



Queensland Sentencing  
Advisory Council

# The impact of domestic violence as an aggravating factor on sentencing outcomes

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## AIM

To explore whether there is a difference in sentencing outcomes for cases involving charges of common assault or assault occasioning bodily harm (AOBH) sentenced as domestic violence offences compared to cases that are not.

## METHOD

Cases sentenced in Queensland's criminal courts between 5 May 2016 to 30 June 2019 involving adult offenders where the most serious offence of either common assault (*Criminal Code*, s 335) or AOBH (*Criminal Code*, s 339) were examined. The type of penalty imposed and the length of custodial penalties were analysed to determine if there was a difference in sentencing outcomes for offences sentenced as domestic violence offences in the *Penalties and Sentences Act 1992* (Qld) ('PSA') compared to cases in which the offence was not a domestic violence offence.

## RESULTS

Custodial penalties were more commonly imposed for domestic violence offences than for non-domestic violence offences, although there was some variation in the types of custodial orders made for different offence types and by court level.

Cases involving domestic violence offences were more likely to result in a custodial penalty compared to non-domestic violence cases. This finding was statistically significant for cases involving common assault and AOBH (non-aggravated and aggravated) in the Magistrates Courts. For cases heard in the higher courts, the statistically significant findings were observed only for cases involving non-aggravated AOBH.

On average, courts imposed longer custodial sentences on domestic violence offences compared to non-domestic violence offences – however, this was not the case for common assault domestic violence offences sentenced in the higher courts.

## CONCLUSION

These findings indicate that courts are treating domestic violence offences as more serious offending, warranting the greater use of custodial penalties and longer custodial sentences. This suggests that the sentencing reforms introduced in 2016 may be having their desired impact on sentencing outcomes. However, further research is needed to determine if this is due to the introduction of the new aggravating factor under section 9(10A) of the PSA, or reflects court sentencing practices prior to the introduction of these reforms when the separate identification and recording of offences as domestic violence offences for reporting purposes was not possible.

## INTRODUCTION

The purpose of this *Research Brief* is to answer the following question:

Is there a difference in sentencing outcomes (penalty types and penalty lengths) for cases of common assault and AOBH (simpliciter and aggravated) that are domestic violence offences triggering the application of the section 9(10A) PSA aggravating factor ('with DV') compared to cases that did not?

Domestic and family violence is a pervasive social harm that affects the lives of many Queenslanders. Over the past decade, significant reforms have been introduced in Queensland and in other Australian jurisdictions to improve responses to domestic and family violence.

An important part of the justice system's response to domestic violence is the sentencing, and management under sentence, of domestic and family violence offenders. Since 1997, significant legislative reforms have been introduced in Queensland to guide courts in the sentencing of violent offences and to strengthen responses to domestic violence.

The following sections provide an overview of these reforms.

A more detailed explanation of key concepts used in this paper can be found in **Appendix 1**.

### A brief history of changes in sentencing legislation for violent offences

In 1997, several amendments were made to section 9 of the *Penalties and Sentences Act 1992* (Qld) ('PSA') that impacted the sentencing of violent offences, including domestic violence offences.

First, for offences involving the use of, or attempted use of violence against another person, or that resulted in physical harm to another person, two general sentencing principles no longer apply.<sup>1</sup> Those principles are that imprisonment must generally only be imposed as a last resort, and a sentence allowing an offender to stay in the community is preferable.

Secondly, a list of 11 special factors the court must have primary regard to in such cases was inserted (section 9(3)).<sup>2</sup> While some of these factors reflect the general principles that apply to the sentencing of all offenders (these are set out in section 9(2)),<sup>3</sup> others are unique to section 9(3).<sup>4</sup> They relate to the risk of physical harm to any members of the community, the need to protect them, the nature and extent of the violence used or intended, and any disregard for public safety. The Court of Appeal has noted that section 9(3) requires a judge to place at 'the forefront of the sentencing process the question whether the risk to the public and to the victim, as well as the circumstances of the victim, point to the need for prison'.<sup>5</sup>

Lastly, an amendment was made to one of the purposes of sentencing. In section 9(1)(d) the expression 'does not approve of' the offending conduct was replaced with the stronger term of 'denounces'. The purpose of those enactments was 'the Parliament's judgment that the community expected that crimes of violence were to be punished more severely by the courts than they had been until then'.<sup>6</sup> Following these amendments to the PSA, the Court of Appeal observed that 'the dominant consideration is now...the protection of the community from any risk of further offences of violence being committed by that offender'.<sup>7</sup>

<sup>1</sup> *Penalties and Sentences Act 1992* (Qld) ss 9(2)(a) (the principles) and 9(2A) (stating the exception). Section 9(2A) was inserted by *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld) s 6(3). The behaviour captured under s 9(2A)(a) is: the use of, or counselling or procuring the use of, or attempting or conspiring to use, violence against another person.

<sup>2</sup> Inserted by *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld) s 6(3).

<sup>3</sup> These are sections 9(3)(d), 9(3)(g), 9(3)(h), 9(3)(i) and 9(3)(j): *R v Oliver* [2019] 3 Qd R 221, 226 [25] (Sofronoff P, Fraser and Philippides JJA agreeing).

<sup>4</sup> These are sections 9(3)(a), 9(3)(b), 9(3)(e), 9(3)(f) and 9(3)(k): *R v Oliver* [2019] 3 Qd R 221, 226 [25] (Sofronoff P, Fraser and Philippides JJA agreeing).

<sup>5</sup> *R v Oliver* [2019] 3 Qd R 221, 227 [26] – [28] (Sofronoff P, Fraser and Philippides JJA agreeing).

<sup>6</sup> *R v O'Sullivan; Ex parte A-G (Qld)* [2019] QCA 300, 21 [75] (Sofronoff P, Gotterson JA and Lyons SJA).

<sup>7</sup> *R v Lovell* [1999] 2 Qd R 79, 83 (Byrne J, Davies JA agreeing and Pincus JA generally agreeing). This passage was cited with approval in *R v Dullroy; Ex parte A-G (Qld)* [2005] QCA 219, 10 [33] (White J, McMurdo J agreeing).

## Domestic and family violence sentencing reforms

In 2012, the *Domestic and Family Violence Act 1989* (Qld) was repealed and replaced by the *Domestic and Family Violence Protection Act 2012* (Qld) ('DFVPA'). The new Act expanded the meaning of 'domestic violence' to include a wider range of actions.

