

APPENDIX 1 – COMPARISON OF CURRENT AND NEW SEXUAL OFFENCE PROVISIONS IN THE *CRIMES ACT*

<i>Crimes Act 1958 - Old Section</i>	<i>Crimes Act 1958 - New Section</i>	Commentary on differences
<p>35 Definitions</p> <p>(1) In Subdivisions (8A) to (8G)-</p> <p><i>de facto spouse</i> means...</p> <p><i>domestic partner</i> of a person means...</p> <p><i>sexual penetration</i> means...</p> <p><i>vagina</i> includes...</p> <p>(1A) For the purposes of the definition of <i>domestic partner</i> in subsection (1)...</p> <p>(2) For the purposes of Subdivisions (8B) to (8E) both the person who sexually penetrates another person and the other person are taking part in an act of sexual penetration.</p>	<p>35 Definitions</p> <p>(1) In Subdivisions (8B) to (8G) - ...</p>	<p>The definitions in section 35 remain, however they are not applicable to offences under new Subdivision 8A (rape and sexual assault).</p> <p>They are still applicable to Subdivisions 8B to 8G.</p> <p>(CASOOMA s7(1), applicable to offences in Subdivision 8A committed on or after 1 July 2015)</p>
<p>36 Meaning of consent</p> <p>For the purposes of Subdivisions (8A) to (8D) <i>consent</i> means free agreement. Circumstances in which a person does not freely agree to an act include the following—</p> <p>(a) the person submits because of force or the fear of force to that person or someone else;</p> <p>(b) the person submits because of the fear of harm of any type to that person or someone else;</p> <p>(c) the person submits because she or he is unlawfully detained;</p> <p>(d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;</p> <p>(e) the person is incapable of understanding the sexual nature of the act;</p> <p>(f) the person is mistaken about the sexual nature of the act or the identity of the person;</p> <p>(g) the person mistakenly believes that the act is for medical or hygienic purposes.</p>	<p>34C Consent</p> <p>(1) For the purposes of Subdivisions (8A) to (8D), consent means free agreement.</p> <p>(2) Circumstances in which a person does not consent to an act include, but are not limited to, the following—</p> <p>(a) the person submits to the act because of force or the fear of force, whether to that person or someone else;</p> <p>(b) the person submits to the act because of the fear of harm of any type, whether to that person or someone else or an animal;</p> <p>(c) the person submits to the act because the person is unlawfully detained;</p> <p>(d) the person is asleep or unconscious;</p> <p>(e) the person is so affected by alcohol or another drug as to be incapable of consenting to the act;</p> <p>(f) the person is incapable of understanding the sexual nature of the act;</p> <p>(g) the person is mistaken about the sexual nature of the act;</p> <p>(h) the person is mistaken about the identity of any other person involved in the act;</p> <p>(i) the person mistakenly believes that the act is for medical or hygienic purposes;</p> <p>(j) if the act involves an animal, the person mistakenly believes that the act is for veterinary, agricultural or scientific</p>	<p>New s34C (inserted by CASOOMA, s3, applicable to offences committed on or after 1 July 2015).</p> <p>Old section 36 is repealed (CASOOMA, s7(2), for offences committed on or after 1 July 2015)</p> <p>Main differences are 2(b) and 2(i).</p>

<p>No equivalent</p> <p>Previous definition of sexual penetration for Subdivision 8A offences was under s35. This definition of sexual penetration remains for all other offences under Subdivisions 8B to 8G.</p> <p>35 Definitions ... <i>sexual penetration</i> means—</p> <p>(a) the introduction (to any extent) by a person of his penis into the vagina, anus or mouth of another person, whether or not there is emission of semen; or</p> <p>(b) the introduction (to any extent) by a person of an object or a part of his or her body (other than the penis) into the vagina or anus of another person, other than in the course of a procedure carried out in good faith for medical or hygienic purposes;</p>	<p>research purposes.</p> <p>37C Definitions In this Subdivision— <i>animal</i> means any animal (other than a human being), whether vertebrate or not; <i>consent</i>—see section 34C; <i>sexual</i>, in relation to touching—see section 37E; <i>sexual penetration</i>—see section 37D; <i>take part in a sexual act</i>—see section 37F; <i>touching</i>—see section 37E; <i>vagina</i> includes— (a) the external genitalia; and (b) a surgically constructed vagina.</p> <p>37D Sexual penetration</p> <p>(1) A person (A) sexually penetrates another person (B) if—</p> <p>(a) A introduces (to any extent) a part of A's body or an object into B's vagina; or (b) A introduces (to any extent) a part of A's body or an object into B's anus; or (c) A introduces (to any extent) their penis into B's mouth; or (d) A, having introduced a part of A's body or an object into B's vagina, continues to keep it there; or (e) A, having introduced a part of A's body or an object into B's anus, continues to keep it there; or (f) A, having introduced their penis into B's mouth, continues to keep it there.