non-consensual sexual activity in different ways, including by freezing and not saying or doing anything. You will recall I earlier told you that a person does not consent to an act if the person does not say or do anything to communicate consent.**

**You must not act on the basis of any preconceived ideas you may have or have heard about how people respond to non-consensual sexual activity.**

(Where appropriate, address s 103ZU of the *Evidence Act*):

**In this trial there is evidence that [set out the relevant evidence]. People who do not consent to a sexual activity may not be physically injured or subjected to violence, or threatened with physical injury or violence. The absence of injury or violence, or threats of injury or violence, if that is what you find, does not of itself mean the complainant was not telling the truth about the commission of the charged act. That is something you must assess based on all of the evidence, but with that direction in mind.**

(Where appropriate, address s 103ZV of the *Evidence Act*):

**It is well known that trauma may affect people differently, which means that some people may show obvious signs of emotion or distress when giving evidence in court about a sexual offence, but others may not. So, the presence or absence of emotion or distress does not, of itself, mean that a person is not telling the truth about a sexual offence.**

**That is something you must assess based on all of the evidence, but with that direction in mind.**

(Where appropriate, address s 103ZW of the *Evidence Act*, amending the list as appropriate):

**In this trial there is evidence that [set out the relevant evidence]. You must bear in mind that non-consensual sexual activity can occur in many different circumstances. It should not be assumed that a person consented to a sexual activity because the person –**

- (a) wore particular clothing or had a particular appearance; or**
- (b) consumed alcohol or another drug; or**
- (c) was present in a particular location; or**
- (d) acted in a flirtatious or sexual manner; or**
- (e) worked as a sex worker.**

**Whether it has been proven that the complainant did not consent is something you must assess based on all of the evidence, but with that direction in mind.**

(The following text must be included in all instances):

**In summary, if the prosecution proves beyond reasonable doubt at least one of the following:**

- 1. That the complainant did not consent to the charged act with the defendant, or**
- 2. That consent was not given, or**
- 3. (Where appropriate) That the complainant was not capable of knowing or understanding what [he/she] was doing in giving consent.**

**then it has proven that consent was not given.**

(Where mistake of fact is raised on the evidence, see the sample directions at **Chapter 80 – Mistake of Fact in Sexual Offences**).

### *Other than Sexual Offences*

**What must be proven beyond reasonable doubt is that the charged act, namely [describe the act alleged] was done without the complainant's consent. The term 'consent' does not have any special meaning for the purposes of considering this offence. It means what it means as part of our everyday language.**

**An act is done without the consent of the complainant if [he/she] does not agree to the act being done, or does not want the act to occur. A person cannot consent to an act occurring unless they have the cognitive ability to fully understand the nature of the act alleged, and its likely consequences.**



(Where appropriate, the following text may be added) **An act is done without the consent of the complainant if [he/she] does agree to the act being done, or does want the act to occur, but the consent was obtained by means of a fraud. In this case the prosecution alleges that the consent was fraudulently obtained because [describe the nature of the fraud alleged]. If the prosecution proves beyond reasonable doubt that the consent was given because of the fraudulent [act/s] alleged, then it was in fact not a true consent and the prosecution will have proven this element.**

(Where appropriate, add the following text) **In addition to looking at what was said by the complainant at the time close to when the act was done, you are entitled to look at what the complainant also did, or did not do, at the time close to when the act was done as well as the overall context of the circumstances that existed at the time of the act and afterwards. Put another way, you are entitled to infer that the prosecution either has or has not proven that consent was not given for the act to be done. I have already directed you as to the drawing of inferences, and I will not repeat what I have said.**

(Where appropriate, add the following text) **You will recall that the complainant was aged [insert age] at the time the charged act was done. While it remains a matter for your determination, you might think that a child of that age either could not consent because [he/she] did not have the cognitive ability understand the nature of the act and its likely consequences, or would be unlikely to have consented to the charged act occurring.**

(Where the allegation is that the complainant was incapable of giving consent, either by virtue of age or other condition) **However, the charged act will be deemed to have occurred with consent if the act proven by the prosecution is of such a nature and occurred in such circumstances that it is generally regarded as acceptable in the ordinary conduct of daily life. In those circumstances even though the complainant may have been incapable of giving consent, it is deemed that [he/she] did give consent.**

(Where a defence of Mistake of Fact is raised on the evidence – see the suggested direction at **Chapter 79 – Mistake of Fact**).

(Where appropriate, simply include the following text) **In this trial there is no suggestion that the charged act occurred without consent, if it is proven to have occurred at all. For that reason, you can take this element as having been proven.**