More significant reforms were implemented as a result of the *Not Now, Not Ever* report of the Special Taskforce on Domestic and Family Violence.<sup>8</sup> The 2015 report made 140 recommendations to address domestic and family violence in Queensland, including the introduction of a circumstance of aggravation of domestic and family violence to be applied to all criminal offences.<sup>9</sup>

On 5 May 2016, section 9(10A) of the PSA came into effect.<sup>10</sup> This requires courts to treat domestic violence as an aggravating factor when sentencing an offender convicted of a domestic violence offence unless the court considers it is not reasonable because of the exceptional circumstances of the case. When introducing these reforms, the expectation was it would 'increase the culpability of an offender', leading to offenders receiving 'a higher sentence within the existing sentencing range up to the maximum penalty' for these offences.<sup>11</sup> The introduction of these changes was justified on the basis it would protect vulnerable community members, denounce relevant offending and 'provide adequate deterrence to perpetrators of this type of offending'.<sup>12</sup>

For a court to apply the section 9(10A) aggravating factor, the offence must be a 'domestic violence

offence'. That is, one where the act or omission that forms the offence is also domestic violence, associated domestic violence, or the contravention of a domestic violence order<sup>13</sup>. It can be an offence against any Queensland Act, with the exception of one under the DFVPA given that under the DFVPA, offences can only be charged where these occur in the context of alleged domestic violence thereby rendering the treatment of this as an aggravating factor of no practical effect.<sup>14</sup>

In this context, an offence involves 'domestic violence' if, first, the offender shares a relevant relationship (intimate personal, family or informal care)<sup>15</sup> with the victim. Second, if that relationship is abusive (physically, sexually, emotionally, psychologically or economically), threatening, coercive, or must control or dominate the second person in another way and cause them to fear for their safety or wellbeing (or someone else's).<sup>16</sup> This means that any Queensland criminal offence (apart from those in the DFVPA or the offence of choking, suffocation or strangulation in a domestic setting under section 315A of the *Criminal Code*)<sup>17</sup> can attract the aggravating factor, depending on the facts of the individual case.

The Court of Appeal has noted that section 9(10A) is likely to have an effect on sentencing for domestic violence offences over time.<sup>18</sup> For instance, general deterrence may now be a more significant factor.<sup>19</sup> However, 'the effect in any particular case will depend on the balancing of all

<sup>8</sup> Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an end to domestic and family violence in Queensland* (2015).

<sup>9</sup> Ibid Recommendation 118.

<sup>10</sup> Inserted by the *Criminal Law (Domestic Violence) Amendment Act 2016* (Qld) s 5, which came into effect on the date of assent (5 May 2016).

<sup>11</sup> Explanatory Notes, Criminal Law (Domestic Violence) Amendment Bill (No.2) 2015 (Qld) 2.

<sup>12</sup> Ibid 3. Note the Court of Appeal's analysis of this, discussed below in *R v Hutchinson* [2018] 3 Qd R 505, 515 [41] (Mullins J, Fraser and Morrison JJA agreeing).

<sup>13</sup> For a definition of 'domestic violence' and 'associated domestic violence' – see Appendix 1.

<sup>14</sup> The *Penalties and Sentences Act 1992* (Qld) s 4 definition of 'domestic violence offence' refers back to the *Criminal Code Act 1899* (Qld) sch 1 ('Criminal Code') s 1. That definition of a 'domestic violence offence' took effect from 22 October 2015. It was inserted into the Code by the *Criminal Law (Domestic Violence) Amendment Act 2015* (Qld) s 3.

<sup>15</sup> *Domestic and Family Violence Protection Act 2012* (Qld) s 13.

<sup>16</sup> Ibid s 8(1).

<sup>17</sup> As to the fact section 9(10A) does not apply to the offence of choking, suffocation or strangulation in a domestic setting under section 315A, see *R v MCW* [2019] 2 Qd R 344, 352–3 [35] (Mullins J, Philippides JA and Boddice J agreeing).

<sup>18</sup> *R v Hutchinson* [2018] 3 Qd R 505, 515 [40] (Mullins J, Fraser and Morrison JJA agreeing), following *R v Pham* (2009) 197 A Crim R 246, 247–8 [5]–[7] (Keane JA).

<sup>19</sup> *R v Castel* [2020] QCA 91, 9 [37] (Mullins JA, Sofronoff P agreeing): 'the enactment of s 9(10A) ... necessarily makes general deterrence now a more significant factor for sentencing for the killing of a domestic partner'.

the relevant factors related to that offending and offender'.<sup>20</sup>

The Court of Appeal has also confirmed that this provision is a procedural, rather than a substantive, provision.<sup>21</sup> This means it is not subject to a presumption against retrospective operation – it applies 'to all sentencing from its commencement, whether or not the offending was committed before or after the commencement'.<sup>22</sup>

### Review of section 9(10A)

The research presented in this paper formed part of the Council's work on penalties for assaults on public officers in response to Terms of Reference

issued to the Council by the Attorney-General. In its final report,<sup>23</sup> the Council analysed the effect of the section 9(10A) aggravating factor by Queensland Courts when sentencing offenders for common assault and assault occasioning bodily harm (AOBH) from 5 May 2016 to 30 June 2019. The purpose of this analysis was to explore the impact of aggravating sentencing factors on sentencing outcomes as an alternative to the introduction of circumstances of aggravation. This paper presents and discusses those findings in greater detail.

For more information on the differences between aggravating factors and circumstances of aggravation, see **Appendix 1**.

## METHOD

The data used for this analysis was the Courts Database as maintained by the Queensland Government Statistician's Office (QGSO), Queensland Treasury. The Courts Database comprises data collected by the Department of Justice and Attorney-General (DJAG) from the administrative information systems used by Queensland's criminal courts. The analysis contained within this report was conducted using data extracted from the Courts Database in November 2019.<sup>24</sup>

An explanation of key data concepts referred to in this section and the following sections of this paper is contained in a separate technical paper available on the Council's website. Bivariate analysis was used to determine whether the presence of domestic violence affected the proportion of cases

that resulted in a custodial penalty. Bivariate analysis was also used to determine whether the presence of domestic violence affected the length of custodial penalties.