</p> <p>(2) A person (A) also sexually penetrates another person (B) if— (a) A causes another person to sexually penetrate B; or (b) A causes B to take part in an act of bestiality within the meaning given by paragraph (b) or (d) of section 59(2).</p> <p>(3) A person sexually penetrates themselves if— (a) the person introduces (to any extent) a part of their body or an object into their own vagina; or (b) the person introduces (to any extent) a part of their body or an object into their own anus; or (c) having introduced a part of their body or an object into their own vagina, they continue to keep it there; or (d) having introduced a part of their body or an object into their own anus, they continue to keep it there.</p>	<p>New definition section applicable only to the new Subdivision 8A – Rape and Sexual Assault (inserted by CASOOMA s4, applicable to new Subdivision 8A offences committed on or after 1 July 2015).</p> <p>Definition of vagina mirrors definition in section 35.</p> <p>New definition of sexual penetration (inserted by CASOOMA, s4, applicable to new Subdivision 8A offences committed on or after 1 July 2015).</p> <p>Pursuant to this new definition, the continuation of penetration is included in the definition of 'sexual penetration', which according to the <i>Explanatory Memorandum</i> avoids the need for the new offence of rape to include failing to withdraw after consent is withdrawn during an act of penetration.</p> <p>The definition of sexual penetration also includes an accused causing another person to sexually penetrate the complainant.</p> <p>Further penetration of oneself and penetration of an animal are also defined.</p> <p>The term sexual penetration is relevant to the offences of rape (s38); rape by compelling sexual penetration (s39), assault with intent to commit a sexual offence (s42), and threat to commit a sexual offence (43).</p>
---	--	---

	<p>(4) A person sexually penetrates an animal if—</p> <ul style="list-style-type: none"> (a) the person introduces (to any extent) a part of their body or an object into the animal's vagina; or (b) the person introduces (to any extent) a part of their body or an object into the animal's anus; or (c) the person introduces (to any extent) their penis into the animal's mouth; or (d) having introduced a part of their body or an object into the animal's vagina, the person continues to keep it there; or (e) having introduced a part of their body or an object into the animal's anus, the person continues to keep it there; or (f) having introduced their penis into the animal's mouth, the person continues to keep it there. <p>(5) For sexual penetration by the use of a penis, it does not matter whether or not there is emission of semen.</p>	
No equivalent	<p>37E Touching</p> <p>(1) Touching may be done—</p> <ul style="list-style-type: none"> (a) with any part of the body; or (b) with anything else; or (c) through anything, including anything worn by the person doing the touching or by the person touched. <p>(2) For the purposes of this Subdivision, if a person (A) causes another person (B) to be touched by a third person or an animal, A is the person doing the touching of B.</p> <p>(3) Touching may be sexual due to—</p> <ul style="list-style-type: none"> (a) the area of the body that is touched or used in the touching, including (but not limited to) the genital or anal region, the buttocks or, in the case of a female, the breasts; or (b) the fact that the person doing the touching seeks or gets sexual gratification from the touching; or (c) any other aspect of the touching, including the circumstances in which it is done. 	<p>Definition of touching and sexual touching (inserted by <i>CASOOMA</i>, s4, applicable to new Subdivision 8A offences committed on or after 1 July 2015).</p> <p>This definition is relevant to sexual assault offences in Subdivision 8A.</p> <p>The <i>Explanatory Memorandum</i> (at p6) notes that subsection 1(c) is intended to cover such circumstances as a complainant being touched by an accused through bed sheets.</p> <p>It should also be noted that the definition provides that an accused is taken to have touched a complainant whether they undertake the touching themselves, or cause another person or animal to touch the complainant.</p> <p>This section also provides a definition of what will amount to 'sexual' touching.</p>
No equivalent	<p>37F Taking part in a sexual act</p> <p>For the purposes of section 42 a person takes part in a sexual act if—</p> <ul style="list-style-type: none"> (a) the person is sexually penetrated or sexually touched— <ul style="list-style-type: none"> (i) by another person; or (ii) by an animal; or (b) the person sexually penetrates or sexually touches— <ul style="list-style-type: none"> (i) another person; or (ii) themselves; or 	<p>New s37F (inserted by <i>CASOOMA</i>, s4, applicable to new section 42 offence (assault with intent to commit a sexual offence) committed on or after 1 July 2015).</p>

