



**Justice**  
Sentencing Council

# Sentencing for domestic violence offences

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Report  
February 2016



## **NSW Sentencing Council**

February 2016

www.sentencingcouncil.justice.nsw.gov.au  
Phone: 02 8346 1284  
Email: [sentencingcouncil@agd.nsw.gov.au](mailto:sentencingcouncil@agd.nsw.gov.au)  
GPO Box 31  
SYDNEY NSW 2001

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## **Terms of reference**

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The Sentencing Council received terms of reference from the Attorney General, the Hon Gabrielle Upton MP, on 7 August 2015:

The Sentencing Council is to undertake an analysis of sentencing in domestic violence offences to:

- § Consider the principles the Courts apply when sentencing domestic violence offences (as defined by the Crimes (Domestic and Personal Violence) Act 2007 - "Domestic Violence Offences") and advise on how those principles are applied by the Courts
- § Compare sentences imposed and sentences actually served for Domestic Violence Offences with those imposed for the same personal violence offences (not classified as Domestic Violence Offences) for key offence types where the Council considers undertaking a comparison may demonstrate sentencing patterns between the two categories of offences
- § Compare the available sentences, sentencing outcomes and sentences served for the NSW offence of contravening an [Apprehended Domestic Violence Order (ADVO)] (s 14 Crimes (Domestic and Personal Violence) Act 2007) with the comparable offences in other Australian jurisdictions and
- § Compare the reoffending rates for people convicted of Domestic Violence Offences with the reoffending rates for the same personal violence offences (not classified as Domestic Violence Offences) for key offence types where a comparison is possible and the Council considers comparison may demonstrate difference between the two categories of offences.



## Contributors

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### The Council

The Hon James Wood AO QC (Chairperson)  
The Hon Anthony Whealy QC (Deputy Chairperson)  
Mr Lloyd Babb SC  
Associate Professor Tracey Booth  
Mr Howard Brown OAM  
His Honour Acting Judge Paul Cloran  
Mr Nick Cowdery AM QC  
Professor Megan Davis  
Mr Wayne Gleeson  
Mr Mark Ierace SC  
Mr Mark Jenkins APM  
Ms Moira Magrath  
Mr Ken Marslew AM  
Mr Peter Severin  
Professor David Tait

### The secretariat

Mr James Hume  
Mr Mark Johnstone (until September 2015)  
Mr Joseph Waugh PSM  
Ms Anna Williams

### Research assistance

Mr Ronan Casey  
Ms Sarah Cumming  
Ms Effie Shorten

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- the NSW Bureau of Crime Research and Statistics
- Corrective Services NSW, and
- NSW Police Force.



## Executive summary

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- 0.1 This report is a response to terms of reference received from the NSW Attorney General on 7 August 2015 to undertake an analysis of sentencing in domestic violence (DV) offences.

### Considerations at sentencing (Chapter 2)

- 0.2 We have identified the principles that the courts use in sentencing DV offences, as stated by the appellate courts. In our view the appellate statements that relate to the sentencing of DV offenders are strong and generally appropriate.
- 0.3 In addition to the general approach of treating DV seriously (**para [2.15]-[2.17]**), we have identified a number of other principles and considerations that the courts take into account.
- 0.4 With regards to the purposes of sentencing, the courts have emphasised the weight to be given to specific and general deterrence and have also referred to protection of the community, recognition of the harm done to the victim and the community, and denunciation. (**para [2.21]-[2.29]**)
- 0.5 Relevant aggravating factors include:
- § the offender is a repeat domestic violence offender (recidivism)
  - § the offender has abused power and control
  - § the offender has breached conditional liberty or an apprehended domestic violence order
  - § the offence took place in the victim's home, and
  - § the offence took place in the presence of a child. (**para [2.30]-[2.43]**)
- 0.6 Circumstances that do not mitigate domestic violence offences include:
- § the fact of an existing or prior relationship between the offender and the victim
  - § the offender's distress at the breakdown of a relationship
  - § provocative conduct, and
  - § the attitude of the victim to the offender at sentencing. (**para [2.44]-[2.64]**)
- 0.7 There are some strictly limited circumstances where some mitigation may be possible:
- § where the offender witnessed or was subject to DV during childhood
  - § where provocation from the victim amounts to DV, and
  - § where consequences for third parties are taken into account. (**para [2.65]-[2.87]**)
- 0.8 We note the work of the Sentencing Guidelines Council of England and Wales on DV and also the work being undertaken on a national bench book on family violence

following recommendations from the Australian and NSW Law Reform Commissions. We strongly support the development of guidelines for sentencing DV offences either in the form of bench book directions or through a guideline judgment to help the courts develop and apply relevant principles. (**para [2.6]-[2.14]**)

### **Comparing DV and non-DV offences (Chapters 3-6)**

0.9 We have compared DV and non-DV offenders for the offences of common assault, assault occasioning actual bodily harm, destroy or damage property (valued at \$2,000 or less), contravene AVO and stalk or intimidate, with respect to the following:

§ charges and charge outcomes (**chapter 3**)

§ sentences imposed for principal offence (**chapter 4**)

§ sentences actually served (**chapter 5**), and

§ reoffending (**chapter 6**).

0.10 As the terms of reference requested, we have identified trends based on a simple comparison between DV and non-DV offenders. Our general view is that there is nothing in the data that identifies a problem with the sentencing of DV offenders. We are supported in this view by the NSW Bureau of Crime Statistics and Research's (BOCSAR) recently published study of sentencing outcomes for serious DV and non-DV assault which adjusts sentencing trends for the factors that are known to influence sentencing outcomes. BOCSAR's general conclusion was that there was no evidence that the Local Court sentences serious non-DV assault matters more harshly than serious DV assault matters, once the factors that are known to influence sentencing outcomes are taken into account. (**para [4.5]-[4.29]**)

0.11 The data on offender characteristics (**para [4.61]-[4.118]**) shows some differences between offences and between the DV and non-DV versions of those offences which may explain some of the different sentencing outcomes. Some further work may be required to adjust the data for variables known to impact on outcomes, to try to account for relevant differences between DV and non-DV offending and DV and non-DV offenders.

0.12 Based on the trends identified, we note the following:

§ In relation to the charge data (**chapter 3**) – we note the recent initiatives to address the relatively high withdrawal rate for DV charges, encourage proactive policing, provide support and assistance to victims and to improve the court process. There is a need to monitor the effectiveness of these initiatives in assisting DV charges to proceed, including the willingness of the courts to convict an offender in the absence of evidence from the victim.

§ In relation to the sentences imposed (**chapter 4**) – there is a need to investigate the general trends identified in the case of the less serious offences of common assault and destroy or damage property, to account for variables that are known to impact on sentencing and to investigate the effectiveness of the various good behaviour bonds imposed.

- § In relation to reoffending (**chapter 6**) – there is a need to investigate the relatively high reoffending rates of offenders who have contravened apprehended domestic violence orders (ADVOs) with a view to developing appropriate responses or sentences that will deal with the causes of offending behaviour and the criminogenic needs of offenders.
- § There is a need to monitor the availability and effectiveness of DV programs both in prison and in the community (either as part of parole or as part of a non-custodial sentence).

### Contravening orders in NSW and other jurisdictions (chapter 7)

- 0.13 Finally, we have compared the data for contravening an ADVO and breaches of similar orders in other jurisdictions. Subject to further investigation, in particular to control for differences between the jurisdictions, we consider it worth investigating the impact of escalated penalties where offenders contravene apprehended violence orders on second and subsequent occasions. (**para [7.9]-[7.10]**)



# 1. Introduction

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## Terms of reference

---

### 1.1 The Attorney General has asked the Sentencing Council to undertake an analysis of sentencing in domestic violence (DV) offences:

The Sentencing Council is to undertake an analysis of sentencing in domestic violence offences to:

- § Consider the principles the Courts apply when sentencing domestic violence offences (as defined by the *Crimes (Domestic and Personal Violence) Act 2007* - "Domestic Violence Offences") and advise on how those principles are applied by the Courts
- § Compare sentences imposed and sentences actually served for Domestic Violence Offences with those imposed for the same personal violence offences (not classified as Domestic Violence Offences) for key offence types where the Council considers undertaking a comparison may demonstrate sentencing patterns between the two categories of offences
- § Compare the available sentences, sentencing outcomes and sentences served for the NSW offence of contravening an [Apprehended Domestic Violence Order] (s 14 *Crimes (Domestic and Personal Violence) Act 2007*) with the comparable offences in other Australian jurisdictions, and
- § Compare the reoffending rates for people convicted of Domestic Violence Offences with the reoffending rates for the same personal violence offences (not classified as Domestic Violence Offences) for key offence types where a comparison is possible and the Council considers comparison may demonstrate difference between the two categories of offences.

### 1.2 This report, therefore:

- § considers the principles the courts apply when sentencing DV offences (**Chapter 2**)
- § provides some background on charges laid and charge outcomes for selected DV and non-DV offences (**Chapter 3**)
- § compares the sentences that the courts impose for selected DV offences with those imposed for the same personal violence offences (**Chapter 4**)
- § compares the sentences actually served for DV offences with those actually served for the same personal violence offences (**Chapter 5**)

- § compares the reoffending rates for DV offenders with the reoffending rates for the other offenders for selected offences (**Chapter 6**), and
- § compares the available sentences and sentencing outcomes for the NSW offence of contravening an apprehended domestic violence order (ADVO) with the comparable offences in other jurisdictions (**Chapter 7**).

