

W1C1 - Assault

7.1.1 Patterns of offending

- Key Themes in Patterns of Personal Violence
 - **1. Hidden Nature** → Violent crime often under reported compared to property crime
 - **2. Relational nature** → often occurs between people who know each other
 - **3. Gender and Age Patterns** → male against women, adult against child
 - **4. Social and group-based violence** → racism, LGBTIQ+, institutional

R Hogg and D Brown, Rethinking Law and Order (1998) 43-78 (references omitted)

Two Main Types of Violence:

1. Confrontational Violence

- a. Usually young, socioeconomically marginalised men.
- b. Violence escalates from interactions; often alcohol-fuelled.
- c. Death is rare; serious non-fatal injuries are common.
- d. Most non-fatal incidents go unreported.

2. Violence amongst family members

- a. Involves partners, ex-partners, parents, and children.
- b. Often ongoing, involving power imbalances, emotional/financial dependency.
- c. Most women seek help from multiple sources (police, doctors, lawyers, welfare) before going to court.

Violence in Aboriginal Communities

- **Chronic violence linked to structural disadvantage:**
 - Unemployment, Poor housing, Health crises, Alcoholism, Limited educational opportunities.
- **Legacy of government policies:**
 - Dispossession, forced removals, segregation, systemic racism.
 - Continued impact on Aboriginal adults today: Exclusion from services, Movement restrictions, Welfare control, Trauma from forced removals.
- **Patterns of violence:**
 - Often occur during drinking sessions involving all parties.
 - Prosecution and incarceration worsen problems
 - Families lose carers/breadwinners.
 - Employment opportunities further eroded.
 - Young people end up in detention instead of education.

Violence as Social Inequality (Jeff Hearn)

- Violence is **not just a symptom** of other issues like class or gender divisions—it is itself a form of social inequality.
- Violence serves to **maintain patriarchal power** and intersectional systems of domination.

Crime Statistics and Patterns (ABS 2022–23, AIHW 2024)

- 1.7% (358,500 people aged 15+); similar rates for men (1.8%) and women (1.7%).
 - Highest rates: 15–24-year-olds (2.7%).
- **Women's Experiences:**
 - Perpetrator: male (66%), known to victim (71%—often family or intimate partner 28%).
 - Location: usually home (46%).
- **Men's Experiences:**
 - Perpetrator: male (77%), stranger (59%).
 - Common locations: work (27%), home (21%).
- **Aboriginal and Torres Strait Islander Data (2018–19, 2020–21)**
 - 16% experienced physical/threatened harm; 6.3% physical harm.
 - 74% of physical harm incidents involved an offender under influence.
 - 67% of assaults by intimate partner/family.

- Hospitalisation rates for family-violence assaults 29x higher than non-Indigenous rates.
- **Barriers of Reporting for Aboriginal and Torres Strait Islander people**
 - Cultural incompetency and discrimination in services.
 - Fear of child removal, losing housing, reprisals.
 - Misidentification of victim-survivors as perpetrators.
 - Lack of legal knowledge, low confidence in services.
 - Community pressure not to involve police.
 - Racism, poverty, isolation, and cultural beliefs about private matters.

7.1.2 Social context and prevalence

- **Context of the assault matters** →
 - minor contact = assault if it causes fear of violence.
 - Serious injury ≠ assault if lawful (e.g., sport, surgery).
- **Legal and social ambivalence towards violence:**
 - Parents can use force to punish children.
 - Violence in sports tolerated or praised.
 - Basic assault (s 61): max 2 years; larceny (s 117): max 5 years.
- **Changing social attitudes:**
 - Domestic violence once seen as private, now better recognised.
 - Public campaigns, police training, laws → rise in reporting.
- **Alcohol and violence (NSW BOCSAR):**
 - 25% of DV-related assaults, 22% of non-DV assaults = alcohol-related.
- **Lockout laws (2014):**
 - 1:30am lockouts + 3am last drinks in Sydney CBD.
 - Aimed at “one-punch” deaths; reduced serious assaults.
 - Repealed (2020–2021) for economic reasons.
- **Takeaway alcohol laws:**
 - 10pm takeaway ban (2014), repealed (2016).
 - Repeal linked to 1,120 extra DV assaults in 38 months.