<p>No equivalent</p>	<p>(iii) an animal.</p>	<p>37G Reasonable belief</p> <p>(1) For the purposes of this Subdivision, whether or not a person reasonably believes that another person is consenting to an act depends on the circumstances.</p> <p>(2) Without limiting subsection (1), the circumstances include any steps that the person has taken to find out whether the other person consents or, in the case of an offence against section 42(1), would consent to the act.</p>
<p>322T Intoxication</p> <p>(1) In this section— <i>defence</i> includes self-defence, duress and sudden or extraordinary emergency; <i>intoxication</i> means intoxication because of the influence of alcohol, a drug or any other substance.</p> <p>(2) If any part of a defence to an offence relies on reasonable belief, in determining whether that reasonable belief existed, regard must be had to the standard of a reasonable person who is not intoxicated.</p>	<p>37H Effect of intoxication on reasonable belief</p> <p>(1) In determining whether a person who is intoxicated has a reasonable belief at any time—</p> <p>(a) if the intoxication is self-induced, regard must be had to the standard of a reasonable person who is not intoxicated and who is otherwise in the same circumstances as that person at the relevant time; and</p> <p>(b) if the intoxication is not self-induced, regard must be had to the standard of a reasonable person intoxicated to the same extent as that person and who is in the same circumstances as that person at the relevant time.</p> <p>(2) For the purposes of this section, intoxication</p>	<p>New s37G (inserted by <i>CASOM4</i>, s4, applicable to new Subdivision 8A offences committed on or after 1 July 2015).</p> <p>“Reasonable belief” is the new fault element for all Subdivision 8A offences. It is based on the <i>Sexual Offences Act 2003</i> (UK). According to the <i>Explanatory Memorandum</i> (p3) it is intended to overcome the complexity and confusion caused by the existing fault element.</p> <p>The <i>Explanatory Memorandum</i> provides (at pp 7-8):</p> <p>The reasonableness of belief in consent is to be assessed against an objective standard. What makes a belief in consent objectively reasonable depends on the circumstances of the case. This allows for the standard of reasonableness to take into account various aspects of the circumstances. However, the standard is not what the accused thinks it is reasonable to believe or simply what appeared reasonable to the accused. Nor is the standard that of a hypothetical reasonable person who may not have any of the characteristics or attributes of the accused. Instead as stated by the Western Australian Court of Appeal in <i>Aubertin v The State of Western Australia</i> [2006] WASCA 229, “reasonableness must be judged in the light of generally accepted community standards and attitudes.”</p> <p>Within these constraints, which of the accused’s personal attributes are relevant to the assessment of reasonableness will depend on the circumstances. An accused’s intellectual handicap which affects their capacity to comprehend social interactions may sometimes be relevant (see <i>R v Dumrobin</i> [2008] QCA 116). Nonetheless, the standard of reasonableness is not to be assessed by “taking into account a mental disorder which induced a belief which could not reasonably arise without it” (<i>B v The Queen</i> [2013] EWCA Crim 3)</p>
<p>322T Intoxication</p> <p>(1) In this section— <i>defence</i> includes self-defence, duress and sudden or extraordinary emergency; <i>intoxication</i> means intoxication because of the influence of alcohol, a drug or any other substance.</p> <p>(2) If any part of a defence to an offence relies on reasonable belief, in determining whether that reasonable belief existed, regard must be had to the standard of a reasonable person who is not intoxicated.</p>	<p>37H Effect of intoxication on reasonable belief</p> <p>(1) In determining whether a person who is intoxicated has a reasonable belief at any time—</p> <p>(a) if the intoxication is self-induced, regard must be had to the standard of a reasonable person who is not intoxicated and who is otherwise in the same circumstances as that person at the relevant time; and</p> <p>(b) if the intoxication is not self-induced, regard must be had to the standard of a reasonable person intoxicated to the same extent as that person and who is in the same circumstances as that person at the relevant time.</p> <p>(2) For the purposes of this section, intoxication</p>	<p>New section 37H (inserted by <i>CASOM4</i>, s4, applicable to new Subdivision 8A offences committed on or after 1 July 2015).</p> <p>Similar to provisions under s322T, however the standard of a reasonable person is to be assessed by reference to that reasonable person being in the same circumstances as the accused at the relevant time.</p>

