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experienced violence. "Violence" was defined as any incident involving the occurrence or attempt or threat of either physical or sexual assault: *Women's Safety, Australia* (Canberra: AGPS, 1996). See further P Parkinson and J Behrens, *Australian Family Law in Context* (3rd ed, Sydney: Lawbook Co, 2004), Ch 9.

In 1996, the British Crime Survey conducted by the Home Office used a computer-assisted self-interviewing questionnaire on domestic violence. Analysis of the data found that 23% of women and 15% of men aged 16–59 said they had been physically assaulted by a current or former partner at some time. Twenty-eight percent of women aged 20–24 said they had been assaulted by a partner at some time and 34% had been threatened or assaulted. Women were more likely to be injured (47%) than men (31%). The majority of female victims said they had been very frightened, compared to a minority of men. Although the questions asked about incidents that would legally be considered assaults, only 17% of incidents counted by the survey were considered to be crimes by their victims: C Mirrlees-Black, Home Office Research Study 191, *Domestic Violence: Findings from a New British Crime Survey Self-Completion Questionnaire* (London: Home Office, 1999).

The latest Australian Crime Victimisation Survey has found that 2% of the 3584 women surveyed by telephone reported assaults or threats by partners over the five year period: Holly Johnson, Australian Institute of Criminology, *Crime Victimisation in Australia: Key Results of the 2004 International Crime Victimisation Survey*, Research and Public Policy Series No 64 (2005), p 24. However the Report on survey findings points out that such surveys tend to underestimate the level of domestic violence "as the methodology or question wording is not designed specifically to measure sensitive experiences that victims may be reluctant to discuss": p 23. Twenty-eight percent of those who reported being assaulted or threatened by an intimate partner feared retaliation on the part of the offender if they involved the police: p 44.

In this chapter we will outline the current law relating to the offences of assault, aggravated assault and the related offences of threats, offences endangering life or personal safety and false imprisonment, child abduction and kidnapping. We will also outline the different categories of lawful assault, paying particular attention to the issue of consent as well as having separate sections on female genital mutilation, stalking and consent relating to sado-masochism. The final concluding section will deal with the proposals for reform put forward by the MCCOC.

2. Assault

The term "assault" is now generally used to encompass two types of unlawful interference with the person of another. In the first instance, an assault is any act committed intentionally or recklessly which puts another person in fear of immediate and unlawful personal violence. In addition, the term assault may be used to encompass the situation where a person causes force to be applied to the body or clothing of another. This type of assault was formerly referred to at common law as "battery", but this distinction no longer applies as both statute and case law use the term "assault" to cover both putting another in fear and the use of force: *R v Lynsey* [1995] 3 All ER 654. In this chapter, the first type of assault will be referred to as "assault by the threat of force" and the second "assault using force".

The various statutory provisions also draw a distinction between "common" assault and a number of more serious offences, generally termed "aggravated assaults", which are built upon the proof of the commission of an assault. "Common" assault exists in statutory form in

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all jurisdictions apart from Victoria.[2] Despite the new statutory scheme in Victoria, common assault at common law was not abolished: *R v Patton* [1998] 1 VR 7. However, there is now a prescribed maximum penalty of five years: *Crimes Act 1958* (Vic), s 320.

Gender and Assault

In 2003, there were 158,629 assaults in Australia recorded by the police. There were more male victims of assault than females in all age categories and both males and females were most at risk of being a victim of assault while aged between 15–24. A large majority of male victims (70%) were assaulted in non-residential locations, whereas a majority (58%) of female victims were assaulted in residential premises: Australian Institute of Criminology, *Australian Crime, Facts and Figures 2004* (Canberra: Australian Institute of Criminology, 2004), pp 17–21.

The structure of the more serious assaults divides them into common assaults aggravated either by the nature of the intent of the accused, the status of the victim or by the harm thereby done. Because these offences share the fact that they are built upon the occurrence of a common assault, an alternative verdict of common assault is generally available where the circumstances of aggravation or its accompanying mental state are not proven. For example, in the Australian Capital Territory, the Northern Territory, Queensland, Tasmania and Western Australia, common assault is an alternative verdict to wounding.[3]

2.1 Common assault—physical elements

Common assault may occur either by the threat of force or through the use of force. The common law definition of assault applies in the Australian Capital Territory, New South Wales, South Australia and Victoria. The leading case setting out this definition is *Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439. James LJ stated in that case (at 444):

> An assault is any act which ... causes another person to apprehend immediate and unlawful personal violence ... and the actual intended use of unlawful force to another person without his [or her] consent.

The Code jurisdictions offer statutory definitions of assault that are of similar effect.[4]

The threat of force

An assault by the threat of force is any act committed intentionally or recklessly which puts another person in fear of immediate and unlawful personal violence or, in the Code jurisdictions, indicates an actual or apparent present ability to apply force.[5]

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2 *Crimes Act 1900* (ACT), s 26; *Crimes Act 1900* (NSW), s 61; *Criminal Code* (NT), s 188; *Criminal Code* (Qld), s 335; *Criminal Law Consolidation Act 1935* (SA), s 39; *Criminal Code* (Tas), s 184; *Criminal Code* (WA), s 313.

3 *Crimes Act 1900* (ACT), s 49; *Criminal Code* (NT), s 315; *Criminal Code* (Qld), s 575; *Criminal Code* (Tas), s 334A; *Criminal Code* (WA), s 594.

4 *Criminal Code* (NT), s 187; *Criminal Code* (Qld), s 245(1); *Criminal Code* (Tas), s 182; *Criminal Code* (WA), s 222.

5 *Criminal Code* (NT), s 187(b); *Criminal Code* (Qld), s 245; *Criminal Code* (Tas), s 182(1); *Criminal Code* (WA), s 222; *Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439; *R v Venna* [1975] 3 All ER 788; *Rozsa v Samuels* [1969] SASR 205; *Knight* (1988) 35 A Crim R 314.

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There are divergent views between jurisdictions as to the answers to the following four questions:

- What sort of conduct is sufficient to amount to a threat of force?
- Must the victim know of the accused's act?
- What constitutes the requirement of immediacy or actual or apparent present ability to commit force?
- Will a conditional threat suffice?

Conduct constituting a threat of force

In relation to the first area of concern, *Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439 at 444 per James LJ, set out a general principle that an omission to act cannot constitute an assault. Some form of positive act is necessary such as a threatening gesture. In Tasmania the use of words alone cannot constitute an assault: *Criminal Code* (Tas), s 182(2). Section 245 of the *Criminal Code* (Qld) and s 222 of the *Criminal Code* (WA) use wording appropriate only to physical gestures. In contrast, in the Northern Territory, and at common law, an assault by the threat of force may be evidenced either by bodily movement or threatening words by themselves: *Criminal Code* (NT), s 187(b); *R v Secretary* (1996) 5 NTLR 96 per Mildren J; *R v Tout* (1987) 11 NSWLR 251 at 256–257 per Lee J; *Knight* (1988) 35 A Crim R 314 at 318 per Lee J.

Threatening words made over the telephone may amount to an assault at common law: *Barton v Armstrong* [1969] 2 NSWLR 451 at 455 per Taylor J; *Knight* (1988) 35 A Crim R 314. But what of silence? In the case of *R v Ireland; R v Burstow* [1998] AC 147 the House of Lords took a broad approach to the definition of a positive act in holding that the making of a series of silent telephone calls that caused fear of immediate and unlawful bodily harm amounted to assault. Lord Steyn stated (at 162):

> [T]he critical question [is] whether a silent caller may be guilty of an assault. The answer to this question seems to me to be "Yes, depending on the facts." ... Take now the case of the silent caller. He intends by his silence to cause fear and he is so understood ... As a matter of law the caller may be guilty of an assault: whether he is or not will depend on the circumstance and in particular on the impact of the caller's potentially menacing call or calls on the victim.

The victim's mental state

The second divergent area concerns the victim's mental state. At common law, the act constituting assault must be such as to raise in the mind of the person threatened an apprehension of immediate bodily harm: *R v McNamara* [1954] VLR 137 at 138; *Brady v Schatzel* [1911] QSR 206. This requires the victim's knowledge or perception of the threat so that pointing a gun at the back of a person's head or holding a knife over a sleeping person would not amount to an assault.[6]

An apprehension of personal violence may exist even where the accused is not in a position to carry out the threat. For example, if a victim reasonably believes that a firearm may be loaded and that he or she is within range, the accused's actions may amount to an

6 *State v Barry* (1912) 45 Mont 598; *Pemble v The Queen* (1971) 124 CLR 107 at 134 per Menzies J and at 141 per Owens J; *R v Lamb* [1967] 2 QB 981.

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assault whether the gun is actually loaded or not.[7] In *R v Everingham* (1949) 66 WN (NSW) 122 the accused pointed a toy gun at a taxi driver who thought that it was real. The New South Wales Court of Appeal held (at 122) that these facts established "as clear a case of assault" as could be imagined.

At the opposite end of the scale, there may be no assault where the victim believes in facts that remove the apprehension. The facts of the following case illustrate this point. In *R v Lamb* [1967] 2 QB 981, the accused and the victim were playing "Russian Roulette" with a loaded revolver. In this case apprehension normally experienced by a person at which a loaded gun is pointed was absent. This was due to a mistaken belief, shared by the accused and the victim that neither of the two bullets in the chamber would be discharged because they were not opposite the firing pin.

In the Code jurisdictions, however, it appears possible for an assault to occur where a person has an actual ability to apply force to another regardless of whether or not the victim has knowledge of that ability.[8] Emphasis in these jurisdictions is placed on an *actual* present ability to apply force or an *apparent* present ability. Where there is an *actual* ability, it is irrelevant whether or not the victim has knowledge of that ability.[9] Where, however, there is an *apparent* present ability, the emphasis on the victim's apprehension is similar as for the common law. The victim must believe that the accused has an ability to apply force. This belief, in Tasmania, must be based upon reasonable grounds: *Criminal Code* (Tas), s 182(1).

The inquiry into the victim's apprehension of the accused's ability to apply force involves a subjective test. It does not depend upon what a reasonable person would have apprehended, but what the victim him or herself apprehended. In *Barton v Armstrong* [1969] 2 NSWLR 451 in the context of determining the civil liability for assault, the Supreme Court of New South Wales set out an objective test, but this has not been followed: see, for example, *MacPherson v Beath* (1975) 12 SASR 174 at 177 per Bray CJ.

Perhaps because the inquiry into the victim's apprehension is subjective, there is some confusion in the case law as to whether or not the prosecution must show that the accused was *in fact* put in fear. In *Brady v Schatzel; Ex parte Brady* [1911] St R Qd 206 the victim gave evidence that when the accused pointed a gun at him, he did not believe the accused would fire it. It was argued that because the victim was not afraid, there was no assault. This argument was rejected and it was held that there could be an assault even where the victim was not put in fear. Chubb J of the Queensland Supreme Court stated (at 208):

> [I]t is not material that the person assaulted should be put in fear ... If that were so, it would make an assault not dependent upon the intention of the assailant, but upon the question whether the party assaulted was a courageous or a timid person.

All that is needed on this view, is the anticipation of the application of unlawful personal violence. In *Ryan v Kuhl; Wilson Kuhl* [1979] VR 315 the victim was in a cubicle in a public toilet at a railway station. The accused pushed a knife through a hole in the partition between the cubicles in order, he claimed, to stop the victim from annoying him. McGarvie J of the Supreme Court of Victoria held (at 327) that there was no assault in these circumstances because the victim had not been put in fear:

> [O]n the evidence it could not be inferred that the defendant's conduct created in Matthews [the "victim"] a fear of violence. Matthews said that he realized at the time that

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7 *R v St George* (1840) 9 Car & P 483; *R v Everingham* (1949) 66 WN (NSW) 122; *Logdon v DPP* [1976] Crim LR 121.

8 *Criminal Code* (NT), s 187(b); *Criminal Code* (Qld), s 245; *Criminal Code* (Tas), s 182(1); *Criminal Code* (WA), s 222.

9 *Criminal Code* (NT), s 187(b); *Criminal Code* (Qld), s 245; *Criminal Code* (Tas), s 182(1); *Criminal Code* (WA), s 222.

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> the person in the next cubicle could not harm him with the knife while he remained in his cubicle. He also said that the sight of the knife had not scared him and said that he had not gone to the station master because he was frightened. On the other hand he also gave evidence that the sight of the knife had shocked him, that he said out aloud, "Are you mad or something?", then opened the door and walked quickly out of the toilet.

These differing viewpoints may partly be caused by the common law placing more emphasis on the accused's state of mind than in the Code jurisdictions. That of course begs the question *should* the victim's state of mind be the focus here at all? Isn't the doing of an act with the intention of causing fear enough to attract criminal liability? The main benefit of focusing on the accused's mental state is that it complies with the general principle of taking one's victim as one finds him or her. This principle has certainly been at the forefront of the law relating to unlawful killing.[10] However, if the MCCOC's approach is to be followed, the focus will be on the degree of harm caused and therefore the *effect* of the threat of force on the victim will be of central concern: *Chapter 5—Non Fatal Offences Against the Person,* Report (1998).

The notion of immediacy

There is a further lack of clarity as to what is meant by the requirement of immediacy or actual or apparent present ability to commit force. At common law, there must be an apprehension of *immediate* bodily harm.[11] Instances where bodily harm has been considered to be immediate include:

- where the accused was in another room (*R v Lewis* [1970] Crim LR 647);
- where the accused was on the other side of a locked door apparently about to break it down (*Beech* (1912) 7 Cr App R 197);
- where the accused opened a drawer and showed the victim a gun declaring that he would hold her hostage (*Logdon v DPP* [1976] Crim LR 121); and
- where the accused peered in through a bedroom window at the victim who was wearing her night clothes (*Smith v Chief Superintendent Woking Police Station* (1983) 76 Cr App R 234).

The general rule is that where a threat is made, even in the most menacing fashion, of future violence, an assault will not be made out. For example, in *Knight* (1988) 35 A Crim R 314 the accused had made a series of threatening phone calls. The New South Wales Court of Appeal held (at 317 per Lee J) that since the calls were made from an appreciable distance away and the recipients of the calls were not in any danger of immediate violence there was no conduct that could constitute an assault: "They were mere threats which may have been executed at anytime if at all".

