

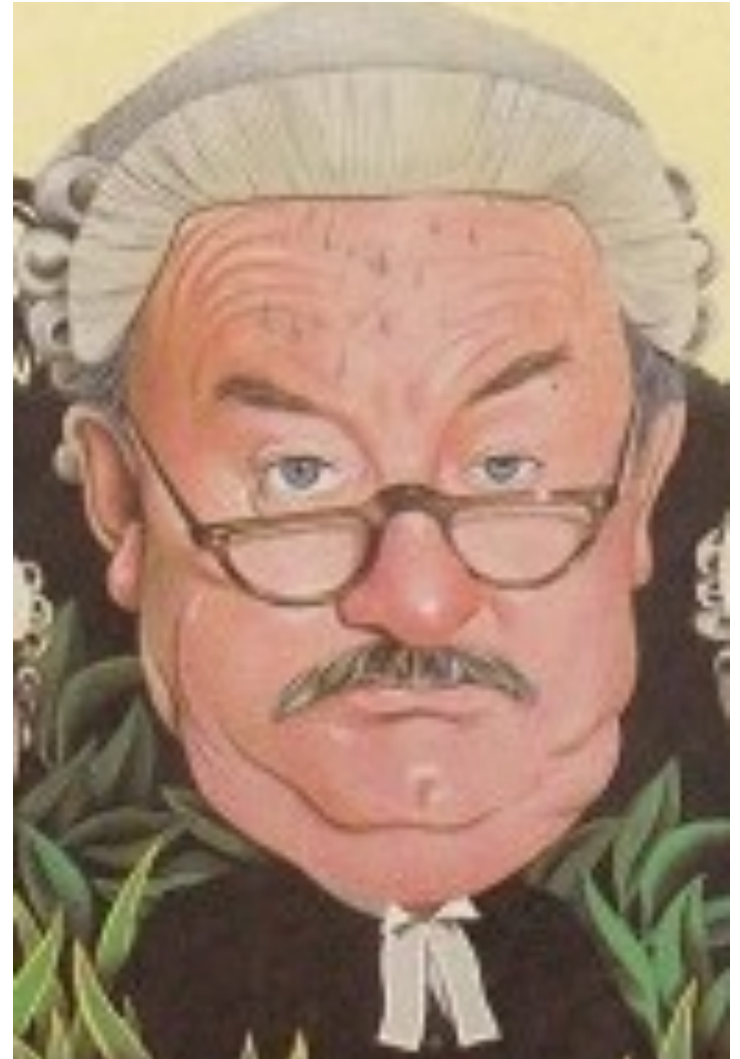


# Consent – A Brave New World?

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# Rumpole and The Golden Thread

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(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 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.

(3) A person is not to be 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.

(4) If an act is done or continues after consent to the act is withdrawn by words or conduct, then the act is done or continues without consent.

## Section 348

# Meaning of Consent

## Section 348A

Mistake of fact in relation to  
consent (April 2021)

*(1) This section applies for deciding whether, for section 24, a person charged with an offence under this chapter did an act under an honest and reasonable, but mistaken, belief that another person gave consent to the act.*

*(2) In deciding whether a belief of the person was honest and reasonable, regard may be had to anything the person said or did to ascertain whether the other person was giving consent to the act.*

*(3) In deciding whether a belief of the person was reasonable, regard may not be had to the voluntary intoxication of the person caused by alcohol, a drug or another substance.*

# R v Sunderland [2020] QCA 156


In *R v Sunderland* [2020] QCA 156 Soffronoff P said:

*[43] As it is now defined, “consent” requires that consent be “given”. This aspect of the definition of consent must not be overlooked.*

*[44] The giving of consent, in the context of a charge of a sexual offence, involves the making of a representation by one person to another; to the effect that the first person agrees to participate in the sexual act that would otherwise be an offence. Such a representation might be made by words or by actions or by a combination of both. Sometimes the words or actions cannot be understood apart from the surrounding circumstances. In cases where the complainant has communicated neither consent nor dissent by words or actions, the inaction cannot be considered in a vacuum. It too must be considered with all of the relevant circumstances surrounding the sexual act. The circumstances involve matters both past and present. So, inaction in the context of prior acts or words might mean that the complainant has previously given consent which remains operative until withdrawn. This might be established by evidence of relationship or previous interactions between the complainant and accused. So too, inaction, when taken with the other circumstances, may be a manifestation of unwilling submission rather than consent. Indeed, continued or sustained inaction for the duration of a sexual act may be a strong indicator of submission rather than consent. In *R v Day Coleridge J* said that every consent to an act “involves a submission; but it by no means follows, that a mere submission involves consent”. In *R v Wollaston Kelly CB* said that “[m]ere submission is not consent, for there may be submission without consent, and while the feelings are repugnant to the act being done. Mere submission is totally different from consent”.*