## Background

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### Context of the terms of reference

- 1.3 Reasons for the terms of reference lie in the NSW Government's priorities surrounding DV and in questions about the adequacy of sentencing for DV offences.

#### *Premier's Priorities*

- 1.4 One of the Premier's Priorities is to reduce the proportion of DV perpetrators who re-offend.
- 1.5 The Government has observed:

Domestic violence has significant immediate and long-term impacts on its victims, the majority of whom are women and children.

It is a leading contributor of ill health and premature death for women under 45 years, outstripping any other health risks for women in this age group. Domestic violence has one of the highest re-offending rates so we will focus our efforts on repeat offenders to reduce the rate of re-offending. This will better protect victims by predicting and preventing violent behaviour.<sup>1</sup>

#### *Questions about the adequacy of sentencing for domestic violence*

- 1.6 Periodically, questions are raised as to whether sentences imposed for personal violence offences committed in domestic relationships are consistent with, or vary from, sentences imposed for personal violence offences in other settings.
- 1.7 Most recently, a study published by Bond and Jeffries in the *British Journal of Criminology* in 2014 suggested that non-DV related offences received harsher penalties than DV related offences in NSW Local Courts.<sup>2</sup> However, more recent work by the NSW Bureau of Crime Statistics and Research (BOCSAR),<sup>3</sup> published after we received the terms of reference for this project, showed the shortcomings of the Bond and Jeffries study. BOCSAR noted that Bond and Jeffries aggregated a diverse range of disparate offences in their dataset, ranging from serious assaults and robbery to less serious common assaults. Consequently, the aggregation of such a diverse range of offences diluted the validity of the overall findings.

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1. <<http://www.nsw.gov.au/making-it-happen>>.

2. C Bond and S Jeffries, "Similar punishment? Comparing sentencing outcomes in domestic and non-domestic violence cases" (2014) 54 *British Journal of Criminology* 849.

3. N Donnelly and S Poynton, *Prison Penalties for Serious Domestic and Non-domestic Assault*, Bureau Brief No 110 (NSW Bureau of Crime Statistics and Research, 2015).



- 1.8 The BOCSAR study examined comparable serious assaults committed by DV and non-DV offenders. Importantly, the BOCSAR study adjusted for all the factors that are known to influence sentencing outcomes. It found no evidence that courts sentence offenders for serious non-DV assault more harshly than for serious DV assault. Further details of the BOCSAR study are found in Chapter 4.<sup>4</sup>

### Identifying offences as involving domestic violence

- 1.9 The *Crimes (Domestic and Personal Violence) Act 2007* (NSW) allows for the recording of DV offences on an offender's criminal record. This ensures a permanent record of a person's DV offending, allows habitual offenders to be tracked, and provides relevant information to the courts at sentencing and when making bail determinations.<sup>5</sup>
- 1.10 Since the commencement of the Act in 2008, each offence that is DV-related has been allocated its own law part for identification in the Police and Courts' record systems. This has allowed DV-related offences to be analysed at all stages of the criminal justice system, not just at sentencing.
- 1.11 For the purposes of the Act, a domestic violence offence is defined as a "personal violence offence committed by a person against another person with whom the person who commits the offence has or has had a domestic relationship".<sup>6</sup> A "personal violence offence" is any one of the offences listed in s 4 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). The offences are:
- § the various offences (and attempts to commit the offences) of murder and manslaughter<sup>7</sup>
  - § sending or causing delivery of documents containing threats<sup>8</sup>
  - § causing injury (including assault, wounding, and actual and grievous bodily harm)<sup>9</sup>
  - § sexual assault,<sup>10</sup> indecent assault,<sup>11</sup> acts of indecency,<sup>12</sup> sexual intercourse with children,<sup>13</sup> and causing sexual servitude<sup>14</sup>
  - § kidnapping and child abduction<sup>15</sup>
  - § destroying or damaging property<sup>16</sup>

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4. Para [4.5]-[4.29].

5. NSW, *Parliamentary Debates (Hansard)*, Legislative Council, 29 November 2007, 4652.

6. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 11.

7. *Crimes Act 1900* (NSW) s 19A, s 24, s 26, s 27, s 28, s 29, s 30.

8. *Crimes Act 1900* (NSW) s31.

9. *Crimes Act 1900* (NSW) s 33, s 33A, s 35, s 35A, s 37, s 38, s 39, s 41, s 44, s 46, s 47, s 48, s 49, s 58, s 59, s 61.

10. *Crimes Act 1900* (NSW) s 61I, s 61J, s 61JA, s 61K, s 80A.

11. *Crimes Act 1900* (NSW) s 61L, s 61M.

12. *Crimes Act 1900* (NSW) s 61N, s 61O.

13. *Crimes Act 1900* (NSW) s 66A, s 66B, s 66C, s 66D, s 66EA.

14. *Crimes Act 1900* (NSW) s 80D.

15. *Crimes Act 1900* (NSW) s 86, s 87.

16. *Crimes Act 1900* (NSW) s 195, s 196, s 198, s 199, s 200.

- § causing danger with a firearm or spear gun,<sup>17</sup> and firing at a building<sup>18</sup>
  - § stalking and intimidation,<sup>19</sup> and
  - § contravening an apprehended violence order.<sup>20</sup>
- 1.12 Offences that are not currently listed (and, therefore, cannot be identified for statistical purposes as being DV-related) include, for example, the recently enacted offence of assault causing death<sup>21</sup> and the various offences of break and enter<sup>22</sup> which are sometimes committed after a relationship has ended.<sup>23</sup>
- 1.13 The relationship between an offender and victim will determine if an offence is classified as DV-related for any of the offences listed above. An assault is defined as DV-related if the offender and victim are currently (or have been previously) in a domestic relationship which includes marriage, a defacto relationship, an intimate personal relationship, ex-partners, family members, carers, as well as those living together in the same household.<sup>24</sup> An offender who commits a non-DV related assault is, therefore, not in a domestic relationship (either present or past) with the victim.

## Our approach in this report

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- 1.14 In light of BOCSAR's work that examines serious violence offences as well as the problems associated with the Bond and Jeffries study, we have decided to examine individual offences where the numbers are sufficiently large to allow for a useful raw comparison to be made between DV and non-DV offenders. We have included both serious violence offences and less serious offences in our analysis.
- 1.15 For the purposes of chapters 4 and 6 of this report we collected data from BOCSAR for the following DV and non-DV offences:
- § common assault<sup>25</sup>
  - § assault occasioning actual bodily harm<sup>26</sup>
  - § reckless grievous bodily harm<sup>27</sup>
  - § reckless wounding<sup>28</sup>

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17. *Crimes Act 1900* (NSW) s 93G.

18. *Crimes Act 1900* (NSW) s 93GA.

19. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13.

20. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14.

21. *Crimes Act 1900* (NSW) s 25A, s 25B.

22. *Crimes Act 1900* (NSW) s 109-113.

23. See, eg, *R v Eckermann* [2013] NSWCCA 188 [35]. See also *Heine v R* [2008] NSWCCA 61 [40]; *Raczkowski v R* [2008] NSWCCA 152 [46]; *ZZ v R* [2013] NSWCCA 83 [104]; *Hussain v R* [2010] NSWCCA 184; *R v Dunn* [2004] NSWCCA 41; 144 A Crim R 180.

24. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 5.

25. *Crimes Act 1900* (NSW) s 61.

26. *Crimes Act 1900* (NSW) s 59(1).

27. *Crimes Act 1900* (NSW) s 35(2).

28. *Crimes Act 1900* (NSW) s 35(4).

- § destroy or damage property valued at \$2,000 or less<sup>29</sup>
  - § contravene prohibition/restriction in an apprehended violence order (AVO),<sup>30</sup> and
  - § stalk/intimidate intend fear of physical/mental harm.<sup>31</sup>
- 1.16 Ultimately, we used only five offence types in our survey. We did not include reckless grievous bodily harm or reckless wounding because there were too few offenders to provide useful comparisons.<sup>32</sup>
- 1.17 The vast majority (98% or more) of sentences for the nominated offences were imposed by the Local Court. This means that we have had to rely on aggregate numbers for sentencing outcomes and offender characteristics. We could not access the more detailed information that is available from the NSW Judicial Commission sentencing data and remarks on sentence for matters that are sentenced predominantly in the District Court, as we did in our recent review of sentencing for child sexual assault.<sup>33</sup> So, while the aggregate figures may show different characteristics for the individual offences, we can only note a potential relationship rather than draw any conclusions about causation.
- 1.18 The principles we discuss in Chapter 3 come mostly from judgments of the Court of Criminal Appeal (CCA) which hears appeals from the relatively small number of cases that are sentenced in the District Court. Therefore, the matters that come before the CCA may not reflect those that regularly come before the Local Court. Matters prosecuted in the District Court are prosecuted there because they are serious and potentially deserve a penalty that is harsher than can be imposed under the Local Court's jurisdictional limit. We did consider examining the sentences imposed by the District Court on appeal from the Local Court for the selected offences. However, this could not be done in the time available for this review.