7.1.3 Assault in the courts

- 50,751 charges for non-fatal assaults finalised (excluding sexual assault).
- Over half (57%; ~29,039) were **common assault (s 61)**.
- **Common assault (s 61 Crimes Act 1900)** → max 2 years imprisonment.
- **Aggravated assault** → broader term; covers assaults with aggravating factors (more serious, higher penalties).

Sentencing Trends

- Most common penalty: non-custodial community-based orders.
- Fines (especially s 59(1) ABH) and custodial sentences for more serious cases.
- majority of assaults (including aggravated assaults) are tried summarily despite being indictable offences.

Aggravated assault finalisations, all NSW Courts

Section	Offence	No of charges
33(1)(a)	Wound with intent to cause GBH	56
33(1)(b)	Cause GBH with intent to cause GBH	53
35(1)	Cause GBH and reckless to causing ABH in company	67
35(2)	Cause GBH and reckless to causing ABH	216
35(3)	Wound and reckless to causing ABH in company	112
35(4)	Wound and reckless to causing ABH	464
37(1)	Intentionally chokes, suffocates or strangles another person rendering unconscious	291
38A(2)	Spike drink or food	4
59(1)	Assault occasioning ABH	11,473
59(2)	Assault occasioning ABH in company	861
59A(1)	Assault during public disorder, no ABH	1
60(1)	Assault police officer	3013
60(1)	Harass police officer	35
60(1)	Intimidate police officer	923
60(1)	Throw missile at police officer	16
60(2)	Assault police causing ABH	448
60E(1)	Assault, harass intimidate or stalk at school	30
60E(2)	Assault occasioning ABH at school	4
60E(3)	Wounding or causing GBH at school	1

7.2 Common Assault

- **Common Assault** → encompasses Common Law Battery and Assault
 - Now combined under s 61 Crimes Act 1900 (NSW) → “Whosoever assaults any person (*physical*), although not occasioning actual bodily harm (*mental*), shall be liable to imprisonment for two years.”

Darby v DPP (NSW) (2004) → assault and battery can exist independently

- Assault can exist without battery (e.g., threat without contact).
- Battery can exist without assault (e.g., hitting someone from behind without warning).
- Courts often use “assault” as shorthand for any unlawful force.

7.2.1 Actus Reus Common Assault

- **For Physical Assault**
 - an act (not omission), without consent.
 - **Minor touching** (e.g., spitting) = assault.
 - *DPP v JWH* (NSWSC, 17 Oct 1997) – spitting = assault.
 - *Stenecker v Police* [2014] SASC 68: spitting may amount to assault.
- **For Psychiatric Assault**
 - defendant’s act must cause the victim to **fear immediate violence** or unlawful contact.
Edwards v Police (1998) 71 SASR 493

Acts - not Omissions

Fagan v Commissioner of Metropolitan Police [1969] 1 QB 439

Court

Queen’s Bench Div Ct

Material Facts	<ul style="list-style-type: none"> • Police constable directed Fagan to park. • Fagan accidentally drove onto the constable's foot. • Constable told Fagan: "Get off, you are on my foot." • Fagan responded: "F*** you, you can wait." • Fagan did not immediately remove the car and delayed reversing. • Fagan argued there was no intentional act or mens rea at the time of the initial contact.
Legal Issues	<ul style="list-style-type: none"> • Can an initially accidental act become an assault when the accused later forms intent to continue the act (e.g., by not moving the car)? • Omission of not moving
Reasoning	<ul style="list-style-type: none"> • Assault requires both an act and mens rea, but these can coincide during a continuing act: <ul style="list-style-type: none"> ◦ The initial driving onto the officer's foot (even accidental) = actus reus. ◦ The refusal to move the car after being told he was on the foot = formation of mens rea. ◦ The actus reus continued while the car remained on the foot, so once mens rea formed, an assault was committed. • There was no pure omission → the car staying on the foot was part of a continuing act (the actus reus persisted).
Outcome	<ul style="list-style-type: none"> • Appeal dismissed; conviction upheld.
Ratio/Significance	<ul style="list-style-type: none"> • assault must be an act not an omission. • some intentional act must have been performed: a mere omission to act cannot amount to an assault <ul style="list-style-type: none"> ◦ There was no pure omission → the car staying on the foot was part of a continuing act (the actus reus persisted).

