

# Sexual Offences



*The Crimes Act 1958 (Vic)*

s.37A - **Objectives**

s.38B - **Guiding Principles**

s.38 - Defines **rape** - including the AR and MR

s.39 - Defines the separate offence of **rape by compelling penetration**

s.35A - Includes the **definition** of 'sexual penetration' (part of the AR)

s.36 - Lists circumstances where there is no 'consent/free agreement' (part of the AR)

s.36A - Further defines the concept of 'reasonable belief' (part of the MR)

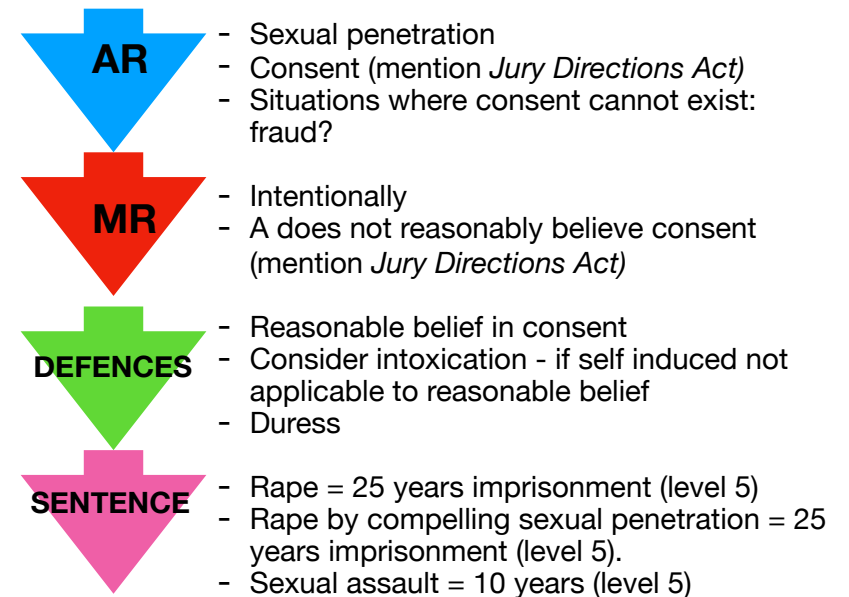
s.36B - Effect of intoxication on 'reasonable belief' (*sometimes* relevant to MR)

s.40 to 54C - Contain many other **sexual offences** (not studied)

s.45-47 - *Jury Directions Act 2015*, Jury directions on **consent and reasonable belief**.

## S.38 Elements of Rape Checklist

- A intentionally sexually penetrates B and
- B does not consent to the penetration and
- A does not reasonably believe that B consents to the penetration
- Both MR and Ar elements must occur contemporaneously.



Sexual Offences	AR	MR	Defence
<b>Rape</b>	<ul style="list-style-type: none"> <li>- Sexual penetration s.38(1)a</li> <li>- Without complainants consent s.38(1)b. Consent means 'free agreement'.</li> </ul> <b>Refer to s.46 JDA 2015</b>	<ul style="list-style-type: none"> <li>- Intentional sexual penetration s.38(1)a</li> <li>- Without reasonable belief of consent s. 38(1)c</li> </ul> <b>Refer to s.47 JDA 2015</b>	<ul style="list-style-type: none"> <li>- Self-induced intoxication is not a defence. If self-induced the standard of a reasonable person who is not intoxicated is applied</li> <li>- S.38(3) procedure for medical purposes.</li> <li>- Objectively reasonable belief in consent.</li> </ul>
<b>Rape by Compelling Sexual Penetration</b>	<ul style="list-style-type: none"> <li>- Causing another to sexually penetrate s.39(a)</li> <li>- Without complainants consent s.39(1)b</li> </ul>	<ul style="list-style-type: none"> <li>- Intentionally causing another person to sexually penetrate s.39(1)a</li> <li>- Without reasonable belief of consent s. 39(1)c</li> </ul>	<ul style="list-style-type: none"> <li>- S.39(3)a, procedure for medical purposes</li> <li>- S.39(3)b, procedure for veterinary, agricultural or scientific purposes (animal)</li> <li>- Objectively reasonable belief in consent.</li> </ul>
<b>Sexual Assault</b>	<ul style="list-style-type: none"> <li>- Touching V in a manner that was sexual s.40(1)a-b</li> <li>- Without complainants consent s.40(1)c</li> </ul>	<ul style="list-style-type: none"> <li>- Intentional touching s.40(1)a</li> <li>- Without reasonable belief of consent s. 40(1)d</li> <li>- Sexual touching is when D receives sexual gratification from it.</li> </ul>	<ul style="list-style-type: none"> <li>- S.40(4)a, the touching is carried out in good faith for medical or hygienic purposes.</li> <li>- Reasonable belief</li> <li>- Duress</li> </ul>
<b>Sexual Assault by Compelling Sexual Touching</b>	<ul style="list-style-type: none"> <li>- Causing another person to touch in a sexual manner s.41(1)a-b</li> <li>- Without complainants consent s.41(1)c</li> </ul>	<ul style="list-style-type: none"> <li>- Intentional touching s.41(1)a</li> <li>- Without reasonable consent s.41(1)d</li> </ul>	<ul style="list-style-type: none"> <li>- S.40(4)a, the touching is done in the course of a procedure carried out in good faith for medical or hygienic purposes.</li> <li>- S.40(4)b, the touching is of an animal and is done in good faith for veterinary purposes.</li> <li>- Reasonable belief</li> </ul>
<b>Assault with intent to Commit a Sexual Offence</b>	<ul style="list-style-type: none"> <li>- Applied force to another person s. 42(1)a</li> <li>- V does not consent to the application of force, s.41(1)b.</li> </ul>	Intentional application of force s.42(1)a D intends that V take part in a sexual act s. 42(1)c Without reasonable belief in consent s.42(1)d	<ul style="list-style-type: none"> <li>- Reasonable belief</li> <li>- Duress</li> </ul>
<b>Threat to Commit a Sexual Offence</b>	<ul style="list-style-type: none"> <li>- Makes a threat to rape or sexually assault another s.43(1)a</li> </ul>	<ul style="list-style-type: none"> <li>- Intention that V will believe or probably believe that D will carry out the threat.</li> <li>- Probably means 'real, substantial and not remote' <b>Boughey</b></li> </ul>	<ul style="list-style-type: none"> <li>- Reasonable belief</li> <li>- Duress</li> </ul>

Also refer to Jury Directions on consent and reasonable belief.

# Defences

S.322i: D has the evidential burden to raise any form of defence, and P has the legal burden to dispel any evidence BRD.



## Types of defence

- 8.1: Self defence (available for assault and homicide)
- 8.2: Self defence in a family violence context
- 8.3: Intoxication
- 8.4: Necessity and duress (available for assault and homicide)
- Sudden or extraordinary emergency.

Defences per Part 1C of the CA apply to any offence whether against the CA or at CL per s.322G CA.

## s.322H Definitions

- Evidence of family violence
- Really serious injury includes sexual assault. N.B. the scope of the definition is narrow so there is plenty of room for counterargument.

## s.322I Onus of Proof

- Accused has evidential onus of raising SD, duress or S&EE by pointing to evidence that suggests a reasonable possibility that would establish the defence raised.

## Defence of consent

- Cannot consent to an unlawful and dangerous act (R v Brown) (R v Stein)
- Consent renders CL assault lawful unless the act causes bodily harm
- Scenarios where bodily harm is permitted
  - Tattooing, body piercing, branding (R v Wilson)
  - Surgery
  - Contact sports in accordance to rules (McNamara v Duncan)