

# Defining assault for the purposes of the reportable conduct scheme

## Assault

This guideline sets out the legal principles that apply when considering whether a person's conduct amounts to an assault for the purposes of the reportable conduct scheme.

Like most other forms of misconduct, assault has both a physical (or 'action') element and a mental (or 'attitude') element. You must not sustain a finding of assault unless you are satisfied that both the action and attitude elements have been satisfied.

This can be a difficult area of law to apply to a given situation, particularly because any form of touching can, depending on the context in which it occurs, constitute an assault.

### Summary of principles

Either of the following types of conduct **may, depending on the circumstances**, amount to assault:

- A **Actual physical force**: the intentional or reckless application of physical force against an alleged victim without their consent.<sup>1</sup>
- B **Apprehension of physical force**: intentional or reckless conduct that causes an alleged victim to apprehend imminent physical force without their consent. Criminal charges, in these cases, where there is no physical force applied, are less common than cases involving actual physical force.

Each type of conduct is considered separately below.

**Not all conduct captured by A and B above will constitute assault.** The context in which the conduct occurs will be crucial

### A. Intentional or reckless physical force without consent

This is the most common form of assault. All of the elements that must be established – **physical force, lack of consent**,<sup>2</sup> and **intention or recklessness** – are explained below. The relevance of injury, aggression and hostility, and the defence of self-defence, are also explained below.

1. This is sometimes described as 'battery'. In addition, there are some circumstances where physical contact can be unlawful despite consent.  
2. There are some circumstances where physical contact can be unlawful despite consent.

Refer to our *Defining Reportable Conduct* Factsheet for more information regarding the test for a sustained finding.

### Physical force

The starting point is that any form of physical contact, no matter how slight, is capable of amounting to 'physical force'.<sup>3</sup> The force can be applied either by part of a person's body (e.g. a hand or a foot), or with an object.

However, there is a range of ordinary everyday contact that does not give rise to assault.<sup>4</sup> Whether or not the physical force amounts to ordinary everyday contact will depend on many things, including the age and characteristics of the people involved, their relationship, the context in which the contact occurs and the nature of the contact made. In each case, the test is whether the contact goes beyond generally acceptable standards of conduct.<sup>5</sup> This will often be a question of degree or proportionality.<sup>6</sup> Something may be considered ordinary everyday contact in one context, but not in another.

### Examples:

For an adult to jump on another and snatch her shoulder bag is clearly unacceptable. Between 13-year-old schoolboys it might perhaps be considered 'as unremarkable as shaking hands': see *Rixon v Star City Pty Ltd* [2001] NSWCA 265 at [54]; (2001) 53 NSWLR 98 at 113.<sup>7</sup>

Throwing a basketball and hitting and injuring someone who tries but fails to catch it would generally not give rise to an assault. However, hitting and injuring someone by throwing a basketball at them unexpectedly, in an attempt to get their attention, might be an assault: see *Knapp v NSW* [2006] NSWDC 84 at [52].

3. The reason for including all physical contact is that the law cannot draw a line or formulate a single test that distinguishes between touching that is objectionable and touching that is not. The starting point is that all physical contact is prohibited: see *Secretary, Department of Health and Community Services v JWB (Marion's Case)* [1992] 175 CLR 218 at 233, 265-266.  
4. *Collins v Wilcock* [1984] 1 WLR 1172 at 1174; *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 at 73; *Darby v DPP* (2004) 61 NSWLR 558 at [80] – [81]; *Horan v Ferguson* [1994] QCA 375; [1995] 2 QdR 490; *Rixon v Star City Pty Ltd* [2001] NSWCA 265 at [54]; 53 NSWLR 98 at 113.  
5. *Collins v Wilcock* at 1178; *McElholum v Hughes* [2015] ACTSC 78; *Horan v Ferguson*.  
6. *The Queen v Phillips* (1971) 45 ALJR 467 at 472; *Hutchison v Fitzpatrick* [2009] ACTSC 43 at [53]-[54].  
7. However, in *Hutchison v Fitzpatrick* a 'tackle' that was intended by a defendant to be a friendly greeting between adults was found to be an assault where the plaintiff, who suffered from a disability that affected his balance, was knocked over and injured.

Where the physical force is something that amounts to ordinary everyday contact, a finding of assault cannot be made.

