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## ASSAULT

### CONSENT

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### CONSENT TO HARM

Courts are uncertain whether a recipient's consent to intentionally (or recklessly inflicted physical harm can provide a defence.

Common law exceptions inc. medical surgery w/ informed consent: *Marion's Case* (1992), sparring and boxing, contact sports: *Re Jewell* (1987), lawful correction / corporal punishment: *W & DL* [2014], bravado, rough horseplay: *Aitkin* [1992].

### POLICY CONCERNS

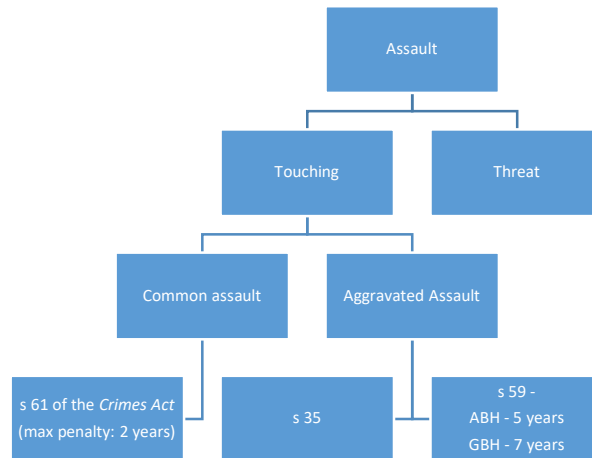
[R v Brown \[1994\] 1 AC 212 \(House of Lords\)](#)

- This case is an example of public interests and other agendas being imported into judgments. Eg. views towards homosexual activity, where other comparatives such as rough horseplay were acceptable. This is perhaps because horseplay occurs between heterosexual males.
- Public interest – depends on the context, community values, personal interests may change the outcome of the case depending on whose judgment is being relied upon.
- This is an example of how a law can operate to one group of people engaging in one type of activity to another (eg. homosexual sado-masochistic behaviour vs. rough horseplay (setting each other on fire) / branding in the confines of the matrimonial home (*Wilson*)).

### COMMON ASSAULT

p. 585 - 601

### TWO CLASSES OF ASSAULT



<b>ASSAULT (TOUCHING)</b> S 61 of the <i>Crimes Act</i>	
AR	MR
<p><b>1) Unlawfulness (circumstance)</b></p> <p>a. <b>Lack of consent:</b> consent is a lawful justification or excuse: <i>Bonora</i> (1994). But it is not a factor which the crown must negative: <i>Wilson</i> [1985]</p> <p>b. <b>Where actual bodily harm caused:</b> victim cannot consent to assault: <i>Donovan</i>.</p> <p>c. <b>Public interest test:</b> Where ABH, consent valid act for good reason and in the public interest: <i>AG</i></p> <p><b>2) Force / contact (act)</b></p>	<p><b>1) Intention to do the touching</b></p> <p>a. Subjective MR – in the mind of the defendant at the time of the act: <i>MacPherson v Beath</i> (1975)</p> <p style="text-align: center;">OR</p> <p><b>2) Recklessness</b></p>

<ul style="list-style-type: none"> <li>a. <b>Positive act, not an omission:</b> <i>Fagan v Commissioner of Metropolitan Police</i> [1969]</li> <li>b. Includes non-direct touching                         <ul style="list-style-type: none"> <li>i. Spitting: <i>DPP v JWH</i></li> <li>ii. Weapons – <i>Fagan</i></li> <li>iii. Clothes: <i>R v Thomas</i> (1985); <i>Stenecker v Police</i> [2014]</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>a. <b>Knowledge or foresight of possibility of inflicting physical contact:</b> <i>MacPherson v Beath</i> (1975)</li> </ul>
Max Penalty: 2 years	

