

114A. Consent for Offending After 23 September 2024

114A.1 Legislation

[Last reviewed: August 2025]

Criminal Code

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

Section 348 – [Consent](#)

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

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

Section 348B – [Cognitive impairment](#)

Section 348C – [Mental health impairment](#)

Section 590BA – [Advance notice of intention to rely on expert evidence under s 348A](#)

Section 761 – [Application of ch 32 to proceedings](#)

Evidence Act

Part 6B, Division 1 – [Evidence related to sexual offences](#)

Part 6B, Division 2 – [Prohibitions and restrictions in relation to particular questions and evidence](#)

Part 6B, Division 3, sub-division 3 – [Directions to jury – consent and mistake of fact](#)

Section 161 – [Application of part 6B, divs 1-3 to criminal proceedings](#)

114A.2 Commentary

[Last reviewed: August 2025]

Consent – sexual offences

This part of the Criminal Code, Chapter 32, was substantially modified on the proclamation of the relevant part of *Criminal Code by Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024*, namely 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.

These ‘affirmative consent’ provisions broadly reflect the legislative provisions in New South Wales (ss 61HI and HJ of the *Crimes Act 1900* (NSW)), Victoria (ss 36 and 36AA of the *Crimes Act 1958* (Vic)), in Tasmania (s 2A of the *Criminal Code 1924* (Tas)) and in the Northern Territory (Part VIA of the *Criminal Code Act 1983* (NT)). Section 348AA(2) is in the same terms as s 2A(3) of the *Criminal Code 1924* (Tas). Case authorities dealing with those interstate provisions may provide some assistance in understanding the effect of the provisions.

The *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024* also introduced ss 103ZS to 103ZW into the *Evidence Act*. They too took effect on proclamation 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 the date of proclamation, regardless of when the offending is alleged to have occurred. They 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).

The suggested directions in this Chapter are a combination of established directions in this State and guidance gained from the applicable directions in the New South Wales Criminal Trial Courts Bench Book.

Note that s 348AA(1)(f) concerning consent having been given as a result of a fear of harm includes a note including examples of ‘harm.’ Also note that ‘sex worker’ is defined for the purposes of s 348AA(1)(l) at s 348AA(4).

Section 348AA(2) provides for a rebuttable presumption that, where grievous bodily harm is caused in the commission of the offence, the injury is evidence of the lack of consent. It is difficult to think of likely scenarios where the provision would have that effect as the prosecution must first prove beyond reasonable doubt that it was caused in the course of, or in relation to the charged offence. Proof to that standard necessarily means that the prosecution will have negated the defendant’s proof to the contrary, on the lower standard of proof. The reasoning in holding that similarly styled reverse onus defences did not apply in *R v Shetty* [2005] 2 Qd R 540, [13]–[14] and *R v Addley* [2018] QCA 125 appear to be apposite. Nonetheless, the trial judge must decide for himself or herself whether directions on this provision are required, and so suggested directions are included below.

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.

An issue of mistake of fact may arise – see notes on mistake of fact in sexual offences in **Benchbook Chapter 80 – Mistake of Fact in Sexual Offending Pre-September 2024** for offences committed on or partly before 23 September 2024 and **Benchbook**

Chapter 80A – Mistake of Fact in Sexual Offending Post-September 2024 for offences committed wholly after that date.

Note that a person charged with rape may be alternatively convicted of the offence, if established by the evidence, of other forms of sex 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 **Benchbook Chapter 32 – The rule in Browne v Dunn**. It has its ordinary everyday meaning for these offences. 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.

114A.3 Suggested Directions

[Last reviewed: August 2025]

Sexual offences

For the purposes of considering this offence, the term ‘consent’ has a special meaning. ‘Consent’ means free and voluntary agreement between all participants in the conduct that gives rise to the charge [(where appropriate): or charges]. The agreement must be to the nature of the activity that occurs. That means that there must be an agreement reached between all participants as to the type of activity that takes place, before it commences.

Everyone has a right to choose whether or not to participate in sexual activity. A person agrees to [identify the nature of the charged act or acts] if, at the time of that act occurring, [he/she] freely and voluntarily agrees to that act occurring. That agreement can be communicated verbally or by actions. A person who does not offer physical or verbal resistance to a charged act is not, by reason only of that fact, to be taken to have consented to that charged act.