However, the requirement of immediacy has been criticised as being too restrictive. In *Barton v Armstrong* [1969] 2 NSWLR 451 which concerned a tort action for assault, Taylor J commented (at 455):

> Being able to immediately carry out the threat or being thus perceived by [the victim] is but one way of creating the fear of apprehension, but not the only way. There are other ways, more subtle and perhaps more effective ... If the threat produces the fear or

10 See, for example, *Mamote-Kulang of Tamagot v The Queen* (1964) 111 CLR 62; *R v Blaue* [1975] 1 WLR 1411; *Hubert* (1993) 67 A Crim R 181.

11 *Wilson v Pringle* [1986] 2 All ER 440; *Logdon v DPP* [1976] Crim LR 121; *Knight* (1988) 35 A Crim R 314.

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> apprehension of physical violence then I am of [the] opinion that the law is breached, although the victim does not know when that physical violence may be effected.

In that case, a telephone threat of serious violence by a person in authority whom the victim feared was held to constitute an assault.

There is no requirement of immediacy in the Code jurisdictions. Rather, the emphasis is on the "present ability" of the accused to carry out the threat.[12] This term is said to bear its ordinary meaning: *R v Secretary* (1996) 5 NTLR 96 at 104–105. Just what time period is appropriate for a "present" ability is unclear.

There is some reason to believe that at common law, the requirement for immediacy may be relaxed in some circumstances. For example, in *Zanker v Vartzokas* (1988) 34 A Crim R 11, the victim accepted a lift from the accused. Once in the car, the accused offered the victim money for sex. The victim refused and demanded that she be let out of the car. The accused kept accelerating the car and stated: "I am going to take you to my mate's house. He will really fix you up". The victim then jumped out of the car. The Supreme Court of South Australia held (at 14 per White J) that:

> A present fear of relatively immediate imminent violence was instilled in her mind from the moment the words were uttered and that fear was kept alive in her mind, in the continuing present, by continuing progress with her as prisoner, towards the house where the feared sexual violence was to occur.

The House of Lords in *R v Ireland; R v Burstow* [1998] AC 147 held that, depending on the circumstances, there may be an apprehension of immediate violence present when a silent telephone call is made. Lord Steyn stated (at 162):

> [The silent caller] intends by his silence to cause fear and he is so understood. The victim is assailed by uncertainty about his intentions. Fear may dominate her emotions, and it may be the fear that the caller's arrival at her door may be imminent. She may fear the *possibility* of immediate personal violence.

Lord Steyn went on to criticise the need for the concept of an assault to involve an element of immediate personal violence because it was a complicating factor in prosecutions for stalking and silent telephone callers. He supported the creation of proposals for the abolition of this requirement and (at 162) a statutory offence of intentionally or recklessly causing injury.

Conditional threats

Finally, there is some lack of clarity as to whether a conditional threat will suffice for assault. This matter was raised in *Rozsa v Samuels* [1969] SASR 205. The accused was a taxi driver who was convicted of assaulting another taxi driver who had objected to his queue jumping. The victim had remonstrated with the accused and said he would punch the accused in the head. The accused produced a knife and said "I will cut you to bits if you try it". The question on appeal to the Supreme Court of South Australia was whether or not the threat to use force, accompanied by words which indicate the threat was conditional, constituted an assault. The court held that the mere fact that the threat was conditional did not prevent it constituting one of the elements necessary to establish assault.

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12 *Criminal Code* (NT), s 187; *Criminal Code* (Qld), s 245; *Criminal Code* (Tas), s 182; *Criminal Code* (WA), s 222; *Lees v Visser* (2000) 9 Tas R 103.

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The Supreme Court accepted that the common law draws a distinction between:

- a conditional threat which is unlawful (one that the party has no right to impose) which constitutes an assault; and
- a conditional threat which is lawful (one that the party has the right to impose) which is not an assault. An example of this would be where the threat is made to apply force unless the person threatened desists from some unlawful course of action.

On the facts, the accused's conditional threat was considered unlawful because it went beyond what was reasonable in self-defence and his appeal was therefore dismissed. It is unclear whether this interpretation carries over into the Code jurisdictions. It could be argued that it does given there is no requirement for immediacy. In *Secretary* (1996) 86 A Crim R 119 the Northern Territory Court of Criminal Appeal held that a threat can be of future violence and the issue of "present ability" is to be determined with reference to the circumstances at the time when the threat would supposedly be carried out. On this basis, a conditional threat can be assessed in relation to when it would be carried out.

The use of force

An assault by the use of force occurs where a person, intentionally or recklessly, causes force to be applied to the body or clothing of another.[13] An assault may occur not only where force is applied to the body of the victim, but also where clothing is slashed or rubbed: *R v Day* (1845) 1 Cox 207; *Thomas* (1985) 81 Cr App R 331. The force used need not be violent, but can be as slight as a mere touch: *Collins v Wilcock* [1984] 1 WLR 1172. Thus, kissing or touching another who does not consent to such conduct may constitute an assault. If an injury results from the application of force and it is more than minor, then the accused may be charged with an aggravated assault.

Usually an assault is committed by delivering a blow with a limb or using a weapon of some kind. However, the Queensland and Western Australian provisions specifically define the use of force so as to include the application of heat, light, electrical force, gas or odour so as to cause injury or personal discomfort: *Criminal Code* (Qld), s 245; *Criminal Code* (WA), s 222.

At common law, it appears that the application of force must be direct in that it must be aimed at the victim or an object on which the victim is supported.[14] In comparison, in the Code jurisdictions, indirect application of force is sufficient provided that there is adequate evidence of causation.[15]

2.2 Common assault—the fault element

In all jurisdictions, a common assault may be committed intentionally or recklessly.[16] Although the Queensland and Western Australian Criminal Codes do not specify the fault requirement for an assault, in *Hall v Fonceca* [1983] WAR 309 it was accepted (at 314) that the

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13 *Beal v Kelley* [1951] 2 All ER 763; *Fairclough v Whipp* [1951] 2 All ER 834; *DPP v Rogers* [1953] 2 All ER 644; *Rolfe* (1952) 36 Cr App R 4; *R v McCormack* [1969] 2 QB 442; *Fagan v Metropolitan Police Commissioner* [1969] 1 QB 439; *R v Venna* [1976] QB 421; *R v Spratt* [1990] 1 WLR 1073; *R v Parmenter* [1991] 3 WLR 914; *Criminal Code* (NT), s 187(a); *Criminal Code* (Qld), s 245; *Criminal Code* (Tas), s 182(1); *Criminal Code* (WA), s 222.

14 *R v Salisbury* [1976] VR 452; *Commissioner of Police v Wilson* [1984] AC 242; *R v Sheriff* [1969] Crim LR 260.

15 *Criminal Code* (NT), s 187(a); *Criminal Code* (Qld), s 245; *Criminal Code* (Tas), s 182(1); *Criminal Code* (WA), s 222.

16 *R v Spratt* [1991] 2 All ER 210; *Vallance v The Queen* (1961) 108 CLR 56; *Leonard v Morris* (1975) 10 SASR 528; *MacPherson v Brown* (1975) 12 SASR 184; *R v Bacash* [1981] VR 923; *Criminal Code* (NT), s 31; *Criminal Code* (Qld), s 23; *Criminal Code* (Tas), s 182 (intentionally applying force); *Criminal Code* (WA), s 23.

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fault element was the same as for common law. Assault has been referred to as a crime of basic intent[17] in that it is a crime involving a specified form of conduct and intention therefore refers to the accused meaning to perform the conduct. Thus for assault by the threat of force, the accused must mean to commit the act creating an apprehension of immediate and unlawful personal violence. Similarly, for assault using force, the accused must mean to use force on the victim.

If the MCCOC's recommendation is followed in setting out a series of statutory crimes based on causing harm,[18] these crimes could be viewed as "result" rather than "conduct" crimes. In relation to the physical element as the results or consequences of conduct, the prosecution must prove that the accused's *purpose* was to bring about the results or consequences of the conduct.[19] In relation to a statutory crime of intentionally causing harm, the accused must be shown to have intended to cause that harm and not just the *act* that may have resulted in harm. However, the existing law in relation to assaults occasioning actual bodily harm views intention as relating to the use of force rather than the resulting bodily harm: see below, p XXX. This offence is therefore viewed as a "conduct" rather than a "result" crime and the MCCOC has made it clear that this should carry over to the MCCOC's scheme: *Chapter 5—Non Fatal Offences Against the Person*, Discussion Paper (1996), p 29.

In keeping common assault as a conduct crime, a narrow, direct form of intention appears appropriate. Brennan J stated in this regard in *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 569 that intention "connotes a decision to bring about a situation so far as it is possible to do so—to bring about an act of a particular kind or a particular result".

The concept of recklessness in relation to common assault is somewhat unclear. An assault will be made out if the accused foresaw unlawful force or the act causing an apprehension of immediate and unlawful personal violence: *Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439 at 444 per James LJ. However, the *degree* of foresight required is uncertain. Some authorities simply refer to the need for recklessness to be proven without further explanation.[20] However, in *MacPherson v Brown* (1975) 12 SASR 184 Bray CJ stated (at 187) that it will be enough that the accused foresaw the *possibility* that force might be inflicted.[21] This ties in with the approach taken toward the New South Wales statutory provision of maliciously inflicting grievous bodily harm: *Crimes Act 1900* (NSW), s 35. Apart from recklessness for murder, some courts have held that where an offence is satisfied by proof of recklessness, it is sufficient if the accused foresaw the possibility of some harm resulting from the accused's act: *R v Coleman* (1990) 19 NSWLR 467 at 475; *Stokes and Difford* (1990) 51 A Crim R 25.

The alternative is that the accused must have foreseen that force would *probably* be inflicted. In *R v Campbell* [1997] 2 VR 585 Hayne J and Crockett AJA spoke with approval of the High Court test of recklessness in relation to murder as set out in *R v Crabbe* (1985) 156 CLR 464. Hayne J and Crockett AJA concluded (at 592–593) in relation to the offence of recklessly causing serious injury:

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17 *R v O'Connor* (1980) 146 CLR 64; *DPP v Majewski* [1977] AC 443; *Duffy v The Queen* [1981] WAR 72.

18 Model Criminal Code Officers Committee, *Chapter 5—Non Fatal Offences Against the Person,* Discussion Paper (1996), p 26; Model Criminal Code Officers Committee, *Chapter 5—Non Fatal Offences Against the Person,* Report (1998), p 13.

19 *La Fontaine v The Queen* (1976) 136 CLR 62; *R v Crabbe* (1985) 156 CLR 464; *Boughey v The Queen* (1986) 161 CLR 10; *R v Demirian* [1989] VR 97.

20 *Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439 at 444; *Logdon v DPP* [1976] Crim LR 121 at 122; *R v Venna* [1976] QB 421.

21 See also *Williams* (1990) 50 A Crim R 213; *R v Coleman* (1990) 19 NSWLR 467 at 475–478 per Hunt J; *R v Lovett* [1975] VR 488 at 493–494 per Harris J: *R v Savage* [1992] 1 AC 699 at 752 per Lord Ackner.

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> We have no doubt that the appropriate test to apply is that it is possession of foresight that injury *probably* will result that must be proved. (original emphasis)

Phillips CJ agreed with this point at 586.

Campbell's case, however, applies to the statutory offence of recklessly causing injury and not to common assault. At common law, Diplock LJ stated in *R v Mowatt* [1968] 1 QB 421 (at 426) that the offence of inflicting grievous bodily harm required foresight that "some physical harm in some person, albeit of a minor character, might result", a proposition that was relied upon in *R v Savage and Parmenter* [1992] 1 AC 699 at 716. This seems to imply a lesser standard of foresight and the weight of common law authority does seem to be in favour of foresight in terms of possibility rather than probability. This requirement is also clearly set out in the Northern Territory. Section 31 of the *Criminal Code* (NT) specifies that an assault is committed whether the harm is "intended or foreseen ... as a possible consequence of [the accused's] conduct".

2.3 Aggravated assaults

A wide variety of statutory offences generally termed "aggravated assaults" authorise the imposition of greater penalties than for common assault. These statutory offences can be divided into three classes:

- assaults accompanied by an intention of a particular kind;
- assaults committed on particular classes of people; and
- assaults resulting in harm of a particular kind.

Assaults accompanied by an intention of a particular kind

The most serious form of aggravated assault involving a particular intention is assault with intent to commit murder.[22] The accused must intend to kill as opposed to intending to inflict grievous bodily harm even though that would be sufficient to render the accused guilty of murder if death resulted.[23] It is not sufficient that the accused acted with recklessness as to the possibility of death: *R v Belfon* [1976] 3 All ER 46.

There are also statutory provisions dealing with assaults with intent to commit another crime.[24] In all jurisdictions, it is an offence to commit an assault with intent to resist or prevent the lawful apprehension of the accused or of any other person for any offence.[25] The arrest that the accused was seeking to resist or prevent must have been in exercise of a legal right. The question is not whether the accused believed that the arrest was lawful, but whether such arrest was in fact lawful: *R v Heavey* (1965) 84 WN (Pt 1) NSW 248; *Williams v The Queen* (1986) 161 CLR 278.

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22 *Crimes Act 1900* (NSW), s 27; *Criminal Code* (NT), s 165; *Criminal Code* (Qld), s 306; *Criminal Code* (WA), s 283. In the other jurisdictions, the crime of attempted murder falls under the general law of attempt: see Ch 9, p XXX.

23 *Whybrow* (1951) 35 Cr App Rep 141; *R v Grimwood* [1962] 2 QB 621; *R v Bozikis* [1981] VR 587 at 591.

24 *Crimes Act 1900* (ACT), s 22; *Crimes Act 1900* (NSW), s 58; *Criminal Code* (NT), s 193; *Criminal Code* (Qld), s 340(a); *Criminal Law Consolidation Act 1935* (SA), s 270B; *Criminal Code* (Tas), s 183(a); *Crimes Act 1958* (Vic), s 31(1)(a); *Criminal Code* (WA), s 317A.

25 *Crimes Act 1900* (ACT), ss 27(4)(b), 32(1)(b), 32(2)(b); *Crimes Act 1900* (NSW), s 58; *Criminal Code* (NT), ss 188(2)(h), 189A; *Criminal Code* (Qld), ss 340(a)-(e); *Criminal Law Consolidation Act 1935* (SA), s 43(c); *Criminal Code* (Tas), s 183(a); *Crimes Act 1958* (Vic), s 31(1)(c); *Criminal Code* (WA), s 317A(c).

