

Directions — misconceptions about consent in sexual assault trials

[2-980] Introduction

Sections 292 to 292E in Ch 6, Pt 5 Div 1, Subdiv 3 of the *Criminal Procedure Act* 1986 were inserted by the *Crimes Legislation Amendment (Sexual Consent Reforms) Act* 2021 and provide for particular directions to be given during certain sexual assault trials. These provisions follow certain recommendations by the Law Reform Commission after its review of the law on consent: New South Wales Law Reform Commission *Consent in relation to sexual offences* Report No 148, 2020, recommendations 8.1–8.7; Ch 8.

These provisions apply to proceedings which commence on and from 1 June 2022, regardless of when the relevant offence was committed: Sch 2, Pt 42.

The Attorney General said the purpose of these provisions was to “address common misconceptions about consent and to ensure a complainant’s evidence is assessed fairly and impartially by the tribunal of fact”: Second Reading Speech, Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021, NSW, Legislative Assembly, *Debates*, 19 November 2021, p 58.

The Court of Criminal Appeal has made a number of statements concerning the futility of making assumptions based on misconceptions about how a sexual assault complainant might behave: see, for example, *Khamis v R* [2018] NSWCCA 131 at [56]–[58] (Gleeson JA), [533] (Button J); *Rao v R* [2019] NSWCCA 290 at [98]; *Xu v R* [2019] NSWCCA 178 at [92]; *Maughan v R* [2020] NSWCCA 51 at [2] (RA Hulme J), [13] (Adamson J), [99] (Ierace J). In *Maughan v R* at [2], RA Hulme J described:

... the futility of assessing the behaviour of sexual assault complainants by reference to stereotypical expectations. The criminal law has moved past the era in which this was often prominent in a defence to a sexual assault allegation. Jurors applying a sensible and mature understanding of human behaviour are far less likely now to be persuaded by such propositions.

[2-982] Summary of the statutory framework

Section 292(1) provides that each of the consent directions in ss 292A – 292E apply to the following offences (or attempts to commit those offences) in the *Crimes Act* 1900:

- sexual assault, aggravated sexual assault and aggravated sexual assault in company: ss 61I, 61J, 61JA
- sexual touching and aggravated sexual touching: ss 61KC, 61KD
- carrying out a sexual act and carrying out an aggravated sexual act: ss 61KE, 61KF.

Section 292(2) provides that a judge *must* give any one or more of the consent directions:

- (a) if there is a good reason to give the consent direction, or
- (b) if requested to give the consent direction by a party to the proceedings, unless there is a good reason not to give the direction.

The directions do not require a particular form of words: s 292(3).

A judge should give reasons explaining the basis of a decision as to whether, or not, to give a direction.

A judge may:

- (a) give a consent direction at any time during a trial: s 292(4)(a)
- (b) give the same consent direction on more than 1 occasion during a trial: s 292(4)(b).

[2-984] Suggested procedure when considering whether consent directions required

At the earliest opportunity, it is suggested it would be good practice to ask the parties to identify the issues in the trial and which, if any, of the consent directions in ss 292A–292E may be required. The potential timing, and frequency, of the directions to be given could also be addressed then.

The directions will require adaptation to suit the charges and the evidence of the particular case. It is unlikely a “one size fits all” approach could be taken, particularly in cases involving multiple offences and multiple complainants.

Sections 292A–292C and 292E concern consent and the circumstances in which non-consensual sexual activity might occur. Whether any of these directions should be included in the summing-up when addressing proof of consent may require consideration. Certain of them might need to be discussed when dealing with the evidence of the complainant more generally (for example, ss 292C and 292D). Consider the relationship between these provisions and the provisions related to proof of consent in the *Crimes Act* 1900 such as, for example, ss 61HI (Consent generally), and 61HJ (Circumstances in which there is no consent). Directions concerning the same or similar topics might be given at the same time.

Section 292D concerns misconceptions about a person’s response to giving evidence: see LRC Report at 8.111–8.119 for an explanation of the rationale for this provision.

[2-986] Suggested direction — responses to giving evidence

[Summarise the submissions about the conclusions that might be drawn from the manner in which the evidence was given.] You must bear in mind that trauma may affect people differently, which means some people may show obvious signs of emotion or distress when giving evidence about an alleged sexual offence, but others may not. The absence of emotion or distress does not necessarily mean a person is not telling the truth about an alleged sexual offence, any more than the presence of emotion or distress means they are telling the truth about it.

[2-988] Suggested directions — ss 292A–292C, 292E

Note: Consider the relationship between these provisions and provisions related to proof of consent in the *Crimes Act* 1900 such as, for example, ss 61HI (Consent generally), and 61HJ (Circumstances in which there is no consent). Directions concerning the same or similar topics might be given at the same time.

Circumstances in which non-consensual sexual activity occurs — s 292A

You must bear in mind that non-consensual sexual activity can occur in many different circumstances and between different kinds of people including people who know one another/people who are married to one another/people who are in an established relationship with one another.

Note: Consider the limitation imposed by s 294CB on cross-examination of a complainant about past sexual activity. The need for this direction will only arise if there has already been a ruling admitting evidence of this kind. See further [1-347] **Cross-examination concerning complainant’s prior sexual history.**

Responses to non-consensual sexual activity — s 292B

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.

Lack of physical injury, violence or threats – s 292C

[*Summarise the evidence and the parties’ arguments on this issue*]. 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, does not necessarily mean the complainant was not telling the truth about [*describe relevant sexual activity*].

Behaviour and appearance of complainant – s 292E

In cases involving the consumption of alcohol or another drug, consideration should also be given to the evidence in the particular case and whether a direction of this kind is required given s 61HJ(1)(c) identifies, as a circumstance where a person cannot consent, if “the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual activity”.

It is difficult to envisage a case where evidence of a complainant’s clothing or appearance would be relevant. It is more likely a direction addressing these aspects of s 292E may be required if other evidence was led in the trial, such as videos or photographs of the complainant taken at the time of the relevant offence, and/or submissions made about those matters.

You should not assume the complainant consented to [*describe relevant sexual activity*] because [*she/he*] [*was wearing particular clothing and/or had a particular appearance / consumed alcohol or another drug / was present in a particular location*].

[The next page is 331]

Disclaimer

The document contains information prepared and collated by the Judicial Commission of New South Wales (the Commission).

The Commission does not warrant or represent that the information contained within this document is free of errors or omissions. The document is considered to be correct as at the date of publication, however changes in circumstances after the time of issue may impact the accuracy and reliability of the information within.

The Commission takes no responsibility for and makes no representation or warranty regarding the accuracy, currency, reliability and correctness of any information provided to the Commission by third parties.

The Commission, its employees, consultants and agents will not be liable (including but not limited to liability by reason of negligence) to persons who rely on the information contained in the document for any loss, damage, cost or expense whether direct, indirect consequential or special, incurred by, or arising by reason of, any person using or relying on the publication, whether caused by reason of any error, omission or misrepresentation in the publication or otherwise.

© Judicial Commission of NSW 2022