## Future directions

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- 1.19 This report considers the principles for sentencing DV offenders as established by the appellate courts and looks at a selection of DV-related offences that are sentenced in sufficient numbers to allow for some comparison. In our view, the principles are generally appropriate and nothing in the data generally points to a problem with the sentencing of DV offenders. We are supported in this view by BOCSAR's study of sentencing outcomes for serious DV and non-DV assault which adjusts sentencing trends for the factors that are known to influence sentencing outcomes. The data on offender characteristics<sup>34</sup> shows some differences between offences and between the DV and non-DV versions of those offences which may explain some of the different sentencing outcomes. Some further investigation and analysis may be required, in particular to adjust for offender characteristics to test whether the sentencing variations identified simply reflect the differences between the types of offenders who commit DV offences and the types of offenders who

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29. *Crimes Act 1900* (NSW) s 195(1)(a), law parts 820 and 64882.

30. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14(1).

31. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13(1).

32. Reckless grievous bodily harm (non-DV: 156; DV: 43); reckless wounding (non-DV: 247; DV: 147).

33. NSW Sentencing Council, *Sentencing for Child Sexual Assault*, Report (2015).

34. Para [4.61]-[4.118].

commit non-DV offences rather than show any variations in judicial approaches to DV and non-DV offences.

- 1.20 In light of the trends identified in Chapters 3-6, there are a number of areas that, in our view, particularly require further attention.
- 1.21 In chapter 4 we identified that there is a higher percentage of sentences of imprisonment for non-DV offenders when compared with DV offenders for the offences of common assault and destroy or damage property valued at \$2000 or less.<sup>35</sup> There is a need to access further information on the sentencing of these offences in the Local Court. It would be beneficial to understand the nature of the offending and the characteristics of the offenders that the courts are taking into account on sentencing. Further investigation into the effectiveness of the various good behaviour bonds in preventing or reducing reoffending would also be useful in this context.
- 1.22 In chapter 6 we identified that there is a relatively high reoffending rate of offenders who have contravened ADVOs.<sup>36</sup> There is a need for further investigation with a view to developing appropriate responses or sentences that will deal with the causes of offending behaviour and the criminogenic needs of offenders.
- 1.23 In this context, we also support monitoring the availability and effectiveness of DV programs both in prison and in the community (either as part of parole or as part of a non-custodial sentence).
- 1.24 In Chapter 3 we have noted the common experience of DV charges being withdrawn and dismissed,<sup>37</sup> in some cases because of victims' unpreparedness to give evidence. There have been a number of recent initiatives to address the relatively high withdrawal rate for DV charges, encourage proactive policing, provide support and assistance to victims and to improve the court process. In our view, it would be instructive to monitor the effectiveness of these initiatives in assisting these charges to proceed, including the willingness of the courts to convict an offender in the absence of evidence from the victim.

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35. Para [4.39]-[4.40]; [4.49]-[4.51].

36. Para [6.6], [6.14], [6.17], [6.20]-[6.21].

37. See para [3.15]-[3.16] and para [3.22]-[3.23].

## 2. Considerations at sentencing for domestic violence offences

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2.1 We have been asked to consider the principles the courts apply when sentencing domestic violence (DV) offences and advise on how the courts apply those principles.

2.2 The descriptions of the principles that the courts apply are based mostly on what the NSW Court of Criminal Appeal (CCA) has decided when matters are appealed from the District Court. In our view these appellate statements that relate to the sentencing of DV offenders are strong and generally appropriate. However, we have little evidence about how the Local Court applies these principles in the cases that come before it. The District Court deals with only the most serious offending behaviour. The Local Court has dealt with the vast majority (more than 98%) of the offences we have considered in the remainder of this report.

2.3 There are a small number of Local Court decisions published that deal with sentencing DV offences.<sup>1</sup> These cases apply the relevant principles as outlined in

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1. See, eg, *Director of Public Prosecutions (NSW) v McKellar* [2015] NSWLC 23; *Director of Public Prosecutions (NSW) v Vallelonga* [2014] NSWLC 13; *Police v Poolman* [2014] NSWLC 3; *Police v Trevail* [2012] NSWLC 1; *Police v Giallourakis* [2010] NSWLC 24.

this chapter. In cases of serious offending, the Local Court also applies the principles laid down by the CCA that:

where the maximum applicable penalty is lower because the charge has been prosecuted within the limited summary jurisdiction of the Local Court, that court should impose a penalty reflecting the objective seriousness of the offence, tempered if appropriate by subjective circumstances, taking care only not to exceed the maximum jurisdictional limit.<sup>2</sup>

- 2.4 However, we have not been able to access the vast majority of magistrates' remarks on sentence delivered in the Local Court. We, therefore, may not have a complete picture of how the Local Court applies the principles, particularly in the case of less serious matters that, for example, result in a bond or other non-custodial sentence.
- 2.5 It should also be noted that some of the principles have been applied in cases of break and enter<sup>3</sup> which do not come within the definition of DV offences under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

## Other compilations of relevant principles

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- 2.6 In presenting this chapter on the principles that apply in NSW, we note some other work undertaken in compiling principles relevant to sentencing DV offenders.
- 2.7 The Judicial Commission of NSW has very recently added to its sentencing bench book a section on sentencing DV offences. This new section collects the leading cases on DV and makes cross references to other sections of the bench book that deal with DV in the context of other specific issues.<sup>4</sup>
- 2.8 We strongly support the development of guidelines for sentencing DV offences either in the form of bench book directions or through a guideline judgment.

## National bench book on family violence

- 2.9 Work is currently underway to compile a national bench book on family violence, following recommendations by the Australian and NSW Law Reform Commissions in their family violence report.<sup>5</sup> In particular, the Commissions recommended that the bench book include a section that “addresses sentencing in family violence matters”,<sup>6</sup> and include a section “guiding courts on how to sentence offenders for breach of protection orders”.<sup>7</sup> The Commissions provided a list of examples of the guidance that could be offered to courts when sentencing for breach of protection orders:

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2. *R v Doan* (2000) 115 NSWLR 115 [35].
  3. *R v Dunn* [2004] NSWCCA 41; 144 A Crim R 180.
  4. Judicial Commission of NSW, *Sentencing Bench Book* [63-500]-[63-520] (update 33, December 2015).
  5. NSW Law Reform Commission, *Family Violence: A National Legal Response*, Report 128 (2010) rec 31-2.
  6. NSW Law Reform Commission, *Family Violence: A National Legal Response*, Report 128 (2010) rec 13-1.
  7. NSW Law Reform Commission, *Family Violence: A National Legal Response*, Report 128 (2010) rec 12-8.

- (a) the purposes of sentencing an offender for breach of a protection order;
  - (b) the potential impact of particular sentencing options, especially fines, on a victim of family violence;
  - (c) sentencing factors relating to the victim, including the impact of the offence on the victim;
  - (d) sentencing factors relating to the offender, including the timing of the breach;
  - (e) factors relevant to determining the severity of sentencing range and the appropriateness of particular sanctions for different levels of severity of breach;
  - (f) that breaches not involving physical violence can have a significant impact on a victim and should not necessarily be treated as less serious than breaches involving physical violence; and
  - (g) the benefits of sentencing options that aim to change the behaviour of those who commit violence.<sup>8</sup>
- 2.10 Some of these factors, many of them addressed below, would also have a wider application in the context of sentencing for DV offences other than breach of a protection order.

### England and Wales Sentencing Guidelines Council

- 2.11 Work has also been undertaken in England and Wales, by the Sentencing Guidelines Council, which, in 2006, published a definitive guideline – *Overarching Principles: Domestic Violence*.<sup>9</sup> Under the *Criminal Justice Act 2003* (UK),<sup>10</sup> every court is required to have regard to this guideline, which applies to all cases that fall within the Crown Prosecution Service’s definition of DV.<sup>11</sup> The foreword to the guidelines summarises the intended approach to DV offending in England and Wales:

This guideline makes clear that offences committed in a domestic context should be regarded as being no less serious than offences committed in a non-domestic context. Indeed, because an offence has been committed in a domestic context, there are likely to be aggravating factors present that make it more serious.<sup>12</sup>

- 2.12 The guideline then sets out the following aggravating factors that may be relevant to DV cases:

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8. NSW Law Reform Commission, *Family Violence: A National Legal Response*, Report 128 (2010) rec 12-8.

9. England and Wales, Sentencing Guidelines Council, *Overarching Principles: Domestic Violence*, Definitive Guideline (2006).

10. *Criminal Justice Act 2003* (UK) s 172.

11. “Any incident of threatening behaviour, violence or abuse [psychological, physical, sexual, financial or emotional] between adults who are or have been intimate partners or family members, regardless of gender or sexuality”: England and Wales, Crown Prosecution Service, *Policy on Prosecuting Cases of Domestic Violence* (2005).

12. England and Wales, Sentencing Guidelines Council, *Overarching Principles: Domestic Violence*, Definitive Guideline (2006) i.