<b>ASSAULT (THREAT)</b>	
AR	MR
<p><b>1) Act causing a reasonable apprehension of imminent force / contact (in the mind of the victim)</b></p> <ul style="list-style-type: none"> <li>a. <b>Positive act</b>, not omission: <i>Fagan</i> [1969]</li> <li>b. <b>Fear in the mind of the victim</b> –                             <ul style="list-style-type: none"> <li>i. Subjective inquiry into the mind of the victim: <i>Edwards v Police</i> (1998)</li> <li>ii. Present fear of physical harm in due course in an unlawful imprisonment: <i>MacPherson v Brown</i> (1975)</li> </ul> </li> <li>c. <b>Harm must be sufficiently imminent:</b> <ul style="list-style-type: none"> <li>i. Not mere threats which may be executed at any time: <i>Knight</i> (eg. telephone calls from a phone booth were not imminent);</li> <li>ii. Immediacy of the threat depends on the circumstances: <i>Barton v Armstrong</i> [1969];</li> <li>iii. Fear of physical violence even though victim doesn't know when physical violence may be applied: <i>Zanker</i> (1988)</li> </ul> </li> <li>d. <b>Reasonableness of apprehension (victim):</b> may or may not be necessary, if the defendant intentionally puts in fear of immediate violence an exceptionally timid person” he knows “then the unreasonableness of the fear may not prevent conviction” <i>MacPherson v Beath</i> (1975)</li> </ul>	<p><b>1) Intention to create an apprehension of imminent unlawful contact</b></p> <ul style="list-style-type: none"> <li>a. Subjective MR – in the mind of the defendant at the time of the act: <i>MacPherson v Beath</i></li> <li>b. Intention to produce that expectation of unlawful force in the victim’s mind.</li> </ul> <p>OR</p> <p><b>2) Recklessness</b></p> <ul style="list-style-type: none"> <li>a. Subjective MR – in the mind of the defendant at the time of the act: <i>MacPherson v Brown</i></li> <li>b. <b>Foresight that conduct might cause an apprehension of imminent unlawful contact.</b> <ul style="list-style-type: none"> <li>i. Knowledge that conduct may cause apprehension, but persistence in the act: <i>Edwards v Police</i> (1998)</li> <li>ii. Foresaw expectation, but persisted: <i>MacPherson v Brown</i> (eg. student protest, did not foresee that the professor was likely to be frightened)</li> </ul> </li> </ul>
Max Penalty:	

**AGGRAVATED ASSAULTS**

p. 618 – 625

**ASSAULT WITH FURTHER SPECIFIC INTENT**

- **Wounding or grievous bodily harm w/ intent:** s 33 of the *Crimes Act*. Max penalty: 25 years’ imprisonment; Standard Non-Parole Period: 7 years.
- Evidence – eg. use of a weapon, saying “I’m going to get you with a chainsaw”

**ASSAULTS CAUSING PARTICULAR INJURIES**

- **Assault occasioning ABH:** s 59 of the *Crimes Act*. Penalty: years imprisonment. Note – in company penalty: 7 years.
- **Reckless grievous bodily harm (GHB) or wounding:** s 35 of the *Crimes Act*.
  - Grievous bodily harm - In company, max penalty: 14 years imprisonment. Otherwise, max penalty: 10 years.
  - Wounding – in company, max penalty: 10 years. Otherwise, max penalty: 7 years.