Participants in sexual activity cannot presume that another participant is consenting to that activity. Consensual sexual activity [or identify the nature of the charged act or acts] involves ongoing and mutual communication and decision-making, and free and voluntary agreement between the persons participating in the sexual activity [or identify the nature of the charged act or acts]. A person may withdraw consent to an act at any time.

(If appropriate and adjust the list to those matters raised on the evidence): Consent will not be given unless agreement has been reached 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:

- (a) the person does not say or do anything to communicate consent;**
- (b) the person does not have the cognitive capacity to consent to the act;**
- (c) the person is so affected by alcohol or another drug as to be incapable of consenting to the act;**
- (d) the person is so affected by alcohol or another drug as to be incapable of withdrawing consent to the act;**
- (e) the person is unconscious or asleep;**
- (f) the person participates in the act because of force, a fear of force, harm of any type or a fear of harm of any type, whether to that person or someone else or to an animal or property, regardless of—**
 - (i) when the force, harm or conduct giving rise to the fear occurs; or**
 - (ii) whether it is, or is a result of, a single incident or is part of an ongoing pattern;**
- (g) the person participates in the act because of coercion, blackmail or intimidation, regardless of—**
 - (i) when the coercion, blackmail or intimidation occurs; or**
 - (ii) whether it occurs as a single incident or as part of an ongoing pattern;**
- (h) the person participates in the act because the person or another person is unlawfully confined, detained or otherwise deprived of their personal liberty;**
- (i) the person participates in the act because the person is overborne by the abuse of a relationship of authority, trust or dependence;**
- (j) the person participates in the act because of a false or fraudulent representation about the nature or purpose of the act, including about whether the act is for health, hygienic or cosmetic purposes;**
- (k) the person participates in the act with another person because the person is mistaken—**
 - (i) about the identity of the other person; or**

- (ii) that the person is married to the other person;
- (l) the person is a sex worker and participates in the act because of a false or fraudulent representation that the person will be paid or receive some reward for the act;
- (m) both of the following apply—
 - (i) the person participates in the act with another person because of a false or fraudulent representation by the other person about whether the other person has a serious disease; and
 - (ii) the other person transmits the serious disease to the person;
- (n) the person participates in the act with another person on the basis that a condom is used for the act and the other person does any of the following things before or during the act—
 - (i) does not use a condom;
 - (ii) tampers with the condom;
 - (iii) removes the condom; or
 - (iv) becomes aware that the condom is no longer effective but continues with the act.

[Here summarise the evidence that raises one or more of these issues and relate it to the relevant provision above, reminding the jury of the onus of proof resting on the prosecution. Some examples follow]:

(Where it is alleged that that complainant did not say or do anything to communicate consent): **In this trial the prosecution alleges that the complainant did not say or do anything to communicate consent. If you are satisfied beyond reasonable doubt that is the case, then the prosecution has proven that the charged act occurred without consent.**

In considering whether that has been proven, I direct you that a person who does not offer physical or verbal resistance to an act is not, by reason only of that fact, to be taken to have consented to the act. You must remember that the absence of a physical or verbal objection is not necessarily the same as giving consent, and that merely because consent has been given, or an agreement reached, in that manner in the past it does not necessarily mean that it was given on this occasion.

[Here, relate the facts of the case to the effect of that direction].

The issue of whether it has been proven that an agreement was not reached on this occasion is something you must determine on the evidence.

(Where appropriate): **However, in certain circumstances a representation might be communicated by remaining silent and doing nothing. That might arise in the context of an established sexual relationship where consent might be given in the most subtle ways, or by evaluation against a pattern of past behaviour. You must remember that the absence of an objection is not necessarily the same as giving consent, and that merely because consent has been given, or an agreement reached, in that manner in the past does not necessarily mean that it was given on this occasion. I direct you that a person who does not offer physical or verbal resistance to an act is not, by reason only of that fact, to be taken to have consented to the act. The issue of whether it has been proven that an agreement was not reached on this occasion is something you must determine on the evidence.**

(If there is an issue at trial as to the cognitive capacity of the complainant to consent, or as to the complainant being so affected by intoxication as to be incapable of consenting or of withdrawing consent):

In this trial the prosecution alleges that [insert here the allegation].