- § Abuse of trust and abuse of power.
  - § Victim is particularly vulnerable.
  - § Impact on children.
  - § Using contact arrangements with a child to instigate an offence.
  - § A proven history of violence or threats by the offender in a domestic setting.
  - § A history of disobedience to court orders.
  - § Victim forced to leave home.<sup>13</sup>
- 2.13 The guideline considers the very limited circumstances where the mitigating factors of positive good character and provocation can be used.<sup>14</sup>
- 2.14 The guideline also considers some further factors that could influence the sentence imposed:

In many situations of domestic violence, the circumstances require the sentence to demonstrate clearly that the conduct is unacceptable. However, there will be some situations where all parties genuinely and realistically wish the relationship to continue as long as the violence stops. In those situations, and where the violence is towards the lower end of the scale of seriousness, it is likely to be appropriate for the court to impose a sentence that provides the support necessary.<sup>15</sup>

## The courts will treat domestic violence offences seriously

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- 2.15 The Court of Criminal Appeal (CCA) has frequently stated that crimes involving DV will be treated seriously across the range of potential offences, from common assault to attempted murder and murder.<sup>16</sup> In one case, the Court observed:

violent attacks in domestic settings must be treated with real seriousness. Regrettably, that form of conduct involves aggression by men who are physically stronger than their victims and who are often in a position economically, or otherwise, to enforce their silence and their acceptance of such conduct. In truth such conduct is brutal, cowardly and inexcusable, and the Courts have a duty to ensure that it is adequately punished, and that sentences are handed out which have a strong element of personal and general deterrence.<sup>17</sup>

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13. England and Wales, Sentencing Guidelines Council, *Overarching Principles: Domestic Violence*, Definitive Guideline (2006) [3.3]-[3.19].

14. England and Wales, Sentencing Guidelines Council, *Overarching Principles: Domestic Violence*, Definitive Guideline (2006) [3.20]-[3.23].

15. England and Wales, Sentencing Guidelines Council, *Overarching Principles: Domestic Violence*, Definitive Guideline (2006) i.

16. See, eg, *Hiron v R* [2007] NSWCCA 336 [32]; *McLaughlin v R* [2013] NSWCCA 152 [48]-[49]; *Shillingsworth v R* [2010] NSWCCA 19 [39]-[40]; *R v Glen* (Unreported, NSWCCA, 19 December 1994) (Simpson J); *R v Ross* (Unreported, NSWCCA, 20 November 1996) (Adams AJ); *R v Rowe* (1996) 89 A Crim R 467; *R v Fahda* [1999] NSWCCA 267 [14]; *R v Powell* [2000] NSWCCA 108 [15]. See also *R v Murray* [2015] NSWSC 1034 [7]-[8].

17. *R v Edigarov* [2001] NSWCCA 436; 125 A Crim R 551 [41]. See also *R v Hamid* [2006] NSWCCA 302; 164 A Crim R 179 [72].



- 2.16 In another case, the CCA highlighted what makes crimes involving DV different from many other crimes of violence:

firstly, the offender usually believes that, in a real sense, what they do is justified, even that they are the true victim; and, secondly, the continued estrangement requires continued threat. These elements also usually mean that the victim never feels truly safe. Unlike the casual robbery, where the victim is often simply in the wrong place at the wrong time, the victim of a domestic violence offence is personally targeted. To my mind these considerations emphasise not only the need for general and personal deterrence but also of denunciation in cases of this kind.<sup>18</sup>

- 2.17 The CCA has also added to its own statements the observations derived from criminological research about DV:

An adequate account of domestic violence should recognise that it typically involves the exercise of power and control over the victim, is commonly recurrent, may escalate over time, may affect a number of people beyond the primary target (including children, other family members and supporters of the victim) and that it contributes to the subordination of women; domestic violence typically involves the violation of trust by someone with whom the victim shares, or has shared, an intimate relationship; the offender may no longer need to resort to violence in order to instil fear and control.<sup>19</sup>

## Purposes of sentencing

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- 2.18 Section 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) identifies the purposes for which a court may impose a sentence on an offender:

- (a) to ensure that the offender is adequately punished for the offence,
- (b) to prevent crime by deterring the offender and other persons from committing similar offences,
- (c) to protect the community from the offender,
- (d) to promote the rehabilitation of the offender,
- (e) to make the offender accountable for his or her actions,
- (f) to denounce the conduct of the offender,
- (g) to recognise the harm done to the victim of the crime and the community.

- 2.19 The Supreme Court has explained how a court approaches sentencing for DV offences:

When any offender is being sentenced for an offence involving domestic violence, that fact, together with the particular acts which constitute the offence must be considered in assessing not only the objective gravity of the offence, but also in determining what role specific and general deterrence, as well as the other objectives of sentencing, must play in the particular sentence which is

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18. *R v Dunn* [2004] NSWCCA 41; 144 A Crim R 180 [47].

19. *R v Hamid* [2006] NSWCCA 302; 164 A Crim R 179 [77], citing J Stubbs, "Restorative Justice, Domestic Violence and Family Violence", *Australian Domestic and Family Violence Clearing House*, Issues Paper 9 (2004) 6-7.

imposed on the offender. That exercise must be undertaken in accordance with what the legislation which the Parliament has enacted and binding case law requires, in the particular sentencing exercise.<sup>20</sup>

- 2.20 The CCA has identified many of the purposes of sentencing as being relevant in the context of DV:

Important factors in sentencing a domestic violence offender are specific and general deterrence, denunciation of the offending conduct and protection of the community.<sup>21</sup>

In sentencing a domestic violence offender, and in particular a repeat domestic violence offender, specific and general deterrence are important factors, together with the requirement of powerful denunciation by the community of such conduct and the need for protection of the community. Recognition of the harm done to the victim and the community as a result of crimes of domestic violence is important.<sup>22</sup>

## Deterrence

- 2.21 The CCA has often emphasised the weight to be given to specific and general deterrence for DV offences.<sup>23</sup>

- 2.22 The CCA has also often referred to a judgment of Justice Simpson that stresses the importance of general deterrence in cases where the victim forgives the offender or requests leniency from the court:<sup>24</sup>

This Court must send a signal to domestic violence offenders that, regardless of self interest denying forgiveness on the part of victims, those victims will nevertheless receive the full protection of the law, insofar as the courts are able to afford it to them. It must not be forgotten, that, if it is to be accorded weight by the courts, forgiveness by the victim also operates contrary to the interests of other victims. Until it is recognised that domestic violence will be treated with severe penalties regardless of a later softening of attitude by the victim, no progress is likely to be made in its abolition or reduction. Put simply, the importance of general deterrence in such cases overrides any minor relevance that evidence of forgiveness might have.<sup>25</sup>

- 2.23 One reason for the particular emphasis on deterrence is the very prevalence of violence against women in domestic relationships.<sup>26</sup> The Supreme Court has observed:

domestic violence offences, of which there can be no more serious example than murder, remain all too common and also need to be addressed by sentences that carry necessary degrees of general and specific deterrence.<sup>27</sup>

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20. *R v Murray* [2015] NSWSC 1034 [5].

21. *Hiron v R* [2007] NSWCCA 336 [32].

22. *R v Hamid* [2006] NSWCCA 302; 164 A Crim R 179 [86].

23. *R v Dunn* [2004] NSWCCA 41; 144 A Crim R 180 [47]; *Simpson v R* [2014] NSWCCA 23 [35]; *Hiron v R* [2007] NSWCCA 336 [32]; *R v Burton* [2008] NSWCCA 128 [107]; *Smith v R* [2013] NSWCCA 209 [68]-[69]; *R v Edigarov* [2001] NSWCCA 436; 125 A Crim R 551 [41].

24. *R v Rowe* (1996) 89 A Crim R 467, 472-3; *R v Berry* [2000] NSWCCA 451 [32]; *R v Hamid* [2006] NSWCCA 302; 164 A Crim R 179 [67].

25. *R v Glen* (Unreported, NSWCCA, 19 December 1994) (Simpson J).

26. *R v Hamid* [2006] NSWCCA 302; 164 A Crim R 179 [68]; *R v Greene* [2001] NSWCCA 258 [16].

2.24 In a CCA case it has also been noted:

It was once thought in some circles that domestic violence was somehow less serious than criminal violence inflicted in other circumstances. I do not agree. In many cases of domestic violence a distinguishing characteristic is the notion of the offender that he (and it is almost invariably a male) is entitled to act as he did pursuant to some perverted view of the rights of a male over a female with whom he is or was intimately connected. It is this characteristic of self-justification which requires particular emphasis to be given, in cases of this kind, to the elements of general and personal deterrence.<sup>28</sup>

2.25 Additional aggravating circumstances, such as a significant history of violent offending, and being subject to a good behaviour bond for offences against the same victim, will justify particular attention being given to deterrence.<sup>29</sup> The CCA has also emphasised “the need for a significant element of general deterrence where a s 323(a) [of the *Crimes Act 1900* (NSW)] offence is committed by a domestic violence offender who seeks to dissuade criminally the victim from giving evidence in the proceedings”.<sup>30</sup>

2.26 The CCA has also noted that the need for specific and general deterrence cannot be entirely disregarded even in the face of factors that might normally be expected to lead to a reduction in sentence. For example, the CCA acknowledged the well-established principle that sentencing a person with a mental health or cognitive impairment is not considered to be a suitable vehicle for denunciation, but added:

However, such cases do not mandate the entire disregard by a sentencing judge of the need in any particular case for recognition of the need for general or personal deterrence. The degree to which the need for such consideration will be reduced is bound to depend upon the circumstances which attend each individual case.<sup>31</sup>

2.27 In another case, the CCA detected no error in the sentencing judge’s finding that the offender’s remorse (a mitigating factor under the *Crimes (Sentencing Procedure) Act 1999* (NSW)<sup>32</sup>) was outweighed by the need for general deterrence.<sup>33</sup>

### Other purposes of sentencing

2.28 The following purposes of sentencing have also been identified as relevant in the context of DV:

§ protection of the community<sup>34</sup>

§ recognition of the harm done to the victim and the community,<sup>35</sup> and

27. *R v Murray* [2015] NSWSC 1034 [6].

