

## 168. Rape: s 349

### (Offences occurring after 27 October 2000)

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#### 168.1 Legislation

[Last reviewed: September 2024]

*Criminal Code*

[Section 349](#) – Rape

[Section 348](#) - Meaning of consent

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

#### 168.2 Commentary

[Last reviewed: September 2024]

For offences occurring prior to 27 October 2000, see **Chapter 167 – Rape (for offence occurring before 27 October 2000)**.

The s 6 definition of ‘penile intercourse’, inserted in substitution of ‘carnal knowledge’ by s 9 of the *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023* (Qld) with effect from 1 August 2023, includes penile penetration of the anus, as did the former definition of ‘carnal knowledge’, which was amended to include anal intercourse (initially referred to as sodomy) with effect from 3 December 2004 by the Schedule to the *Justice and Other Legislation Amendment Act 2004* (Qld)

Because the physical acts contemplated by either label remain the same and because trial judges’ directions should direct what the relevant act is, the below suggested direction adopts the more recent label of ‘penile intercourse’ without reminding judges that the theoretically correct label for pre-1 August 2023 offending is ‘carnal knowledge.’

The *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Act 2021* (Qld), which commenced on 7 April 2021, amended the Code by:

- inserting a definition of assault: ss 1 and 347;
- expanding the meaning of consent by adding s 348(3) and (4); and
- inserting s 348A relating to mistake of fact in relation to consent.

The transitional provision in s 754 states that the former provisions continue to apply where the person is charged before the commencement date. The new provisions

apply where the person is charged after the commencement date, whether the charge is for an offence committed before or after the commencement.

The position prior to those amendments was explained in *R v Sunderland* [\(2020\) 5 QR 261](#), [38]-[42]. The definition of ‘consent’ in s 348 was held to apply to the offence of sexual assault in s 352.

Chapter 32 of the Criminal Code was substantially amended on the proclamation of the relevant part *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024* (Qld) on 23 September 2024. Included in those amendments were amendments to the definition of the offence of rape, and of the issue of consent. 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. This Benchbook Chapter therefore applies to offences committed wholly, or in part, prior to 23 September 2024 and, due to the earlier legislative history, after 20 October 2000.

The amending Act also introduced ss 103ZS to 103ZW and 103ZZA into the *Evidence Act*. 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. Suggested directions concerning those provisions are located in the consent Chapter 59A.

As the offence is a prescribed offence under s 161Q of the *Penalties and Sentences Act 1992*, a serious organised crime circumstance of aggravation is applicable.

### 168.3 Suggested direction

[Last reviewed: September 2024]

**A variety of sexually penetrative acts engaged in with another person without the person’s consent constitute the offence of rape.**

**Relevantly to this case, a person rapes another person if (omit those not relevant to the trial):**

- **the person engages in penile intercourse with the other person without the other person’s consent; or**

- **the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or**
- **the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.**

**There are therefore two elements or ingredients which the prosecution must prove beyond a reasonable doubt to prove the offence of rape:**

- 1. that there was an act of physical penetration; and**
- 2. that the act of penetration occurred without the Complainant's consent.**

**First, as to the act of physical penetration, the prosecution must prove that the Defendant (omit those not relevant to the trial):**

- **engaged in penile intercourse with the Complainant. Penile intercourse is the penetration, to any extent, of the [vagina/vulva/anus] (as the case may be) of a person by the penis of another person. A person engages in penile intercourse with another person if (omit reference to acts irrelevant to the trial):**
  - **the person penetrates to any extent, the [vagina/vulva/anus] (as the case may be) of another person with the person's penis.**
  - **the person's [vagina/vulva/anus] (as the case may be) is penetrated, to any extent, by the penis of another person.**
- **penetrated the [vulva/vagina/anus] (as the case may be) of the Complainant, to any extent, with a [thing/part] of the Defendant's body that is not a penis.**
- **penetrated the mouth of the Complainant, to any extent, with the Defendant's penis.**

[Consider here the need to refer to directions contemplated by ss 103ZS – 103ZW and the mandatory direction at s 103ZZA, each of the *Evidence Act*. Specimen directions for each provision can be found in Chapter 59A concerning consent for the purposes of Chapter 32 offences for offences committed on or before 23 September 2024].

[Identify the factual issues to be resolved by the jury in determining whether the act of physical penetration occurred. In identifying these issues, the trial judge must remember the mandatory direction at s 103ZY and the prohibited direction at s 103ZZB of the *Evidence Act*. A specimen direction concerning s 103XY can be found in Chapter 59A].

[If the case has been litigated on the basis an alternative verdict is open, direct re the alternative].

**Secondly, as to element 2, the prosecution must prove the act of penetration occurred without the Complainant's consent.**

[Refer here to Chapter 59A concerning consent for the purposes of Chapter 32 offences for offences committed on or before 23 September 2024].