### Without consent

The nature of the physical contact must be without consent.<sup>8</sup> Consent can be expressed or implied. For example, consenting to participate in a soccer game would involve implied consent to some degree of physical contact. Punching someone during a soccer game, however, would not be something to which implied consent would be given.<sup>9</sup>

A person may, depending on their age or mental capacity, be incapable of consenting to physical contact. In those cases, the only person who may give consent will be the person's parent, carer or guardian.

### Injury

Injury is not an essential element of assault, because it is not necessary that the conduct results in physical injury.<sup>10</sup> At the same time, the existence of an injury does not necessarily mean that there has been an assault. However, the presence or absence of an injury, and the severity of any injury, will be relevant when deciding whether the conduct constituted an assault. This is because the presence or absence of an injury may go to whether the physical contact went beyond what would be acceptable in the course of everyday conduct.

### Intention or recklessness

To constitute an assault, the physical force must be intentional or reckless. This means the person must either intend the physical force, or foresee the possibility of physical force, but proceed to act anyway.<sup>11</sup>

The only thing the person needs to have intended (or have been reckless about) is the application of force.<sup>12</sup> They do not have to intend to act aggressively or with hostility or to have caused harm, nor do they need to be reckless as to those matters.

### Example

The conduct of someone who makes physical contact with another by accidentally brushing past them will not amount to assault. That conduct could, however, amount to assault if it was not accidental (i.e. because the person either intended to make contact or was reckless about whether they made contact): see *Murphy v Spencer* [2013] WASC 256

While aggression or hostility is not necessary, the presence or absence of any hostility, aggression, malice or ill-will may be relevant. This is because its presence or absence may assist in distinguishing between ordinary everyday contact and assault.<sup>13</sup> Something that would otherwise be ordinary everyday contact may amount to an assault if it is done in a hostile or aggressive manner.

### Example

Opening a door to enter a room is 'something that constitutes conduct in the ordinary course of life. However, to open a door with vigour and force, knowing that it is being closed by someone on the other side and being indifferent as to whether a person, whom a defendant knows to be standing behind the door, or is aware of that likelihood, could be struck or injured, goes beyond the limits of permissible ordinary conduct': see *McElholum v Hughes* [2015] ACTSC 78 at [188]

### Self-defence

Assault will not be established where a person has applied physical force in circumstances where:

- (a) the person actually believed that what they were doing was necessary by way of self-defence or defence of another, and
- (b) that belief was reasonably held.<sup>14</sup>

In deciding whether these requirements have been met, the degree of force used (and whether it was proportionate to the threat that the person was confronting) will be relevant. If the person uses too great a degree of force, this may mean that the person could not have reasonably held the belief that what they were doing was necessary.

8. Note that there are some exceptional circumstances where physical contact may amount to an assault even where there is consent.

9. This will turn on what could ordinarily and reasonably be contemplated as incidental to the game: *Pallante v Stadiums Pty Ltd* (No 1) [1976] VR 331; *Pallante v Stadiums Pty Ltd* (No.1)[1976]

10. *McIntyre v R* [2009] NSWCCA 305 at [42]; see also *Platt v Nutt* at 244-245; *Carter v Walker* [2010] VSCA 340 at [215].

11. *Vallance v The Queen* [1961] HCA 42; 108 CLR 56 at 61; *Blackwell v The Queen* [2011] NSWCA 93; (2011) 81 NSWLR 119 at [76]; *Carter v Walker* [2010] VSCA 340 at [215]; *Hall v Fonceca* [1983] WAR 309; *Murphy v Spencer* [2013] WASC 256.

12. *Cowell v Corrective Services Commission of New South Wales* (1988) 13 NSWLR 714 at 743 (NSWCA); *Carter v Walker* [2010] VSCA 340 at [215]; See also *Trevitt v NSW TAFE Commission* [2001] NSWCA 363 (assault occurred during a role play).

13. *Boughey v The Queen* [1986] HCA 29; (1986) 161 CLR 10 at 25; *Rixon* at 113, [52]; *Re F* at 73.

14. According to the standards of the hypothetical reasonable person standing in that person's place: *Zecevic v Director of Public Prosecutions (Vic)* [1987] HCA 26; 162 CLR 645; *R v Portelli* [[2004] VSCA 178; (2004) 148 A Crim R 282.

## B. Intentional or reckless conduct that causes another person to apprehend imminent physical force against them without consent

Criminal charges in relation to this form of assault are less common than assault involving actual physical force.

### Conduct

The conduct may be words or actions or both. The surrounding circumstances will be important here including; the demeanour of the person, the words spoken and the proximity of the parties.<sup>15</sup>

### Apprehension

It does not matter that the person does not make physical contact, provided the apprehension of imminent physical force is created.