<p>(3) any part of a defence to an offence relies on reasonable response, in determining whether that response was reasonable, regard must be had to the standard of a reasonable person who is not intoxicated.</p> <p>(4) If a person's intoxication is not self-induced, in determining whether any part of a defence to an offence relying on reasonable belief or reasonable response exists, regard must be had to the standard of a reasonable person intoxicated to the same extent as the person concerned.</p> <p>(5) For the purposes of this section, intoxication is self-induced unless it came about—</p> <p>(a) involuntarily; or</p> <p>(b) because of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force; or</p> <p>(c) from the use of a drug for which a prescription is required and that was used in accordance with the directions of the person who prescribed it; or</p> <p>(d) from the use of a drug for which no prescription is required and that was used for a purpose, and in accordance with the dosage level, recommended by the manufacturer.</p> <p>(6) Despite subsection (5), intoxication is self-induced in the circumstances referred to in subsection (5)(c) or (d) if the person using the drug knew, or had reason to believe, when the person took the drug that the drug would significantly impair the person's judgment or control.</p>	<p>is self-induced unless it came about—</p> <p>(a) involuntarily; or</p> <p>(b) because of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force; or</p> <p>(c) from the use of a drug for which a prescription is required and that was used in accordance with the directions of the person who prescribed it; or</p> <p>(d) from the use of a drug for which a prescription is not required and that was used for a purpose, and in accordance with the dosage level, recommended by the manufacturer.</p> <p>(3) However, intoxication that comes about in the circumstances referred to in subsection (2)(c) or (d) is self-induced if the person using the drug knew, or had reason to believe, when taking the drug that it would significantly impair the person's judgment or control.</p>	
<p>38 Rape</p> <p>(1) A person must not commit rape.</p> <p>Penalty: Level 2 imprisonment (25 years maximum).</p> <p>(2) A person commits rape if—</p> <p>(a) he or she intentionally sexually penetrates another person without that person's consent—</p> <p>(i) while being aware that the person is not consenting or might not be consenting; or</p> <p>(ii) while not giving any thought to whether the person is not consenting or might not be consenting; or</p> <p>(b) after sexual penetration he or she does not withdraw from a person who is not consenting on becoming aware that the person is not consenting or might not be consenting.</p> <p>(3) A person (the offender) also commits rape if he or she compels a person—</p> <p>(a) to sexually penetrate the offender or another person, irrespective of whether the person being sexually penetrated</p>	<p>38 Rape</p> <p>(1) A person (A) commits an offence if—</p> <p>(a) A intentionally sexually penetrates another person (B); and</p> <p>(b) B does not consent to the penetration; and</p> <p>(c) A does not reasonably believe that B consents to the penetration.</p> <p>(2) A person who commits an offence against subsection (1) is liable to level 2 imprisonment (25 years maximum).</p> <p>(3) A person does not commit an offence against subsection (1) if the sexual penetration is done in the course of a procedure carried out in good faith for medical or hygienic purposes.</p>	<p>New s38 (inserted by CASOMA s4, for offences committed on or after 1 July 2015).</p> <p>Note that the s37D definition of sexual penetration covers both the initial penetration and continuation of penetration.</p> <p>Note also the <i>Explanatory Memorandum</i> (p9) re the operation for the new fault element for rape:</p> <p>“The requirement of reasonableness introduces an objective aspect into the main fault element of rape. The requirement means that if a person intentionally sexually penetrates another person, and that other person did not consent, then the first person will be guilty of rape if they did not reasonably believe (though mistakenly) that the other person did consent.</p> <p>To prove the new offence of rape, the prosecution will need to prove that the accused did not reasonably believe that the complainant was consenting. This fault element could be proved in various ways. It could be proved by showing that the accused did not have any belief</p>