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Assaults committed on particular classes of people

Assaults on particular classes of people are viewed as aggravated because of the special status of the people concerned. For example, it is an offence to assault a police officer in the execution of his or her duty.[26] Except in Victoria, it is not necessary for the prosecution to prove that the accused knew that the person assaulted was a police officer.[27] In comparison, s 31(b) of the *Crimes Act 1958* (Vic) requires the prosecution to prove that the accused *knew* that the person was a police officer. The offence is committed only if the officer is acting in the execution of his or her duty.[28] This has been defined very broadly. The Federal Court stated in *R v K* (1993) 118 ALR 596 (at 601):

> [A] police officer acts in the execution of his [or her] duty from the moment he [or she] embarks upon a lawful task connected with his [or her] functions as a police officer, and continues to act in the execution of that duty for as long as he [or she] is engaged in pursuing the task and until it is completed, provided that he [or she] does not in the course of the task do anything outside the ambit of his [or her] duty so as to cease to be acting therein.

The scope of police duties is not confined to the apprehension of crime, but extends to taking reasonable steps to prevent crime and disorder: see Ch 13, 2.3 'Policing Public Disorder'.

In New South Wales further offences have been enacted that criminalise a wider range of conduct against police. These changes reflect growing concerns about violence against police. In 2002, the basic offence of assaulting a police officer (discussed above) was supplemented by the following graduated scheme of offences inserted into s 60 of the *Crimes Act 1900* (NSW):

> **Section 60 Assault and other actions against police officers**
> (1) A person who assaults, stalks, harasses or intimidates a police officer while in the execution of the officer's duty, although no actual bodily harm is occasioned to the officer, is liable to imprisonment for 5 years.
> (2) A person who assaults a police officer while in the execution of the officer's duty, and by the assault occasions actual bodily harm, is liable to imprisonment for 7 years.
> (3) A person who maliciously by any means:
> (a) wounds a police officer, or
> (b) inflicts grievous bodily harm on a police officer,
> while in the execution of the officer's duty is liable to imprisonment for 12 years.

The reforms significantly extended the scope of violence committed against police officers acting in the execution of their duty. Section 60(4) provides that an act against an officer in the execution of his or her duty occurs if the act is carried out "(a) as a consequence of, or in

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26 *Crimes Act 1900* (ACT), ss 27(4)(c), 32(1)(c), 32(2)(c); *Crimes Act 1900* (NSW), s 58; *Criminal Code* (NT), ss 189A, 188(2)(h); *Criminal Code* (Qld), ss 340(b), (e); *Criminal Law Consolidation Act 1935* (SA), s 43(b); *Summary Offences Act 1953* (SA), s 6; *Police Offences Act 1935* (Tas), s 34B(1); *Crimes Act 1958* (Vic), s 31(1)(b); *Criminal Code* (WA), s 318(1)(d); *Manton* (2002) 132 A Crim R 249 (interpretation of s 60(1) of the *Crimes Act 1900* (NSW)).

27 *R v Forbes & Webb* (1865) 10 Cox CC 362; *R v Reynhoudt* (1962) 107 CLR 381; *McBride v Turnock* [1964] Crim LR 456; *McArdle v Wallace* [1964] Crim LR 467.

28 *R v Cumpton* (1880) 5 QBD 341; *Davis v Lisle* [1936] 2 KB 434; *Duncan v Jones* [1936] 1 KB 218; *R v Waterfield* [1964] 1 QB 164; *McArdle v Wallace* [1964] Crim LR 467; *Kenlin v Gardiner* [1967] 2 QB 510; *Donnelly v Jackman* [1970] 1 All ER 987; *Gardner* (1979) 71 Cr App Rep 13; *Coffin v Smith* (1980) 71 Cr App Rep 221; *Lindley v Rutter* (1980) 72 Cr App Rep 1; *Pedro v Diss* [1981] 2 All ER 59; *Collins v Wilcock* [1984] 1 WLR 1172; *Weight v Long* [1986] Crim LR 746; *Noordhof v Bartlett* (1986) 69 ALR 323.

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retaliation for, actions undertaken by that police officer in the execution of the officer's duty, or (b) because the officer is a police officer" even though the police officer is not on duty at the time the assault occurs. Similar provisions apply to actions against other law enforcement officers, and to assaults against the domestic partner of law enforcement officers: *Crimes Act 1900* (NSW), ss 60A(1), 60A(2), 60B(1).

Other classes of person receive special protection from assault in certain jurisdictions. These include:

- women (*Criminal Code* (NT), s 188(2)(b));
- family members (*Criminal Law Consolidation Act 1935* (SA), ss 39,40);
- those under a certain age (*Crimes Act 1900* (NSW), s 43; *Criminal Code* (NT), s 188(2)(c); *Criminal Law Consolidation Act 1935* (SA), s 40);
- those unable to defend themselves by reason of infirmity, age, physique, situation or other disability (*Crimes Act 1900* (NSW), s 44; *Criminal Code* (NT), s 188(2)(d); *Criminal Code* (Qld), ss 340(g)-(h));
- members of parliament where the assault is committed because of such membership (*Criminal Code* (NT), s 188(2)(e); *Criminal Code* (WA), s 318(1)(e));
- members of the public service or the judiciary (*Crimes Act 1900* (NSW), ss 58, 326; *Criminal Code* (NT), s 188(2)(f); *District Court of Queensland Act 1967* (Qld), s 129; *Criminal Law Consolidation Act 1935* (SA), s 42; *Criminal Code* (WA), s 318(1)(e));
- those serving court documents (*Criminal Code* (NT), s 188(2)(g));
- those executing any process against lands or goods (*Criminal Code* (Tas), s 183(b));
- those protecting wrecked vessels (*Crimes Act 1900* (NSW), s 57; *Criminal Code* (Qld), s 338; *Criminal Law Consolidation Act 1935* (SA), s 42);
- members of a crew on board an aircraft (*Civil Aviation Act 1988* (Cth), s 24; *Crimes (Aviation) Act 1991* (Cth), s 21; *Crimes Act 1900* (NSW), s 206; *Criminal Code* (NT), s 191; *Criminal Code* (Qld), s 338A; *Criminal Code* (WA), s 318A);
- members of the clergy (*Crimes Act 1900* (NSW), s 56; *Criminal Law Consolidation Act 1935* (SA), s 41);
- school students or members of school staff (*Crimes Act 1900* (NSW), s 60E); and
- seamen (*Criminal Law Consolidation Act 1935* (SA), s 44).

These classes reflect a degree of outmoded paternalism toward those perceived to need extra protection such as women and children, and the law's general abhorrence toward those who commit assaults on public officials. The MCCOC has suggested that there be increased penalties for assaults where factors of aggravation exist: *Chapter 5—Non Fatal Offences Against the Person*, Discussion Paper (1996), pp 92ff; *Chapter 5—Non Fatal Offences Against the Person,* Report (1998), pp 111ff. A modified version of these classes of person has been outlined. The MCCOC suggests the following categories:

- public officials defined as including members of parliament, a minister of the Crown, a judicial officer, a police officer, a person appointed by, or employed by, the government of a government agency;
- a person who was involved in any capacity in judicial proceedings;
- a child under the age of 10 years; and
- those to whom the accused is in a position of trust.

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The MCCOC approach is to place circumstances of aggravation into the sentencing stage of procedure, rather than have separate statutory crimes of causing harm to certain classes of person.

Assaults resulting in harm of a particular kind

We have already pointed out that the MCCOC has suggested that a scheme of non fatal offences against the person based on degrees of fault and seriousness of injury should provide the basis for the *Model Criminal Code*: *Chapter 5—Non Fatal Offences Against the Person*, Report (1998). In all jurisdictions, except Tasmania, there already exists a division between assaults causing actual bodily harm or injury, and grievous bodily harm or serious injury. There is also a related offence that exists in all jurisdictions apart from Victoria and the Northern Territory of unlawful wounding. Section 423 of the *Crimes Act 1958* (Vic) does allow for an alternative verdict of unlawful wounding where elements of another indictable offence cannot be proved, but this seems to be an anomaly, given that unlawful wounding is not mentioned elsewhere in the Act. Section 183 of the *Criminal Code* (Tas) creates a separate crime of aggravated assault and describes it as assault with intent to commit a crime or to resist lawful apprehension and the assault of a person in the lawful execution of process against land and goods. However, s 172 provides that any person who "causes grievous bodily harm to any person by any means whatever is guilty of a crime".

Definitions of types of harm

The problem with the term "bodily harm" is that it appears to ignore the psychological harm that may result from an assault. Thus, at common law, an assault that causes shock or an hysterical reaction may amount to an assault occasioning actual bodily harm: *R v Miller* [1954] 2 QB 282. In *R v Chan-Fook* [1994] 2 ER 552 the court held (at 559) that actual bodily harm includes "psychiatric injury", but it does not include mere emotions such as fear or distress or panic nor does it include states of mind that are not evidence of some "identifiable clinical condition".

The House of Lords in *R v Ireland; R v Burstow* [1997] 3 WLR 534, confirmed that bodily harm was no longer confined to physical harm and could include mental harm provided that it amounted to a "recognisable psychiatric illness".[29] In coming to this conclusion in *R v Ireland; R v Burstow* [1998] AC 147, Lord Steyn (at 159) was influenced by the position in the law of negligence in relation to nervous shock cases where the common law, supported by advances in modern psychiatry, no longer drew a rigid distinction between the mind and body. He concluded (at 159) that the term "bodily harm" used in the *Offences Against the Person Act 1861* (UK) should be interpreted in light of these legal and scientific developments: "the statute must be interpreted in the light of the best current scientific appreciation of the link between the body and psychiatric injury". This decision has serious implications for the scope of many offences against the person in Australia which employ identical definitions of bodily harm, modelled on the *Offences Against the Person Act 1861* (UK). The judicial expansion of bodily injury to include psychic injury is arguably unnecessary in light of the statutory offences of stalking recently enacted in all Australian jurisdictions: see below p XXX.

The MCCOC has recommended that "harm" and "serious harm" are more appropriate terms: *Chapter 5—Non Fatal Offences Against the Person*, Report (1998), pp 21ff.

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29 For a critical review of the link between physical and psychological harm, see L Dunford and V Pickford, "Is There a Qualitative Difference Between Physical and Psychiatric Harm in English Law?" (1999) 7 *Journal of Law and Medicine* 36 at 42ff; J Horder, "Reconsidering Psychic Assault" [1998] Crim LR 392.

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The main difference between these forms of aggravated assaults and unlawful wounding lies in the definition of the relevant types of harm. In relation to the offence of unlawful wounding,[30] a wound at common law consists of an injury involving a breaking through both the inner and outer skin.[31] The term is not defined in the Criminal Codes, but the common law definition has been applied by the Queensland Court of Criminal Appeal in *Jervis* (1991) 56 A Crim R 374. The word "unlawfully" in relation to this offence appears to be largely redundant in that it does no more than express the principle that certain uses of force may be lawful or justifiable if used in self-defence and arrest situations. The fault elements for this offence are the same as for assaults resulting in grievous bodily harm which will be discussed later: p XXX.

In the Australian Capital Territory, New South Wales and South Australia, the relevant provisions refer to "actual bodily harm": *Crimes Act 1900* (ACT), s 24; *Crimes Act 1900* (NSW), s 59; *Criminal Law Consolidation Act 1935* (SA), s 40. The Code jurisdictions, apart from Tasmania, use "bodily harm": *Criminal Code* (NT), s 186; *Criminal Code* (Qld), s 328; *Criminal Code* (WA), s 304. In Victoria, the word used is "injury": *Crimes Act 1958* (Vic), s 18. At common law, it has been held that the words "actual bodily harm" should be given their ordinary and natural meaning: *R v Metharam* [1961] 3 All ER 200. In Victoria, injury is defined in s 15 of the *Crimes Act 1958* (Vic) as including "unconsciousness, hysteria, pain and any substantial impairment of bodily function".

"Actual bodily harm" need not be permanent, but must be more than merely transient or trifling: *R v Donovan* [1934] 2 KB 498 at 509. The Code jurisdictions' definitions of "bodily harm" are similar. In the Northern Territory, "bodily injury" means "any physical injury that interferes with health": *Criminal Code* (NT), s 1. In Queensland and Western Australia, the definition is broader and means "any bodily injury that interferes with health or comfort": *Criminal Code* (Qld), s 1; *Criminal Code* (WA), s 1. In *Wayne v Boldiston* (1992) 85 NTR 8, Mildren J stated that an assessment of bodily harm required the tribunal of fact to focus on the injury and its immediate consequences. In that case, the victim had received two cuts to the face that, after medical treatment, resulted in a slight cosmetic disfigurement. In upholding a conviction of assault causing bodily harm, Mildren J stated (at 13–14) that the fact the victim was left with only cosmetic injuries was irrelevant if the *immediate* result of the injury temporarily interfered with health. However, in *R v Tranby* [1992] 1 Qd R 432 De Jersey J held that "health" meant freedom from disease or ailment and an injury to body parts that have no function and do not cause disease or physical ailment would be insufficient.

In all jurisdictions, there exists an offence of assault resulting in some form of serious harm. The term "grievous bodily harm" is used in most jurisdictions,[32] with "grievous harm" used in the Northern Territory and "serious injury" in Victoria: *Criminal Code* (NT), ss 177, 181; *Crimes Act 1958* (Vic), ss 16, 17, 24. "Grievous bodily harm" has been interpreted at

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30 *Crimes Act 1900* (ACT), s 21; *Crimes Act 1900* (NSW), ss 33, 35; *Criminal Code* (Qld), s 323(1); *Criminal Law Consolidation Act 1935* (SA), ss 21, 23; *Criminal Code* (Tas), s 172; *Criminal Code* (WA), s 301. Section 423 of the *Crimes Act 1958* (Vic) provides for the finding of unlawful wounding as an alternative verdict to indictable offences except murder and manslaughter where the jury finds that the accused has unlawfully wounded another but the other elements of the indictable offence have not been proved.

31 *R v Wood and McMahon* (1830) 1 Mood CC 278; *Moriarty v Brooks* (1834) 6 C & P 684; *R v Beckett* (1836) 1 Mood & R 526; *Vallance v The Queen* (1961) 108 CLR 56 at 77; *R v Berwick* [1979] Tas R 101.

32 *Crimes Act 1900* (ACT), ss 19, 20, 25; *Crimes Act 1900* (NSW), ss 35, 54; *Criminal Code* (Qld), ss 317, 320; *Criminal Law Consolidation Act 1935* (SA), ss 21, 23; *Criminal Code* (Tas), ss 170, 172; *Criminal Code* (WA), ss 294, 297.