### Imminence

This element is sometimes described as 'immediate', rather than 'imminent'. These terms have their ordinary meaning; the person must apprehend physical contact 'very shortly' or 'without delay'. This can be the most difficult element to determine – there is no precise time measurement that can be applied in all circumstances, and the context in which the conduct occurs will be important.<sup>16</sup> Whether or not a person apprehends imminent physical contact will depend on the type of physical contact that they anticipate. For example, a person who receives a threat by telephone that he or she will be punched by the caller could not reasonably believe that a punch was imminent if the person is known to be some distance away.<sup>17</sup> A person who receives a threat by telephone that they are about to be shot could, depending on the circumstances, reasonably apprehend that harm was imminent.<sup>18</sup>

However, causing someone to apprehend physical force at a point too far into the future will not be an assault.

### Physical force

No actual physical force or interference is necessary; it is the apprehension of imminent physical force that gives rise to the assault.<sup>19</sup> An apprehension of imminent physical force may be created by someone forming and shaking a fist, and 'it does not matter that the accused does not strike the blow or that he or she has no intention to do so'.<sup>20</sup> An alleged victim may reasonably apprehend imminent physical force even where the person creating the apprehension is incapable of making contact with them.<sup>21</sup> The apprehension of imminent physical force must, however, relate to force of a kind that goes beyond generally accepted standards of ordinary everyday contact.<sup>22</sup>

### Intention or recklessness

The person must intend to cause the other person to apprehend immediate physical contact or be reckless as to whether the other person will apprehend immediate physical contact.<sup>23</sup> Recklessness is established where the person knows that it is possible that the person may apprehend immediate physical contact, but ignores the risk and proceeds to engage in it.<sup>24</sup> It is not necessary that the person intends to follow through and apply the physical force,<sup>25</sup> simply that they intend to create that apprehension in the other person's mind, or they are reckless about creating that apprehension.

15. See *R v Moore-McQuillan* [2014] SASCFC 113 at [40] and the cases cited in that decision.

16. Including the relationship between the victim and the offender: *Zanker v Vartzokas* (1988) 34 A Crim R 11

17. See however *R v Mostyn* [2004] NSWCCA 97 (a threat to strike the victim when it was impossible to do so may be capable of amounting to assault if it created an apprehension of immediate physical contact in the victim's mind).

18. *R v Gabriel* [2004] ACTSC 30.

19. *The Queen v Phillips* (1971) 45 ALJR 467 at 472.

20. *R v Gabriel* [2004] ACTSC 30 at [129].

21. A person who has an unloaded gun pointed at them can be the victim of an assault if they believe that the gun is loaded: *Brady v Schatzel* [1911] St R Qd 206. See also *R v Mostyn* [2004] NSWCCA 97.

22. see Section A: Intentional or reckless physical force without consent.

23. *NSW v McMaster* [2015] NSWCA 228 at [191], *R v Knight* (1988) 35 A Crim R 314 at 316-7; *R v Barker* [2014] ACTSC 374; *R v Gabriel* (2004) 182 FLR 102 at 1178-8, [130] (ACTSC); *Matsebula v Vandeklashorst* [2000] WASCA 141.

24. *Vallance v The Queen* [1961] HCA 42; 108 CLR 56 at 61; *NSW v McMaster* at [191]; *Fisher v Police* [2004] SASC 232 at [21]; *MacPherson v Beath* (1975) 12 SASR 174 at 177; *MacPherson v Brown* (1975) 12 SASR 184 at 188, 199; *Edwards v Police* (1998) 71 SASR 493 at 495.

25. *Rixon v Star City Pty Ltd* [2001] NSWCA 265 at [56]-[58].

---

## Contact us for more information

Our business hours are: Monday to Friday, 9am–5pm (*Inquiries section closes at 4pm*).

If you wish to visit us, we prefer you make an appointment. Please call us first to ensure your complaint is within our jurisdiction and our staff are available to see you.

Level 24, 580 George Street  
Sydney NSW 2000

**Email** [nswombo@ombo.nsw.gov.au](mailto:nswombo@ombo.nsw.gov.au)

**Web** [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au)

**General inquiries** 02 9286 1000

**Facsimile** 02 9283 2911

**Toll free** (outside Sydney metro) 1800 451 524

**Tel. typewriter** (TTY) 02 9264 8050

Telephone Interpreter Service (TIS): 131 450

We can arrange an interpreter through TIS or you can contact TIS yourself before speaking to us.