

## ASSAULT

### COMMON ASSAULT

‘Any person who unlawfully assaults or beats another person shall be guilty of an offence’  
(SOA s 23)

#### **Definition:**

The definition of the elements for s 23 assault is the same as for the common law offence  
(*R v Patton 1998, Victorian Supreme Court*)

Assault means the direct or indirect application of force by a person to the body of, or to clothing or equipment worn by, another person where the application is

- a. without lawful excuse; and
- b. with intent to inflict or being reckless as to the infliction of bodily injury, pain, discomfort, damage ... and results to the infliction of any such consequence *CA s 31(2)*

### ASSAULT INVOLVING THE APPLICATION OF FORCE (BATTERY)

#### **Definition:**

A person who, without lawful excuse, intentionally or recklessly causes injury to another is guilty of an indictable offence’ *CA s 18*

#### **The prosecutor must prove 3 ELEMENTS BYD:**

1. The accused applied force to the complainant’s body
2. The accused:
  - a. intended to apply force to the complainant’s body **or**
  - b. knew that force would probably be applied to the complainant’s body
3. The application of force was without lawful justification or excuse

#### **ELEMENT 1: Application of force to the complainant’s body**

- Prosecution must prove that the accused **applied force** to the complainants body  
*Fagan v Commissioner of Police 1969, Queen’s Bench Division (UK)*
- Force applied **need not be violent**. A mere touch is sufficient.  
*Collins v Wilcock 1984, WLR*
- Force can be **direct or indirect**  
*Fagan v Commissioner of Police 1969, Queen’s Bench Division (UK)* (ie a car)

### **ELEMENT 2A: Intention**

- The prosecution must prove that the application of force was **intentional**  
*Fagan v Commissioner of Metropolitan Police 1969, Queen's Bench Division*
- Whether or not the consequence inflicted is the consequence intended or foreseen is irrelevant *CA s31(2)*

**Consider:** Did the accused mean to apply force?

### **ELEMENT 2B: Recklessness**

- The accused knew (or realised) that his conduct would *probably* result in force being applied to the complainant's body  
**Consider:** What did the accused know?  
*R v Crabble 1985, High Court of Australia*
- Accused will not have acted recklessly simply because s/he 'ought to have known' that their conduct would result in such contact

*Fisher v police 2004, South Australian Supreme Court*

### **ELEMENT 3: LAWFUL JUSTIFICATION OR EXCUSES**

#### **Lawful excuse:**

The absence of hostility does not, on its own, provide an excuse or justification for an assault  
*Bouhey v R 1986, High Court of Australia*

#### **Justifications:**

##### **1. Consent**

- Whether consent is available as a lawful excuse will depend on:
  - a. The extent of any harm caused or risked and
  - b. The purpose for which the act was committed  
*Neal v R 2011 Victorian Supreme Court of Appeal*

##### **2. Touching in the course of an ordinary social activity**

- An act which is conducted as part of ordinary social activity will not constitute an assault. This includes jostling on public transport or in a busy street  
*Collins v Wilcock 1984, WLR*

##### **3. Exercising a lawful power of arrest**

- A person exercising a lawful power of arrest is entitled to use reasonable force where necessary to effect the arrest  
*R v Turner 1962, Victorian Supreme Court*

#### 4. Lawfully correctly a child

- Lawful correction of children will generally not be an assault.
- However, the punishment must be:
  - a. Moderate and reasonable
  - b. Have a proper relation to the age, physique and mentality of the child, and
  - c. Be carried out in a reasonable manner

*R v Terry 1955, Victorian Supreme Court*

#### 5. Self-defence

- A person is not guilty of an offence if the person carries out the conduct constituting the offence in self-defence.
- A person carries out conduct in self defence if:
  - a. The person believes that the conduct is necessary in self-defence, and
  - b. The conduct is reasonable response in the circumstances as the person perceives them

*CA s 322K(1)-(2)*

Note: it is not for the accused to establish that s/he held the relevant belief and that his/her conduct was a reasonable response in the perceived circumstances.

The onus is on the prosecution to disprove this defence.

*CA s 322I*

#### 6. Ejecting a trespasser

- A householder is entitled to use reasonable force to eject a trespasser.
- However, where the person who enters is a licensee, s/he must be given reasonable time to leave before force can be used against him or her

*Kay v Hibbert 1977 Crim LR (UK)*

**Consider:** Is there evidence that the accused acted with a lawful excuse?

**AND...**

Will the prosecutor be able to disprove that the accused acted without lawful excuse BYD?

*Zecevic v DPP 1987, High Court of Australia*

#### Penalties

If the injury was caused intentionally, [x] is subject to 10 years maximum

If the injury was caused recklessly, [x] is subject to 5 years maximum *CA s18*

**Otherwise**, if found jury, [x] is subject to 3 months penalty *summary offences act s 23*

**Conclude** = [x] is guilty BYD for assault of application of force.