<p>consents to the act; or</p> <p>(b) who has sexually penetrated the offender or another person, not to cease sexually penetrating the offender or that other person, irrespective of whether the person who has been sexually penetrated consents to the act.</p> <p>(4) For the purposes of subsection (3), a person compels another person (the victim) to engage in a sexual act if the person compels the victim (by force or otherwise) to engage in that act—</p> <p>(a) without the victim's consent; and</p> <p>(b) while—</p> <p>(i) being aware that the victim is not consenting or might not be consenting; or</p> <p>(ii) not giving any thought to whether the victim is not consenting or might not be consenting.</p>		<p>that the complainant was consenting. It could also be proved by showing that, if the accused did believe that the complainant was consenting, that belief was not reasonable. The fault element could also be proved by showing that, whether or not the accused believed the complainant was consenting, any such belief, if held, would have been unreasonable in the circumstances. This means that the prosecution will not always first have to address the issue of whether the accused in fact believed in consent before it may address the issue of the reasonableness of belief in consent”</p> <p>Whereas currently, an unreasonable belief which is genuinely held could raise a reasonable doubt as to whether an accused is aware that a complainant was not consenting or might not be consenting, the new provisions do not appear to allow for this situation.</p>
<p>38A Compelling sexual penetration</p> <p>(1) A person must not compel another person to take part in an act of sexual penetration. Penalty: Level 2 imprisonment (25 years maximum).</p> <p>(2) A person (the offender) compels another person (the victim) to take part in an act of sexual penetration if—</p> <p>(a) the offender compels the victim to introduce (to any extent) an object or a part of his or her body into his or her own anus or, in the case of a female victim, her own vagina, other than in the course of a procedure carried out in good faith for medical or hygienic purposes; or</p> <p>(b) the offender compels the victim to take part in an act of bestiality within the meaning of section 59.</p> <p>(3) For the purposes of subsection (2), a person compels another person (the victim) to take part in an act of sexual penetration if the person compels the victim (by force or otherwise) to engage in that act—</p> <p>(a) without the victim's consent; and</p> <p>(b) while—</p> <p>(i) being aware that the victim is not consenting or might not be consenting; or</p> <p>(ii) not giving any thought to whether the victim is not consenting or might not be consenting.</p>	<p>39 Rape by compelling sexual penetration</p> <p>(1) A person (A) commits an offence if—</p> <p>(a) A intentionally causes another person (B) to sexually penetrate—</p> <p>(i) A; or</p> <p>(ii) themselves; or</p> <p>(iii) a third person; or</p> <p>(iv) an animal; and</p> <p>(b) B does not consent to doing the act of sexual penetration; and</p> <p>(c) A does not reasonably believe that B consents to doing that act.</p> <p>(2) A person who commits an offence against subsection (1) is liable to level 2 imprisonment (25 years maximum).</p> <p>(3) A does not commit an offence against subsection (1) if—</p> <p>(a) the sexual penetration is of a person and is caused to be done by A in the course of a procedure being carried out by A in good faith for medical or hygienic purposes; or</p> <p>(b) the sexual penetration is of an animal and is caused to be done by A in the course of a procedure being carried out by A in good faith for veterinary, agricultural or scientific research purposes.</p>	<p>New s39 (inserted by <i>CASOOMA</i> s4, for offences committed on or after 1 July 2015).</p> <p>Replaces existing s38A. See extract from explanatory memorandum re fault element of “reasonable belief” above.</p>
<p>39 Indecent assault</p> <p>(1) A person must not commit indecent assault. Penalty: Level 5 imprisonment (10 years maximum).</p> <p>(2) A person commits indecent assault if he or she assaults another</p>	<p>40 Sexual assault</p> <p>(1) A person (A) commits an offence if—</p> <p>(a) A intentionally touches another person (B); and</p> <p>(b) the touching is sexual; and</p>	<p>New s40 (inserted by <i>CASOOMA</i> s4, for offences committed on or after 1 July 2015).</p> <p>Replaces existing offence of indecent assault (current s39).</p> <p>“Touching” and “sexual touching” are defined at s37E.</p>

<p>person in indecent circumstances—</p> <p>(a) while being aware that the person is not consenting or might not be consenting; or</p> <p>(b) while not giving any thought to whether the person is not consenting or might not be consenting.</p>	<p>(c) B does not consent to the touching; and</p> <p>(d) A does not reasonably believe that B consents to the touching.</p> <p>(2) A person who commits an offence against subsection (1) is liable to level 5 imprisonment (10 years maximum).</p> <p>(3) It is not a defence to a charge for an offence against subsection (1) that, at the time of the conduct constituting the offence, A was under a mistaken but honest and reasonable belief that the touching was not sexual.</p> <p>(4) A person does not commit an offence against subsection (1) if the touching is done in the course of a procedure carried out in good faith for medical or hygienic purposes.</p> <p>Note</p> <p>An offence against subsection (1) may be heard and determined summarily by the Magistrates' Court if section 29 of the Criminal Procedure Act 2009 is satisfied. See section 28 of the Criminal Procedure Act 2009.</p>	
