80A. Mistake of Fact in Sexual Offences – offences committed wholly after 23 September 2024

80A.1 Legislation

[Last reviewed: August 2025]

Criminal Code

Section 24 – Mistake of fact

Section 348A – Mistake of fact in relation to consent

Section 348B – Cognitive Impairment

Section 348C – Mental health impairment

Section 348A – Mistake of fact in relation to consent

Section 590BA – Advance notice of intention to rely on expert evidence under s348A

Section 754 – Offences charged before or after the commencement

Section 761 – Application of ch 32 to proceedings

Evidence Act

Section 103ZX – Direction on mistake of fact in relation to consent

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

Part 6B, Division 4 – Expert evidence in relation to sexual offences

80A.2 Commentary

[Last reviewed: August 2025]

Section 348A was inserted by the *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Act* 2021, No 7 of 2021 which commenced on 7 April 2021. The transitional provision is s 754.

That provision 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* 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, whereas the amendment to the *Evidence Act* applies from the date of proclamation.

The *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024* also introduced s 103ZX into the *Evidence Act*. It too took effect on proclamation on 23 September 2024. The transitional provision (s 161 of the *Evidence Act*) in effect means that it applies to all directions given on or after the date of proclamation. Section 103ZX refers back to s 348AA of the *Criminal Code*, which only commenced on proclamation, but has a different transitional provision than s 103ZX. It applies only to proceedings for offences committed wholly after proclamation. Unlike proceedings taking place after proclamation for offending wholly or partly committed before proclamation - see the commentary for those proceedings -, the applicability of s 103ZX to proceedings for an offence committed wholly after proclamation is not in doubt.

The current form of s 348A is similar to s 61HK of the *Crimes Act 1900* (NSW) and the suggested directions have drawn on some of the directions in the New South Wales Criminal Bench Book.

The expert evidence provisions in Part 6B, Div 4 of the *Evidence Act 1977* (ss 103ZZC – 103ZZK) were also enacted by the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024*. Those concerning the safeguard provisions were proclaimed on the same day as the affirmative consent provisions. Although there is no specific transitional provision for that amendment, the practical effect of the suite of amendments is that s 761 of the *Criminal Code* means that they too only apply to offences alleged to have been wholly committed after the proclamation date. The panel of experts will be implemented by way of a pilot program in Brisbane and Townsville initially. The pilot project commenced February 2025.

The circumstances in which a trial judge ought to direct the jury on the excuse of mistake of fact in the case of non-consensual sexual offences committed on or prior to 23 September 2024 were considered in detail in *R v Makary* [2019] 2 Qd R 528; [2018] QCA 258 ('*Makary*'). (See also *R v FAV* [2019] QCA 299 per Fraser JA at [5]-[6], per Mullins JA at [45]-[48], per Henry J (dissenting) at [108]-[111] and *R v Kellett* [2020] QCA 199 per Morrison JA at [18]-[23], per Mullins JA at [128]-[129].)

In *Makary,* the trial judge's refusal to direct the jury on mistake of fact was held to be correct. Sofronoff P (with whom Bond J agreed) said:

> [54] It follows that before s 24 can arise for a jury's consideration in connection with the issue of consent there must be some evidence that raises a factual issue about whether the accused believed that the complainant had a particular state of mind and also believed that the complainant had freely and voluntarily given consent in some way. Inevitably, that will require some evidence of acts (or, in particular circumstances, an omission to act) by a complainant that led the

defendant to believe that the complainant had a particular state of mind consisting of a willingness to engage in the act and believed also that that state of mind had been communicated to the defendant, that is, that consent had been "given".

[55] Where s 24 arises for a jury's consideration the onus of proof lies upon the prosecution to exclude mistake as an excuse … The excuse afforded by that provision may have to be excluded by the prosecution even if the accused does not invoke the section … [Section 24 arises if] there [are] facts in the case that justify consideration of the issue by the jury …[T]he only question is whether there is evidence which raises the issue of mistaken belief for the jury's consideration so that the prosecution must exclude the excuse afforded by s 24.

…

[59] In cases like this one, in which the appellant alleges that the complainant consented but did not give evidence, the raising of s 24 is problematical because the element of the accused's belief can arise only by way of inference. As always, inference must not be confused with speculation.

…

[61] In a case like this one, in which the primary answer to the charge is one of consent, it is likely that the very facts relied upon to show consent, being objective facts, will also be relied upon to raise an inference that the accused held a reasonable but mistaken belief about that issue …

…

[71] The appellant's submission that anything that the complainant said, did, or did not say or do could reasonably have been understood as her giving consent to having sexual intercourse with him so as to generate an inference that he believed that she had given her consent was utterly unreal and …Richards DCJ was right not to direct the jury in the way invited.

(The President's reference to the unreality of the appellant's submission drew upon a quote from the reasons of L'Heureux-Dube J in R v Ewanchuk [1999] 1 SCR 330, at [376 – 377], [97]. R v Ewanchuck was also cited with approval by McMurdo P in R v Cutts [2005] QCA 306 at [14], with her Honour quoting: '…there is, on the record, no evidence that would give an air of reality to an honest belief in consent for any of the sexual activity which took place in this case.')

