

Crimes (Rape) Bill

No.

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SCHEDULE

Consequential Amendments

By Authority L V North, Government Printer Melbourne

LEGISLATIVE COUNCIL

Read 1° 29 October 1991

(Brought in by the Honourable M. A. Lyster)

A BILL

to reform the law relating to rape and indecent assault, to amend the
Crimes Act 1958, the **Evidence Act 1958** and the **Crimes (Sexual
Offences) Act 1991** and for other purposes.

Crimes (Rape) Act 1991

The Parliament of Victoria enacts as follows:

1. *Purpose*

The purpose of this Act is to reform the law relating to
rape and indecent assault in order to—

- 5 (a) clarify the concept of consent;
 (b) reaffirm the fundamental right of a person not to
 engage in sexual activity;
 (c) give greater protection to complainants in court
 proceedings.

10 2. *Commencement*

- (1) This Act (except sections 7 and 8) comes into operation
on a day or days to be proclaimed.

Section headings appear in bold italics and are not part of the Act
(see **Interpretation of Legislation Act 1984**).

(2) Sections 7 and 8 must be taken to have come into operation on 16 April 1991.

3. *New Subdivisions (8) and (8A) substituted*

For Subdivisions (8) and (8A) of Division 1 of Part I of the Crimes Act 1958 substitute—

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‘(8) Sexual Offences (General Provisions)

35. Definitions

(1) In Subdivisions (8A) to (8G)—

“**De facto spouse**” means a person who is living with a person of the opposite sex as if they were married although they are not. 10

“**Sexual penetration**” means—

- (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 15
- (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 an appropriate medical or hygienic procedure carried out in good faith. 20

“**Vagina**” includes— 25

- (a) the external genitalia; and
- (b) a surgically constructed vagina.

(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. 30

36. Meaning of consent

For the purposes of Subdivisions (8A) to (8D)
 “consent” means free agreement. Circumstances
 in which a person does not freely agree to an act
 include the following:

- (a) the person submits because of force or the
fear of force to that person or someone
else;
- (b) the person submits because of the fear of
harm of any type to that person or
someone else;
- (c) the person submits because she or he is
unlawfully detained;
- (d) the person is asleep, unconscious, or so
affected by alcohol or another drug as to
be incapable of freely agreeing;
- (e) the person is incapable of understanding
the sexual nature of the act;
- (f) the person is mistaken about the sexual
nature of the act or the identity of the
person;
- (g) the person mistakenly believes that the
act is for medical or hygienic purposes.

***37. Jury directions on consent**

In a relevant case the judge must direct the jury
that—

- (a) the fact that a person did not say or do
anything to indicate free agreement to a
sexual act is normally enough to show that
the act took place without that person’s
free agreement;
- (b) a person is not to be regarded as having
freely agreed to a sexual act just because—
 - (i) she or he did not protest or physically
resist; or

* Section 61 of the Crimes Act 1958 sets out other jury warnings

- (ii) she or he did not sustain physical injury; or
- (iii) on that or an earlier occasion, she or he freely agreed to engage in another sexual act (whether or not of the same type) with that person, or a sexual act with another person; 5
- (c) in considering the accused's alleged belief that the complainant was consenting to the sexual act, it must take into account whether that belief was reasonable in all the relevant circumstances. 10

(8A) Rape and Indecent Assault

38. *Rape*

- (1) A person must not commit rape. 15
Penalty: Imprisonment for 20 years.
- (2) A person commits rape if—
 - (a) he or she intentionally sexually penetrates another person without that person's consent while being aware that the person is not consenting or might not be consenting; or 20
 - (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. 25

39. *Indecent assault*

- (1) A person must not commit indecent assault.
Penalty: Imprisonment for 10 years. 30
- (2) A person commits indecent assault if he or she assaults another person in indecent circumstances

while being aware that the person is not consenting or might not be consenting.’.