In an earlier decision of the President in *Makary* the year before he said at [50]:

*“[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.”*



*“The risk in adopting an affirmative consent model lies in the unintended consequence that comes with attempting to overregulate and second guess human behaviour that is familiar to members of a jury – ultimately such overregulation may result in the conviction of innocent people. If an affirmative consent model is adopted, in our view there will be difficulties in mitigating that risk without the introduction of cumbersome and complex provisions.”*

# Crimes Act 1900 (New South Wales)

## Subdivision 1A Consent and knowledge of consent

### **61HF Objective**

An objective of this Subdivision is to recognise the following—

- (a) every person has a right to choose whether or not to participate in a sexual activity,
- (b) consent to a sexual activity is not to be presumed,
- (c) consensual sexual activity involves ongoing and mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual activity.

### **61HI Consent generally**

- (1) A person consents to a sexual activity if, at the time of the sexual activity, the person freely and voluntarily agrees to the sexual activity.
- (2) A person may, by words or conduct, withdraw consent to a sexual activity at any time.
- (3) Sexual activity that occurs after consent has been withdrawn occurs without consent.
- (4) A person who does not offer physical or verbal resistance to a sexual activity is not, by reason only of that fact, to be taken to consent to the sexual activity.
- (5) A person who consents to a particular sexual activity is not, by reason only of that fact, to be taken to consent to any other sexual activity.

Example—A person who consents to a sexual activity using a condom is not, by reason only of that fact, to be taken to consent to a sexual activity without using a condom.

- (6) A person who consents to a sexual activity with a person on one occasion is not, by reason only of that fact, to be taken to consent to a sexual activity with—
  - (a) that person on another occasion, or
  - (b) another person on that or another occasion.



# Crimes Act 1900 (New South Wales)

## Subdivision 1A Consent and knowledge of consent (cont.)

### 61HJ Circumstances in which there is no consent

(1) A person does not consent to a sexual activity if—

- (a) the person does not say or do anything to communicate consent, or
- (b) the person does not have the capacity to consent to the sexual activity, or
- (c) the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual activity, or
- (d) the person is unconscious or asleep, or
- (e) the person participates in the sexual activity because of force, fear of force or fear of serious harm of any kind to the person, another person, an animal or property, regardless of—
  - (i) when the force or the conduct giving rise to the fear occurs, or
  - (ii) whether it occurs as a single instance or as part of an ongoing pattern, or
- (f) the person participates in the sexual activity because of coercion, blackmail or intimidation, regardless of—
  - (i) when the coercion, blackmail or intimidation occurs, or
  - (ii) whether it occurs as a single instance or as part of an ongoing pattern, or
- (g) the person participates in the sexual activity because the person or another person is unlawfully detained, or
- (h) the person participates in the sexual activity because the person is overborne by the abuse of a relationship of authority, trust or dependence, or



# Crimes Act 1900 (New South Wales)

## Subdivision 1A Consent and knowledge of consent (cont.)

(i) the person participates in the sexual activity because the person is mistaken about—

- (i) the nature of the sexual activity, or
- (ii) the purpose of the sexual activity, including about whether the sexual activity is for health, hygienic or cosmetic purposes, or

(j) the person participates in the sexual activity 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, or

(k) the person participates in the sexual activity because of a fraudulent inducement.

(2) This section does not limit the grounds on which it may be established that a person does not consent to a sexual activity.

(3) In this section—fraudulent inducement does not include a misrepresentation about a person's income, wealth or feelings.