<p>No equivalent</p>	<p>41 Sexual assault by compelling sexual touching</p> <p>(1) A person (A) commits an offence if—</p> <p>(a) A intentionally causes another person (B) to touch—</p> <p>(i) A; or</p> <p>(ii) themselves; or</p> <p>(iii) a third person; or</p> <p>(iv) an animal; and</p> <p>(b) the touching is sexual; and</p> <p>(c) B does not consent to the touching; and</p> <p>(d) A does not reasonably believe that B consents to the touching.</p> <p>(2) A person who commits an offence against subsection (1) is liable to level 5 imprisonment (10 years maximum).</p> <p>(3) It is not a defence to a charge for an offence against subsection (1) that, at the time of the conduct constituting the offence, A was under a mistaken but honest and reasonable belief that the touching was not sexual.</p> <p>(4) A person does not commit an offence against subsection (1) if—</p> <p>(a) the touching is of a person and is caused to be done by A in the course of a procedure being carried out by A in good faith for medical or hygienic purposes; or</p> <p>(b) the touching is of an animal and is caused to be done by A in the course of a procedure being carried out by A in good</p>	<p>New s 41 (inserted by <i>CASOOMA</i> s4, for offences committed on or after 1 July 2105).</p> <p>See definitions of 'touching' and 'sexual touching' at s37E.</p>

	<p>faith for veterinary, agricultural or scientific research purposes.</p> <p>Note: An offence against subsection (1) may be heard and determined summarily by the Magistrates' Court if section 29 of the Criminal Procedure Act 2009 is satisfied. See section 28 of the Criminal Procedure Act 2009.</p>	
<p>40 Assault with intent to rape</p> <p>(1) A person must not assault or threaten to assault another person with intent to commit rape.</p> <p>Penalty: Level 5 imprisonment (10 years maximum).</p> <p>(2) In subsection (1), <i>assault</i> has the same meaning as in section 31(1).</p>	<p>42 Assault with intent to commit a sexual offence</p> <p>(1) A person (A) commits an offence if—</p> <p>(a) A intentionally applies force to another person (B); and</p> <p>(b) B does not consent to the application of that force; and</p> <p>(c) at the time of applying that force A intends that B take part in a sexual act; and</p> <p>(d) A does not reasonably believe that B would consent to taking part in that sexual act.</p> <p>(2) A person who commits an offence against subsection (1) is liable to level 4 imprisonment (15 years maximum).</p> <p>(3) A may commit an offence against subsection (1) even if B is not aware of the application of force by A.</p> <p>(4) Force for the purposes of subsection (1) may be applied—</p> <p>(a) directly or indirectly; or</p> <p>(b) to the body of, or to clothing or equipment worn by, B.</p> <p>(5) In subsection (1)—application of force includes—</p> <p>(a) application of heat, light, electric current or any other form of energy; and</p> <p>(b) application of matter in solid, liquid or gaseous form.</p>	<p>New s42 (inserted by <i>CASOOMA</i> s4, for offences committed on or after 1 July 2015)</p> <p>This section replaces and expands the current s40, to include not only assault with intent to rape, but also assault with intent to commit sexual assault.</p> <p>For a definition of taking part in a sexual act for the purposes of s42, see s37F.</p> <p>It should be noted that the maximum penalty (15 years) is higher than the current maximum penalty of assault with intent to rape (10 years).</p> <p>Further it should be noted that the new offence can be committed even if the complainant is not aware of the application of force by the accused.</p>
<p>40 Assault with intent to rape</p> <p>(2) A person must not assault or threaten to assault another person with intent to commit rape.</p> <p>Penalty: Level 5 imprisonment (10 years maximum).</p> <p>(2) In subsection (1), <i>assault</i> has the same meaning as in section 31(1).</p>	<p>43 Threat to commit a sexual offence</p> <p>(1) A person (A) commits an offence if—</p> <p>(a) A makes to another person (B) a threat to rape or sexually assault B or a third person (C); and</p> <p>(b) A intends that B will believe, or believes that B will probably believe, that A will carry out the threat.