This research examined cases in which common assault or AOBH (both simpliciter and aggravated forms) were sentenced as the most serious offence (MSO) in the Queensland Magistrates and higher courts over the period 5 May 2016<sup>25</sup> to 30 June 2019. The MSO is defined as the offence that received the most serious sentence, as ranked by the classification scheme used by the ABS.<sup>26</sup> Domestic violence offences were identified by those flagged as being a domestic violence offence in the Courts Database.<sup>27</sup> During the reference period, 15,800 cases sentenced involved a charge either of common assault or

<sup>20</sup> *R v Hutchinson* [2018] 3 Qd R 505, 515 [40] (Mullins J, Fraser and Morrison JJA agreeing), following *R v Pham* (2009) 197 A Crim R 246, 24–8 [5]–[7] (Keane JA). See also *R v Castel* [2020] QCA 91, 8 [35] (Mullins JA, Sofronoff P agreeing).

<sup>21</sup> As to the difference between procedural and substantive provisions, the Court of Appeal had earlier stated that 'procedural law is the body of rules setting out the manner, form and order in which matters may be dealt with and enforced in a court. It includes the formal steps in an action including pleadings, process, evidence and practice. On the other hand, substantive law creates, defines and regulates people's rights, duties, powers and liabilities, and contains the actual rules and principles administered by courts, both under statute law and common law': *R v Carlton* [2010] 2 Qd R 340, 350 [35] (McMurdo P, dissenting as to the result).

<sup>22</sup> *R v Hutchinson* [2018] 3 Qd R 505, 516 [44] (Mullins J, Fraser and Morrison JJA agreeing). The unsuccessful argument against this was based on the presence of the words 'must' and 'aggravating': 511 [24].

<sup>23</sup> Queensland Sentencing Advisory Council, *Penalties for Assaults on Public Officers* (Final Report, August 2020).

<sup>24</sup> The Courts Database is continually updated as more information is entered into the administrative systems. The information presented in this report may vary from data published elsewhere due to differences in the dates data were extracted.

<sup>25</sup> The date that the DV aggravating factor provision commenced operation. See n 10 for more information.

<sup>26</sup> See *Criminal Courts, Australia, 2018-19*, Appendix 3, *Sentence Type Classification*, Australian Bureau of Statistics (ABS).

<sup>27</sup> This is now possible with the operation of section 12A of the *Penalties and Sentences Act 1992* (Qld) that allows for a charge for an offence of which the offender is convicted to be recorded as being a conviction for a DV offence, or if no conviction is recorded, entered in the offender's criminal history as a DV offence. This provision was inserted into the *Penalties and Sentences Act 1992* (Qld) by section 18 of the *Criminal Law (Domestic Violence) Amendment Act 2015* (Qld) and came into effect by operation of section 1A of that Act on 1 December 2015.

AOBH (MSO), of which 4,611 were domestic violence offences. All cases involved adults aged 18 years or over.

A 'case' is the collection of offences for a single offender that are finalised on the same day at the same court level and court location. Where there are multiple offenders dealt with jointly during a court event, the event is recorded as separate cases. A single offender may appear in multiple cases over the reporting period.

This paper uses the term 'domestic violence' (DV) when presenting and discussing the data. This is because section 9(10A) expressly refers to domestic violence, rather than domestic and family violence.

### Limitations

The data presented in this report is a simplified representation of Queensland's complex criminal justice system and is subject to a range of limitations. Caution therefore should be used when interpreting this information. For instance, data is derived from an administrative system that is designed for operational, rather than research purposes. The accuracy of information presented in this *Research Brief* reflects how administrative information is structured, entered, maintained and extracted from administrative systems.

This analysis does not assess whether sentencing courts were already sentencing assaults that involved domestic violence to higher sentences prior to the introduction of section 9(10A). The relatively short period of time since the amendment was made affects both the usefulness and breadth of available data and the development of judicial consideration of the aggravating factor.

There is a large number of factors the courts may consider when sentencing an offender. It is impossible to measure and control for them all. This means not all relevant variables were examined (e.g. criminal history, Aboriginal and Torres Strait Islander status, age of the victim) due to the limitations of the data available from the Courts Database. Outcomes by plea status (i.e. whether the person pleaded guilty or was found guilty following trial) were also not included in the analysis due to the large number of unknown pleas.

It was also not possible to identify (and therefore exclude from the analysis) those DV cases to which the aggravating factor was not applied as a result of the court finding there were exceptional circumstances. For more detail about what constitutes an offence of common assault or AOBH, see **Appendix 1**.

## RESULTS

### Sentencing outcomes for DV offences vs non-DV offences

Bivariate analysis was used to compare whether there was a difference in the percentage of custodial penalties issued for offences that were DV offences, compared to offences that were not.

Table 1 shows the percentage of cases that resulted in a custodial penalty depending on whether the offence was a DV offence, the type of offence, and the level of court. The p-values displayed in this table represent the outcomes of the Pearson's Chi-square test for bivariate significance.

In the Magistrates Courts, for every type of offence analysed, cases that involved DV offences were

more likely to result in a custodial penalty. This relationship was found to be statistically significant.

In the higher courts, cases involving non-aggravated AOBH were more likely to result in custodial penalties in circumstances where the offence was also a DV offence. For the offences of common assault and aggravated AOBH, although there was a higher percentage of custodial penalties for DV offences than for non-DV offences, this finding was not statistically significant.



**Table 1: Proportion of cases that resulted in a custodial penalty, by type of offence, level of court and whether the offence was a domestic violence offence**

Offence / Outcome	No DV	With DV	p-value	
Common assault				
Magistrates Courts				
Custodial penalties (n=1,504)	18.2%	35.7%	< 0.0001	*
Non-custodial penalties (n=5,235)	81.8%	64.3%		
Higher courts				
Custodial penalties (n=95)	36.2%	49.0%	0.518	
Non-custodial penalties (n=133)	63.8%	51.0%		
Assault occasioning bodily harm (non-aggravated)				
Magistrates Courts				
Custodial penalties (n=3,089)	43.6%	68.3%	< 0.0001	*
Non-custodial penalties (n=2,866)	56.4%	31.7%		
Higher courts				
Custodial penalties (n=545)	72.4%	86.7%	< 0.0001	*
Non-custodial penalties (n=132)	27.6%	13.3%		
Assault occasioning bodily harm (aggravated)				
Magistrates Courts				
Custodial penalties (n=1,031)	60.9%	80.7%	< 0.0001	*
Non-custodial penalties (n=526)	39.1%	19.3%		
Higher courts				
Custodial penalties (n=441)	80.0%	84.1%	0.299	
Non-custodial penalties (n=103)	20.0%	15.9%		

\* statistically significant relationship between the presence of DV and whether a custodial penalty was imposed with a confidence level of 0.05.

