LAWS1022

Criminal Laws

Faculty of Law, UNSW Sydney

Primary Text: Brown, Farrier, McNamara et al, Criminal Laws (7th edn, Federation Press, 2020)

Course Coverage

Week 1-2: Assault -- common assault, consent to harm, aggravated assault, domestic violence, ADVO system, coercive control

Week 2-3: Sexual Assault -- law reform, actus reus (consent provisions), mens rea, recklessness, no reasonable grounds test

Week 3-4: Homicide (1) & (2) -- murder (4 heads), causation, constructive murder, manslaughter (UDAM, criminal negligence)

Week 4: Homicide (3) -- assault causing death, one-punch laws, supply of drugs causing death, homicide by omission

Week 5: Defences (1) & (2) -- mental health impairment, cognitive impairment, automatism, substantial impairment, intoxication

Week 7: Defences (3) & (4) -- self-defence, excessive self-defence, extreme provocation, ordinary person test

Week 8: Dishonest Acquisition (1) -- dishonesty, fraud (s 192E), deception, obtaining financial advantage

Week 9-10: Larceny; Complicity -- JCE, extended JCE, accessorial liability, conspiracy, criminalising association

WEEKS 1-2: ASSAULT

1.1 Introduction and Patterns of Violence

Chapter 7 of Brown et al opens with a critical observation about the gendered and contextual nature of violence. Public violence typically involves men as both offender and victim, is associated with alcohol, and occurs in or around licensed premises. Private violence is disproportionately committed by men against female domestic partners. The chapter highlights how the criminal law's response differs according to the public/private setting of the violence.

Two types of violent interaction (Hogg and Brown, *Rethinking Law and Order* **(1998)):** (1) confrontational violence between males, usually young men of marginal socioeconomic status, typically alcohol-related; and (2) family/intimate violence, marked by ongoing power inequalities, emotional and material dependencies, and lasting psychological effects.

Key themes in assault law:

- The largely hidden nature of violent crime -- under-reporting is far higher for violence than for property crime
- The familial or relational nature of much violence -- violence mainly involves persons known to each other
- Male violence against women reflects gender and power asymmetries
- Violence against Aboriginal communities is bound up with intergenerational trauma from dispossession and removal policies

1.2 Common Assault

1.2.1 Elements of Common Assault

Section 61 Crimes Act 1900 (NSW) -- Common Assault

Whosoever assaults any person, although not occasioning actual bodily harm, shall be liable to imprisonment for two years.

Actus reus: An assault may be committed by (a) an act that causes the complainant to apprehend immediate physical violence (psychic assault); or (b) a battery -- the actual application of physical force to the complainant's body, even without the complainant's awareness.

Psychic assault: the accused creates in the complainant's mind an apprehension of imminent physical contact. Words alone may constitute assault in some circumstances. Conditional threats ('I'll hit you if you do that again') may or may not constitute assault depending on the imminence.

Fagan v Metropolitan Police Commissioner [1969] 1 QB 439

Facts: Fagan accidentally drove his car onto a police officer's foot. When told to move the car, he turned off the engine and refused. He was convicted of assault.

Held: The Court held the assault was constituted by the continuing act of keeping the car on the foot once a hostile intent was formed. The initial accidental act became criminal from the moment Fagan formed the intention to produce the apprehension. There was no mere omission -- the act of keeping the wheel in position with hostile intent constituted the battery.

Significance: The case establishes that assault does not require the act and intent to coincide at the initial moment -- a continuing act can become criminal when a later hostile intent is formed.

1.2.2 Mens Rea of Common Assault

The mens rea of common assault is an intention to inflict the unlawful contact or to cause the victim to apprehend unlawful contact, or recklessness as to causing such apprehension or contact. In NSW, recklessness requires foresight of the possibility that the complainant might apprehend the contact or that contact might result.

1.3 Consent to Harm

A person can consent to a common assault where no actual bodily harm results. Consent renders the conduct non-criminal. The more complex question is whether consent can operate as a defence where actual bodily harm or greater harm is inflicted. The general position is that consent is no defence to assaults causing actual bodily harm or more serious harm.