</p> <p>(2) Words or conduct may constitute a threat for the purposes of subsection (1) if by those words or that conduct an intention to do any of the following is conveyed—</p> <p>(a) to sexually penetrate or sexually touch B or C without B or C's consent;</p>	<p>New s43 (inserted by <i>CASOOMA</i> s4, for offences committed on or after 1 July 2015)</p> <p>This section replaces and expands the current s40, to include not only threats by the accused to assault the complainant with an intention to commit rape but also includes threats by the accused to:</p> <ul style="list-style-type: none"> sexually penetrate a person other than the complainant sexually touch either the complainant or a person other than the complainant; cause the complainant to sexually penetrate or sexually touch another person, or another person to sexually penetrate or sexually touch the complainant; cause the complainant or another person to sexually penetrate or sexually touch the accused; cause the complainant or another person to sexually

	<p>(b) to cause B or C, without B or C's consent, to sexually penetrate or sexually touch—</p> <ul style="list-style-type: none"> (i) A; or (ii) C or B (as the case requires); or (iii) themselves; or (iv) another person; or (v) an animal. <p>(3) A person who commits an offence against subsection (1) is liable to level 6 imprisonment (5 years maximum).</p> <p>(4) For the purposes of this section, a threat may be made by any conduct and may be explicit or implicit.</p> <p>Note: An offence against subsection (1) may be heard and determined summarily by the Magistrates' Court if section 29 of the Criminal Procedure Act 2009 is satisfied. See section 28 of the Criminal Procedure Act 2009.</p>	<ul style="list-style-type: none"> • penetrate or sexually touch themselves; • cause the complainant or another person to sexually penetrate or sexually touch a fourth person; • cause the complainant or another person to sexually touch or sexually penetrate an animal. <p>Note that the threat may be made by conduct, and may also be implicit or explicit.</p> <p>The maximum penalty for this offence (5 years) is lower than the current maximum penalty of threats to assault with intent to commit rape (10 years).</p>
--	---	--

APPENDIX 2 – COMPARISON OF CURRENT AND NEW JURY DIRECTIONS ON CONSENT

<i>Crimes Act 1958</i>	<i>Jury Directions Act 2013 - New Section</i>	Commentary
<p>37 Jury directions</p> <p>(1) If relevant to the facts in issue in a proceeding the judge must direct the jury on the matters set out in sections 37AAA and 37AA.</p> <p>(2) A judge must not give to a jury a direction of a kind referred to in section 37AAA or 37AA if the direction is not relevant to the facts in issue in the proceeding.</p> <p>(3) A judge must relate any direction given to the jury of a kind referred to in section 37AAA or 37AA to—</p> <p>(a) the facts in issue in the proceeding; and</p> <p>(b) the elements of the offence being tried in respect of which the direction is given—</p> <p>so as to aid the jury's comprehension of the direction.</p> <p>37AAA Jury directions on consent</p> <p>For the purposes of section 37, the matters relating to consent on which the judge must direct the jury are—</p> <p>(a) the meaning of consent set out in section 36;</p> <p>(b) that the law deems a circumstance specified in section 36 to be a circumstance in which the complainant did not consent;</p> <p>(c) that if the jury is satisfied beyond reasonable doubt that a circumstance specified in section 36 exists in relation to the complainant, the jury must find that the complainant was not consenting;</p> <p>(d) that the fact that a person did not say or do anything to indicate free agreement to a sexual act at the time at which the act took place is enough to show that the act took place without that person's free agreement;</p> <p>(e) that the jury is not to regard a person as having freely agreed to a sexual act just because—</p> <p>(i) she or he did not protest or physically resist; or</p> <p>(ii) she or he did not sustain physical injury; or</p> <p>(iii) on that or an earlier occasion, she or he freely agreed to engage in another sexual act (whether or not of the</p>	<p>PART 14—RAPE AND SEXUAL ASSAULT</p> <p>60 Application of Part</p> <p>This Part applies to a criminal proceeding that relates (wholly or partly) to a charge for an offence against any provision in Subdivision (8A) to (8D) of Division 1 of Part 1 of the Crimes Act 1958.</p> <p>61 Direction on consent</p> <p>(1) The prosecution or defence counsel may request under section 11 that the trial judge direct the jury on—</p> <p>(a) consent; or</p> <p>(b) reasonable belief in consent.</p> <p>(2) In making a request referred to in subsection (1), the prosecution or defence counsel (as the case requires) must specify—</p> <p>(a) in the case of a request for a direction on the meaning of consent—one or more of the directions set out in subsection (3); or</p> <p>(b) in the case of a request for a direction on the circumstances in which a person is taken not to have consented to an act—one or more of the directions set out in subsection (4); or</p> <p>(c) in the case of a request for a direction in relation to reasonable belief—one or more of the directions set out in subsection (5).