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common law as meaning bodily harm of a serious character.[33] It is a matter for the jury as to whether the injury complained of amounts to grievous bodily harm.[34] In the Australian Capital Territory and New South Wales, grievous bodily harm is defined as including "any permanent or serious disfiguring of the person": *Crimes Act 1900* (ACT), s 4; *Crimes Act 1900* (NSW), s 4(1). The *Crimes Amendment (Grievous Bodily Harm) Act 2005* (NSW) expanded the definition of grievous bodily harm under s 4 to encompass the destruction of the foetus of a pregnant woman: see Ch 9, pp XXX–XXX. "Serious injury" is defined in s 15 of the *Crimes Act 1958* (Vic) as including "a combination of injuries".

The Code jurisdictions provide statutory definitions of the relevant terms. "Grievous bodily harm" is defined under s 1 of the *Criminal Code* (Qld) as the loss of a distinct part or an organ of the body, serious disfigurement or "any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life, or to cause or be likely to cause permanent injury to health". The Western Australian definition is similar to this latter quoted part. However, s 1(4) of the *Criminal Code* (WA) extends it to include a "serious disease". The Tasmanian definition is also similar to the quoted part of the Queensland definition, but the words "serious injury" are used instead of "permanent injury".

Under s 1 of the *Criminal Code* (NT) "grievous harm" is similarly defined as "any physical or mental injury of such a nature as to endanger or be likely to endanger or to cause or be likely to cause permanent injury to health".

Working Definitions of Bodily Harm and Grievous Bodily Harm

Whether an injury reaches the threshold of "actual" or "grievous" bodily harm or is merely "transient or trifling" is a factual matter for the jury. The victim's own physiology and availability of medical treatment will play a determining role in how serious an injury will be for the victim. As Lord Mustill noted in *R v Brown* [1993] 2 WLR 556 at 600, some of the sado-masochistic activities of the accused involved a risk of genito-urinary infection and septicaemia, which though grave in former times, had been greatly reduced by modern medical science. From a practical perspective, the question of the seriousness of the injury (and thus the offence charged) will be determined when the charges are laid. In this regard, the police and prosecution play a significant role in determining the scope and content of concepts such as actual and grievous bodily harm. The discretion over the choice of charge will be influenced by substantive legal definitions as well as "working definitions" that operate through internal guidelines or policy documents. A study of hospital admissions in England identified a wide-range of factors that influence whether or not an assault will be criminalised. However, the researchers concluded that there was no relationship between offence seriousness (measured in terms of culpability and harm) and the likelihood of reporting, investigation, prosecution and punishment: C Clarkson, A Cretney, G Davies and J Shepherd, "Assaults: The Relationship between Seriousness, Criminalisation and Punishment" [1994] Crim LR 4.

33 *DPP v Smith* [1961] AC 290 at 334 per Viscount Kilmuir LC; *R v Metharam* [1961] 3 All ER 200; *R v Cunningham* [1982] AC 566; *R v Saunders* [1985] Crim LR 230.

34 *R v Miller* [1951] VLR 346 at 356–357; *R v Van Beelen* (1973) 4 SASR 353 at 404; *R v Perks* (1986) 41 SASR 335; *R v Blevins* (1988) 48 SASR 65 at 68; *DPP v Smith* [1961] AC 290 at 335; *Hyam v DPP* [1975] AC 55 at 68, 84, 94.

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Perspectives on Public Health

Grievous Bodily Harm and HIV/AIDS

There is some question as to whether grievous bodily harm encompasses serious diseases, particularly sexually transmitted diseases. In *R v Clarence* (1888) 22 QBD 23, the communication of a venereal disease was held not to amount to an infliction of grievous bodily harm. This, however, was recently overturned by the English Court of Appeal in *R v Dica* [2004] EWCA Crim 1103: see Ch 11, pp XXX–XXX.

In the early 1990s, some jurisdictions decided to criminalise the spreading of a serious disease by enacting specific statutory provisions. For example, s 36 of the *Crimes Act 1900* (NSW) was introduced by the *Crimes (Injuries) Amendment Act 1990* (NSW). This criminalises causing or attempting to cause a "grievous bodily disease". Section 317 of the *Criminal Code* (Qld) has been extended to cover the intentional transmission of a serious disease. A serious disease is defined in s 1 as

> a disease that would, if left untreated, be of such a nature as to –
> (a) cause or be likely to cause any loss of a distinct part or organ of the body; or
> (b) cause or be likely to cause serious disfigurement; or
> (c) endanger or be likely to endanger life or to cause or be likely to cause permanent injury to health;
> whether or not treatment is or could have been available.

Section 294(8) of the *Criminal Code* (WA) was introduced by the *Criminal Law Amendment Act (No 2) 1992* (WA). This makes it an offence to do any act that is likely to result in a person contracting a serious disease with intent to do that person grievous bodily harm. As stated above, s 1(4) of the *Criminal Code* (WA) now extends the meaning of "grievous bodily harm" to include a "serious disease". This is further defined in s 1(1) as a disease that is of such a nature as to endanger, or be likely to endanger, life or to cause or be likely to cause permanent injury to health. Finally, s 19A of the *Crimes Act 1958* (Vic) was introduced by the *Crimes (HIV) Act 1993* (Vic). This makes it an offence to cause another person to be infected with a very serious disease which is defined to mean HIV. Cases where the person has not contracted HIV have been prosecuted under s 22 of the *Crimes Act 1958* (Vic) which concerns recklessly engaging in conduct that places or may place another person in danger of death: see below, p XXX.

These provisions raise the question as to whether the criminal law is the appropriate avenue for controlling such conduct. In 1992, the Final Report of the Legal Working Party on the Intergovernmental Committee on AIDS recommended:

> A public health offence should exist where a person knows that he or she is HIV-infected and significantly exposes or infects another person without his or her consent … Special as opposed to existing general criminal law sanctions should be carefully considered by State and Territory governments because of the danger of stigmatising already alienated groups.[35]

As well as the stigma involved, criminalising conduct that transmits HIV raises concerns about excessive government intervention into the private realm, the potential for selective prosecutions (why HIV and not other diseases?) and difficulties in proving the fault element of such an offence. There are also extensive civil powers of detention relating to the spread of infectious diseases already in operation: see B McSherry, "'Dangerousness' and Public Health" (1998) 23(6) *Alternative Law Journal* 276. For an essay

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35 Legal Working Party of the Intergovernmental Committee on AIDS, *Legislative Approaches to Public Health Control of HIV Infection* (1992), pp 21–22. See further S Bronitt, "Criminal Liability for the Transmission of HIV/AIDS" (1992) 16 Crim LJ 85; S Bronitt, "Spreading Disease and the Criminal Law" [1994] Crim LR 21: D Ormerod and M Gunn, "Criminal Liability for the Transmission of HIV" (1996) 1 *Web Journal of Current Legal Issues*, search http://webjcli.ncl.ac.uk (cited 1 June 2005); J Godwin, J Hamblin, D Patterson and D Buchanan, *Australian HIV/AIDS Legal Guide* (2nd ed, Sydney: Federation Press, 1993).

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examining the legal regulation of life-threatening disease, drawing on republican theory and strategies of regulation see S Bronitt, "The Transmission of Life-Threatening Infections: A New Regulatory Strategy" in R Smith (ed), *Health Care, Crime and Regulatory Control* (Sydney: Hawkins Press, 1998), Ch 13: see Ch 1, pp XX–XX.

On the other hand, conduct resulting in harm to others is already criminalised and the transmission of HIV with its potentially lethal consequences should be seen as a criminal act. Alan Turner in his article "Criminal Liability and AIDS" (1995) *Auckland University Review* 875 summarises the arguments for criminalising the transmission of HIV as follows (at 887):

> The criminal law would be a valuable tool for assisting and reinforcing education in this area. The criminal law clearly defines the standards of behaviour which society deems to be unacceptable, and imposes sanctions on those persons whose conduct falls within these bounds. Knowingly transmitting HIV is a cruel, anti-social act that is deserving of stigmatisation by the criminal law. Criminalisation can also be justified on the basis that individuals, and society as a whole, are entitled to be protected from harmful behaviour.

The MCCOC is of the opinion that the transmission of HIV should be criminalised: *Chapter 5–Non Fatal Offences Against the Person*, Report (1998), p 85. It recommends, however, that a specific offence need not be enacted, but a general endangerment offence will suffice: p 87. For a critical review of these proposals see S Bronitt, "HIV/AIDS and the *Model Criminal Code:* Endangering Public Health?" (1997) 8(4) *HIV/AIDS Legal Link* 14. See also below as to offences of endangerment, p XXX.

Causing or inflicting harm

The jurisdictions differ as to the verb used in relation to actual or grievous bodily harm. It may be "causing", "inflicting", "occasioning" or "doing".

The verbs "causing" and arguably, "occasioning" can be viewed as broader than "inflicting" or "doing". The MCCOC points to the case of *R v Nicholson* [1916] VR 130 as exemplifying this distinction: *Chapter 5—Non Fatal Offences Against the Person*, Report (1998), p 17. The accused entered a house with the purpose of removing two gas meters. He failed to properly plug the gas pipe in one meter. When the occupants of the house subsequently lit a lamp, the gas exploded and injured them. The accused was convicted of negligently "causing" injury. It was held that the accused indirectly "caused" the injury and an argument that "causing" was limited to "direct" injury was dismissed.

"Inflicting" grievous bodily harm, in comparison, has been said to involve the direct or indirect *application of force* to the victim. For example where a person does an act calculated to cause a panic in a public assembly, he or she may be guilty of the offence of inflicting grievous bodily harm if injury results.[36]

However, in practice, little rides on the difference between these verbs because the word "inflict" has been interpreted broadly in recent years to include causing psychiatric illness: *R v Ireland; R v Burstow* [1998] AC 147. The MCCOC recommends casting offences resulting in harm in terms of "causing" the prohibited consequences: *Chapter 5—Non Fatal Offences Against the Person*, Report (1998), p 17.

36 *R v Martin* (1881) 8 QBD 54; *R v Clarence* (1888) 22 QBD 23 at 36 per Wills J; *R v Chapin* (1909) 74 JP 71; *R v Salisbury* [1976] VR 452.

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Table 1: Terms Used in Relation to Actual or Grievous Bodily Harm

JURISDICTION AND RELEVANT LAW	CAUSING	INFLICTING	OCCASIONING	DOING
ACT *Crimes Act 1900*	causing grievous bodily harm (s 25)	inflicting actual bodily harm (s 23) inflicting grievous bodily harm (ss 19, 20)	assault occasioning actual bodily harm (s 24)	—
NSW *Crimes Act 1900*	causing grievous bodily harm (s 54)	inflicting grievous bodily harm (s 35)	assault occasioning actual bodily harm (s 59)	—
NT *Criminal Code*	unlawfully causes bodily harm (s 186) causing grievous harm (ss 177, 181)	—	—	—
QLD *Criminal Code*	unlawfully causes bodily harm (s 328)	—	—	doing bodily harm (s 339) doing grievous bodily harm (ss 317, 320)
SA *Criminal Law Consolidation Act 1935*	—	inflicting grievous bodily harm s 23	assault occasioning actual bodily harm (s 40)	doing grievous bodily harm (s 21)
TAS *Criminal Code*	causing grievous bodily harm (s 172)	—	—	doing grievous bodily harm (s 170)
VIC *Crimes Act 1958*	causes injury (s 18) causes serious injury (ss 16, 17, 24)	—	—	—
WA *Criminal Code*	unlawfully causes bodily harm (s 304)	—	—	does bodily harm (s 317) does grievous bodily harm (ss 297, 294)

The fault element

The fault element required for assaults resulting in actual bodily harm is the same as for common assault in that intention or recklessness will suffice. The intention or recklessness relates to the use (or threatened use) of force, rather than the actual bodily harm, rendering this a conduct rather than a result crime.[37] However, s 18 of the *Crimes Act 1958* (Vic) may

37 *R v Venna* [1975] 3 WLR 737 at 742 per James LJ; *R v Percali* (1986) 42 SASR 46; *Coulter v The Queen* (1988) 164 CLR 350; *Savage v DPP* [1991] 3 WLR 914 at 930; *Williams* (1990) 50 A Crim R 213.

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require an intention to cause injury rather than simply engage in the conduct that had that result: *Westaway* (1991) 53 A Crim R 336.

The fault element in relation to assaults resulting in grievous bodily harm varies between jurisdictions. All jurisdictions refer to intention as a fault element.[38] Recklessness is also mentioned as a fault element in the Australian Capital Territory, South Australia and Victoria.[39] The relevant Northern Territory, Queensland, Tasmanian and Western Australian provisions contain no mention of recklessness: *Criminal Code* (NT), s 181; *Criminal Code* (Qld), s 320; *Criminal Code* (Tas), s 172; *Criminal Code* (WA), s 297. Nonetheless, both intention and recklessness will be relevant to show that the act did not occur involuntarily or by accident: *Criminal Code* (NT), s 31; *Criminal Code* (Qld), s 23; *Criminal Code* (Tas), s 13; *Criminal Code* (WA), s 23; *Fitzgerald* (1999) 106 A Crim R 215.

It would seem that the intention required is the same as for the offences of assault and assault resulting in bodily harm. In *Bennett* (1989) 45 A Crim R 45, the Tasmanian provision was viewed as a crime of basic rather than specific intent.

The test for recklessness varies between jurisdictions. In the Northern Territory, for example, the test for criminal responsibility is foresight of the possible consequences of conduct: *Criminal Code* (NT), s 31. In *R v Campbell* [1997] 2 VR 585 Hayne and Crockett JJ stated that the test for recklessly causing serious injury was foresight of the *probability* that injury will result. At common law, however, Diplock LJ stated in *R v Mowatt* [1968] 1 QB 421 (at 426) that the offence of inflicting grievous bodily harm required the accused to "foresee that some physical harm to some person, albeit of a minor character, might result". (This view was relied on by the House of Lords in *R v Savage and Parmenter* [1992] 1 AC 699 at 716.) This seems to imply a lesser standard of foresight.