28. *Vragovic v R* [2007] NSWCCA 46 [33] (Adams J, Howie and Price JJ agreeing).

29. *Smith v R* [2013] NSWCCA 209 [70]; *R v Hamid* [2006] NSWCCA 302; 164 A Crim R 179 [86].

30. *R v Burton* [2008] NSWCCA 128 [105].

31. *Palijan v R* [2010] NSWCCA 142 [27]. See also *Picciolo v R* [2011] NSWCCA 180 [62].

32. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(i).

33. *Shaw v R* [2008] NSWCCA 58 [24].

34. *Simpson v R* [2014] NSWCCA 23 [35]; *Hiron v R* [2007] NSWCCA 336 [32]; *Smith v R* [2013] NSWCCA 209 [68]-[69]; *R v Hamid* [2006] NSWCCA 302; 164 A Crim R 179 [86]; *Shaw v R* [2008] NSWCCA 58 [24].

§ denunciation.<sup>36</sup>

2.29 In relation to denunciation, the CCA has observed:

Unlike the casual robbery, where the victim is often simply in the wrong place at the wrong time, the victim of a domestic violence offence is personally targeted. To my mind these considerations emphasise not only the need for general and personal deterrence but also of denunciation in cases of this kind.<sup>37</sup>

## Circumstances of aggravation

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2.30 Circumstances of aggravation may be found if the offence was committed in circumstances where:

- § the offender is a repeat DV offender (recidivism)
- § the offender has abused power and control
- § the offender has breached conditional liberty or an apprehended domestic violence order (ADVO)
- § the offence took place in the victim's home, and
- § the offence took place in the presence of a child.

## Recidivism

2.31 As we have already noted, the CCA has given particular emphasis to the purposes of deterrence, denunciation, protecting the community and recognising harm to victims and the community when sentencing repeat DV offenders.<sup>38</sup>

2.32 In one CCA appeal, the offender's criminal history contained "repeated offences of violence against domestic partners", including two previous domestic partners, demonstrating "a propensity to act violently towards his partners".<sup>39</sup> The CCA observed, in accordance with general authority,<sup>40</sup> that the prior convictions:

were pertinent to an assessment as to where, within the boundary set by the objective circumstances, sentences should lie by reference to his attitude of disobedience towards the law and increased weight to be given to retribution, personal deterrence and the protection of society.<sup>41</sup>

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35. *R v Hamid* [2006] NSWCCA 302; 164 A Crim R 179 [86].

36. *Simpson v R* [2014] NSWCCA 23 [35]; *Hiron v R* [2007] NSWCCA 336 [32]; *R v Burton* [2008] NSWCCA 128 [107]; *R v Hamid* [2006] NSWCCA 302; 164 A Crim R 179 [86]; *Shaw v R* [2008] NSWCCA 58 [24].

37. *R v Dunn* [2004] NSWCCA 41; 144 A Crim R 180 [47].

38. *R v Hamid* [2006] NSWCCA 302; 164 A Crim R 179 [86]; *Roberts v R* [2012] NSWCCA 232 [23]; *Browning v R* [2015] NSWCCA 147 [7].

39. *Jeffries v R* [2008] NSWCCA 144; 185 A Crim R 500 [92].

40. *R v McNaughton* [2006] NSWCCA 242; 66 NSWLR 566 [26].

41. *Jeffries v R* [2008] NSWCCA 144; 185 A Crim R 500 [93].

### Abuse of power and control

- 2.33 The CCA has recognised the element of abuse and control as an aggravating factor on a number of occasions.<sup>42</sup> For example, in assessing the seriousness of an offence of unlawful detention in a DV setting, the CCA has looked to the context of the offender’s “controlling and violent relationship” with the victim.<sup>43</sup>
- 2.34 The CCA<sup>44</sup> has approved a statement by the Alberta Court of Criminal Appeal:
- When a man assaults his wife or other female partner, his violence toward her can be accurately characterised as a breach of the position of trust which he occupies. It is an aggravating factor. Men who assault their wives are abusing the power and control which they so often have over the women with whom they live. The vulnerability of many such women is increased by the financial and emotional situation in which they find themselves, which makes it difficult for them to escape.<sup>45</sup>
- 2.35 The Tasmanian Court of Criminal Appeal has also adopted this statement as setting out the principles by which sentencing for DV offences should proceed.<sup>46</sup>

### Breach of conditional liberty or an ADVO

- 2.36 The aggravating factors listed in the *Crimes (Sentencing Procedure) Act 1999* (NSW) include that “the offence was committed while the offender was on conditional liberty in relation to an offence or alleged offence”.<sup>47</sup> The CCA has noted this factor in DV cases.<sup>48</sup>
- 2.37 The CCA has also observed that it is an aggravating factor to commit a DV offence while subject to an ADVO.<sup>49</sup> A further element of aggravation may be found where the offender has breached the conditional liberty imposed for an earlier breach of an ADVO.<sup>50</sup>
- 2.38 In one case, the CCA has observed:
- It is enough to say that, if an offender sees fit repeatedly to visit violence upon a woman in breach of a bond and an apprehended violence order imposed months before with regard to the same behaviour and the same victim, he should expect to be imprisoned, and not for an insubstantial period.<sup>51</sup>
- 2.39 In a recent sentencing for murder in the Supreme Court, the offender had been subject to a good behaviour bond and an ADVO made to protect the victim. The sentencing judge observed:

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42. *R v Hamid* [2006] NSWCCA 302; 164 A Crim R 179 [74]-[77]; *R v Ball* [2013] NSWCCA 126 [98].

43. *R v Burton* [2008] NSWCCA 128 [95].

44. *R v Hamid* [2006] NSWCCA 302; 164 A Crim R 179 [75].

45. *R v Brown* (1992) 73 CCC (3d) 242, 249.

46. *Parker v R* (Unreported, Tasmanian Court of Criminal Appeal, 21 July 1994) 11 (Underwood J).

47. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(j).

48. *Jeffries v R* [2008] NSWCCA 144; 185 A Crim R 500 [91].

49. *Jeffries v R* [2008] NSWCCA 144; 185 A Crim R 500 [91]; *R v Macadam-Kellie* [2001] NSWCCA 170 [37]-[38]; *R v Rumbel* (Unreported, NSWCCA, 15 December 1994) 14 (Newman J).

50. *Browning v R* [2015] NSWCCA 147 [8].

51. *McLaughlin v R* [2013] NSWCCA 152 [49].

There could be no more serious breach of a good behaviour bond than to murder the person protected by the AVO which bound [the offender]. It follows this was a serious, aggravating factor to be taken into account in this sentencing exercise.<sup>52</sup>

### Offence took place in the victim's home

- 2.40 The courts have generally construed the aggravating factor that “the offence was committed in the home of the victim or any other person”<sup>53</sup> to reflect the previous common law position that this aggravating factor applied only to intruders.<sup>54</sup> Justice Schmidt, in a recent sentencing decision for a DV murder, noted that the correctness of this construction has been questioned, but that the issue has not been resolved.<sup>55</sup>

### Offence took place in the presence of a child

- 2.41 One of the aggravating factors listed in the *Crimes (Sentencing Procedure) Act 1999* (NSW) is that “the offence was committed in the presence of a child under 18 years of age”.<sup>56</sup> The CCA has taken a strict approach to proof of this aggravating factor.<sup>57</sup>

- 2.42 The CCA has commented on the purpose of the provision:

it is not difficult to appreciate that the provision in s 21A(2)(ea) is principally aimed at the deleterious effect that the commission of a crime, particularly one of violence, might have on the emotional wellbeing of a child. The commission of the offence may also be deleterious to the child's moral values. It does not matter whether the offender is a parent of the child or not, although if it is a parent this will be particularly aggravating. ... whether such a factor is aggravating in a particular case and how aggravating it is, will depend upon the nature of the offence charged and the likelihood that the child will be affected by it, having regard to all the circumstances including the child's age.<sup>58</sup>

- 2.43 In a recent case, the CCA has observed:

When women (and men) enter into a new domestic relationship, they are entitled to do so without the threat of violence from a former partner. This is particularly so when there are children of the prior relationship as acts of violence towards a parent particularly when committed in the children's presence have the potential to impact severely upon their well-being and future development.<sup>59</sup>

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52. *R v Murray* [2015] NSWSC 1034 [70].

53. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(eb).

54. See, eg, *R v Comert* [2004] NSWCCA 125 [29]; *Ingham v R* [2011] NSWCCA 88 [112].

55. *R v Murray* [2015] NSWSC 1034 [76]-[78], referring to *Melbom v R* [2013] NSWCCA 210 [1]-[2], [44]; *Montero v R* [2013] NSWCCA 21; 234 A Crim R 532 [46]-[47]; *Oh v R* [2010] NSWCCA 148 [40]; *Aktar v R* [2015] NSWCCA 123 [1], [2] and [55].

56. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(ea).

57. *Gore v R* [2010] NSWCCA 330; 208 A Crim R 353 [104]; *McLaughlin v R* [2013] NSWCCA 152 [28].

58. *Gore v R* [2010] NSWCCA 330; 208 A Crim R 353 [14]. See also *McLaughlin v R* [2013] NSWCCA 152 [28]-[30]; *R v Seymour* [2012] NSWSC 1010 [43]-[44].

59. *R v Eckermann* [2013] NSWCCA 188 [54].



## Circumstances that do not mitigate domestic violence offences

- 2.44 The courts have also commented on what does not mitigate or excuse DV. These cases generally depend on the facts before the court.
- 2.45 In general, however, a sentencing court need take mitigating factors into account only to the extent that they are relevant to the case before it.<sup>60</sup> The *Crimes (Sentencing Procedure) Act 1999* (NSW) relevantly provides that:

The fact that any such aggravating or mitigating factor is relevant and known to the court does not require the court to increase or reduce the sentence for the offence.<sup>61</sup>

### The fact of an existing or prior relationship between offender and victim

- 2.46 At various times, and in various contexts, it has been argued that an offence is less serious because it has taken place in the context of a current or former domestic relationship. The CCA has rejected this view in a number of cases.
- 2.47 In one case, the sentencing judge found that a break and enter by the offender who had previously been in a domestic relationship with the victim “would have been less frightening than a home invasion by a stranger”. The CCA observed:

Home invasions by strangers are undoubtedly serious examples of an offence contrary to s 112(2) [of the *Crimes Act 1900* (NSW)], but so may be break and enters where an offender has previously been in a domestic relationship with the occupant of the house, particularly when there has been a history of domestic violence. In such cases, the victim's fearfulness should not be underestimated. An offence does not become less serious by virtue of a prior domestic relationship between an offender and the victim. The objective gravity of the crime is to be assessed on its facts.<sup>62</sup>

- 2.48 Another CCA case involved an offence of aggravated entering a dwelling as well as taking a person without consent to obtain an advantage. It was submitted that, “all other things being equal”, the fact that an offender is a close relative of the victim makes the criminal act one of a lesser nature. Justice Davies, in a separate judgment, observed:

I do not agree with that submission. It overlooks the fact that a victim who is a relative, and particularly a wife, may be in a more, rather than a less, vulnerable position with regard to the wrongful acts of the offender. It contains the inference that it is less serious to commit a crime, whether a crime involving property or a crime of violence against a relative compared with a stranger.<sup>63</sup>

- 2.49 The CCA has on a number of occasions rejected submissions that murders should be mitigated on the grounds that they fall into a category of “ordinary domestic murders”.<sup>64</sup> In handing down a sentence for murder in the Supreme Court, Justice

60. *R v Wickham* [2004] NSWCCA 193 [29].

61. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5).

62. *R v Eckermann* [2013] NSWCCA 188 [35]. See also *Heine v R* [2008] NSWCCA 61 [40]; *Raczkowski v R* [2008] NSWCCA 152 [46]; *ZZ v R* [2013] NSWCCA 83 [104].

63. *Hussain v R* [2010] NSWCCA 184 [80]-[82].

64. *R v Whitmore* [1999] NSWCCA 75 [16]; *Knight v R* [2006] NSWCCA 292; 164 A Crim R 126 [26]; *Gonzales v R* [2007] NSWCCA 321; 178 A Crim R 232 [175]. See also *R v Rosevear* [1999] NSWSC 732 [23]-[24].

Adams rejected the suggestion that “domestic” murders were a less heinous class of crime than other murders:

The deliberate infliction of lethal violence is as culpable whether the victim is a spouse or a stranger. I add that it is apparent that there are some men in the community who consider that marriage gives them the right to control the lives and welfare of their wives and to punish them when they do not comply with those demands. Those men should be warned that the law will not stand idly by and permit them to commit crimes of violence, however justified they think they might be. Nor should they think that such attempts at justification will be met with sympathy. To the contrary, the assertion of such a right should be treated as rendering culpability all the greater.<sup>65</sup>

2.50 In another CCA case, Justice Allen made the following observations in a separate judgment:

There are those within the community whose approach to the relationship between a man and a woman is that if the man has what might be called a grand passion for the woman, which completely overwhelms him, there is somehow a degree of respectability in him giving vent to that grand passion by seeking to control the life of the woman against her will - indeed, even in an extreme case, taking her life if he believes that is what ought to be done.

There is no respectability in that at all. It is arrogance. I do accept that having such a grand passion, if it can be so called, can diminish, for sentencing, the importance of the element of personal deterrence. But it certainly does not diminish the importance of the element of general deterrence. Indeed, the very misconception that such a grand passion affords a degree of respectability to what otherwise is abhorrent makes it all the more important that, for the purpose of general deterrence, it be made perfectly clear that such an approach will not be tolerated in this civilised society.<sup>66</sup>

### **Distress at the breakdown of a relationship**

2.51 The CCA has made it clear on many occasions that an offender’s distress at the breakdown of a relationship is no excuse for violence:

The Courts, including this Court variously constituted, have tried to make it clear beyond any doubting that the breakdown of personal relationships, marital and extramarital alike, cannot be allowed to justify vengeful violence of any kind, let alone extreme violence of the kind here relevant.<sup>67</sup>

2.52 In another case, the CCA noted that the sentencing judge had:

emphasised, as various Benches of this Court have emphasised for many years, that however sad and distressing in a particular case a matrimonial breakdown might be, the one thing that cannot be tolerated is a view that violence of any kind, let alone violence of the kind that I have described, is somehow to be accepted as a more or less natural incident of such a breakdown. The law is clear and it is to the contrary of that view.<sup>68</sup>

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65. *R v Keir* [2000] NSWSC 111 [15]. See also *R v Sievers* [2002] NSWSC 1257 [20].

66. *R v Cheung* (Unreported, NSWCCA, 11 December 1995) 1 (Allen J). See also *R v Badanjak* [2004] NSWCCA 395 [31].

67. *R v Rae* [2001] NSWCCA 545 [21].

68. *Walker v R* [2006] NSWCCA 347 [7].



### Provocative conduct

- 2.53 Under the *Crimes (Sentencing Procedure) Act 1999* (NSW) one of the mitigating factors to be taken into account in determining the appropriate sentence for an offence is that the victim provoked the offender.<sup>69</sup> The question becomes one of the degree of provocation in the circumstances.
- 2.54 Provocation in this sense, which applies as a sentencing consideration for any offence, needs to be distinguished from provocation that operates as a partial defence to make what would otherwise be murder, manslaughter. The interaction between the mitigating factor of provocative conduct and the partial defence of provocation is discussed further below.<sup>70</sup>
- 2.55 On the question of the mitigating factor, in one case, the CCA observed that while there was evidence before the sentencing judge of “relationship tension and general enmity ... leading up to the offence” between the offender and victim and that “while this was part of the overall circumstances in which the offending occurred, it did not constitute evidence of provocation such as to amount to mitigation”.<sup>71</sup>
- 2.56 In another case, the CCA observed that an offender’s conduct can be “so far out of any reasonable proportion to the behaviour of the victim that it was well within [the court’s] discretion to determine that there was no mitigation arising from that circumstance”.<sup>72</sup>
- 2.57 In a recent parliamentary inquiry, the absence of any qualification to the mitigating factor of provocation was noted. In evidence before the inquiry it was suggested, for example, that provocation could be qualified “by saying provocation where it arises out of sexual infidelity, jealousy, possessiveness or control et cetera is not to be taken into account”.<sup>73</sup>
- 2.58 Cases where the provocative conduct in fact amounted to DV against the offender are discussed below.<sup>74</sup>

### Attitude of victim to the offender at sentencing

- 2.59 In some cases, often through a victim impact statement or other communication, a victim of DV may indicate a preparedness to forgive the offender, may accept some responsibility for the offending behaviour, may wish to withdraw evidence and statements, may express a desire to see the family reunited, and may ask the court to impose a lesser sentence.
- 2.60 The courts have generally taken a cautious approach to such cases.<sup>75</sup> The CCA has observed that such caution can be justified “since it is the collected experience of sentencing courts that victims of domestic violence may be actively pressured to

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69. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(c).

70. Para [2.70]-[2.75].

71. *Shaw v R* [2008] NSWCCA 58 [26].

72. *R v Mendez* [2002] NSWCCA 415 [16].

73. NSW, Select Committee on the Partial Defence of Provocation, *The Partial Defence of Provocation*, Report (2013) [5.22].