# Crimes Act 1900 (New South Wales)

## Subdivision 1A Consent and knowledge of consent (cont.)

### 61HK Knowledge about consent

(1) A person (the accused person) is taken to know that another person does not consent to a sexual activity if—

- (a) the accused person actually knows the other person does not consent to the sexual activity, or
- (b) the accused person is reckless as to whether the other person consents to the sexual activity, or
- (c) any belief that the accused person has, or may have, that the other person consents to the sexual activity is not reasonable in the circumstances.

(2) Without limiting subsection (1)(c), a belief that the other person consents to sexual activity is not reasonable if the accused person did not, within a reasonable time before or at the time of the sexual activity, say or do anything to find out whether the other person consents to the sexual activity.

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## Policy Objectives and the reasons for the amendments

The policy objectives of the amendments to the Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020 (the Bill) are:

- (a) To uphold the fundamental right of every person to make decisions about her or his sexual behaviour and to choose not to engage in sexual activity;
- (b) To protect children and persons with a cognitive impairment, mental illness or other vulnerability from sexual exploitation; and
- (c) To protect every person from unlawful threats or deprivation of her or his liberty.

Rape and sexual assault cause significant and devastating harms to victims. The existing laws governing sexual violence crimes in Queensland are complex and outdated. This amendment seeks to address this by introducing vital reforms which better recognise the lived experience of rape and sexual assault victims, and respond to changing attitudes towards what constitutes appropriate and respectful sexual relations.

## Section 348AA

# Circumstances in which there is no consent

(1) Circumstances in which a person does not consent to an act include the following—

- (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;

Note—This circumstance may apply where a person gave consent when not so affected by alcohol or another drug as to be incapable of consenting.

- (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;

Examples of harm—

- economic or financial harm
- reputational harm
- harm to the person's family, cultural or community relationships
- harm to the person's employment
- domestic violence involving psychological abuse or harm to mental health
- sexual harassment

## Section 348AA Circumstances in which there is no consent (cont.)

(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;

(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;

(iv)becomes aware that the condom is no longer effective but continues with the act.

Section 348AA  
Circumstances  
in which there  
is no consent  
(cont.)

(2) If a person, against whom an offence under this chapter is alleged to have been committed, suffers grievous bodily harm as a result of, or in connection with, the offence, the grievous bodily harm suffered is evidence of the lack of consent on the part of the person unless the contrary is proved.

(3) This section does not limit the grounds on which it may be established that a person does not consent to an act.

(4) In this section—

**sex worker** means a person who provides services to another person that involve the person participating in a sexual activity with the other person for payment or reward.

(1) This section applies for deciding whether, for section 24, a person charged with an offence under this chapter did an act under an honest and reasonable, but mistaken, belief that another person consented to the act.

(2) In deciding whether a belief of the person was honest and reasonable, regard may not be had to the voluntary intoxication of the person caused by alcohol, a drug or another substance.

(3) A belief by the person that another person consented to an act is not reasonable if the person did not, immediately before or at the time of the act, say or do anything to ascertain whether the other person consented to the act.

(4) Subsection (3) does not apply if the person proves that—

(a) the person had at the time of the act—

(i) a cognitive impairment within the meaning of section 348B; or

(ii) a mental health impairment within the meaning of section 348C; and

(b) the impairment was a substantial cause of the person not saying or doing anything.

(5) The person bears the burden of proving the matters mentioned in subsection (4).

(6) Evidence adduced by the person of the matters mentioned in subsection (4) must include evidence given by a person qualified to give expert evidence on the matters.

## Section 348A

# Mistake of fact in relation to consent



## Chapter 2.7 of the Report deals with the issues at hand

[p.214] The Taskforce acknowledge that the practical effect of an affirmative consent model is that an accused person who claims that they mistakenly believed the victim was consenting will have to show that the accused person said or did something to justify that belief. By placing this additional evidential burden on an accused person, their rights will be limited, namely the rights to the presumption of innocence and to a fair hearing, which ordinarily require the prosecution to disprove this issue beyond reasonable doubt. Further, although an affirmative consent model will not compel an accused person to testify, it will be difficult for an accused person to claim they had a mistaken belief as to consent without their account being in evidence before the court in some way.

The Taskforce did consider whether there were alternative ways of achieving affirmative consent that might place fewer limits on the human rights of an accused person. For example, the Taskforce considered whether the burden of proof could simply be reversed for an accused person seeking to claim that they had an honest and reasonable mistake of fact as to consent, either on its own or in combination with a requirement that regard must be had to anything the defendant said or did or did not say or do to ascertain consent.