The New South Wales provisions refer to maliciously inflicting grievous bodily harm with intent to do grievous bodily harm and maliciously inflicting grievous bodily harm: *Crimes Act 1900* (NSW), ss 33, 35. Section 5 of the *Crimes Act 1900* (NSW) defines "malice" as acting with indifference to human life or suffering, or with intent to injure some person or persons, and in any such case without lawful cause or excuse, or acting recklessly or wantonly. If the offence is sought to be established by proof of recklessness, it is sufficient that the accused foresaw the possibility as opposed to probability of some harm resulting from the accused's act: *R v Coleman* (1990) 19 NSWLR 467 at 475; *Stokes* (1990) 51 A Crim R 25 at 40.

Some jurisdictions also have statutory provisions relating to causing grievous bodily harm through a negligent act or omission.[40] In *R v Shields* [1981] VR 717, the Full Court of the Supreme Court of Victoria held that the standard of negligence required was the same as for negligent manslaughter. The latter test is set out at common law in *Nydam v The Queen* [1977] VR 430 at 455 and is discussed in Chapter 9, pp XXX–XXX.

The MCCOC has recommended that an offence of negligently causing serious harm should form part of the *Model Criminal Code* partly because it "is necessary in order to criminalise those instances of gross negligence that cause serious harm, such as the removal of safety equipment in the workplace": *Chapter 5—Non Fatal Offences Against the Person*, Discussion Paper (1996), p 33.

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38 *Crimes Act 1900* (ACT), s 19; *Crimes Act 1900* (NSW), s 35 (maliciously, defined in s 5); *Criminal Code* (NT), s 177; *Criminal Law Consolidation Act 1935* (SA), s 21; *Criminal Code* (Tas), s 170; *Crimes Act 1958* (Vic), s 16; *Criminal Code* (Qld), s 317; *Criminal Code* (WA), s 294.

39 *Crimes Act 1900* (ACT), s 20; *Criminal Law Consolidation Act 1935* (SA), s 29(2)(b); *Crimes Act 1958* (Vic), s 17.

40 *Crimes Act 1900* (ACT), s 25; *Crimes Act 1900* (NSW), s 54; *Crimes Act 1958* (Vic), s 24. Section 328 of the *Criminal Code* (Qld) relates to bodily harm through negligent act or omission.

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Cultural Perspectives

Female Genital Mutilation

Female genital mutilation (FGM) is a term used to describe a variety of ritual practices ranging from scraping or cutting the clitoris to the excision of the clitoris, labia minora and parts of the labia majora: see Queensland Law Reform Commission, *Female Genital Mutilation,* Report No 47 (1994), pp 7–8. FGM was first described as "female circumcision" reflecting its religious significance in some cultures. In recent years, however, the language of human rights abuse has displaced the "traditional" language: see, for example, Australian Medical Association, *Female Genital Mutilation*, Position Statement (1994). FGM is portrayed as a form of torture, or as cruel, inhuman or degrading treatment. Its redefinition as "mutilation" denotes more clearly the physical, sexual and aesthetic boundary violations involved in these practices: M Douglas, *Purity and Danger* (London: Routledge & Kegan Paul, 1992).

Although much has been written on the origins of the practice, primarily to dispute the authenticity of its basis in the *Koran* or religious law,[41] little attention has been paid to its therapeutic and experimental use by the medical profession in the United Kingdom throughout the 19th century. As Susan Edwards in her book *Female Sexuality and the Law* (Oxford: Martin Robertson, 1981) notes (p 87):

> Contrary to popular belief, this ancient and primitive custom [clitoridectomy] is not just a "survival" from the past that persists in peasant and pastoral societies; it was an advanced cure for a wide variety of female disorders in nineteenth-century gynaecological practice.

In the United Kingdom, the performance of FGM has now been criminalised. The *Prohibition of Female Circumcision Act 1985* (UK) made it an offence to "excise, infibulate or otherwise mutilate the labia", but makes it a defence if it is performed by a doctor and is intended to benefit the person in a therapeutic context: s 1. The offence, punishable by a maximum of five years imprisonment, extends to individuals who aid, abet, counsel or procure the performance of the procedure. Similar legislation exists in all Australian States and Territories.[42] This is despite the fact that the Australian Law Reform Commission rejected calls for special FGM offences, favouring the view that the practice constitutes an offence under the general law.[43]

FGM has been represented as a both a human rights and a health issue. When FGM is considered as a human rights issue, women's rights have tended to trump the cultural and religious rights of minority groups. The *Declaration on the Elimination of Violence Against Women* (1993) adopted by the United Nations defined "violence" as including "female genital mutilation and other traditional practices harmful to women". Anticipating the clash between cultural and feminist claims to equality, the Declaration states that States "should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to [the elimination of violence against women]". The Declaration draws on the rights contained in the *Universal Declaration of Human Rights* 1948 (UDHR) and the *International Covenant on Civil and Political Rights* 1966 (ICCPR). The UDHR and ICCPR contain the right not to be subject to torture, or to cruel, inhuman or degrading treatment or punishment and the right to liberty and security of person. The ICCPR specifically protects ethnic and cultural rights under the

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41 See Family Law Council, *Female Genital Mutilation*, Discussion Paper (January 1994); Family Law Council, *Female Genital Mutilation*, Report (1994). For a commentary on the Report, see B Hughes, "Female Genital Mutilation: The Complementary Roles of Education and Legislation in Combating the Practice in Australia" (1995) 3 *Journal of Law and Medicine* 202.

42 *Crimes Act 1900* (ACT), Pt 4; *Crimes Act 1900* (NSW), s 45; *Criminal Code* (NT), Pt VI Divn 4A; *Criminal Code* (Tas), ss 178A–178C; *Criminal Code* (Qld), ss 323A, 323B; *Criminal Law Consolidation Act* (SA), Pt 3 Divn 8; *Crimes Act* (Vic), ss 32–34A; *Criminal Code* (WA), s 306.

43 Australian Law Reform Commission, *Multiculturalism: Criminal Law,* Discussion Paper No 48 (1991), p 23. For a critical review of its recommendations see S Bronitt and K Amirthalingam, "Cultural Blindness and the Criminal Law" (1996) 21(2) *Alternative Law Journal* 58.

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guarantee of freedom of religion and the right of ethnic, religious or linguistic minorities to enjoy their own culture, religion or language: Arts 18 and 27.

The problem that occurs here is that imposing western human rights standards on individuals of other cultures may lead to FGM being driven "underground". The Family Law Council in its Report, *Female Genital Mutilation* (1994), points out (para 5.10, p 31):

> Many people who practise female genital mutilation see western societies as sexually promiscuous, decadent and in the process of disintegration. They cite female genital mutilation as a defence against such corrupting influences. They see the attack on female genital mutilation as an attempt to disintegrate their social order and thereby speed up their Europeanisation.

The health objections levelled at FGM raise the possibilities of a range of short-term and long-term complications: Queensland Law Reform Commission, *Female Genital Mutilation*, Report No 47 (1994), pp 22–24. While these objections are indeed significant, they overlook the broader cultural justifications that underlie some forms of surgical procedure. The law has never cast doubt on the legality of ritual circumcision performed on newly-born male infants for religious or cultural reasons. Within Jewish and Islamic communities, these operations are often performed in non-sterile environments without anaesthesia by individuals who lack formal medical training. Post-operative complications do occur, although prosecution is rarely instituted even in cases where the infant suffers severe infection or permanent physical impairment. The changing social and medical attitudes to male circumcision for non-medical purposes have raised the question whether the assumed legality of the religious circumcision could be challenged before the courts: see D Richards, "Male Circumcision: Medical or Ritual" (1996) 3(4) *Journal of Law and Medicine* 371; G Boyle, J Svoboda, C Price and J Turner, "Circumcision of Healthy Boys: Criminal Assault?" (2000) 7(3) *Journal of Law and Medicine* 301. FGM and male circumcision can be viewed as qualitatively different procedures, the latter having no or only limited impact on sexual or reproductive functioning. While this may be true, the point revealed by this comparison is that the legal legitimacy of surgical interference does not rest *exclusively* on its medical utility. Indeed, it is important to recognise that justifications based on medical utility often blur with those derived from the patient's religious, cultural and aesthetic beliefs. Further, compliance with deeply-held beliefs is often claimed by the medical profession to yield therapeutic or psychological benefits for the patient.

The present legal approach toward FGM fails to take seriously the rights relating to both individual and cultural autonomy. Clearly arguments based on autonomy have less weight with respect to FGM performed on children. Indeed, FGM should *never* be performed on a child. As Art 24(3) of the *Convention on the Rights of the Child* (1989) states, parties must "take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children". However, dismissing the consent of adult women who wish to undergo FGM may compound their lack of autonomy and sense of alienation: S Pritchard, "The Jurisprudence of Human Rights: Some Critical Thought and Developments in Practice" (1995) 2(1) *Australian Journal of Human Rights* at 23, fn 87.

A different approach to FGM, one that is rarely discussed, is regulation rather than prohibition. Ian Patrick is one of the few authors who has argued for a "harm minimisation strategy" akin to that sometimes argued for in the field of substance abuse: "Responding to Female Genital Mutilation: The Australian Experience in Context" (2001) 36(1) *Australian Journal of Social Issues* 15 at 24. As with other controversial procedures, such as abortion, the law could impose restrictions relating to consent such as requiring mandatory counselling before obtaining an "informed consent", coupled with limits on the *type* of procedure permitted. This together with education programs such as those run by the Ecumenical Migration Centre in Victoria, may provide a better alternative than criminalisation of the practice: M Ierodiaconou, "'Listen to Us!' Female Genital Mutilation, Feminism and the Law in Australia" (1995) 20 *Melbourne University Law Review* 562. As experience in drug law demonstrates, strict enforcement of prohibition can be counterproductive, resulting in less rather than more control. Realistically, the present strategy of global prohibition of FGM is unlikely to stamp out the practice. A policy of strict enforcement is much more likely to produce unintended consequences by driving the practice underground. For example, this may severely compromise the strategies in place to control the transmis-

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sion of HIV and other blood-borne infections: see generally, P Grabosky, "Counterproductive Regulation" (1995) 23 *International Journal of the Sociology of Law* 347. Policy in this area should pursue the "least worst solution".

The "unprincipled" but practical approach mooted here may seem abhorrent. However, resolving clashes between cultural, moral and political imperatives requires imaginative policy-making. By advocating effective regulation that is based on education and harm-minimisation, medico-legal discourse could exert greater influence on these traditional practices, and perhaps, over time, transform these initiation rituals into symbolic covenants rather than surgical ones.

3. Lawful assault

As the law of assault and related offences has developed, a number of ways of avoiding criminal responsibility have also arisen. The use of force may be considered lawful if:

- it forms part of ordinary social activity;
- it forms the basis for an arrest or steps taken to prevent a breach of the peace;
- it is used in self-defence;
- in some jurisdictions, it is used as a result of provocation; or
- it is used reasonably and moderately to chastise children.

Consent to a common assault renders the act lawful, but there is considerable debate about the role of consent in relation to aggravated assault. We will examine all these areas in turn.

3.1 Ordinary social activity

An act that is part of ordinary social activity is not an assault.[44] Physical conduct that is generally acceptable in the ordinary course of everyday life includes the jostling that may occur on public transport or in a busy street or handshaking at a party: *Collins v Wilcock* [1984] 1 WLR 1172 at 1177–1178 per Goff LJ. Similarly, it is not an assault to give a slight touch in friendship or to seek the attention of another by tapping on that person's shoulder.[45]

3.2 Arrest

A person exercising a lawful power of arrest is entitled to use reasonable force where it is necessary in order to effect that arrest.[46] The old common law drew a distinction between the use of force in relation to resisting arrest and in relation to fleeing from arrest. The provisions in the Queensland and Western Australian Criminal Codes still retain this distinction with more limitations being placed on the force used in relation to fleeing from arrest. Section 28

44 *Collins v Wilcock* [1984] 1 WLR 1172; *R v Boughey* (1986) 161 CLR 10; *Criminal Code* (NT), s 187(e); *Criminal Code* (Tas), s 182(3).

45 *Coward v Baddeley* (1859) 4 H&N 478; *Donnolly v Jackman* [1970] 1 All ER 987; *R v Phillips* (1971) ALR 740 at 746; *Boughey v The Queen* (1986) 161 CLR 10 at 24 per Mason, Wilson and Deane JJ.

46 *R v Turner* [1962] VR 30; *Crimes Act 1914* (Cth), s 3ZC(2)(a); *Crimes Act 1900* (ACT), s 221; *Criminal Code* (NT), ss 27(a)–27(b), 28; *Criminal Code* (Qld), ss 254, 257; *Criminal Code* (Tas), ss 30–31, 26; *Criminal Code* (WA), ss 231, 233, 237.

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of the *Criminal Code* (NT) sets out the circumstances in which conduct by police and prison officers that causes death or grievous bodily harm will amount to justifiable force.

What amounts to reasonable force is a question of fact that depends upon the circumstances of the particular case including the nature of the resistance put up by the accused: *R v Turner* [1962] VR 30. There is also a corresponding right to use reasonable force to resist unlawful arrest[47] and again what amounts to reasonable force is a question of fact. The use of force to prevent a breach of the peace is explored in Chapter 13, pp XXX–XXX.

3.3 Self-defence

The defence of self-defence is available to crimes involving the use of or threat of force to the person such as assault and it results in a complete acquittal. As explored in Chapter 6, the test for self-defence varies across jurisdictions.

In New South Wales and Victoria, the common law holds sway. Wilson, Dawson and Toohey JJ set out the requirements for the defence in *Zecevic v DPP* (1987) 162 CLR 645 (at 661) as follows:

> The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he [or she] did. If he [or she] had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he [or she] is entitled to an acquittal. Stated in this form, the question is one of general application and is not limited to cases of homicide.

Section 46 of the *Criminal Code* (Tas) states that:

> A person is justified in using, in defence of himself [or herself] or another person, such force as, in the circumstances as he [or she] believes them to be, it is reasonable to use.

This test is partly subjective and partly objective. It requires two questions to be answered. First, what were the circumstances as the accused believed them to be? Secondly, was the use of force reasonable in those circumstances?

Similarly, s 15(1) of the *Criminal Law Consolidation Act 1935* (SA) allows an accused to use force if that person believes that the force is necessary and reasonable for self-defence and conduct was reasonably proportionate to the threat that the accused genuinely believed to exist.