**ASSAULTS USING OFFENSIVE WEAPONS**

- Definition of offensive weapons, *Crimes Act* s 4

**Definitions**

Element	Definition
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<b>Actual bodily harm</b>	<ul style="list-style-type: none"> <li>Bodily harm has its ordinary meaning and includes any hurt or injury calculated to interfere w/ the health and comfort of the victim, need not be permanent but more than merely transient: <i>Donovan</i> [1934] <ul style="list-style-type: none"> <li>Bruises and scratches: <i>R v Cameron</i> [1983]</li> <li>Includes psychiatric injury: <i>R v Lardner</i> (NSWCCA, 10 Sep 1998, unreported)</li> </ul> </li> <li><b>Psychiatric injury</b> must be an <i>identifiable clinical condition</i> but does not include mere emotions such as fear or distress or panic: <i>Chan-Fook</i> [1994] and prosecution must call expert evidence. <ul style="list-style-type: none"> <li>Recognised psychiatric illnesses includes severe depressive illness and anxiety disorder: <i>Ireland and Burstow</i> [1998]</li> <li>Nervous shock (eg. sleeping difficulties, anxiety, fear) merely constitute emotions and reactions and do not establish a psychiatric condition: <i>Lardner</i></li> <li>Serious, more than merely transient emotions, feelings and states of mind: <i>Li v R</i></li> </ul> </li> </ul>
<b>Wounding</b>	<ul style="list-style-type: none"> <li>S 35(3) and s 35(4) of the <i>Crimes Act</i> does not define wounding.</li> <li>Incision or puncturing of the skin (dermis): <i>Shepard</i> [2003]</li> <li>Consequences of wounding may vary: <i>Hatch</i> [2006]</li> </ul>
<b>Grievous bodily harm</b>	<p><b>Under s 4 of the Crimes Act, grievous bodily harm includes:</b></p> <ol style="list-style-type: none"> <li>The destruction (other than in the course of a medical procedure) of the foetus of a pregnant woman, whether or not the woman suffers any other harm, and</li> <li>Any permanent or serious disfiguring of the person, and</li> <li>Any grievous bodily disease (in which case a reference to the infliction of grievous bodily harm includes a reference to causing a person to contract a grievous bodily disease) <ul style="list-style-type: none"> <li>Reasonable precaution against spreading the condition</li> </ul> </li> </ol> <p><b>Grievous Bodily Harm</b></p> <ul style="list-style-type: none"> <li>Not required to be permanent, but must be really serious injury: <i>Haoui</i> [2008]</li> <li>Complex skull fractures: <i>R v Remilton</i> [2011]</li> <li>Severe multiple fractures to a leg and nerve damage to the right side of a fact; a closed head injury and facial neurological damage: <i>R v Shannon</i></li> <li>Fractures to the middle third of the fact .. causing ongoing headaches and continuing treatment to sunken eyes as a result of surgery: <i>R v Sumeo</i></li> </ul> <p><b>Grievous Bodily Harm: Death of a foetus</b></p> <ul style="list-style-type: none"> <li>Harm done to the mother: <i>King</i> [2003]</li> </ul> <p><b>Grievous Bodily Harm: Causing Grievous Bodily Disease</b></p> <ul style="list-style-type: none"> <li>Where offender passes on a serious disease to a victim without taking reasonable precautions.</li> <li>If a person has sexual intercourse and knows they suffer from a STI, punishable by fine of up to 50 PU: s 79 of the <i>Public Health Act 2010</i>. Unless he/she informs the other person of the risk of contracting the STI.</li> </ul>

## AGGRAVATED INTOXICATED ASSAULTS

p. 634 – 637

- In Feb-14, the NSW government attempted to introduce assaults committed when the offender was “intoxicated in public” (Crimes Amendment (Intoxication) Bill 2014) as part of their 16-point plan to tackle alcohol fuelled violence.
- It sought to introduce 11 new aggravated versions of existing assault offences; 5 aggravated offences w/ increased max penalties by 2 years; 5 mandatory min sentences.
- Intoxicated** was defined in **s 8A(2)**:
  - Person’s speech balance, coordination or behaviour is noticeably affected as a result of the consumption of alcohol or narcotic drug.
  - High-range prescribed concentration of alcohol (PCA > 0.15g per 210L of breath or 100ml of blood).
- Presently, the legislation has lapsed:** Bill passed the LA on 6/03/14 but LC sought significant amendments which LA refused to pass. The Bill remains a current session bill but with no progression. There is opposition to mandatory min sentencing for such a significant no. (high volume) assault offences.
- Example of strong relationship w/ public events and high-profile crimes and new movement towards legislation where politic
  - Interaction b/w criminal law / hard law reform and public / media discussion that influences
  - Politicisation of criminal justice law reform where reform touches on issues that affect a politicians standing or re-election.
  - Doesn’t lead to very considered law making – quick legislating.

## DOMESTIC VIOLENCE

p. 639, 642-656

### HISTORY OF DOMESTIC VIOLENCE

- In the 12 months to Dec-13, NSW Police recorded over 40% of all reported assaults were DV and an increase of 1.9% since Jan-09 (whilst all other major offences remained stable: BOCSAR 2013)
- Around 17% of women have experienced violence at the hands of a partner since the age of 15, and approx. 25% experienced emotional abuse by a partner (ABS 2012)
- Specifically affects: Indigenous women, vulnerable women (disability)
- J Allen, 'The invention of the pathological family: A historical study of family violence in NSW' (1982)
  - Only when attack amounted to attempted murder or malicious wounding was intervention of criminal law enforcement deemed appropriate response to 'marital conflict'
  - There has been a shift in focus in the 20<sup>th</sup> century towards a view that battered wives are victims with problems that the State should intervene w/ solutions.
- Legislative change in the 1980s – rise of the ADVO system
  - Shift in policy towards criminal justice intervention re. domestic violence.
  - *Crimes (DV) Amendment Act 1982 and 1983:*
    - Established procedure where a person who reasonably feared violence from their spouse (lawful or de facto) could obtain an ADVO, imposing restrictions up to 6 mths. Grounds inc. molestation and harassment. Application by police officer or victim.
    - Defined DV offence inc. assault and sexual assault committed by one spouse on another.
    - Amended the *Crimes Act* to make a spouse a compellable witness
    - Clarified police power to enter private premises where DV is suspected.