74. Para [2.71]-[2.74].

75. *R v Glen* (Unreported, NSWCCA, 19 December 1994) (Simpson J); *R v Rowe* (1996) 89 A Crim R 467, 472-473; *R v Kanj* [2000] NSWCCA 408; 118 A Crim R 329 [26]-[28]; *R v Burton* [2008] NSWCCA 128 [104]-[105].

forgive their assailants or compelled for other reasons to show a preparedness to forgive them".<sup>76</sup>

2.61 Justice Simpson has further explained the need for such caution:

It is a fact known to the courts and to the community that victims of domestic violence frequently, and clearly contrary to their own interests and welfare, forgive their attackers. It is said, and has been said so often and for so long as to be almost notorious, that it was this pattern of post offence forgiveness, accompanied by apparent remorse or contrition on the part of the offender, that prevented the prosecution of such offenders. In turn, it appeared that the victim of domestic violence was in a class different to the rest of the community insofar as the protection of the law was concerned. Domestic violence was not seen as a crime which attracted the sanction of the law in the same way or to the same extent as other crimes, whether or not of violence. The perpetrator of domestic violence was relatively safe to commit crimes with impunity, at least provided he or she (and, in the cases that have to date come before the courts, it has almost invariably been he) could attain the victim's forgiveness.

... This Court must send a signal to domestic violence offenders that, regardless of self interest denying forgiveness on the part of victims, those victims will nevertheless receive the full protection of the law, insofar as the courts are able to afford it to them.<sup>77</sup>

2.62 In some cases, the courts have emphasised the need to treat DV cases as having a relevance beyond individual circumstances and beyond the wishes of an individual victim in order to give due weight to general deterrence.<sup>78</sup> In one CCA case it was observed:

A serious crime is a wrong committed against the community at large and the community is itself entitled to retribution ... Matters of general public importance are at the heart of the policies and principles that direct the proper assessment of punishment, the purpose of which is to protect the public ...<sup>79</sup>

2.63 Justice Simpson has also explained:

It must not be forgotten, that, if it is to be accorded weight by the courts, forgiveness by the victim also operates contrary to the interests of other victims. Until it is recognised that domestic violence will be treated with severe penalties regardless of a later softening of attitude by the victim, no progress is likely to be made in its abolition or reduction. Put simply, the importance of general deterrence in such cases overrides any minor relevance that evidence of forgiveness might have.

For too long the community in general and the agencies of law enforcement in particular, have turned their backs upon the helpless victims of domestic violence. Acceptance of the victim's word that he/she forgives the offender, casts too great a burden of responsibility upon one individual already in a vulnerable position. Neither the community, the law enforcement agencies, nor the courts can be permitted to abdicate their responsibility in this fashion.

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76. *Shaw v R* [2008] NSWCCA 58 [27].

77. *R v Glen* (Unreported, NSWCCA, 19 December 1994) (Simpson J); *R v Burton* [2008] NSWCCA 128 [104].

78. *R v Burton* [2008] NSWCCA 128 [103]-[105]; *R v Kershaw* [2005] NSWCCA 56 [24]; *R v Quach* [2002] NSWCCA 173 [28]; *R v Berry* [2000] NSWCCA 451; 32 MVR 405 [32].

79. *R v Palu* [2002] NSWCCA 381; 134 A Crim R 174 [37].

Protection of the particular victim in the particular case is a step towards protection of other victims in other cases.<sup>80</sup>

- 2.64 However, there may be exceptional circumstances where a victim's attitude to the offender, for example, in terms of ongoing support and maintenance of family connections, may permit the court "to approach the issue of rehabilitation in a most favourable light".<sup>81</sup>

## Circumstances that may mitigate domestic violence offences

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- 2.65 There are some particular circumstances involving DV where the courts may find some mitigation. Current case law, however, suggests that these circumstances are quite strictly limited.

### Offender witnessed or was subject to domestic violence during childhood

- 2.66 It is possible that offenders may, at sentencing, raise the fact that they witnessed or were subjected to DV during their upbringing.

- 2.67 The question of an offender being a victim of past domestic abuse arises in the broader context of taking an offender's deprived background into account. The High Court has recently considered the extent to which an offender's deprived background can mitigate that offender's sentence. The High Court considered that the issue in the case before it was "whether the appellant's background of profound childhood deprivation allowed the weight that would ordinarily be given to personal and general deterrence to be moderated in favour of other purposes of punishment, including rehabilitation".<sup>82</sup>

- 2.68 The Court<sup>83</sup> also quoted a point made by Chief Justice Gleeson in an earlier case that "in the case of a particular offender, an aspect of the case which might mean that deterrence of others is of lesser importance, might, at the same time, mean that the protection of society is of greater importance".<sup>84</sup>

- 2.69 The High Court observed:

The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person's capacity to mature and to learn from experience. It is a feature of the person's make-up and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending. ...

However, this is not to suggest ... that an offender's deprived background has the same (mitigatory) relevance for all of the purposes of punishment. Giving weight to the conflicting purposes of punishment is what makes the exercise of the discretion so difficult. An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when

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80. *R v Glen* (Unreported, NSWCCA, 19 December 1994) (Simpson J). See also *R v Fahda* [1999] NSWCCA 267 [26].

81. *Shaw v R* [2008] NSWCCA 58 [45].

82. *Bugmy v R* [2013] HCA 37; 249 CLR 571 [46].

83. *Bugmy v R* [2013] HCA 37; 249 CLR 571 [45].

84. *R v Engert* (1995) 84 A Crim R 67, 68.

frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However the inability to control the violent response to frustration may increase the importance of protecting the community from the offender.<sup>85</sup>

### Provocation amounting to domestic violence

2.70 Provocation by the victim is listed among the mitigating factors in s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW), but, as noted above,<sup>86</sup> whether provocation is found depends very much on the circumstances of each case.

2.71 We have already noted the distinction between provocation as a mitigating factor that can be applied, where relevant, for all offences and provocation as a partial defence to murder. However, there are some circumstances where the two types of provocation interact. In particular, there is a line of authority in DV manslaughter cases so that, in exceptional cases, a non-custodial sentence may be appropriate where provocation has been found as a partial defence to murder and there is a history of DV perpetuated by the deceased victim.

2.72 The general approach of the courts to domestic manslaughter in the context of long-term provocation is exemplified in the following:

The circumstances inevitably attract a very considerable degree of sympathy towards the appellant but she has taken a human life, and this is one of the most dreadful crimes known to the law. Whilst one can understand the circumstances and the trauma which led up to her committing this crime, it would nevertheless be a failure on the part of the criminal law to take too lenient a view of the matter. The learned sentencing judge quite understandably found himself bound to mark the seriousness of the crime of taking a human life. His Honour was properly concerned to ensure that there could be no impression gained from what had taken place that matrimonial discord, indeed extreme matrimonial discord such as one sees in this case, can ever be an excuse for the victimised party to take the life of the aggressor. It has always been the policy of the criminal law to emphasise that a victimised person cannot be permitted, even in such circumstances as the present, to take the law into his or her own hands by killing the aggressor .... It is necessary to ensure that there be an adequate element of deterrence to the community at large against crimes such as the present.<sup>87</sup>

2.73 In a later CCA case, it was observed that “[t]he one principle to be extracted from the authorities is that it is only in the most exceptional cases a court will impose a non-custodial sentence”.<sup>88</sup> In that case, the circumstances did warrant such a finding:

For a period of some thirteen years the deceased indulged in extreme brutality of a physical and mental kind towards his wife and elder child and as the other children were born they received like treatment. The deceased's persistent conduct can only be described as brutal, callous and inhuman. At the very least a very strong case is made out for manslaughter on the basis of provocation and even without the presence of diminished responsibility the effect is that there must be a very considerable diminution in criminal responsibility. ...

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85. *Bugmy v R* [2013] HCA 37; 249 CLR 571 [43]-[44].

86. Para [2.54]-[2.56].

87. *Whiting v R* (Unreported, NSWCCA, 27 September 1979) 5 (Street CJ).

88. *R v Bogunovich* (1985) 16 A Crim R 456, 461. See also *R v Russell* [2006] NSWSC 722 [85]-[88]; *R v Jukes* [2006] NSWSC 1065 [49]-[54]; *R v Silva* [2015] NSWSC 148 [54]-[63].

Finally, I am unable to find any valid reason for the imposition of a custodial sentence. I am quite satisfied that the deceased's persistent ill treatment and abuse of the prisoner, and her knowledge of his assaults upon his sons, were such as to render this a special case in which a non-custodial penalty should be imposed.<sup>89</sup>

- 2.74 Another CCA case provided an opportunity to summarise the considerations that apply in such cases:

Such sentences, it seems to me, reflect more the undeniable fact that those prisoners had been subjected to both mental and physical dominance by the deceased over a substantial period of time.<sup>90</sup>

- 2.75 Recent amendments to the partial defence of provocation in cases of homicide<sup>91</sup> would not appear to have directly affected the consideration of provocation as a mitigating factor at sentencing.