Data include adult offenders, MSO, cases sentenced between 5 May 2016 and 30 June 2019.

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

Table 2 drills down into the specific sentencing orders that were made for cases with and without DV. It shows that, across all courts, and for each offence analysed, imprisonment was much more common for cases that involved DV. There was a smaller difference in the use of wholly suspended sentences between the two types of offences.

For offences of common assault, the most common penalty for cases that did not involve a DV offence was a monetary order (40.4% of cases in the Magistrates Courts, and 23.1% of cases in the higher courts).

For common assault DV cases, imprisonment was the most common penalty imposed in the higher courts (31.6% of cases), followed by probation orders (23.5% of cases). In the Magistrates Courts, the most common penalty for common assault DV offences was probation (26.2%), followed closely by imprisonment (24.3%), and monetary orders (23.9%).

For cases involving non-aggravated AOBH, imprisonment was the most common penalty, regardless of whether DV was a factor, in both the higher courts and the Magistrates Courts. In the Magistrates Courts the imprisonment rate for non-

aggravated AOBH with DV was double the rate for offences without DV (51.3% compared to 25.7%).

In the lower courts, for non-aggravated AOBH offences where DV was not a factor, monetary orders very closely followed imprisonment (25.7% of cases received imprisonment, compared with 25.3% of cases with a monetary penalty). Custodial penalties were much more common for cases that involved a DV offence, irrespective of the sentencing court. Specifically, imprisonment and partially suspended sentences were more common for DV offences; whereas community-based orders and monetary penalties were more common for offences without DV.

For all offences of aggravated AOBH, imprisonment was the most common penalty imposed across both the Magistrates Courts and the higher courts. However, imprisonment was imposed more often for offences involving DV sentenced across both courts. Non-custodial penalties were higher in the Magistrates Courts, particularly for cases without DV – probation orders and monetary orders comprised 17.2 and 12.2 per cent respectively of penalties in the Magistrates Courts for cases without DV.

**Table 2: Types of penalties imposed, by type of offence, level of court and whether the offence was a domestic violence offence**

Penalty type	Magistrates Courts		Higher courts	
	No DV	With DV	No DV	With DV
<b>s 335 Common assault</b>				
Imprisonment	10.2%	24.3%	18.5%	31.6%
Partially suspended imprisonment	0.6%	1.0%	1.5%	5.1%
Wholly suspended imprisonment	7.0%	9.7%	14.6%	11.2%
Intensive correction order	0.5%	0.7%	1.5%	1.0%
Community service order	10.4%	4.7%	8.5%	6.1%
Probation order	15.5%	26.2%	15.4%	23.5%
Monetary order	40.4%	23.9%	23.1%	10.2%
Good behaviour, recognisance	13.6%	9.0%	16.2%	10.2%
Convicted, not further punished	1.8%	0.5%	0.8%	1.0%
<b>TOTAL</b>	<b>100.0%</b> <b>(n=5,161)</b>	<b>100.0%</b> <b>(n=1,578)</b>	<b>100.0%</b> <b>(n=130)</b>	<b>100.0%</b> <b>(n=98)</b>
<b>s 339(1) Assault occasioning bodily harm (non-aggravated)</b>				
Imprisonment	25.7%	51.3%	47.8%	62.5%
Partially suspended imprisonment	1.4%	2.6%	3.4%	8.1%
Wholly suspended imprisonment	14.6%	13.5%	18.8%	14.8%
Intensive correction order	0.8%	0.9%	2.4%	1.3%
Community service order	9.8%	2.7%	7.5%	1.8%
Probation order	18.9%	18.7%	12.3%	6.5%
Monetary order	25.3%	7.8%	5.8%	3.9%
Good behaviour, recognisance	3.3%	2.3%	1.7%	0.8%
Convicted, not further punished	0.3%	0.2%	0.3%	0.3%
<b>TOTAL</b>	<b>100.0%</b> <b>(n=4,061)</b>	<b>100.0%</b> <b>(n=1,994)</b>	<b>100.0%</b> <b>(n=293)</b>	<b>100.0%</b> <b>(n=384)</b>
<b>s 339(3) Assault occasioning bodily harm (aggravated)</b>				
Imprisonment	38.9%	61.1%	53.5%	65.9%
Partially suspended imprisonment	2.0%	3.6%	7.9%	5.8%
Wholly suspended imprisonment	18.5%	14.8%	17.5%	12.3%
Intensive correction order	1.4%	1.2%	1.2%	0.0%
Community service order	7.4%	2.9%	5.2%	1.5%
Probation order	17.2%	13.6%	10.8%	13.8%
Monetary order	12.2%	2.2%	2.0%	0.7%
Good behaviour, recognisance	2.1%	0.7%	1.7%	0.0%
Convicted, not further punished	0.2%	0.0%	0.3%	0.0%
<b>TOTAL</b>	<b>100.0%</b> <b>(n=1,138)</b>	<b>100.0%</b> <b>(n=419)</b>	<b>100.0%</b> <b>(n=406)</b>	<b>100.0%</b> <b>(n=138)</b>

Data include adult offenders, MSO, cases sentenced between 5 May 2016 and 30 June 2019.

Source: QGSO, Queensland Treasury — Courts Database, extracted November 2019.

## Length of custodial penalties

T-tests were conducted to determine if there was a significant difference in the length of custodial penalties for DV offences compared to cases that did not involve DV – see Table 3.

Additional summary statistics on the length of custodial penalties are available in Table 4.

**Table 3: Comparison of custodial sentence length for cases with domestic violence offences**

	Average custodial sentence length (years)					
Offence	No DV	With DV	N	t-value	p-value	
Magistrates Courts						
s 335 Common assault	0.4	0.6	1,504	-7.44	<0.0001	* †
s 339(1) AOBH (non-aggravated)	0.8	1.0	3,089	-9.65	<0.0001	* †
s 339(3) AOBH (aggravated)	0.9	1.1	1,031	-5.18	<0.0001	* †
Higher courts						
s 335 Common assault	0.7	0.6	95	0.4	0.691	
s 339(1) AOBH (non-aggravated)	1.3	1.6	545	-5.34	<0.0001	* †
s 339(3) AOBH (aggravated)	1.6	1.8	441	-3.09	0.002	*

\* statistically significant with a confidence level of 0.05.

† unequal variances assumed.

Data include adult offenders, MSO, cases with custodial penalties sentenced between 5 May 2016 and 30 June 2019. Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

In most circumstances, DV offences received longer custodial sentences, about 2.5 to 5 months longer.