## APPREHENDED DOMESTIC VIOLENCE ORDERS

p. 642 - 656

### CRIMES (DOMESTIC AND PERSONAL VIOLENCE) ACT 2007 (“CDPV”)

- Objectives of the *Crimes (Domestic and Personal Violence) Act 2007* under s 9 includes:
  - To ensure the safety and protection of all persons who experience / witness DV, and
  - To reduce and prevent violence by a person against another person where a domestic relationship exists
  - Enact provisions consistent w/ principles underlying the Declaration on the Elimination of Violence against Women
  - Enact provisions consistent w/ the UN Convention on the Rights of the Child.

#### Definitions

Element	Definition
<b>Domestic relationship</b>	<ul style="list-style-type: none"> <li>• S 5 of the <i>Crimes (Domestic and Personal Violence) Act 2007</i>: spouses (inc. de facto), intimate personal relationships (whether sexual or not), persons living in the same household or residential facility (present or in the past), persons in a relationship of ongoing, dependent care and relatives (inc. same sex relationships).</li> </ul>
<b>Personal relationships</b>	<ul style="list-style-type: none"> <li>• Neighbours (30%); partner's former partner; co-workers</li> <li>• Concern that are often not founded, used as a spite mechanism when without basis</li> </ul>

## APPLICATIONS FOR ADVO

In NSW, an AVO is a civil order which requires the burden of proof consistent w/ civil law (balance of probabilities). When there is a breach of AVO, it becomes a criminal offence.

<b>APPLICATION FOR ADVO (s 16)</b>	
<b>GROUND</b>	
1)	<p><b>Person in domestic relationship has reasonable grounds to fear and in fact fears (on balance of probabilities):</b></p> <ul style="list-style-type: none"> <li>a) Commission of a personal violence offence against the person, or</li> <li>b) Engagement of the other person in conduct which intimidates or stalks the person.</li> <li>c) Subjective test: <i>in fact</i> fears</li> <li>d) Objective test: reasonable grounds to fear</li> <li>e) <b>Burden:</b> balance of probabilities</li> </ul>
2)	<p><b>Not necessary to be satisfied that PINOP in fact fears such offence will be committed if:</b></p>