	<ul style="list-style-type: none"> The initial act (driving onto the foot) continued as a single act until the car was removed.
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7.2.1.2 Consent

- Without consent, the act is **unlawful**.

Bonora (1994) 35 NSWLR 74:

- Abadee J: “An assault with consent is no assault at all.”
- Finlay J: For assault, there must be **intentional application of force** that is **unlawful**; consent = lawful justification/excuse.

7.2.1.3 Imminent force → *Threat of Harm*

Knight (1988) 35 A Crim R 314 (NSWCCA)	
Court	NSW Criminal Court of Appeal
Material Facts	<ul style="list-style-type: none"> Knight made threatening and abusive phone calls to a police officer, magistrate, and judge. Threats included violent language (“your father’s a dead man”; “I will poke

	<p>your eyes out with a screwdriver”).</p> <ul style="list-style-type: none"> • Calls made from a distance, no physical contact or proximity.
Legal Issues	<ul style="list-style-type: none"> • Can threats over the phone, made at a distance, constitute assault under s 61?
Reasoning	<ul style="list-style-type: none"> • Immediate → Assault requires fear of immediate and unlawful violence <ul style="list-style-type: none"> ◦ The threats here were serious but did not create a fear of immediate violence. ◦ the threats did not create a fear of immediate violence. • No Specified Time → The victims were not in any real danger of imminent harm—the threats were about violence at an unspecified future time.
Outcome	<ul style="list-style-type: none"> • Convictions quashed—threats not sufficient to establish assault.
Ratio/Significance	<ul style="list-style-type: none"> • Must be immediate violence • A threat, without creating a fear of immediate violence, is not an assault. • Threats of future harm (not imminent) do not meet the actus reus of assault.

Zanker v Vartzokas (1988) 34 A Crim R 11 (SASC)

Material Facts	<ul style="list-style-type: none"> In Zanker, a woman was held captive in a car and told: <ul style="list-style-type: none"> “I’m going to take you to my mate’s house. He’ll really fix you up.”
Reasoning	<ul style="list-style-type: none"> Immediacy was satisfied because the woman had a continuing fear while trapped in the car. Fear was not limited to the moment the words were spoken—it persisted until she escaped.
Outcome	<ul style="list-style-type: none"> Assault upheld
Ratio/Significance	<ul style="list-style-type: none"> Zanker v Vartzokas → critically provides that the feared harm need not be immediate, as long as it is present and continuing.

Mostyn (2004) 145 A Crim R 304 (NSWCCA)

Court	NSW Criminal Court of Appeal
Material Facts	<ul style="list-style-type: none"> Mostyn convicted of assault and maliciously inflicting GBH on his wife. Argued on appeal: the trial judge misdirected the jury on the meaning of assault, specifically whether a threat at a distance (without ability to strike) could amount to assault. Cited <i>Knight</i> (1988) to argue that an assault requires the accused to

	have a present ability to carry out the threat.
Legal Issues	<ul style="list-style-type: none"> • Can a threat of violence, made at a distance (without immediate ability to act), amount to assault?
Reasoning	<ul style="list-style-type: none"> • Assault by threat = creation of fear of immediate violence in the victim's mind, regardless of the accused's actual ability to carry out the threat at that moment. • Assault by threat = creation of fear of immediate violence in the victim's mind, regardless of the accused's actual ability to carry out the threat at that moment. • Knight distinguished: <ul style="list-style-type: none"> ◦ In <i>Knight</i>, the threats did not create a fear of immediate violence. ◦ In <i>Mostyn</i>, the threats were capable of instilling imminent fear, regardless of executed immediately
Outcome	<ul style="list-style-type: none"> • Appeal dismissed—conviction for assault upheld.
Ratio/Significance	<ul style="list-style-type: none"> • An assault by threat requires the victim to fear immediate violence, regardless of whether the accused could actually carry out the threat at that moment.

- In NSW, some conduct (e.g., threatening phone calls) may now be dealt with under:
 - **Crimes (Domestic and Personal Violence) Act 2007 (NSW) s 13**: Intimidation offences.
 - **Criminal Code (Cth) s 474.17**: Use of carriage service to menace, harass, or offend.