Section 29 of the *Criminal Code* (NT) provides that a person is not criminally responsible for conduct that he or she believes is necessary for certain specified defensive purposes and that is a reasonable response in the circumstances he or she reasonably perceives them to be. Similarly, s 42 of the *Criminal Code* (ACT) exonerates a person from criminal responsibility if the person carries out conduct which he or she believes is necessary for specified defensive purposes and which is a reasonable response in the circumstances as the person perceives them. In each of these jurisdictions the test involves both a subjective and objective element, although the nature and extent of the subjective element differs.

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47 *R v Ryan* (1890) 11 LR(NSW) 171; *McLiney v Minster* [1911] VLR 347; *R v Marshall* (1987) 49 SASR 133; *R v Fry* (1992) 58 SASR 424; *Criminal Code* (NT), s 29(2)(a)(ii); *Criminal Code* (Qld), s 271; *Criminal Code* (WA), s 248. Section 15 of the *Criminal Law Consolidation Act 1935* (SA) allows reasonably proportionate force for the purpose of preventing or terminating unlawful imprisonment. See also Chapter 6, 2 'Self-Defence'.

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The provisions in the Queensland and Western Australian Criminal Codes are more complex and supplement the core element of "reasonable necessity" with additional rules that limit the use of permissible force. Both jurisdictions distinguish between self-defence as it relates to provoked and unprovoked attacks. In relation to an unprovoked attack, s 271(1) of the *Criminal Code* (Qld) and s 248 of the *Criminal Code* (WA) provide:

> [I]t is lawful for [the accused] to use such force to the assailant as is reasonably necessary to make effectual defence against the assault, provided that the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.

Here, the test is objective in determining whether or not the force used by the accused was reasonably necessary.

3.4 Provocation

Provocation in some jurisdictions is not only a defence to murder, but may also apply as a defence to assault. In the Northern Territory, Queensland and Western Australia, provocation is also a complete defence to offences that have assault as a defined element: *Criminal Code* (NT), s 34; *Criminal Code* (Qld), s 269; *Criminal Code* (WA), s 246. It is, however, not applicable to offences such as doing bodily harm, grievous bodily harm or wounding where assault is not a defined element: *Kaporonovski v The Queen* (1973) 133 CLR 209.

In the Australian Capital Territory, New South Wales and Victoria, provocation is a qualified defence to an assault which is defined to include the word "murder" such as wounding with intent to murder: *R v Newman* [1948] VLR 61; *Helmhout v The Queen* (1980) 49 FLR 1. In South Australia, provocation does not appear to apply as there are no offences of assault defined to include the word "murder". Mitchell J held in *R v Duvivier* (1982) 29 SASR 217 that provocation could be a defence to an attempted murder in South Australia. However, a majority of the High Court in *McGhee v The Queen* (1995) 183 CLR 82 has cast doubt on this interpretation of the law: at 89 per Brennan J, at 96 per Dawson J, at 105 per Toohey and Gaudron JJ.

In *McGhee's* case, a majority of the High Court held that provocation was not a defence to attempted murder under the *Criminal Code* (Tas). It is also highly unlikely that it exists as a defence to assaults in Tasmania given that the defence of provocation was abolished by the *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas).

In the Australian Capital Territory, New South Wales and Victoria, the test for provocation is the same as that applied for murder: see Ch 5, pp XXX–XXX. In Queensland and Western Australia, the definition of provocation as it applies to assault differs from that of the common law: *Criminal Code* (Qld), s 268; *Criminal Code* (WA), s 245. For example, s 268 of the *Criminal Code* (Qld) provides that the term:

> "provocation", used with reference to an offence of which an assault is an element means, and includes ... any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another who is under the person's immediate care, or to whom the person stands in a conjugal, parental, filial, or fraternal, relation, or in the relation of master or servant, to deprive the person of the power of self-control, and to induce the person to assault the person by whom the act or insult is done or offered ...

The MCCOC in its Report, *Chapter 5—Non Fatal Offences Against the Person* (1998), has recommended that provocation should not be a defence to assault. It states (p 141):

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> [O]ne of the many conceptual problems with the doctrine of provocation is that it artificially forces attention to what is likely to be but one of the factors that precipitated the violence, and is to that extent misleading. In cases where there is no mandatory sentence, (as with all offences under consideration here) the circumstances of provocation can be taken into account together with the other factors precipitating the offence in sentence.

The criticisms of provocation discussed in Chapter 5 (pp XXX–XXX) are equally applicable here.

3.5 Lawful correction of children

The common law enabled the lawful correction of certain classes or persons such as children, servants, the crew of ships, apprentices and, though subject to debate, wives. The lawful chastisement of wives was ruled out in *R v Jackson* [1891] 1 QB 671.

It appears that currently, parents are entitled to use reasonable and moderate force to chastise their children.[48] There is also some authority to the effect that teachers or those "in *loco parentis*" to the child may use some degree of force to correct a child as "lawful correction": *Cleary v Booth* [1893] 1 QB 465; *Mansell v Griffin* [1908] 1 KB 160. This is reflected in legislation in some jurisdictions. For example, s 257 of the *Criminal Code* (WA) states:

> It is lawful for a parent or a person in the place of a parent, or for a school master or master, to use, by way of correction, towards a child, pupil, or apprentice, under his [or her] care, such force as is reasonable under the circumstances.

Section 280 of the *Criminal Code* (Qld) is cast in similar terms.

In Tasmania and Victoria, corporal punishment in State schools has been prohibited: *Education Act 1994* (Tas), s 82A; *Education Act 1958* (Vic), reg XVI. Section 14 of the *Education and Public Instruction Act 1987* (NSW) enabled discipline codes to be formulated for State schools after consultation with parents. In 1990, the National Committee on Violence recommended in *Violence: Directions for Australia* (Canberra: Australian Institute of Criminology, 1990) that corporal punishment in all schools be illegal. See also Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997), Recommendation 50, p 217.

There is scant authority defining the scope and degree of force implied by the words "reasonable correction" as it relates to parents or teachers. In *R v Terry* [1955] VLR 114, Sholl J stated (at 116):

> [T]here are exceedingly strict limits to that right [to use reasonable force on a child]. In the first place, the punishment must be moderate and reasonable. In the second place, it must have a proper relation to the age, physique and mentality of the child, and in the third place, it must be carried out with a reasonable means or instrument.

In a Discussion Paper commissioned by the Commonwealth Department of Human Services and Health, Judy Cashmore and Nicola de Haas undertook an extensive examination of the

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48 *Crimes Act 1900* (NSW), s 61AA; *Criminal Code* (NT), s 11 (delegation of power); *Criminal Code* (Qld), s 280; *Criminal Code* (Tas), s 50; *Criminal Code* (WA), s 257; *R v Hopley* 2 F & F 202; *Smith v Byrne* (1894) QCR 252 at 253; *R v Terry* [1955] VLR 114 at 116–117.

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existing law. They concluded that the law currently does not provide a clear and consistent guide as to what behaviour is and is not acceptable and does not provide children with the protection available to other members of society: *Legal and Social Aspects of the Physical Punishment of Children* (ACT: Commonwealth of Australia, 1995).

When the Tasmanian Law Reform Institute released its Issues Paper No 3 entitled *Physical Punishment of Children* (2002), it was inundated with responses from the community: T Henning, "One Little Smack—Will You be in the Slammer?" (2003) 27 Crim LJ 293. In its Final Report, the Institute decided by a majority to recommend that the defence of reasonable chastisement be abolished: *Physical Punishment of Children*, Final Report No 4 (2003), pp 3–4. The fact that the Institute went on to provide two alternative recommendations, neither of which were unanimously approved, shows the difficulty in reaching a consensus in this area.

Rochelle Urlich has argued that the defence of lawful correction should be abolished because physical discipline is ineffective, is linked to child abuse, teaches children that violence is a legitimate means of problem solving and erodes children's rights: "Physical Discipline in the Home" [1994] 7(3) *Auckland University Law Review* 851. Similarly, Robin Grille argues that "ordinary" spanking or smacking is harmful because it tends to make children more aggressive due to role-modelling: *Parenting for a Peaceful World* (Sydney: Longueville, 2005), Ch 17.

The common law governing lawful correction was recently challenged before the European Court of Human Rights as violating Art 3 of the *European Convention on Human Rights* (ECHR). This states that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment".

The European Court in *A v United Kingdom* (Eur Court HR, 23 September 1998, *Reports of Judgments and Decisions* 1998–VI) held (at para 22, p 2699) that Art 3 imposes on the State an obligation "to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals". In that case, a nine-year-old boy was beaten repeatedly with a garden cane by his step-father with "considerable force" resulting in severe bruising. The step-father was charged and acquitted of assault and the child sought a ruling from the ECHR that the common law defence of reasonable chastisement violated Art 3. The court held, and the United Kingdom government conceded, that the notion of reasonable correction embodied in the common law exception to assault did not offer adequate protection against inhuman or degrading treatment or punishment contrary to Art 3.

Article 19(1) of the *Convention on the Rights of the Child*[49] is similar to Art 3 in that it states:

> [P]arties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

As the MCCOC noted, the Australian government has taken the view that this article does not require the prohibition of reasonable correction: *Chapter 5—Non Fatal Offences Against the*

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49 *Convention on the Rights of the Child*, opened for signature 20 November 1989, ATS 1991 No 4 (entered into force in Australia 19 January 1991).

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Person, Report (1998), p 135. Recently, in *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)* [2004] 1 SCR 76, the Supreme Court of Canada decided by a majority of six to three that s 43 of the Canadian *Criminal Code* which excludes from the offence of assault the "reasonable physical correction of children by their parents and teachers" did not violate the Canadian *Charter of Rights and Freedoms*.

The MCCOC has recommended the introduction of the following qualifications on "reasonable correction". First, that reasonable correction be lawful when conducted by a parent or another person who takes care of the child where the parent has so consented. Secondly, in relation to what constitutes reasonable correction, the MCCOC proposed (p 130) that:

> Conduct can amount to reasonable correction of a child only if it is reasonable in the circumstances for the purposes of the discipline, management or control of the child. The following conduct does not amount to reasonable correction of a child:
> (a) causing or threatening to cause harm to a child that lasts for more than a short period; or
> (b) causing harm to a child by use of a stick, belt or other object (other than an open hand).

This proposal, defining and limiting the scope of "reasonable correction", addresses the concerns raised about the defence in *A v United Kingdom*. If adopted, it would be difficult to sustain an argument that the criminal law authorised or excused inhuman or degrading treatment or punishment contrary to international human rights law. It may be that clarification of the law rather than complete abolition will be more acceptable to legislatures. Terese Henning has made the point that abolition "of the defence is probably an aspiration for a more heroic age": "One Little Smack—Will You be in the Slammer?" (2003) 27 Crim LJ 293 at 302.

In New South Wales, the defence has recently been clarified rather than abolished: see *Crimes Amendment (Child Protection—Physical Mistreatment) Act 2001* (NSW). The Act amended s 61AA(1) of the *Crimes Act 1900* (NSW), which now provides that any physical force applied by a parent of a child or a person acting for a parent of a child must be reasonable, taking into account the age, health, maturity or other characteristics of the child, the nature of the misbehaviour and other circumstances. Section 61AA(2) provides that physical force is not reasonable, unless it is trivial or negligible, if it is applied "to any part of the head or neck of the child, or to any other part of the body of the child in such a way as to be likely to cause harm to the child that lasts for more than a short period".

3.6 Consent

Consent to a common assault renders the act lawful.[50] In *Schloss v Maguire* (1897) 8 QLJ 21 the Supreme Court of Queensland commented (at 22):

> [T]he term assault of itself involves the notion of want of consent. An assault with consent is not an assault at all.

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50 *R v Donovan* [1934] 2 KB 498; *Attorney-General's Reference (No 6 of 1980)* [1981] QB 715; *R v Brown* [1993] 2 WLR 556; *Criminal Code* (NT), s 187; *Criminal Code* (Qld), s 245; *Criminal Code* (Tas), s 182; *Criminal Code* (WA), s 222.

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Consent may be express or implied.[51] The rule that an act that is part of ordinary social activity is not an assault is sometimes justified on the basis of implied consent: *Boughey v The Queen* (1986) 161 CLR 10 at 24 per Mason, Wilson and Deane JJ. Consent must be freely given and not induced by fraud, force or threats: *Criminal Code* (NT), s 187, *Criminal Code* (Qld), 245, *Criminal Code* (WA), s 222, *Criminal Code* (Tas), s 2A; *Wooley v Fitzgerald* [1969] Tas SR 65.

The situation in relation to aggravated assaults differs quite markedly from consent as it relates to common assault. There are a number of English cases setting out the general rule that a victim cannot consent to an act that has the purpose of causing, or will probably cause, him or her actual bodily harm.[52] There are no decisions in Australian common law jurisdictions that directly address this point. In *Lergesner v Carroll* (1989) 49 A Crim R 51 the Queensland Court of Criminal Appeal held that consent may in some cases be a "defence" to an assault occasioning actual bodily harm. However, consent does not appear to be relevant where the force applied amounts to grievous bodily harm or wounding.

The rationale for the English rule that consent is irrelevant where actual bodily harm occurs, lies in the notion that it is not in the public interest that a person should cause bodily harm to another for no good reason: *Attorney-General's Reference (No 6 of 1980)* [1981] QB 715 at 719.

What constitutes a "good reason" for causing consensual bodily harm includes:

- personal adornment such as tattooing, body piercing and branding;
- surgery; and
- rough "horseplay" and violent sports.

Consensual sadomasochistic sexual activities have been viewed as not providing a "good reason" for the infliction of bodily harm: *R v Brown* [1993] 2 WLR 556. This point is taken up later (p XXX) and also in Chapter 11, 1.1 'Constructing Sexual Crimes: Sexual Violence or Violent Sex'.

Personal adornment

Various cultures have sanctioned the infliction of harm upon the body in the form of such conduct as tattooing, piercing, footbinding, headmoulding or genital rearrangement: see in general A Favazza, *Bodies Under Seige* (Baltimore: John Hopkins University Press, 1992). In Western society, body piercing has increased in popularity in recent years: see I Freckelton, "Masochism, Self-mutilation and the Limits of Consent" (1994) 2(1) *Journal of Law and Medicine* 48 at 50. While tattooing and body piercing may seem to result from the quest for personal adornment, there is an argument that self-injurious behaviour may be sexual in nature. As stated by Ian Freckelton (at 51) the relationship between sadomasochistic behaviour and injurious behaviour is "difficult to define and as yet the subject of little analysis". Freckelton goes on to say (at 55):

> Because of the emphasis that Western society places on health, idealised appearance and our abhorrence of suffering, the voluntary assumption of pain has a taboo or subversive aspect for most. It should not be surprising, therefore, that this status alone should

51 *Beer v McCann* [1993] 1 Qd R 25 at 28–29 per Derrington J; *Collins v Wilcock* [1984] 1 WLR 1172 at 1177–1178 per Goff LJ; *Carroll v Lergesner* [1991] 1 Qd R 206.