There was only one situation in which this was not the case – common assault cases sentenced in the higher courts – where no statistically significant difference was found in the length of custodial penalties imposed for cases involving DV.

In the Magistrates Courts, over one-third (35.7%) of common assault cases with DV received a custodial sentence with an average sentence length of 0.6 years. This is higher than the 18.2 per cent of common assault offences without DV that resulted in a custodial sentence, with the average custodial penalty in this case also being lower at 0.4 years.

In the higher courts, nearly half (49.0%) of common assault offences with DV received a custodial penalty, compared with just over one-third (36.2%) of common assault offences without DV. However, on average, cases without DV received slightly longer sentences at 0.7 years, compared with 0.6 years for those with DV.

Under section 339 of the *Criminal Code*, non-aggravated AOBH carries a 7-year maximum penalty. This increases to 10 years for aggravated AOBH, where the offender does bodily harm, and is, or pretends to be, armed with any dangerous or offensive weapon or instrument, or is in

company. However, Magistrates Courts cannot impose a sentence of more than 3 years' imprisonment for any offence.<sup>28</sup>

Table 4 shows that across all courts and all forms of AOBH (MSO), with one exception, the majority of cases resulted in the imposition of a custodial penalty. That exception was for non-aggravated AOBH without DV in the Magistrates Courts, where 42.5 per cent of cases received a custodial penalty.

In the Magistrates Courts, aggravated AOBH with DV was both the most likely type of offence to receive a custodial sentence (80.7%) and had the longest average sentence (1.1 years). For cases sentenced in a Magistrates Court, the percentage of custodial penalties imposed for both aggravated and simpliciter forms of AOBH markedly increased when the DV aggravating factor was present. The jurisdictional limit for the Magistrates Courts – 3 years – was also reached for all forms of AOBH (simpliciter and aggravated), with and without DV (see Figure 1 for more detail).

In the higher courts, a custodial penalty was the most common penalty across all forms of AOBH (MSO). Offences with DV received a higher proportion of custodial penalties compared with offences without DV; however, the impact of the DV aggravating factor was less pronounced than in the case of sentences imposed by the Magistrates Courts.

<sup>28</sup> An exception to this is if the Magistrates Court constituted by a magistrate is imposing a drug and alcohol treatment order under the *Penalties and Sentences Act 1992* (Qld), part 8A, in which case the Court can impose a sentence of up to 4 years.



When considering sentence lengths in the higher courts, AOBH without DV (both non-aggravated and aggravated) attracted longer sentences of up to 5 years, compared to 4 years for those offences with DV. However, when considering the median

sentence, taking into account all sentences imposed in the higher courts for this offence (as the MSO), aggravated AOBH with DV had the longest median sentence length of 1.8 years.

**Table 4: Summary statistics on the length of custodial penalties, by type of offence and level of court and whether the offence was a domestic violence offence**

Offence	Custodial order length (years)				
	% Custodial	Average	Median	Minimum	Maximum
<b>Magistrates Courts</b>					
s 335 Common assault (n=5,161)	18.2%	0.4	0.3	(rise) 0.0	2.3
s 335 Common assault – DV offence (n=1,578)	35.7%	0.6	0.5	(5 days) 0.0	2.5
s 339(1) AOBH (non-aggravated) (n=4,061)	42.5%	0.8	0.8	(5 days) 0.0	3.0
s 339(1) AOBH (non-aggravated) DV offence (n=1,994)	68.3%	1.0	1.0	(14 days) 0.0	3.0
s 339(3) AOBH (aggravated) (n=1,138)	60.9%	0.9	0.8	(14 days) 0.0	3.0
s 339(3) AOBH (aggravated) DV offence (n=419)	80.7%	1.1	1.0	0.1	3.0
<b>Higher courts</b>					
s 335 Common assault (n=130)	36.2%	0.7	0.5	0.1	2.5
s 335 Common assault – DV offence (n=98)	49.0%	0.6	0.5	(rise) 0.0	2.0
s 339(1) AOBH (non-aggravated) (n=293)	72.4%	1.3	1.2	0.1	5.0
s 339(1) AOBH (non-aggravated) DV offence (n=384)	86.7%	1.6	1.5	0.3	4.0
s 339(3) AOBH (aggravated) (n=406)	80.1%	1.6	1.5	(6 days) 0.0	5.0
s 339(3) AOBH (aggravated) DV offence (n=138)	84.1%	1.8	1.8	0.4	4.0

Data include adult offenders, MSO, cases sentenced between 5 May 2016 and 30 June 2019.

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019

## Distribution of sentence lengths

Figure 1 shows the distribution of custodial penalties for offences with, and without, DV. The wider the portion of the chart, the greater the number of cases sentenced.

Many of the figures show ‘spikes’ at 3-months, 6-months, 9-months and 12-months. This may be indicative of a preference for sentence lengths to have a round number. Figures that are not characterised by prominent spikes at regular intervals indicate a higher proportion of cases with more varied sentence lengths.

For common assault offences in both the Magistrates and higher courts, the maximum penalty of 3 years was not reached. In the Magistrates Courts the longest sentence imposed was 2.5 years for common assault with DV. Whereas, in the higher courts the longest sentence given was 2.5 years for common assault without DV.

For common assault offences, the widest part of the chart for most figures is around the 6-month mark – which aligns with the findings in the previous table which found that the median custodial sentence length for common assault was 6 months (except for common assault cases without DV in the Magistrates Courts, which had a medium length of 3 months).

Higher court penalty lengths for common assault were more evenly distributed compared to cases sentenced in the Magistrates Courts, with the majority of cases receiving less than one year for offences without DV. For cases with DV, the majority of cases also received less than one year, although a larger number clustered around the 6–9 month mark.

For non-aggravated AOBH cases sentenced in the Magistrates Courts, the longest sentences imposed reached the 3-year jurisdictional limit – both for offences with and without DV as an aggravating factor. Generally, cases with DV resulted in longer sentences, with a relatively high proportion attracting sentences longer than 12 months. For offences without DV, there were clear spikes in sentence lengths at each 3-month interval – particularly at the 6-month and 12-month mark.

In the higher courts, non-aggravated AOBH cases with DV generally received longer sentences, with a relatively high proportion of cases receiving custodial sentences longer than 2 years. On the other hand, non-aggravated AOBH offences without DV tended to be shorter, with the majority of sentences below 2 years. No cases reached the maximum penalty of 7 years.