McMurdo JA (in Makary) said:

> *[90] To raise the operation of s 24, there must be some evidence of a mistaken belief by the defendant … I would not describe the requirement as going as far as a need for evidence on which there could be a finding that the mistaken belief was held. I prefer the formulation by McPherson JA in R v Millar [[2000] 1 Qd R 437, 439 [7]], which is that there must be evidence on which the jury could legitimately entertain a reasonable doubt about whether the defendant honestly and reasonably believed the complainant had consented.*

In so far as there is a difference of approach between that of the majority in *Makary* and that of McMurdo JA, all members of the Court in *R v Kalisa* [2024] QCA 198 at [6], [9] and [94] preferred the formulation by McMurdo JA. Further relevant observations as to when the defence might be raised on the evidence may be found in the judgment of Ryan J at [54]-[56].

The directions to the jury should identify the particular matters for consideration in deciding whether the Crown has negatived the defence: *R v Rope* [2010] QCA 194 at [53]-[56]; *R v Dunrobin* [2013] QCA 175 at [119].

Matters relevant to a defendant's belief

Regard may not be had to a defendant's voluntary intoxication caused by alcohol, a drug or another substance in deciding whether the defendant's belief was honest and reasonable: s 348A(2).

Section 24(1) requires consideration of whether a defendant's belief, based on the circumstances as he or she perceived them to be, was held on reasonable grounds (as opposed to whether a reasonable person would have held it. (*R v Julian* (1998) 100 A Crim R 430 at [434]; *R v Mrzljak* [2005] 1 Qd R 308 at [321], [326]; *R v Wilson* [2009] 1 Qd R 476 at [20]).

Since the focus is on the defendant's belief, rather than that of a theoretical reasonable person, the information available to the defendant and the defendant's circumstances (such as an intellectual impairment or language difficulty) are of relevance in considering whether a belief was reasonably held: *R v Mrzljak* [2005] 1 Qd R 308 at [321], [329-330].

Williams JA said:

> *[53] The critical fact for a defence based on s 24 is the offender's belief. For the defence to arise the belief held by the offender must be both honest and reasonable. Whilst that means that the belief must be based on reasonable grounds it is nevertheless the belief of the offender which is critical. That must mean, in my view, that the critical focus is on the offender rather than a theoretical reasonable person.*

It is the information available to the offender which must determine whether the belief was honest and also was reasonable. That must mean that factors such as intellectual impairment, psychiatric problems and language difficulties are relevant considerations though none would be necessarily decisive.

Holmes J (as her Honour then was) said:

[89] The circumstances of the present case point up the inevitability of reference to the characteristics of an accused in considering the reasonableness of mistake. It would be absurd here to introduce a fiction that the appellant had a full command of the language into the process of considering whether he laboured under a reasonable but mistaken apprehension as to the existence of consent. But if one accepts, as (counsel for the Crown) seemed to, that a language handicap is a feature of the accused relevant to assessment of the reasonableness of his belief, it becomes difficult to assert that an intellectual handicap is not similarly such a feature.

[90] It is not the handicap per se which bears on the excuse of mistake. It is the fact that the handicap results in the accused having to form his belief on a more limited set of information that is relevant, just as other external circumstances affecting the accused's opportunity to develop and test his perception are relevant. A jury cannot assess the rationality of a belief in isolation from the circumstances in which, and the information on which, it is formed.

80A.3 Suggested Direction

[Last reviewed: August 2025]

If you are satisfied beyond reasonable doubt that the complainant did not consent there is another matter you must consider.

Our law provides that a person who does an act under an honest and reasonable, but mistaken belief in the existence of any state of things is not criminally responsible for the act to any greater extent than if the real state of things had been such as the person believed to exist.

In the context of this case that means that, even though the complainant was not in fact consenting, you must consider whether the defendant, in the circumstances, honestly and reasonably believed that the complainant was consenting at the time he did the charged act.

(It may help to describe those circumstances at this stage of the directions**).**

A belief by the defendant that the complainant consented to the charged act occurring is not reasonable if the defendant did not immediately before or at the time of the charged act, say or do anything to ascertain whether the complainant consented to the charged act occurring. So, if the prosecution have proved beyond reasonable doubt that the defendant did not say or do anything to ascertain whether the complainant consented to the charged act either immediately before or at the time he/she did the charged act, any belief the defendant held as to consent is not a reasonable one and the prosecution have proven that the charged act occurred without consent.

If, on the other hand, you are satisfied the defendant did say or do something at those times to ascertain if the complainant consented, you may have regard to whatever the defendant said or did and what, if anything, the complainant said or did in response to decide if any belief the defendant held was both honest and reasonable.

A mere mistake by the defendant is not enough. The mistaken belief in consent must have been both honest and reasonable, and if the prosecution disproves either or both of those things beyond reasonable doubt, it will have proven that this defence does not apply.