52 *R v Coney* (1882) 8 QBD 534 (prize fighting); *Rex v Donovan* [1934] 2 KB 498 (caning a 17-year-old girl for sexual gratification); *Attorney General's Reference (No 6 of 1980)* [1981] QB 715; *R v Brown* [1993] 2 WLR 556.

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> provoke a sub-culture of limited and stylised self-harm, shared among the initiated and either revealed only to one another or brandished to the uninitiate as a statement of identity and "otherness".

The leading case dealing with bodily harm for "personal adornment" is that of *R v Wilson* [1996] 3 WLR 125. In that case, the accused branded his initials on his wife's buttocks with a hot knife. He was charged and convicted of assault occasioning actual bodily harm. He argued that the act was consensual. On appeal, the Court of Appeal quashed the conviction on the basis that what the accused did was on a par with tattooing which did not involve an offence. Russell LJ in delivering the judgment of the court, stated (at 128):

> For our part, we cannot detect any logical difference between what the appellant did and what he might have done in the way of tattooing. The latter activity apparently requires no state authorisation, and the appellant was as free to engage in it as anyone else. We do not think that we are entitled to assume that the method adopted by the appellant and his wife was any more dangerous or painful than tattooing.

Just where the line is to be drawn between allowing consent to personal adornment by way of tattooing, body piercing and branding and criminalising other conduct that causes bodily harm is very difficult. See generally, L Bibbings and P Alldridge, "Sexual Expression, Body Alteration and the Defence of Consent" (1993) 20(3) *Journal of Law and Society* 356; A Watkins, "Score and Pierce: Crimes of Fashion? Body Alteration and Consent to Assault" (1998) 28(2) *Victoria University of Wellington Law Review* 371. This issue is taken up further in the ensuing section on consent and sadomasochism: p XXX.

Surgery

Surgery is viewed as lawful when performed with the patient's consent despite it involving serious bodily harm.[53] Consent may be oral, written or implied: *Re T (Adult: Refusal of Treatment)* [1993] Fam 95 at 102 per Lord Donaldson MR. Valid consent requires that the patient has the capacity to consent and is capable of understanding the treatment: *Department of Health and Community Services (NT) v JWB (Marion's Case)* (1992) 175 CLR 218. Consent must be voluntary: *Re T (Adult: Refusal of Treatment)* [1992] 3 WLR 782. It must also pertain to the act performed.[54]

If a patient is unable to give consent, another person may be authorised to give consent on that person's behalf.[55] In Queensland, Tasmania and Western Australia surgical operations performed in good faith and with reasonable care and skill upon a person incapable of giving consent are lawful: *Criminal Code* (Qld), s 282; *Criminal Code* (Tas), s 51(3); *Criminal Code* (WA), s 259. In the Northern Territory, Queensland and South Australia, doctors have statutory powers to give treatment without consent in an emergency[56] and it appears that there is a common law doctrine of emergency that is applicable in other Australian jurisdictions: L Skene, *Law and Medical Practice: Rights, Duties, Claims and Defences* (2nd ed, Sydney:

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53 *Department of Health and Community Services (NT) v JWB (Marion's case)* (1992) 175 CLR 218 at 232; *Criminal Code* (NT), s 26(3); *Criminal Code* (Qld), s 282; *Criminal Code* (Tas), s 51(1); *Criminal Code* (WA), s 259.

54 *Walker v Bradley* (unrep, 15/12/1993, NSW Dist Ct Kirkham J, 1919 of 1989); *Murray v McMurchy* [1949] 2 DLR 442.

55 See B Bennett, *Law and Medicine* (Sydney: LBC, 1997), pp 21–29; L Skene, *Law and Medical Practice: Rights, Duties, Claims and Defences* (2nd ed, Sydney: LexisNexis Butt, 2004), Chs 4, 5.

56 *Emergency Medical Operations Act 1973* (NT), s 3(1); *Law Reform Act 1995* (Qld), s 16; *Consent to Medical Treatment and Palliative Care Act 1995* (SA), s 13(1).

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LexisNexis Butt, 2004), pp 93–94. An emergency situation is one where the treatment is essential to preserve the patient's life or to prevent serious permanent injury. It does not extend to treatment that is convenient. For example, in *Murray v McMurchy* [1949] 2 DLR 442 the patient was undergoing a Caesarean delivery when the doctor discovered fibroids in the patient's uterus. The doctor performed a sterilisation on the basis that the patient should not undergo another pregnancy and it was more convenient to carry out the procedure at that time. The doctor was found liable for damages (at 445) as there was "no evidence that these tumours were presently at the time of the operation dangerous to her life or health".

Treatment may also be justified in the absence of consent on the basis of a common law doctrine of necessity. This was explored in Chapter 6, p XXX.

Rough horseplay and violent sports

The courts have permitted consent to operate as a defence to bodily harm in the course of certain activities such as "rough horseplay" and violent sports. In *R v Aitken* [1992] 1 WLR 1006 the three accused and the "victim" were members of the Royal Air Force in the United Kingdom. They went to a party at the completion of their formal flying training and they consumed a "considerable quantity" of alcohol. Later that night when two officers who were wearing fire resistant flying suits fell asleep, some of the men set fire to their suits. The suits burned enough to wake the officers and they both treated this as a joke. After the party broke up, the three men followed Flying Officer Gibson, caught him, poured spirit over his suit and set fire to it. This time, the flames engulfed Gibson and he suffered extremely severe burning. The three accused were convicted at a general court-martial of inflicting grievous bodily harm. They appealed to the Courts-Martial Appeal Court which quashed the convictions.

Cazalet J who delivered the judgment of the court stated (at 1020) that the judge advocate had failed to give any direction in relation to Gibson's consent to "rough and undisciplined horseplay". Cazalet J went on to set out (at 1021) the direction that should have been given:

> It is common ground that there was no intention to cause any injury to Gibson. In those circumstances, if Gibson consented to take part in rough and undisciplined mess games involving the use of force towards those involved, no assault is proved in respect of any defendant whose participation extended only to taking part in such an activity.

It is uncertain what status this case has in Australia given the decision in *Lergesner v Carroll* (1989) 49 A Crim R 51 that implies consent will be irrelevant to a situation where grievous bodily harm is caused. The injuries suffered by Gibson would seem to fall within this category.

There is slightly more authority on the role of consent in relation to sports violence. Sports such as boxing, wrestling, football and hockey involve body contact that may lead to serious harm. The general rule is by engaging in sport, the participant accepts the inherent risks involved in that sport: *Billinghurst* [1978] Crim LR 553. For the purpose of civil law the status of professional boxing matches was considered in *Pallante v Stadiums Pty Ltd (No 1)* [1976] VR 331. McInerney J stated (at 343):

> [B]oxing is not an unlawful and criminal activity so long as, whether for reward or not, it is engaged in by a contestant as a boxing sport or contest, not from motive of personal animosity, or at all events not predominantly from that motive, but predominantly as an exercise of boxing skill and physical condition in accordance with rules and in conditions the object of which is to ensure that the infliction of bodily injury is kept within reasonable bounds, so as to preclude or reduce, so far as is practicable, the risk of either

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> contestant incurring serious bodily injury, and to ensure that victory shall be achieved in accordance with the rules by the person demonstrating the greater skill as a boxer.

In some sports such as Australian Rules Football, however, it is recognised that the rules will be breached on a regular basis and participants accept this within reasonable limits. Legoe J pointed out in *McAvaney v Quigley* (1992) 58 A Crim R 457 (at 459–460) that "opposing players will not always abide by the rules and it cannot be said that every infringement of the rules resulting in physical contact that directly results in injury can amount to a criminal act".

Similarly, in *R v Carr* (unrep, 17/10/1990, CCA NSW), the New South Wales Court of Criminal Appeal upheld the accused's conviction for assault occasioning actual bodily harm. In a particularly violent rugby league match, the accused had executed a head high swinging arm tackle that broke the victim's jaw. The court upheld the conviction on the basis that the tackle was in breach of the rules of the game and players did not consent to major breaches of the rules that led to injuries of the type sustained on the facts.[57]

There has, however, been a marked reluctance in Australia to invoke the law of assault in relation to sports violence. Most disciplinary action is brought by way of the relevant governing bodies of the sports concerned. In Canada, by contrast, where ice hockey involves a great deal of bodily contact, more than 100 criminal convictions were made for offences involving violence between players in the 1970–1985 period: D White, "Sports Violence as Criminal Assault: Development of the Doctrine by Canadian Courts" (1986) 6 *Duke Law Journal* 1030 at 1034. In Australia, however, there have only been a handful of prosecutions and of those cases reported, Paul Farrugia writes that the courts "have apparently not been concerned with applying, or formulating any form of workable test for the scope of consent on the sports field": "The Consent Defence: Sports Violence, Sadomasochism, and the Criminal Law" (1997) 8(2) *Auckland University Review* 472 at 485.

All that can be drawn from the limited case law on sports violence is that the courts will focus on "the rules of the game, the degree to which the victim actually or could have consented to the behaviour and importantly its outcome, and the varying degrees of express or implied intention in the mind of the perpetrator at the time of the incident in question": I Warren, "Violence, Sport and the Law: A Critical Discussion" in D Hemphill (ed), *All Part of the Game: Violence and Australian Sport* (Melbourne: Walla Walla Press, 1998), p 99.

Perspectives

Consent and Sadomasochism

In the course of an investigation into child pornography in England, the police discovered a number of videotapes that were originally thought to be "snuff" movies: S Edwards, "No Defence for a Sado-Masochistic Libido" (1993) 143 *New Law Journal* 406 at 406. The videotapes in fact showed a group of homosexual men engaging in sadomasochistic sex with one another. Some of the acts that were portrayed involved whipping, branding and the infliction of wounds to the genitals, including the insertion of safety pins and fish hooks into the penis, the dripping of hot wax into the urethra and the

57 See also *Watherston v Woolven* (1988) 139 LSJS 366; *R v Stanley* (unrep, 7/4/1995, CCA NSW, No 60554 of 1994); D Garnsey, "Rugby League Player Jailed for On-Field Assault" (1995) 5(2) *Australian and New Zealand Sports Law Association Newsletter* 7; *Abbott v The Queen* (unrep, 25/7/1995, CCA WA, No 98 of 1995); H Opie, "Aussie Rules Player Jailed for Behind-Play Assault" (1996) 6(2) *Australian and New Zealand Sports Law Association Newsletter* 3.

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nailing of a penis into a bench. (Details of the activities are set out in the Court of Appeal judgment in *R v Brown* [1992] 2 WLR 441.)

These activities had taken place over a period of 10 years at a number of different locations, including rooms equipped as torture chambers. The activities were videotaped and the tapes then copied and distributed amongst members of the group.

The men involved were charged with a number of offences including charges of assault occasioning actual bodily harm. The men argued that they had committed no crimes as all the activities were consensual. They said there was no permanent injury, and that there was no infection of the wounds, and they used a code word to halt the infliction of pain if necessary.

After a ruling by the trial judge that they could not rely on consent as an answer to the prosecution case, the men changed their pleas of not guilty to guilty. On 19 December 1990, the men were sentenced. Some of the men were given terms of imprisonment, one receiving a prison sentence of four and a half years. Six of the men appealed to the Court of Appeal. That court reduced the sentences but upheld the convictions: *R v Brown* [1992] 2 WLR 441.

In a joint judgment delivered by Lord Lane CJ, the judges followed *Attorney-General's Reference (No 6 of 1980)* [1981] QB 715 in which the court stated (at 719):

> [I]t is not in the public interest that people should try to cause, or should cause, each other actual bodily harm for no good reason.

The Court of Appeal stated in *Brown's* case (at 449) that:

> [W]e agree with the trial judge that the satisfying of sadomasochistic libido does not come within the category of good reason nor can the injuries be described as merely transient or trifling.

Five of the men then appealed to the House of Lords. A majority of three judges to two dismissed their appeal: *R v Brown* [1993] 2 WLR 556. The judges in the majority stressed that consent could not be a defence to a charge of assault occasioning actual bodily harm unless the circumstances fell within pre-existing categories of exceptions such as sporting contests or reasonable surgery. The words used by the majority judges display a degree of moral censure. For example, Lord Templeman stated (at 566):

> 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.

Similarly, Lord Lowry (at 583) referred to the men suffering injury in order to:

> satisfy a perverted and depraved sexual desire. Sadomasochistic homosexual activity cannot be regarded as conducive to the enhancement or enjoyment of family life or conducive to the welfare of society.

These views echo the position of the distinguished English judge, Lord Patrick Devlin who in the 1960s argued that certain kinds of conduct ought to be prohibited and punished by the law simply because they are immoral according to the norms of a given society: P Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1965). See further, Ch 1, 3.2 'Morality'. He argued that certain types of consensual conduct such as homosexual acts should be criminalised in order to preserve society, its essential institutions and what he termed as its "positive morality" from disintegration.

The opposing view was taken up by Herbert Hart, who, following the tradition of John Stuart Mill, argued that conduct should only be criminalised if it caused harm to others: *Law, Liberty and Morality* (Oxford: Oxford University Press, 1963). What people did with consent in private was their business and not that of the criminal law.

This view was followed by the dissenting judges in *Brown's* case. Lord Mustill, in particular, stated (at 599) that questions dealing with morally acceptable behaviour "are questions of private morality: the standards upon which they fall to be judged are not those of the criminal law".

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Three of the accused in *Brown* then took the matter to the European Court of Human Rights, arguing that the British justice system had violated their human rights, in particular, their right to privacy: *Laskey, Jaggard and Brown v United Kingdom* (Eur Court HR, 19 February 1997, *Reports of Judgments and Decisions* 1997–I), 120. A unanimous nine-judge decision of the European Court held that it found no basis for allegations that the British courts were biased against homosexual men and that it had been necessary to delve into the men's private lives "for the protection of health".

Should the acts done by the men in *Brown's* case be punishable by the criminal law? A positive answer could be justified by recourse to Lord Devlin's moralistic approach. A negative answer could be based on Professor Hart's liberal approach. Interestingly, the European Court of Human Rights' approach seems to fall somewhere in between, in that it could be argued that such conduct should be criminalised because, even though consensual, it is likely to cause harm to health.