The longest custodial penalty imposed for this offence in the higher courts was 5 years, for non-aggravated AOBH without DV.

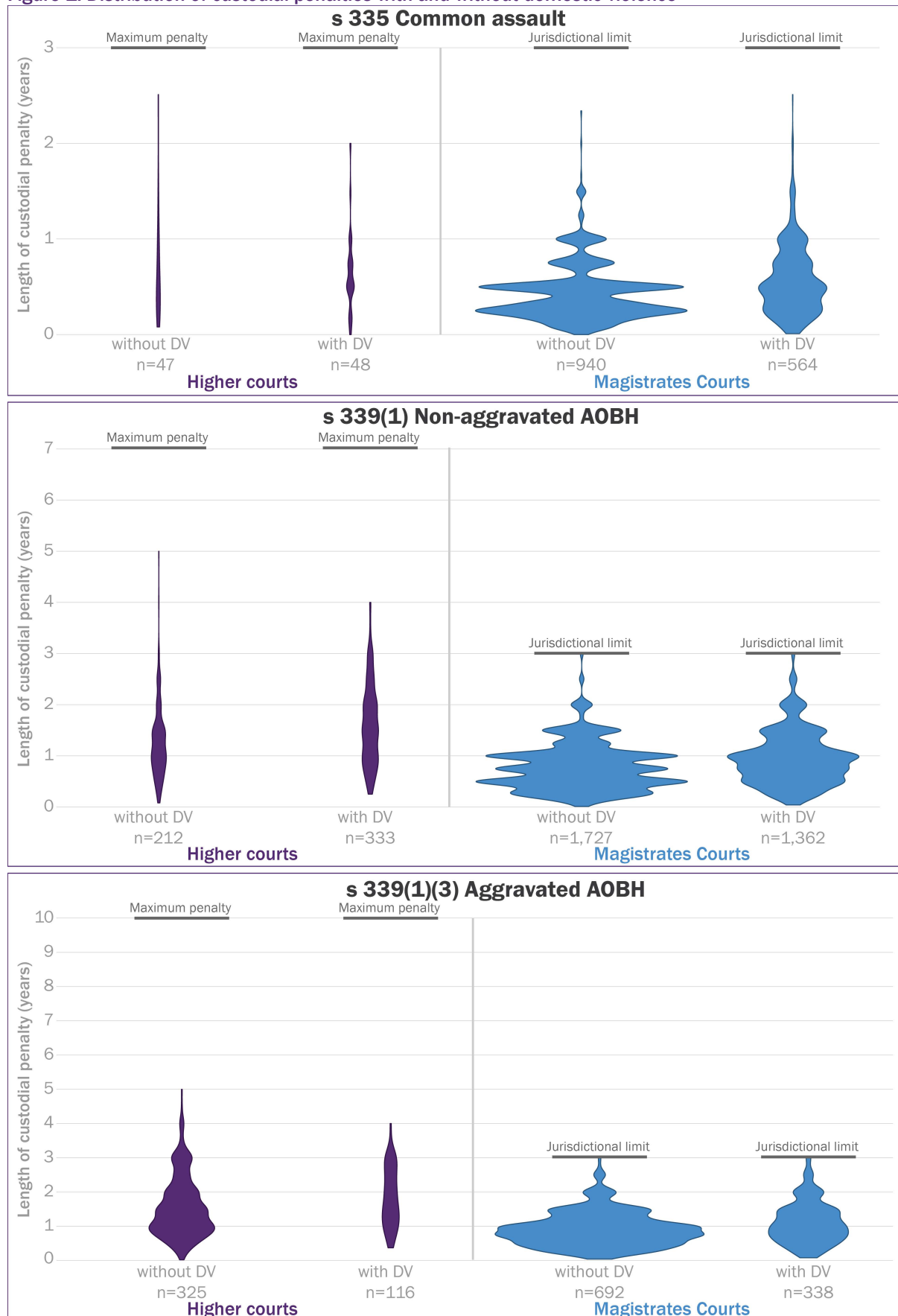
The longest custodial sentence for aggravated AOBH was 5 years – half of the 10-year maximum penalty. This was the same as the longest sentence imposed over the data period for non-aggravated AOBH.

In the Magistrates Courts, sentences imposed for aggravated AOBH offences, both with and without DV, reached the 3-year jurisdictional limit.

For offences without DV, sentences were generally shorter, clustering around one year; however, where DV was involved, sentences were spread more evenly up to the 2-year mark.

In the higher courts, aggravated AOBH offences without DV tended to receive shorter sentences compared to cases with DV. Sentences for cases without DV were generally less than 2 years in length, whereas offences with DV commonly received sentences of between 1 and 3 years.

Figure 1: Distribution of custodial penalties with and without domestic violence



Data include adult offenders, MSO, cases sentenced between 5 May 2016 and 30 June 2019.

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

Figure 2 provides an alternative representation of the distribution of custodial sentences in the higher courts (i.e. compared to the charts presented in Figure 1).

For common assault cases without DV sentenced in the higher courts, 85.1 per cent of custodial sentence lengths were less than 40 per cent of the 3-year maximum penalty (approximately 1.2 years or 14 months). Where DV was involved in a common assault sentenced in the higher courts, 91.7 per cent of custodial penalties were less than 40 per cent of the 3-year maximum penalty.

Common assault without DV was the only offence to have sentence lengths at or over 80 per cent of the available maximum penalty, although this only accounted for 4.3 per cent of these offences.

Cases involving AOBH in the higher courts were predominately below 40 per cent of the available maximum penalty, regardless of circumstances of aggravation or DV factors.

For non-aggravated AOBH without DV, the overwhelming majority of custodial sentences (97.2%) were below 40 per cent of the 7-year maximum penalty (less than 2.8 years or approximately 34 months). Similarly, the vast majority of non-aggravated AOBH with DV cases (90.4%) were also below 40 per cent of the maximum penalty.

For aggravated AOBH, the results were almost the same with nearly all sentences being below 40 per cent of the 10-year maximum penalty (4 years or less), constituting 97.5 per cent of custodial sentences imposed for offences without DV and 98.3 per cent of custodial sentences for offences with DV.

There were almost no cases of AOBH with sentence lengths at or above 60 per cent of the maximum penalty.