Recognised exceptions to the general rule: prize fighting and boxing; contact sports (where the conduct falls within the accepted rules and risks); surgery; lawful correction of children; dangerous pastimes; rough horseplay; and tattoos. The categories are not closed but courts are cautious about recognition of new categories.

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

Facts: Five appellants engaged in consensual, sado-masochistic homosexual activities. No victim complained. Charges were laid on the strength of videotapes. All appellants pleaded guilty after the trial judge ruled that consent was no defence. The appeals raised the question whether consent negatives the offences of unlawful wounding and assault occasioning actual bodily harm.

Lord Templeman (majority, 3:2): 'Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilised.' The defence of consent should not be extended to sado-masochistic encounters which breed cruelty and result in offences under ss 47 and 20 of the OAPA 1861. The question was one of policy and public interest.

Lord Mustill (dissent): 'This is a case about the criminal law of violence. In my opinion it should be a case about the criminal law of private sexual relations, if about anything at all.' Mustill J would have found that the conduct, being private, consensual and not endangering third parties, should not be criminalised absent specific Parliament action.

Subsequent cases: Wilson [1997] QB 47 (UK CA) -- branding husband's initials on wife's buttocks: consent was effective, distinguishing Brown on the ground it was not sado-masochism but a consensual act of mutilation. Victoria: Neal (2011) 32 VR 454 -- court preferred minority view in Brown (consent effective up to ABH).

1.3.1 Policy Tensions in Consent Cases

The consent cases reveal that courts are essentially making value judgments about which activities merit the protection of consent as a defence. The inconsistency (boxing lawful, sado-masochism not) is exposed by Lord Mustill's dissent: 'the court is in such cases making a value-judgment, not dependent upon any general theory of consent'. The distinction between activities treated as lawful and those not reflects cultural and moral attitudes of the time rather than principled legal analysis.

1.4 Aggravated Assaults

1.4.1 Assault with Further Specific Intent

Section 33 Crimes Act 1900 (NSW) -- Wounding or GBH with Intent

A person is guilty of an offence if the person wounds or causes grievous bodily harm to any person AND does so with intent to: (a) cause grievous bodily harm to that person; or (b) resist or prevent the lawful arrest or detention of any person. Maximum: 25 years.

1.4.2 Key Injury Concepts

Injury	Definition	Key Cases
Actual Bodily Harm (ABH)	Any hurt or injury calculated to interfere with the health or comfort of the victim. More than transient or trifling. Can include psychiatric harm.	Donovan [1934] UK; Lardner (1998) NSWCCA; Chan-Fook [1994] UK
Wounding	Breaking of both layers of skin (epidermis and dermis). Breaking outer layer (epidermis) alone is insufficient.	Shepherd (2003) NSWCCA
Grievous Bodily Harm (GBH)	Really serious bodily harm. Defined in s 4(1) Crimes Act to include: destruction of a foetus; permanent or serious disfiguring; causing person to contract a grievous bodily disease (eg HIV).	Section 4(1) Crimes Act 1900

1.4.3 Table of Aggravated Assault Offences

Section	Act	Mens Rea	Max Penalty
s 61 CA	Common assault (no harm)	Intent to touch or cause apprehension	2 years
s 59 CA	ABH -- assault occasioning ABH	Intent to assault + ABH must result	5 years
s 35(2) CA	Reckless GBH	Intent to assault + reckless as to GBH	10 years
s 35(1) CA	Reckless wounding	Intent to assault + reckless as to wounding	7 years

s 33 CA	Wounding/GBH with intent	Intent to cause GBH or resist arrest	25 years
s 54 CA	Causing ABH in company	Intent to assault + ABH + in company	7 years
s 37(1A) CA	Intentional strangulation	Intentional strangulation without consent	5 years
s 37(1) CA	Strangulation rendering unconscious	Intentional + reckless as to rendering unconscious	10 years
s 37(2) CA	Strangulation enabling another offence	Intentional + intent to enable another indictable offence	25 years

1.4.4 Strangulation and Choking -- Section 37

Strangulation is a recognised indicator of the risk of further harm to victims of domestic violence, including homicide. The ABS Personal Safety Survey (2016) found 17.4% of female respondents had been choked by a male. Strangulation is described by domestic violence workers as a 'red flag' for future serious abuse and fatality.