An honest belief is one which is genuinely held by the defendant.

A defendant's belief is reasonable, when it is one held by the defendant, on reasonable grounds. Whether the belief is reasonable requires an objective assessment by you of all of the circumstances, [(where appropriate**):** other than the accused's self-induced intoxication**].**

(Consider whether it is necessary to direct the jury on any particular circumstances relevant to the defendant and outline these relevant particular characteristics: see commentary on matters relevant to a defendant's belief**).**

(Where appropriate**): The complainant says that [**he/she**] did not consent and made that clear to the defendant. If you accept the complainant's evidence that [**he/she**] [**quote the evidence**], you might think that the defendant could not have honestly and reasonably believed the complainant was consenting.**

(Where appropriate: s 103ZX *Evidence Act*): **I have earlier directed you that 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 – [**here repeat the list of matters referred to earlier from s 348AA**]. I direct you that if you find beyond reasonable doubt that the defendant either knew or believed that one of those circumstances applied, that knowledge or belief is enough to show that the**

defendant did not reasonably believe that the complainant was consenting to the charged act.

[Here set out the evidence touching on the state of knowledge or belief of the defendant**].**

A state of knowledge means what it says; the defendant actually knows that one of circumstances applies. A state of belief that one of those circumstances applies is a state of lesser certainty than knowledge. It is an inclination towards accepting that one of the circumstances applies, without actual knowledge. It is however a state of greater certainty than a mere suspicion or speculation. It is a matter for you to decide on the basis of all of the evidence whether or not the prosecution has proven beyond reasonable doubt that the defendant either knew or believed that one of those circumstances applied.

(Where appropriate**): I earlier directed you that if the prosecution has proved beyond reasonable doubt that the accused did not say or do anything to ascertain whether the complainant consented to the the charged act immediately before or at the time of doing that act, then that would establish that the belief of the accused that the complainant was not consenting was not reasonable. However, this is not the case if the accused was suffering from a cognitive impairment/mental health impairment at the time of doing the charged act and that impairment was a substantial cause of them not saying or doing anything to ascertain whether the complainant consented to that charged act occurring.**

In these circumstances, before you can find that the belief was honest and reasonable in the absence of the required enquiries by [him/her**], the accused must prove on the balance of probabilities both that:**

1. **[**He/she**] was suffering from a cognitive [**impairment/mental health impairment**] at the time of the charged act; and**

2. **That cognitive [**impairment/mental health impairment**] was a substantial cause of the accused not saying or doing anything to ascertain whether the complainant consented to the act of [**intercourse/charged act**].**

(For the first limb, if in issue, refer to so much of the definitions of cognitive impairment at s 348B and mental health impairment at s 348C as is appropriate and relate them to the evidence on the topic, and the parties' arguments**).**

[For the second limb, summarise the evidence and relevant arguments of the parties**].**

I have directed you that the defendant must prove on the balance of probabilities that the cognitive [impairment/mental health impairment**] was a**

substantial cause of the accused not saying or doing anything to ascertain whether the complainant consented to the act of [intercourse/charged act**]. The cognitive [**impairment/mental health impairment**] will be a substantial cause of the accused not saying or doing anything to ascertain whether the complainant consented to the act of [**intercourse/charged act**] if it was a substantial or significant cause of not making those inquiries. That is, if it was not necessarily the only reasons why those enquiries were not made, but if it was a cause of substance. It is not a question for scientists or philosophers. It is a question for you to answer, applying your common sense to the facts as you find them, appreciating you are considering legal responsibility in a criminal matter.**

If the accused has not proved both these matters on the balance of probabilities, then the prosecution has established beyond reasonable doubt that the defendant's failure to say or do anything to ascertain whether the complainant consented to the charged act was such that their belief the complainant was not consenting was not reasonable in the circumstances.

If the accused has proved both these matters on the balance of probabilities, then you cannot use the fact the accused did not do or say anything to ascertain whether the complainant consented to the act of [intercourse/charged act**] in considering whether the Crown has proved beyond reasonable doubt that the accused's belief in consent was not reasonable. You must put that fact to one side and consider whether the Crown has proved beyond reasonable doubt that the accused's belief in consent was not reasonable because of other facts and circumstances.**

(Where issues of cognitive impairment/mental health impairment do not apply**): Remember the onus of proof. It is not for the defendant to prove that [**he/she**] honestly and reasonably believed the complainant was consenting but for the prosecution to prove beyond reasonable doubt that the defendant did not honestly and reasonably believe that the complainant was consenting.**

Accordingly, if you find that the complainant wasn't in fact consenting, you must ask yourself 'can I be satisfied beyond reasonable doubt that the defendant did not have an honest and reasonable belief that [he/she**] was consenting?'**

If the prosecution have satisfied you beyond reasonable doubt that the defendant did not have such a belief you must find the accused guilty.

If you are not so satisfied, even though the complainant was not consenting, you must find the defendant not guilty.