**Figure 2: Higher court custodial penalty length as a proportion of the maximum penalty**

	Maximum penalty: 3 years		Maximum penalty: 7 years		Maximum penalty: 10 years	
<b>Quintile 5</b> (80% or more of maximum penalty)	4.3%	0.0%	0.0%	0.0%	0.0%	0.0%
<b>Quintile 4</b> (60% up to 80% of maximum penalty)	2.1%	4.2%	0.5%	0.0%	0.0%	0.0%
<b>Quintile 3</b> (40% up to 60% of maximum penalty)	8.5%	4.2%	2.4%	9.6%	2.5%	1.7%
<b>Quintile 2</b> (20% up to 40% of maximum penalty)	23.4%	37.5%	36.3%	51.1%	30.2%	47.4%
<b>Quintile 1</b> (less than 20% of maximum penalty)	61.7%	54.2%	60.9%	39.3%	67.4%	50.9%
	no DV (n=47)	with DV (n=48)	no DV (n=212)	with DV (n=333)	no DV (n=325)	with DV (n=116)
	Common assault		AOBH non-aggravated		AOBH aggravated	

Data include adult offenders, MSO, higher courts only, custodial penalties, cases sentenced between 5 May 2016 and 30 June 2019.

Source: QGSO, Queensland Treasury — Courts Database, extracted November 2019.

## DISCUSSION

This research set out to determine if there was a difference in sentencing outcomes (penalty types and penalty outcomes) for cases of common assault and AOBH (simpliciter and aggravated) that involved section 9(10A) aggravating factors ('with DV') compared to cases that did not.

When considering penalty outcomes for these offences, our analysis shows that for each offence in each court, custodial penalties were more common for assaults that were DV offences than those that were not. This difference was particularly pronounced for both forms of AOBH

sentenced in the Magistrates Courts. While this difference was not always maintained when custodial penalties were broken down by penalty order type (e.g. suspended sentences), it remained the case in respect of imprisonment, which was more commonly imposed across all offence types for DV offences than for non-DV offences.

For common assault (MSO), although non-custodial penalties were the most common penalty type imposed in both the higher and lower courts, for offenders who did receive a custodial

penalty, the rate of custodial penalties imposed for DV offences was almost double that of offences without DV. In the Magistrates Courts, just over one-third of DV common assault offences (35.7%; n= 1,578) received a custodial penalty, compared to less than 2 in 5 non-DV offences (18.2%). The higher rate of custodial penalties for DV offences was also observed for cases dealt with in the higher courts, with almost half (49.0%) of DV common assault offences receiving a custodial penalty, compared to one-third (36.2%) of non-DV common assault offences. When considering non-custodial penalties in the Magistrates Courts, monetary orders were the most common penalty type for non-DV common assault offences (40.4%). In comparison, there was almost an even split between the use of probation (26.2%) and monetary penalties (23.9%) for common assault offences with DV. The higher rate of probation orders imposed for DV offences may indicate that magistrates want to provide DV offenders with opportunities for monitoring and support to address their offending behaviour.

Unsurprisingly given the more serious nature of the offence, imprisonment was the most common penalty for AOBH offences (simpliciter and aggravated) with or without DV. However, our findings show that imprisonment (and custodial penalties more generally) was far more likely to be ordered where the AOBH offence involved DV. This was particularly apparent in the Magistrates Courts' sentencing practices for AOBH and aggravated AOBH where the imprisonment rate for DV offences was 51.3 per cent compared to 25.7 per cent, and 61.1 per cent compared to 38.9 per cent respectively.

When considering penalty outcomes, and in particular custodial sentences, our findings show that in most circumstances, DV offences received longer custodial sentences. This occurred in all cases except one (common assault offences sentenced in the higher courts). This difference was statistically significant. DV offences received sentences that were, on average, 2.5 to 5 months longer than non-DV offences.

The distribution of sentence lengths for these offences shows that for common assault and non-aggravated AOBH offences sentenced in the Magistrates Courts there were regular 'spikes' at the 3, 6, 9 and 12-month marks. This is in contrast to the sentencing distributions for aggravated AOBH offences sentenced in the Magistrates

Courts, and across all offences sentenced in the higher courts, both with and without DV.

A possible explanation for this finding is that offenders sentenced for more serious forms of offending are more likely to have spent time in pre-sentence custody and for longer periods of time. If the court imposes a prison sentence, the time spent in pre-sentence custody may be declared as time served under the sentence.<sup>29</sup> This may have the effect that less serious offences that do not have pre-sentence custody may be more likely to receive a sentence of 3, 6, 9 or 12 months; whereas more serious cases that have declared pre-sentence custody may receive sentence lengths with a more random distribution due to the factoring in of a variable amount of days spent on remand.

This includes circumstances where the court considers it appropriate to sentence the person to 'time served' (meaning the term of imprisonment is set at the numbers of days spent in pre-sentence custody). Further research is needed to test this theory.

While this analysis did not compare sentences for common assault and AOBH with sentences for those offences with DV sentenced prior to section 9(10A), our findings suggest courts are treating these offences as more serious than those without DV. However, Court of Appeal decisions prior to the introduction of section 9(10A) show the courts already regarded domestic violence seriously and that custodial penalties for these offences may already have been more likely prior to these legislative changes than for assaults without DV.<sup>30</sup>

Further, without accounting for other factors that may have been more likely to support a custodial penalty being imposed, such as a relevant criminal history, the seriousness of the offending, or other aggravating factors, it cannot be said with certainty that the introduction of section 9(10A) of the PSA has resulted in courts imposing more severe sentences.

Another factor, outside of the scope of this research, but that may help to explain why very few custodial penalties for AOBH in the higher courts were above 40 per cent of the maximum penalty, is the offence being charged and convicted. It is very likely that the types of serious offending that might attract a sentence closer to the maximum penalty are being dealt with by the charging of other, more serious offences.

<sup>29</sup> See *Penalties and Sentences Act 1992* (Qld) s 159A.

<sup>30</sup> *R v Major; Ex parte A-G (Qld)* [2012] 1 Qd R 465, 481 [53] (McMurdo P) about the importance of these factors in sentencing for domestic violence offences generally.



This would include the offences of wounding, grievous bodily harm, or in the case of DV, the offence of choking, suffocation or strangulation in a domestic setting (s 315A of the *Criminal Code*). Although section 315A commenced at the same time as section 9(10A), it is a substantive provision and a person can only be charged with it if the offence occurred after the commencement date. Further research would be required to test this theory.

Our findings suggest there may have been a change in the penalty type for cases involving DV, compared to offences that do not. This research suggests that courts are treating DV offences as more serious (aggravated) forms of offending and are therefore more likely to impose a term of imprisonment or other custodial sentence. However further research is needed to determine if this is due to the operation of section 9(10A).