Legislative evolution of s 37: The original offence (s 37(2)) required proof that strangulation was done to enable another indictable offence -- very narrow. In 2014, s 37(1) was added (reckless rendering unconscious -- lower threshold). In 2018, s 37(1A) was added (intentional strangulation without consent -- broadest, no degree of strangulation required). The 2018 addition resolved a gap: 70% of domestic violence strangulations were previously charged only as common assault.

Open issue with s 37(1A): The inclusion of 'without consent' creates tension with the prevailing common law rule that a person cannot consent to actual bodily harm or greater harm. It may operate as a 'defence' in some domestic violence cases.

1.5 Domestic Violence and the ADVO System

1.5.1 Patterns and Context

Domestic violence was historically treated as private and below criminal law's purview. Court-based studies reveal most victims are women not in paid employment, with children, often receiving welfare. Many have endured violence over years before initiating official action. Most are separated when they act. The criminal justice system has limited capacity: its role should not be exaggerated given the structural causes.

1.5.2 The ADVO System -- Hybrid Criminalisation

The ADVO System: Two-Step Criminalisation

Step 1: Obtaining a civil Apprehended Domestic Violence Order (ADVO) that imposes prohibitions and restrictions on the defendant

Step 2: Breach of the civil ADVO = criminal offence (Crimes (Domestic and Personal Violence) Act 2007 s 14(1)). Maximum: 2 years (or 5 years if in company, armed, or has previous conviction for contravening an AVO)

This unique 'two-step' model seeks to prevent violence or its recurrence by foregrounding civil protection, and reserving criminal prosecution for non-compliance.

1.5.3 Key Definitions under the CDPVA 2007

Crimes (Domestic and Personal Violence) Act 2007 (NSW) -- Definitions

s 5 -- 'Domestic relationship': includes marriage; de facto; intimate personal relationship; persons living together or having lived together; relatives; carers; and persons who have or had a dependent child with the defendant.

s 7 -- 'Intimidation': conduct (including cyberbullying) that causes a person to fear personal safety; damage to property; making repeated telephone calls; following a person; keeping a person under surveillance; or conduct amounting to harassment or molestation.

s 8 -- 'Stalking': following a person; watching or keeping under surveillance; frequently contacting or approaching; following or watching a workplace or place frequented.

1.5.4 Making an ADVO -- Section 16

Section 16(1): A court may make an ADVO if satisfied on the balance of probabilities that a person in a domestic relationship with another fears that other person will commit a domestic violence offence against them, intimidate or stalk them, or damage their property.

Section 16(2): It is NOT necessary for the court to be satisfied the person actually fears the defendant's behaviour. An objective assessment of whether the behaviour warrants protection is sufficient. This is designed to address situations where the victim does not acknowledge fear due to the power dynamics of the relationship.

Standard prohibitions under s 36: every AVO is taken to prohibit the defendant from (a) assaulting, threatening, stalking, harassing or intimidating the protected person; (b) intentionally or recklessly destroying or damaging property of the protected person; (c) intimidating the protected person.

1.5.5 Coercive Control

Section 13 CDPVA 2007 defines 'coercive control' as a pattern of behaviour by an abusive person that amounts to systematic control over another person in a domestic relationship. In 2023, NSW introduced the offence of abusive behaviour towards intimate partners (Crimes Act 1900 s 54D), criminalising a pattern of abusive behaviour including coercive control. This followed the model of the Domestic Violence Act 2018 (Ireland).

Elements of the new coercive control offence: repeatedly or continuously engaged in behaviour against an intimate partner; the behaviour is abusive (meaning physically, sexually, financially or psychologically abusive); the behaviour would cause a reasonable person to fear violence, or anxiety as to wellbeing. The course of conduct must be proven (not isolated incidents).

1.5.6 Research on ADVO Effectiveness

Research on ADVOs presents a mixed picture. A significant proportion of breaches occur, with serious risks of escalation. Compliance is higher among first-time ADVO defendants. Effectiveness depends

heavily on victim willingness to report breaches, police responsiveness, and support services being available. ADVOs are a necessary but not sufficient response to domestic violence.