</p> <p>Note</p> <p>Section 34C of the Crimes Act 1958 provides that consent means free agreement. That section also sets out circumstances in which a person has not consented to an act.</p> <p>(3) For the purposes of subsection (2)(a), the prosecution or defence counsel may request that the trial judge—</p> <p>(a) inform the jury that a person can consent to an act only if the person is capable of consenting and free to choose whether or not to engage in or allow the act; or</p> <p>(b) inform the jury that where a person has given consent</p>	<p>Commentary</p> <p>New Part 14 of <i>Jury Directions Act</i> (inserted by <i>CASOOMA</i> s20 for offences committed after 1 July 2015)</p> <p>Sections 37, 37AAA and s37AA repealed for offences committed after 1 July 2015 (<i>CASOOMA</i> s7(3))</p>

<p>same type) with that person, or a sexual act with another person.</p> <p>37AA Jury directions on the accused's awareness</p> <p>For the purposes of section 37, if evidence is led or an assertion is made that the accused believed that the complainant was consenting to the sexual act, the judge must direct the jury that in considering whether the prosecution has proved beyond reasonable doubt that the accused was aware that the complainant was not consenting or might not have been consenting, the jury must consider—</p> <ul style="list-style-type: none"> (a) any evidence of that belief; and (b) whether that belief was reasonable in all the relevant circumstances having regard to— <ul style="list-style-type: none"> (i) in the case of a proceeding in which the jury finds that a circumstance specified in section 36 exists in relation to the complainant, whether the accused was aware that that circumstance existed in relation to the complainant; and (ii) whether the accused took any steps to ascertain whether the complainant was consenting or might not be consenting, and if so, the nature of those steps; and (iii) any other relevant matters. 		
	<p>to an act, the person may withdraw that consent either before the act takes place or at any time while the act is taking place; or</p> <ul style="list-style-type: none"> (c) inform the jury that the fact that a person did not say or do anything to indicate consent to an act at the time at which the act took place is enough to show that the act took place without the person's consent; or (d) warn the jury that evidence of the following alone is not enough to regard a person as having consented to an act— <ul style="list-style-type: none"> (i) evidence that the person did not protest or physically resist; or (ii) evidence that the person did not sustain physical injury; or (iii) evidence that on any particular occasion the person consented to another act that is sexual in nature (whether or not of the same type) with the accused or with another person. <p>(4) For the purposes of subsection (2)(b), the prosecution or defence counsel may request that the trial judge—</p> <ul style="list-style-type: none"> (a) inform the jury of the relevant circumstances in which the law provides that a person does not consent to an act; or <p>Note: Section 34C of the Crimes Act 1958 sets out these circumstances.</p> <ul style="list-style-type: none"> (b) direct the jury that if the jury is satisfied beyond reasonable doubt that a circumstance referred to in section 34C of the Crimes Act 1958 existed in relation to a person, the jury must find that the person did not consent to the act. <p>(5) For the purposes of subsection (2)(c), the prosecution or defence counsel may request that the trial judge—</p> <ul style="list-style-type: none"> (a) direct the jury that if the jury concludes that the accused knew or believed that a circumstance referred to in section 34C of the Crimes Act 1958 existed in relation to a person, that knowledge or belief is enough to show that the accused did not reasonably believe that the person was consenting to the act; or (b) direct the jury that in determining whether the accused who was intoxicated had a reasonable belief at any 	

	<p>time---</p> <p>(i) if the intoxication was self-induced, regard must be had to the standard of a reasonable person who is not intoxicated and who is otherwise in the same circumstances as the accused at the relevant time; and</p> <p>(ii) if the intoxication is not self-induced, regard must be had to the standard of a reasonable person intoxicated to the same extent as the accused and who is in the same circumstances as the accused at the relevant time.</p> <p>Note Section 14 requires the trial judge to give this direction, if requested, unless there are good reasons for not doing so.</p> <p>Section 15 requires the trial judge to give a direction if the trial judge considers that there are substantial and compelling reasons for doing so.</p>	
--	--	--