<ul style="list-style-type: none"> <li>a) Person is a child</li> <li>b) Below average general intelligence</li> <li>c) In the opinion of the court:                             <ul style="list-style-type: none"> <li>i. Has been subjected to a personal violence offence, <i>AND</i></li> <li>ii. Reasonable likelihood that D may commit a personal violence offence, <i>AND</i></li> <li>iii. Order is necessary in circumstances to protect PINOP from further violence</li> </ul> </li> </ul> <p><b>NOTE:</b> person is vulnerable, may not be in a position to express fear they are in danger. PINOP may not feel fear in cycle of reconciliation phase of domestic violence.</p> <p><b>3) Conduct amounts to intimidation</b> even though</p> <ul style="list-style-type: none"> <li>a) No actual or threatened violence to the person</li> </ul> <p>Consists of actual or threatened damage to property belonging to the person</p>
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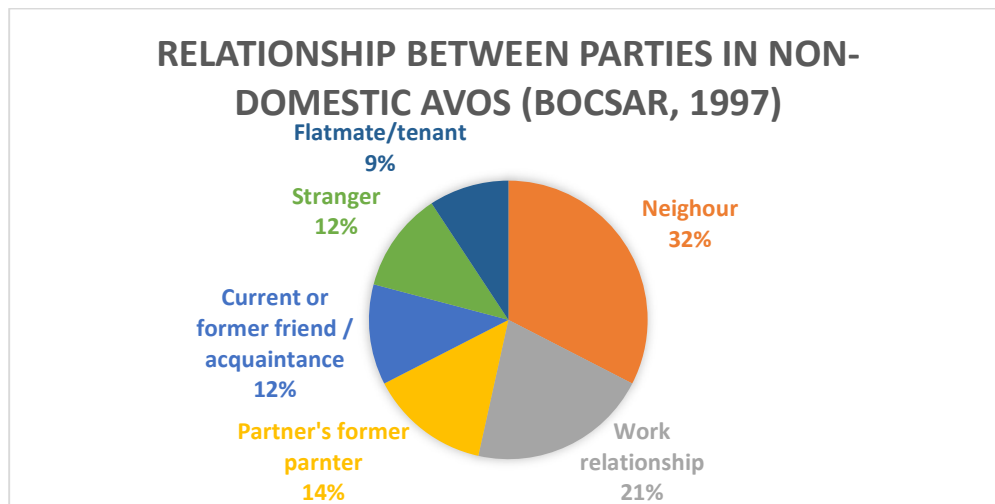
- **Duration:** specified by the court.
- **Considerations:** “the safety and protection of the protected person and any child directly or indirectly affected by the conduct of the defendant alleged in the application for the order: s 17(1)
- **Order must be applied:** under s 39, an order must be applied for when defendant pleads guilty or found guilty of stalking or intimidation (s 13); DV offence (s 27) or offences relating to child abuse (s 49(1). But not needed when PINOP makes application (s 49(4).
- **Extensions:** to other people the PINOP has a domestic relationship (s 36)
- **Interim Orders (IO):** Court grants immediate protection pending full hearing where “necessary or appropriate” (s 22)
- **Provisional Orders (PO):** Senior Police Officers may issue POs (s 3(1) of the *Crimes (Domestic and Personal Violence Amendment Act 2013*, if:
  - a) An incident occurs involving the person against whom PO is sought and PINOP
  - b) Police officer has good reason to believe PO needs to be made immediately for safety and protection of PINOP or prevent substantial damage to property.
- **Cost orders:** only ordered against complainant if complaint was frivolous or vexatious.
- **Disclosure of PINOP’s address prohibited:** s 43
- **Reasons for taking out an AVO**
  - If breach AVO, defendant may not be granted bail (now a factor in considering unacceptable risk)

<b>BREACH OF ADVO</b>	
<b>AR</b>	<b>MR</b>
<p><b>1) Contravene prohibitions or restrictions in ADVO</b></p> <p>Police must record reasons in writing for not initiating criminal proceedings against a person alleged to breach order: s 14(8)</p>	<p><b>2) Intentional</b> (knowledge) contravention of AVO</p>
<p>Max Penalty: 2 years imprisonment and/or 50 PU</p>	

**Criticism:** that breach of AVO only is charged, but the actual assault penalty is more severe. Police should charge both breach of AVO and the assault offence.

**APPLICATIONS FOR APVO**

- **Grounds for APVO (s 18)** – same as for ADVO.
- **Discretion to refuse to issue process for APVO:** if complaint is frivolous, vexatious, without substance or has not reasonable prospects of success or could be dealt with more appropriately by *mediation or ADR* (s 53(4).
  - Presumption against discretion if complaint related to allegations of personal violence, stalking, harassment relating to complainant’s race, religion, homosexuality, transgender status, HIV/AIDS or other disability (s 53(5).
  - Presumption in favour of mediation or ADR unless there is good reason not to (s 21)
- **Costs orders:** may be ordered against complainant (s 99)



FALSE OR MISLEADING APPLICATIONS FOR APVO (s 49A)	
AR	MR
1) <b>Person makes a statement:</b> s 49A (a) of the Crimes (Domestic and Personal Violence) Act 2007  2) <b>Statement made to a Registrar or magistrate for APVO under s 18:</b> s 49A (c) of the Crimes (Domestic and Personal Violence) Act 2007	1) <b>Knowledge that the statement is false or misleading</b> in a material particular: s 49A (b) of the Crimes (Domestic and Personal Violence) Act 2007
Max penalty: 12 months imprisonment or 10 PU, or both.	Created in 2013 in response to concern about frivolous or vexatious applications.