# Appendix 1

## What is domestic violence?

For the purpose of applying the aggravating factor in section 9(10A) of the PSA, a domestic violence offence is one where the act or omission which forms the offence is also domestic violence, associated domestic violence, or the contravention of a domestic violence order. However, the offence itself cannot be one under the *Domestic and Family Violence Protection Act 2012* (Qld).<sup>31</sup> It can be an offence against any other Queensland Act.

In this context, an offence involves ‘domestic violence’ if, first, the offender shares a relevant relationship (intimate personal, family or informal care)<sup>32</sup> with the victim. Second, that relationship must be abusive (physically, sexually, emotionally, psychologically or economically), threatening, coercive or must control or dominate the second person in another way and cause them to fear for their safety or wellbeing (or someone else’s).<sup>33</sup>

‘Associated domestic violence’ widens the law to include children, relatives and associates of an ‘aggrieved’ person (victim).<sup>34</sup> This means that any Queensland criminal offence (apart from those in the DV legislation) can attract the aggravating factor, depending on the facts of the individual case.

The fact that the DV aggravating factor was specifically legislated for the first time in May 2016 does not mean that the courts did not give weight to such factors before then. There are sentencing laws that pre-date the introduction of the legislated aggravating factor and contribute to the seriousness with which courts treat DV offending. This is an important qualification to keep in mind when reading this paper.

There are three particularly relevant sentencing laws that pre-dated the DV aggravating factor –

1. common law recognition of the aggravation that DV adds to sentencing;
2. a more general legislative requirement that sentencing courts have regard to the presence of any aggravating or mitigating factor concerning the offender, in section 9(2)(g) of the PSA; and
3. the removal of the brake on imprisonment as the order of ‘last resort’ when offending involves violence or physical injury, in section 9(2A) of the PSA, and other factors set out under section 9(3) directing courts to have primary regard to certain factors in sentencing for these offences, including the risk of physical harm if a custodial sentence were not imposed and the need to protect members of the community from that risk.

## What is assault?

Section 245 of the *Criminal Code* defines assault. The definition is very wide and can be met in two ways. The first is where the offender strikes, touches, moves or otherwise applies force of any kind to another person. This can be direct or indirect. It must be done without the victim’s consent, or where consent was obtained by fraud.

The second is where the offender uses a bodily act or gesture to attempt or threaten to apply force of any kind to the victim without the victim’s consent, in circumstances where the offender has (actually or apparently) a present ability to effect his or her purpose. Words alone are not enough.

‘Applies force’ includes applying heat, light, electrical force, gas, odour, or any other substance or thing, if it is applied in such a degree as to cause injury or personal discomfort.

### Common Assault - section 335 of the Criminal Code

This offence provides that any person who unlawfully assaults another person faces a maximum penalty of 3 years’ imprisonment. It must be dealt with in the Magistrates Courts.

<sup>31</sup> The *Penalties and Sentences Act 1992* (Qld) s 4 definition of ‘domestic violence offence’ refers back to the *Criminal Code* (Qld) s 1. That definition of a ‘domestic violence offence’ took effect from 22 October 2015. It was inserted into the Code by the *Criminal Law (Domestic Violence) Amendment Act 2015* (Qld) s 3.

<sup>32</sup> *Domestic and Family Violence Protection Act 2012* (Qld) s 13.

<sup>33</sup> *Ibid* s 8(1).

<sup>34</sup> *Ibid* s 9.

### Assault occasioning bodily harm (AOBH) - section 339 of the Criminal Code

A more serious offence, assault occasioning bodily harm ('AOBH', section 339) is committed when a person unlawfully assaults someone else and causes them bodily harm. Bodily harm means any bodily injury which interferes with health or comfort. The maximum penalty is 7 years' imprisonment. This is the 'simpliciter' version of the offence.

The 'aggravated' version of the offence carries a maximum penalty of 10 years' imprisonment. This is where the offence has a circumstance of aggravation (which is specifically charged by the prosecution) – when the offender:

- is or pretends to be armed with any dangerous or offensive weapon or instrument; or
- is in company with someone else.

### Aggravating factors v circumstances of aggravation

Aggravating factors that apply for sentencing purposes and circumstances of aggravation have similar intended purposes. That is, to indicate Parliament's intention that offences with these features should be considered as being more serious, and therefore attract higher sentences or more severe penalties. However, these two approaches aim to achieve this outcome using different mechanisms – one, requiring courts to treat the stated factor as aggravating at the point of determining the appropriate sentence (but not affecting the maximum penalty that applies to the offence), and the second, by creating statutory circumstances of aggravation that, when charged and proven, generally result in courts sentencing in the context of a higher maximum penalty (or in some cases, mandatory penalty)<sup>35</sup> applying than where such factors are not present.<sup>36</sup>

Examples of circumstances of aggravation in Queensland include, for example:

- AOBH under section 339 of the *Criminal Code* discussed above, where the person is or pretends to be armed, or is in company with someone else, increasing the maximum penalty from 7 to 10 years;
- serious assault of police, corrective services officers and other public officers under section 340 of the *Criminal Code* where such assault causes bodily harm to the victim, the offender is or pretends to be armed, or bites or spits on the victim or throws at or applies to the victim bodily fluid or faeces, increasing the maximum penalty from 7 years to 14 years;
- for certain prescribed offences, committing the offence in a public place while adversely affected by an intoxicating substance, which triggers a requirement to make a community service order in addition to any other sentence imposed unless the court is satisfied the person is not capable of complying due to any physical, intellectual or psychiatric disability.<sup>37</sup>

<sup>35</sup> See for example, the serious organised crime circumstance of aggravation under section 161Q of the *Penalties and Sentences Act 1992* (Qld) that requires a court to impose imprisonment when sentencing an offender for certain prescribed offences where committed with this circumstance of aggravation, and an additional cumulative component of 7 years or the maximum penalty for the offence (whichever is less) (s 161R).

<sup>36</sup> Section 1 of the *Criminal Code* (Qld) defines a 'circumstance of aggravation' to mean: 'any circumstance by reason whereof an offender is liable to a greater punishment than that to which the offender would be liable if the offence were committed without the existence of that circumstance.'

<sup>37</sup> *Penalties and Sentences Act 1992* (Qld) pt 5, div 2, subdiv 2.



## Queensland Sentencing Advisory Council

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