4. Rules of evidence

5 In section 37A (1) of the **Evidence Act 1958** (which deals with sexual history evidence)—

- (a) in Rule (2) (a) **omit** “other than with the accused”;
- (b) in Rule (2) (b) **omit** “other than with the accused”;
- (c) in Rule (4) **omit** “other than with the accused”.

5. Alternative arrangements for giving evidence

10 In section 37C of the **Evidence Act 1958**, for sub-sections (1) and (2) **substitute**—

“(2) The court may, of its own motion or on the application of a party to a legal proceeding, direct that alternative arrangements be made for the giving of evidence by a witness if—

- 15
- (a) the proceeding relates (wholly or partly) to a charge for—
 - (i) a sexual offence; or
 - (ii) an indictable offence which involves an assault on, or injury or a threat of injury to, a person—
- 20

and the court is satisfied that the witness is a person with impaired mental functioning or under the age of 18; or

- 25
- (b) the proceeding relates (wholly or partly) to a charge for a sexual offence and the court is satisfied that, without alternative arrangements being made, the witness is likely in giving evidence—
- 30
- (i) to suffer severe emotional trauma; or
 - (ii) to be so intimidated or stressed as to be severely disadvantaged as a witness.”.

6. Abolition of common law rape

The common law offence of rape is abolished.

No. 8/1991.

7. Insertion of new section 11 (1A) in Crimes (Sexual Offences) Act 1991

In section 11 (1) of the **Crimes (Sexual Offences) Act 1991**, before the proposed new section 37C to be inserted in the **Evidence Act 1958** insert—

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“(1A) Before section 38 of the **Evidence Act 1958** insert—
”.

8. Amendment of Schedule to Crimes (Sexual Offences) Act 1991

In the Schedule to the **Crimes (Sexual Offences) Act 1991**—

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- (a) in clause 1 (d) for “or (c)” substitute “, (c), (d) or (e)”;
- (b) in clause 2 (2) for “(d)” substitute “(f)”.

9. Transitional provisions

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- (1) Sections 36 and 37 of the **Crimes Act 1958** (as inserted by section 3 of this Act) and the amendments made by sections 4 and 5 of this Act apply to proceedings that occur after the commencement of the relevant provision of this Act regardless of when the alleged offence was committed. 20
- (2) Subdivision (8A) of Division 1 of Part I of the **Crimes Act 1958** (as inserted by section 3 of this Act) applies only to offences alleged to have been committed after the commencement of that section. 25
- (3) The abolition of the common law offence of rape by section 6 does not apply to an offence that is alleged to have been committed before the commencement of that section.
- (4) For the purposes of this section, if an offence is alleged to have been committed between two dates and the relevant provision of this Act commences on a date between those 30

two dates, the offence is alleged to have been committed before the commencement date.

10. *Consequential amendments*

5 The Acts listed in the Schedule are amended as set out in the Schedule.

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SCHEDULE

Section 10

CONSEQUENTIAL AMENDMENTS

1. Crimes Act 1958

- 1.1 In section 359A (1) (a), for “40, 41, 42 (if the complainant was under the age of 16 at the time of the alleged offence), 43” **substitute** “38, 39”.
- 1.2 In section 425 (1) (b) for “42” **substitute** “39”.
- 1.3 Section 425 (2) is **repealed**.

2. Magistrates’ Court Act 1989

- 2.1 In item 8 of Schedule 4, for “42” **substitute** “39”.
- 2.2 In clause 15 (8) of Schedule 5, for “40, 41, 42 (if the complainant was under the age of 16 at the time of the alleged offence), 43” **substitute** “38, 39”.

3. Sentencing Act 1991

- 3.1 For items 1, 1A, 2 and 3 in Schedule 3 **substitute**—
 - “1. In section 38 (1), for the penalty set out at the foot of the sub-section **substitute** “Penalty: Level 2 imprisonment.”.
 - 2. In section 39 (1), for the penalty set out at the foot of the sub-section **substitute** “Penalty: Level 5 imprisonment.”.