## POLICING OF DOMESTIC VIOLENCE

- **Criticisms:**
  - Inadequate response –
    - Breach not reported through police discretion;
    - Not proactively handling and properly investigating the incident
  - Inconsistent response –
    - Depending on who the victim is (eg. indigenous women; vulnerable women);
    - Charging w/ breach of AVO rather than more serious assault
    - Police less likely to take action in domestic living situation
  - Aiding and abetting –
    - Victim of DV may come into contact w/ perpetrator (willingly)
    - Charging the victim; doesn't take into account that DV is a cycle. Not something the law should punish as it is part of the profile of a DV victim. In 2007, amendment that now PINOP cannot be charged w/ aiding and abetting.
- In 2006 NSW Police Force implemented NSW Ombudsman's recommendations for Code of Practice to ensure consistent, equitable and accountable approach to domestic violence responses.
- NSW Legislative Council Standing Council on Social Issues observed that calls for assistance can be slow, breaches of ADVOs reported by victims may not be recorded or acted upon, investigations of incidents can be inadequate, choice of charges laid can vary.
- Lack of confidence in system means there is limited ability of the criminal justice system to be protective.
  - BOCSAR 2013 found 51.8% of victims reported their most recent incident to police, and barriers to reporting was that police do not understand or are not proactive in handling DV.
- ALRC (no. 114, 2010) found reasons police do not prosecute crimes in a family context seems inappropriate, and sometimes do not clearly relate to the victim's wishes.

## EFFECTIVENESS OF AVOS

- Young, Byles and Dobson (2000) found that severity of violence was reduced after legal protection but the benefit was not as marked unless women sought help from the court as well as police.

- Study provides evidence that preventative strategies for young women at early stage of relationship can eliminate or reduce physical violence by a partner. However, seeking legal protection from serious violence rarely made things worse.
- L Laing (2013) study provides an account of women’s experiences across the legal system, inc. encounters w/ police, legal personnel and courts. It reports women’s reasons for seeking protection, barriers to obtaining protection order and perceptions of the outcome.
  - Women’s Domestic Violence Court Advocacy Service (WDVCAS) provided positive support and advocacy, ‘safe rooms’ at Court.
  - Police initial response was stressed as important to assessing high risk factors and serious domestic violence.

**OTHER PROGRAMS AND SERVICES**

- In 2005, two specialised domestic courts were established under the Domestic Violence Intervention Court Model (DVICM). But in 2012 the NSW Legislative Council Standing Committee on Social Issues endorsed an approach to incorporate DVICM strategies into mainstream justice processes across NSW
- Key reforms inc. improved consistency in NSW Police Force responses to incidents of violence; improved evidence collection; improved referral and information sharing protocols about clients; coordinated responses to the management of risk; greater access to case management services across NSW; improved regional coordination of DV programs and agencies; greater access to DV behaviour change programs; greater access to other programs that will reduce reoffending; targeted strategies for Aboriginals.
- DV Death Review Team (DVDRT) established under the *Coroners Amendment (Domestic Violence Death Review Team) Act 2010* identifies systemic issues and causes of death occurring in a DV context; focus on areas of improvement for service delivery or intervention.
- 2014 *It stops here*: \$9.8m funding to establish an integrated and coordinated state-wide system to coordinate local support for victims and facilitate urgent action for those at serious threat of further harm through coordination of regular Safety Action Meetings.
  - Policy framework that promotes common understanding / response to DV;
  - Research to determine activities designed to support everyone understand and develop healthy, respectful relationships
  - Improving consistency and effectiveness of the system response through new referral pathways of service coordination
  - Min. practice standards to ensure victims receive consistent level of response
  - Training to support workers implementing to reforms.

**STALKING AND INTIMIDATION**

<b>STALKING &amp; INTIMIDATION (s 13)</b>	
<b>AR</b>	<b>MR</b>
<p><b>1) Stalking or intimidation causing an apprehension of imminent violence, s 13 CDPVA</b></p> <p><b>a) Stalking (s 8):</b> <i>following a person about or watching</i> or frequenting the vicinity of, or an approach to a person’s residence, business or work or any place that person frequents for social / leisure activity</p> <p><b>b) Intimidation (s 7):</b></p> <ul style="list-style-type: none"> <li>i. <i>Conduct amounting to harassment or molestation, or</i></li> <li>ii. <i>An approach made to the person by any means (inc. telephone, sms, email) that causes the person to fear for his/her safety, or</i></li> <li>iii. <i>Any conduct that causes reasonable apprehension of injury to a person or person whom he/she has a domestic relationship, or of violence / damage to a person or property</i></li> </ul>	<p><b>1) Intention to cause the person to fear physical or mental harm, s 13 CDPVA</b></p>
<p>Max penalty: 5 years imprisonment and/or 50 PU</p>	

**SEXUAL ASSAULT**

p. 657-680