Brown's case was widely reported in the media and has been subject to a great deal of academic debate.[58] From a doctrinal perspective, the decision was criticised as representing a concealed shift in the approach to consent in the criminal law. For example, Nicola Padfield suggested that *Brown* represented a fundamental shift in philosophy:

> In the past, consent had been seen as a defence in all but a few cases where the judiciary specifically ruled that it could not apply. Now the courts seem to be saying that consent can only be used in those few circumstances defined by the judiciary.[59]

Brown's case also provided a focus for renewed discussion in England and Australia on the limits of consent in the criminal law, producing analyses of sadomasochism from various perspectives including liberalism, feminism, critical theory and human rights.[60]

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58 See for example, PJ Farrugia, "The Consent Defence: Sports Violence, Sadomasochism and the Criminal Law" (1997) 8(2) *Auckland University Law Review* 472; P Roberts, "Consent to Injury: How Far Can You Go?" (1997) 113 *Law Quarterly Review* 27; S Bronitt, "The Right to Sexual Privacy, Sadomasochism and the *Human Rights (Sexual Conduct) Act 1994* (Cth)" (1995) 21(2) *Australian Journal of Human Rights* 59; Law Commission Consultation Paper No 139, *Consent in the Criminal Law* (December 1995); I Freckelton, "Masochism, Self-mutilation and the Limits of Consent" (1994) 2(1) *Journal of Law and Medicine* 48; M Giles, "*R v Brown*: Consensual Harm and the Public Interest" (1994) 57 *Modern Law Review* 101; N Bamforth, "Sado-masochism and Consent" [1994] Crim LR 661; D Kell, "Social Disutility and the Law of Consent" (1994) 14 *Oxford Journal of Legal Studies* 121; D Kell, "Bodily Harm in the Court of Appeal" (1993) 109 *Law Quarterly Review* 199.

59 N Padfield, "Consent and the Public Interest" [1992] *New Law Journal* 430 at 430. For a similar argument made in the context of the *Criminal Code* (Qld), see D Kell, "Consent to Harmful Assaults Under the Queensland *Criminal Code*: Time for a Reappraisal?" (1994) 68 *Australian Law Journal* 363.

60 For an analysis drawing on medico-legal perspectives and liberal theory, see I Freckelton, "Sado-masochism, Repeated Self-mutilation and Consent" (1994) 2 *Journal of Law and Medicine* 48. For a feminist analysis, see S Edwards, *Sex and Gender in the Legal Process* (London: Blackstone Press, 1996), pp 77–89; S Jeffreys, "Consent and the Politics of Sexuality" (1993) 5(2) *Current Issues in Criminal Justice* 173 and C Smart, *Law, Crime and Sexuality* (London: Sage, 1995), pp 110–123. For a discourse analysis drawing on critical theory, see C Stychin, "Unmanly Diversions: The Construction of the Homosexual Body (Politic) in English Law" (1994) 32 *Osgoode Hall Law Journal* 503; S Chandra-Shekeran, "Theorising the Limits of the 'Sado-masochistic homosexual' identity in *R v Brown*" [1997] 21 *Melbourne University Law Review* 584. For a human rights analysis, see S Bronitt, "The Right to Sexual Privacy, Sado-masochism and the *Human Rights (Sexual Conduct) Act 1994* (Cth)" (1995) 2(1) *Australian Journal of Human Rights* 59. Other discussions of the case can be found in P Farrugia, "The Consent Defence: Sports Violence, Sadomasochism and the Criminal Law" (1997) 8(2) *Auckland University Law Review* 472; P Roberts, "Consent to Injury: How Far Can You Go?" (1997) 113 *Law Quarterly Review* 27; Law Commission *Consent in the Criminal Law*, Consultation Paper No 139 (December 1995); M Giles, "*R v Brown*: Consensual Harm and the Public Interest" (1994) 57 *Modern Law Review* 101; N Bamforth, "Sado-masochism and Consent" [1994] Crim LR 661; D Kell, "Social Disutility and the Law of Consent" (1994) 14 *Oxford Journal of Legal Studies* 121; D Kell, "Bodily Harm in the Court of Appeal" (1993) 109 *Law Quarterly Review* 199.

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A similar approach to the majority view in *Brown's* case was expressed by the Ontario Court of Appeal in *R v Welch* (1996) 101 CCC (3d) 216. In the course of consensual sadomasochistic activity, the "victim" suffered "obvious and extensive bruising" and (possible) injury to the rectum. The court affirmed (at 239) that the trial judge had been correct in withdrawing the issue of consent from the jury on the following basis:

> Although the law must recognise individual freedom and autonomy, when the activity in question involves pursuing sexual gratification by deliberately inflicting pain upon another that gives rise to bodily harm, then the personal interest of the individuals involved must yield to the more compelling societal interests which are challenged by such behaviour.

A subsequent decision of the English Court of Appeal, *R v Emmett* (unrep, 18/6/1999, CA Rose LJ, Wright and Kay JJ, No 9901191/Z2) has confirmed the principle arising from *Brown's* case and refused to draw a distinction between sadomasochistic activity on a heterosexual basis and that which is conducted in a homosexual context. In *Emmett's* case, the accused was living with the "victim" at the time of the alleged assaults and they afterwards married. The evidence of injuries came from a doctor whom the victim had consulted. The victim herself did not give evidence at the trial. The accused was charged with five offences of assault occasioning actual bodily harm, but this was dropped to two at the trial. Emmett was convicted of assault occasioning actual bodily harm on one count and in the light of the judge's direction, the accused pleaded guilty to a further count of assault occasioning actual bodily harm. He was sentenced to nine months' imprisonment on each count consecutive, the sentence being suspended for two years.

The first incident that gave rise to the conviction concerned a process of partial asphyxiation through a plastic bag being tightly tied around the victim's neck during the course of the accused engaging in oral sex with her. The victim lost consciousness due to loss of oxygen. The following day her eyes became progressively bloodshot and when she went to her doctor, he found subconjunctival haemorrhages in both eyes due to the lack of oxygen and bruising around the neck due to the tight ligature holding the plastic bag in place. No treatment was given and after about a week, the bloodshot eyes returned to normal.

The second incident occurred a few weeks later when during sexual activity, the accused poured lighter fuel on the victim's breasts and set light to it. The accused said the victim had panicked and would not keep still, so he could not extinguish the flames immediately. She suffered a 6 cm x 4 cm third degree burn that became infected. The doctor initially thought it might need a skin graft but the burn eventually healed over without scarring.

The accused appealed against conviction upon a certificate granted by the trial judge setting out the following question for the court's determination:

> Where two adult persons consent to participate in sexual activity in private not intended to cause any physical injury but which does in fact cause or risk actual bodily harm, the potential for such harm being foreseen by both parties, does consent to such activity constitute a defence to an allegation of assault occasioning actual bodily harm contrary to s 47 of the *Offences Against the Person Act 1861*.

The Court of Appeal held that consent could not amount to a defence in such circumstances. The accused relied upon *R v Wilson* [1996] 3 WLR 125 in which Russell LJ observed that consensual activity between husband and wife, in the privacy of the matrimonial home, is not a proper matter for criminal investigation or prosecution. However, the Court of Appeal in *R v Emmet* drew a distinction (at 4) between the type of harm in *Wilson* (branding for personal adornment) and the actual or potential damage suffered by the victim during the course of sexual activity on the facts:

> The lady suffered a serious, and what must have been, an excruciating painful burn which became infected, and the appellant himself recognised that it required medical attention. As to the process of partial asphyxiation, to which she was subjected on the earlier occasion, while it may … now be

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> fairly known that the restriction of oxygen to the brain is capable of heightening sexual sensation, it is also, or should be, equally well-known that such a practice contains within itself a grave danger of brain damage or even death.

The Court of Appeal found that the facts of *Emmett* were similar to that in *Brown,* observing (at 3) that there was "no reason in principle … to draw any distinction between sadomasochistic activity on a heterosexual basis and that which is conducted in a homosexual context". The court concluded by agreeing with the trial judge's comments (at 4):

> In this case, the degree of actual and potential harm was such and also the degree of unpredictability as to injury was such as to make it a proper cause for the criminal law to intervene. This was not tattooing, it was not something which absented pain or dangerousness and the agreed medical evidence is in each case, certainly on the first occasion, there was a very considerable degree of danger to life; on the second, there was a degree of injury to the body.

It is unclear whether these English decisions will be followed in Australia, although there is some slight indication that they may be. In *R v McIntosh* [1999] VSC 358 the accused pleaded guilty to manslaughter. His sexual partner died during bondage sex after the accused deliberately pulled on the rope around the deceased's neck on the theory that near asphyxia can heighten sexual pleasure. There was no evidence that the deceased had not consented to the rope being placed around his neck and there was evidence that the accused and the deceased had periodically engaged in bondage type sex. In the course of sentencing the accused to five years imprisonment, Vincent J remarked (at 4–5) in relation to whether the activity was unlawful for the purpose of unlawful and dangerous act manslaughter:

> [I]t is not, of itself, and I repeat that expression, of itself, in the case of consenting adult persons, contrary to the law of this jurisdiction to engage in activities that could be described as bondage or sexual sadomasochism … In my opinion, if the sadomasochistic activity or bondage activity to which a victim consents involves the infliction of any such injury or the reckless acceptance of the risk that it will occur, then the consent of the victim will not be recognized.

Here, Vincent J appears, like the Court of Appeal in *Emmett's* case, to focus on the degree of harm involved in order to provide a threshold for consent to sadomasochistic activities. The regulation of sadomasochistic activities is particularly difficult because such activities combine sex with violence and therefore raise issues for the law relating to sexual offences as well as assault. Susan Edwards in "No Defence for Sado-masochistic Libido" (1994) *New Law Journal* 406, for example, has stated:

> In our desire to preserve privacy, individual liberty, and freedom from state intervention we are in danger of missing what lies at the heart of sado-masochism—its potential for violence. Why is it that for some the prefix "sex" functions as a protective shield? We need to recognise, as we move increasingly into a world of sexual violence, the dangers of placing this so-called "sex" beyond the rule of law.

The physical expression of sexuality takes many different forms, and this may include sadomasochistic violence.[61] The malleability of the distinction between "sex" and "violence", and its scope for legal inversion, is explored in Chapter 11, pp XXX–XXX.

The present law may offer some degree of protection by setting limits on the *degree of harm* to which a person can validly consent. An alternative framework for developing safeguards for those engaging in sadomasochistic activities may lie in the concept of consent rather than the degree of harm: N Athanassoulis, "The Role of Consent in Sado-Masochistic Practices" (2002) 8 *Res Publica* 141; *cf*

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61 For a discussion of activities concerning the causing of pain to enhance sexual pleasure, see the Law Commission, *Consent in the Criminal Law*, Consultation Paper No 139 (London: HMSO, 1995), pp 133ff.

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P Markwick, "Harming Consent" (2002) 8 *Res Publica* 157. The law relating to consent for common assault at present offers little (if any) protection to those individuals who are especially vulnerable because of youth, inexperience or dependency. The general position is that provided the person is sufficiently mature to understand the nature of the relevant act or risk, consent operates as a complete defence. By contrast, recent reforms to the law governing consent to sexual intercourse offers greater protection to vulnerable parties. In Chapter 11, we explore how free agreement to sexual intercourse may be negated by, for example, intoxication, the abuse of authority, threats or mental incapacity. In the context of offences against the person, similar rules should be developed to ensure that the consent of the parties is given freely, without constraint. This could involve the adoption of a positive consent standard for sadomasochistic activities that involve the risk of bodily harm to the participants: S Bronitt, "The Right to Sexual Privacy, Sado-Masochism and the *Human Rights (Sexual Conduct) Act 1994* (Cth)" (1995) 2(1) *Australian Journal of Human Rights* 59 at 72.

4. Threats

We have outlined how assault by the threat of force involves any act committed intentionally or recklessly which puts another person in fear of immediate and unlawful personal violence. Threats independently of assault may also give rise to a criminal offence.

The most serious of the threat offences that exist in all jurisdictions are threats to kill and threats to cause harm or injury. In New South Wales, Queensland and Tasmania, a threat to kill must be put in writing.[62] In the other jurisdictions, the threat can be by words or conduct.[63] For example, s 19(3) of the *Criminal Law Consolidation Act 1935* (SA) states that a threat may be "directly or indirectly communicated by words (written or spoken) or by conduct, or partially by words and partially by conduct".

All jurisdictions apart from Queensland require an intention to cause the victim's fear that the threat will be carried out. In Queensland, it is enough that there is proof that the accused knew of the contents of any writing threatening to kill another. Some jurisdictions also contain recklessness as a fault element: *Crimes Act 1900* (ACT), s 30; *Criminal Law Consolidation Act 1935* (SA), s 19; *Crimes Act 1958* (Vic), s 20.

The Australian Capital Territory and the Northern Territory also impose an additional reasonable person test. Section 30 of the *Crimes Act 1900* (ACT) states that the circumstances must be such that a reasonable person would fear that the threat would be carried out. Similarly, under s 166 of the *Criminal Code* (NT), the threat must be of such a nature as to cause fear to any person of reasonable firmness and courage. It is a defence in that Territory that the making of the threat was reasonable by the standards of an ordinary person in similar circumstances to the accused: s 166.

It is also an offence in all jurisdictions to threaten harm or injury to another.[64] How that harm or injury is constituted varies between jurisdictions. In the Australian Capital Territory, the term is "grievous bodily harm" and in New South Wales, "bodily harm". In the Northern Territory and Queensland, it is "any injury" or "any detriment" and in Victoria, "serious

62 *Crimes Act 1900* (NSW), s 31; *Criminal Code* (Qld), s 308; *Criminal Code* (Tas), s 162.

63 *Crimes Act 1900* (ACT), s 30; *Criminal Code* (NT), s 166; *Criminal Law Consolidation Act 1935* (SA), s 19; *Crimes Act 1958* (Vic), s 20; *Criminal Code* (WA), s 338.

64 *Crimes Act 1900* (ACT), s 31; *Crimes Act 1900* (NSW), s 31; *Criminal Code* (NT), s 200; *Criminal Code* (Qld), s 359; *Criminal Law Consolidation Act 1935* (SA), s 19; *Criminal Code* (Tas), s 182; *Crimes Act 1958* (Vic), s 21; *Criminal Code* (WA), ss 338, 338B.