[Outline here the evidence relevant to the allegation].

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 of the cognitive capacity to know what [he/she] was doing in giving consent [(or where appropriate): impairment through intoxication as to the decision to give consent/withdraw consent] , it must prove beyond reasonable doubt that, at the time the agreement was reached, the complainant was incapable of knowing or understanding what [he/she] was doing in giving that consent [(or where appropriate): was incapable of consenting to the charged act/of withdrawing consent to the charged act].

(Where appropriate): **I have earlier directed you that a person may withdraw consent at any time. If the [identify the charged act] occurs, or continues, after consent has been withdrawn, then it occurs without consent. The prosecution case here is [outline the relevant evidence]. If you are satisfied beyond reasonable doubt that the complainant withdrew consent and that the [identify the charged act] occurred or continued after that point in time, then you would find that the occurrence or continuation of the [identify the charged act] was without [his/her] consent.**

(Where appropriate): **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 the 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): A person who consents to a particular sexual activity is not, by reason of that fact alone, to be taken to consent to any other sexual activity, regardless of whether it is the same or a different act and regardless of whether or not it is on the same occasion as the charged act. There is evidence in this trial that the complainant may have consented to some sexual activity with the defendant, namely [describe the nature and time/occasion of the consensual activity or refer to the evidence that suggests the possibility of consensual activity]. If you decide [he/she] may have consented to that activity, it does not follow for that reason alone that [he/she] consented to the conduct with which the defendant is charged.

(Where appropriate): A person who consents to a sexual activity with one person is not, by reason of that fact alone, taken to have consented to a sexual activity with another person, whether on the same or a different occasion. There is evidence in this trial that the complainant may have consented to sexual activity with [the name of the person involved], namely [describe the nature and time/occasion of the earlier consensual activity or refer to the evidence that suggests the possibility of consensual activity]. If you decide [he/she] may have consented to that activity, it does not follow for that reason alone that [he/she] consented to the conduct with which the defendant is charged.

(Where appropriate): In this trial the prosecution allege that the complainant suffered an injury, namely [describe the injury]. It is also alleged that the injury amounts to grievous bodily harm. Unless the defendant proves on the balance of probabilities to the contrary, the fact that this injury was suffered is evidence that the complainant did not consent to the charged conduct, but only if you are satisfied of three things:

- 1. That the injury in fact amounts to grievous bodily harm. [See *Benchbook Chapter 140 – Grievous Bodily Harm* for the suggested directions concerning the proof of grievous bodily harm].**

[Outline here the evidence going to the issue of proof of grievous bodily harm].

2. That the injury was suffered as a result of, or in connection with the charged act; and

[Outline the evidence relevant to this aspect].

3. The defendant has not proven on the balance of probabilities that the injury was not caused in connection with the commission of the offence.

Proof on the balance of probabilities differs from the standard of proof imposed on the prosecution, namely proof beyond reasonable doubt. If the defendant satisfies you on the evidence that it is more likely than not that the injury was the result of or caused in connection with consensual contact with the complainant, or in some way not in the course of the commission of the charged act. If you are satisfied of either of those things on the balance of probabilities then this third aspect will not have been proven by the prosecution.

If all three of those things are proven, then the existence of the injury is evidence that the charged act was done without consent.

[(Where appropriate): 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 this list 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): 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): 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: s 103ZV *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 and amend the list as appropriate; s 103ZW): **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.

[In all instances] In summary, if the prosecution proves beyond reasonable doubt at least one of the following:

1. That the complainant did not agree to the charged act occurring with the defendant before it occurred, or
2. That if there was apparent agreement, that agreement or consent was not freely and voluntarily given

then it has proven that consent was not given.

(Where mistake of fact is raised on the evidence, see the suggested directions at Chapter 80A of the Benchbook).

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): 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): 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): 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* of the *Benchbook*).

(Where appropriate): **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.**