REVERSING THE ONUS OF PROOF for the excuse of mistake of fact ON ITS OWN WOULD BE LESS LIKELY TO ACHIEVE THE REBALANCED FOCUS ON THE ACTIONS OF THE ACCUSED PERSON AND THE NEED TO PROMOTE EQUALITY IN SEXUAL RELATIONSHIPS that so many people have told the Taskforce is needed. A reversal of the onus of proof could still simply see the focus remain on what the victim did or did not say or do to communicate a lack of consent, rather than what the accused person did or said to ensure there was consent.

(Reversal of the onus of proof was not sufficient)

## Chapter 2.7 of the Report deals with the issues at hand (cont.)

A REVERSAL OF THE ONUS OF PROOF for the excuse of mistake of fact as to consent, COUPLED WITH A REQUIREMENT THAT REGARD MUST BE HAD TO WHAT A PERSON DID OR DID NOT DO TO ASCERTAIN CONSENT when deciding whether a person had an honest and reasonable mistake of fact about consent, would likely take Queensland very close to the affirmative consent model operating in Tasmania, New South Wales and the Australian Capital Territory. BUT IT WOULD FALL SHORT OF REQUIRING AN ACCUSED PERSON TO DO OR SAY SOMETHING TO ASCERTAIN CONSENT in order to ground an honest and reasonable mistake of fact as to consent. THIS OPTION WOULD LEAVE OPEN THE POSSIBILITY THAT AN ACCUSED PERSON COULD ARGUE THAT IN ALL THE CIRCUMSTANCES THEIR MISTAKEN BELIEF AS TO CONSENT WAS HONEST AND REASONABLE, REGARDLESS OF THEM NOT BEING ABLE TO SHOW THAT THEY TOOK ANY TYPE OF STEP TO ASCERTAIN CONSENT. WHILST THIS MAY IMPOSE A LESSER LIMITATION ON THE RIGHTS OF THE ACCUSED PERSON, IT COULD ALSO BE SEEN AS INSUFFICIENT TO REFLECT THE COMMUNITY EXPECTATIONS that consensual sexual relationships will involve frank, open and honest communication between equals. It MAY NOT CREATE ENOUGH OF A SHIFT IN FOCUS ONTO THE BEHAVIOUR OF THE ACCUSED PERSON rather than the behaviour of the victim, to create real change in the way sexual offence matters are investigated, prosecuted and defended during the criminal justice process.

## Chapter 2.7 of the Report deals with the issues at hand (cont.)

### P.217 HUMAN RIGHTS CONSIDERATIONS

It may help reduce the high attrition rates of sexual assault complaints as police and prosecutors become more confident to pursue more cases. This may result in more convictions. Charges for sexual offences may become more difficult to defend as it is likely that an accused person claiming mistake as to consent will have to refer to evidence in support of their alternative version of events, in order to satisfy a jury or judge (in a judge-alone trial) that the accused person did or said something to ascertain consent.

Human rights that may be limited include the right to liberty and security of person (section 29); right to a fair hearing (section 31); and rights in criminal proceedings (section 32). The Taskforce carefully considered whether the limitation of these rights was justified.

### LIMITATIONS ON RIGHTS ARE JUSTIFIED

The amendments recommended by the Taskforce have the legitimate purpose of improving the fairness of trials for sexual offences and ensuring that the law recognises the responsibility of parties to sexual activity to ensure that other parties have agreed to the activity. The rights to a fair trial in criminal proceedings extend beyond the right of the accused person and include consideration of the interests of the community and the protection of witnesses. The recommended amendments will ensure that it is not only the account of the person alleging the sexual violence that is scrutinised by the police, lawyers and jury or judge. Importantly, the recommended amendments will in no way limit the accused person's right to cross-examine and put directly to the victim that they consented or that the accused person took particular steps to ascertain consent. As noted above, the Taskforce considered whether there was any less-restrictive way to achieve the intended purpose and concluded there was not. To the extent that there is a limitation of an accused person's human rights, that limitation is justified in a free and democratic society based on human dignity, equality and freedom.



ANY QUESTIONS?