### Consequences for third parties

- 2.76 It is sometimes assumed that some courts will treat a DV offender more leniently because of the impact a fine or a sentence of imprisonment will have on the offender's family.<sup>92</sup> The Chief Magistrate, in a submission to the NSW and Australian Law Reform Commissions' family violence review, observed that some further complicating factors in sentencing for breach of ADVOs included that:

the punishment of an offender may well have an adverse impact upon the victim or any children of a relationship, particularly in circumstances where there is an ongoing relationship. This might include financial hardship due to the imposition of a fine, emotional, relational and financial hardship due to the imposition of a custodial sentence ...<sup>93</sup>

- 2.77 As we have already noted, the Australian and NSW Law Reform Commissions have suggested that guidance could be offered to courts when sentencing for breach of protection orders as to "the potential impact of particular sentencing options, especially fines, on a victim of family violence".<sup>94</sup>

- 2.78 The Commissions drew on work undertaken by the Victorian Sentencing Advisory Council on guiding principles for sentencing contraventions of family violence intervention orders. The Council devised the principles in what it saw as the absence of specific guidance to the courts as to how they should deal with family violence cases in general or breaches of intervention orders in particular, "other than general statements from the higher courts".

- 2.79 In its 2009 report, the Victorian Council observed that the fine was the most common sentence imposed on offenders who breached a family violence

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89. *R v Bogunovich* (1985) 16 A Crim R 456, 462.

90. *R v Alexander* (1994) 78 A Crim R 141, 145-146.

91. *Crimes Act 1900* (NSW) s 23 as amended by *Crimes Amendment (Provocation) Act 2014* (NSW).

92. R Alexander, *Domestic Violence in Australia: The Legal Response* (3rd ed, 2002) 33, 52.

93. NSW Law Reform Commission, *Family Violence: A National Legal Response*, Report 128 (2010) [12.155].

94. NSW Law Reform Commission, *Family Violence: A National Legal Response*, Report 128 (2010) rec 12-8(b). See para [2.9].

intervention order<sup>95</sup> but also noted the fine's failure to achieve the purposes of punishment and deterrence. The Council noted:

the dynamics of family violence mean that fines can punish the victim(s) as much or more than the offender. Payment of the fine by the offender may affect his ability to provide financial support to the victim and her family. The offender may even coerce the victim into paying the fine.<sup>96</sup>

2.80 The Council, therefore, proposed that:

sentences with more flexibility in terms of punishment (such as conditional orders that can incorporate community work and/or a financial condition), which are structured to ensure that it is the offender that must serve the punishment, may be more effective in achieving this sentencing purpose<sup>97</sup>

adding that

[t]here will be occasions where a sentence with coercive rehabilitation requirements (such as mandatory attendance at a behavioural change course) as well as a punitive element (such as community work or a financial condition) strikes a better balance between the purposes of sentencing than a sentence such as a fine. Such sentences may achieve more in ensuring long-term compliance with the intervention order.<sup>98</sup>

2.81 Some evidence for courts taking such concerns into account in NSW may be seen in the fact that courts appear to resort to the fine considerably less frequently in common assault cases where common assault involving DV is the principal offence.<sup>99</sup> However, there are no decisions specifically on this narrow point, the case law generally dealing with the hardships caused to an offender's family by imprisonment. The case law in such circumstances also generally tends to consider the impact on family members who are not also victims of the offender.

2.82 The sentencing considerations set out in s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) do not expressly include the possible effect of a sentence on third parties.<sup>100</sup> The general law appears to be that hardship to third parties may be taken into account at sentencing when that hardship is exceptional.<sup>101</sup> The CCA has acknowledged that sentencing courts may consider matters, such as hardship to an offender's family if the offender is incarcerated, "as part of the general mix of subjective matters". However, the CCA has also observed that it is "an entirely different thing to isolate those family circumstances, characterise them as highly exceptional, and use that characterisation as a justification for a discrete and substantial measure of leniency added on the

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95. Victoria, Sentencing Advisory Council, *Sentencing Practices for Breach of Family Violence Intervention Orders*, Final Report (2009) [3.56].

96. Victoria, Sentencing Advisory Council, *Sentencing Practices for Breach of Family Violence Intervention Orders*, Final Report (2009) [6.12].

97. Victoria, Sentencing Advisory Council, *Sentencing Practices for Breach of Family Violence Intervention Orders*, Final Report (2009) [6.12].

98. Victoria, Sentencing Advisory Council, *Sentencing Practices for Breach of Family Violence Intervention Orders*, Final Report (2009) [6.13].

99. Para [4.62]-[4.64].

100. *El-Hilli v R* [2015] NSWCCA 289 [96].

101. *R v Edwards* (1996) 90 A Crim R 510.



[offender's] entitlements under the general law and under the general requirements of [s 22 and 23 of the *Crimes (Sentencing Procedure) Act 1999 (NSW)*]"<sup>102</sup>

- 2.83 The main Australian case for this line of authority is the South Australian case of *R v Wirth*, where it was said:

Hardship to spouse, family, and friends, is the tragic, but inevitable, consequence of almost every conviction and penalty recorded in a criminal court ... . It seems to me that courts would often do less than their clear duty – especially where the element of retribution, deterrence, or protection of society is the predominant consideration – if they allowed themselves to be much influenced by the hardship that prison sentences, which from all other points of view were justified, would be likely to cause to those near and dear to prisoners.

But it has often been remarked that the strength of our law lies in the willingness of judges, when applying a principle, not to carry it past the point where a sense of mercy or of affronted common sense imperatively demands that they should draw back. So it is proper that I should here add that, in my opinion, hardship likely to be caused by a sentence of imprisonment under consideration ought to be taken into account where the circumstances are highly exceptional, where it would be, in effect, inhuman to refuse to do so.<sup>103</sup>

- 2.84 In another CCA case, it was observed:

There is nothing unusual about a situation in which the sentencing of an offender to a term of imprisonment would impose hardship upon some other person. Indeed, ... it may be taken that sending a person to prison will more often than not cause hardship, sometimes serious hardship, and sometimes extreme hardship, to another person. It requires no imagination to understand why this is so. Sentencing judges and magistrates are routinely obliged, in the course of their duties, to sentence offenders who may be bread-winners of families, carers, paid or unpaid, of the disabled, parents of children, protectors of persons who are weak or vulnerable, employers upon whom workers depend for their livelihood, and many others, in a variety of circumstances bound to result in hardship to third parties if such an offender is sentenced to a term of full-time imprisonment.<sup>104</sup>

- 2.85 The situation is somewhat different for Commonwealth offences although the outcome is the same. Under the *Crimes Act 1914 (Cth)* a court sentencing a federal offender must take into account the probable effect of the sentence on an offender's family or dependants.<sup>105</sup> This has been interpreted as accommodating – rather than altering – the general law position that any hardship to family members must be shown to be “exceptional” before it can be taken into account to mitigate an otherwise appropriate sentence.<sup>106</sup> For example, exceptional hardship was found to exist where a 77-year-old accused was the sole carer of her 40-year-old son, who had serious disabilities.<sup>107</sup> It was also found where an offender's wife and each of his four children suffered psychological injury as a result of his imprisonment.<sup>108</sup>

102. *R v X* [2004] NSWCCA 93 [24].

103. *R v Wirth* (1976) 14 SASR 291, 295-296.

104. *R v Edwards* (1996) 90 A Crim R 510, 515.

105. *Crimes Act 1914* (Cth) s 16A(2)(p).

106. *R v Toghias* (2001) 127 A Crim R 23 [13]-[17]. See also *R v Zerafa* (2013) 235 A Crim R 265 [93]; *Elshani v R* [2015] NSWCCA 254 [34]-[35].

107. *R v Aller* [2004] NSWCCA 378.

108. *Elshani v R* [2015] NSWCCA 254.

The hardship must be greater than that which is ordinary and inevitable when a family member faces imprisonment.

- 2.86 In a South Australian case, involving DV against a former partner and potential hardship to the offender's current family, the Court of Criminal Appeal dealt directly with the question of where the balance ought to lie in such a context:

In my view, where a plea is made to mitigate a sentence on the grounds that it will adversely affect an offender's family, the court must necessarily weigh the public interest in imposing a sentence which sufficiently serves the purposes of punishment and deterrence against the public interest in the welfare of the children and dependents of the offender. The offender's failure to discharge his or her duty to them does not extinguish the public interest in their welfare. The welfare of children is a matter of public interest of the highest importance.

I would take the approach that the welfare of the children of an offender who faces imprisonment is always a relevant consideration but, in the general run of cases, the ordinary consequences of imprisonment will not justify the imposition of a sentence which falls below the range which would otherwise be appropriate. Equally, the consequences of an offender's imprisonment on his or her family will not, generally, demand the suspension of a sentence which would otherwise be served immediately. However, the effects of the imprisonment of an offender on his or her children, or other dependents, must be considered in the circumstances of each case and an appropriate balance struck between their welfare and the need to protect the community.

In sentencing offenders for repeated acts of domestic violence committed over protracted periods of time, deterrence is a paramount consideration. The protection of women from physical harm and from the psychological scars it leaves on them, and their children, is a primary concern of sentencing courts in such cases. The predicament of [the current partner] and her children is a difficult and a sad one. However, it is not of an order which would justify a reversal of the sentencing Judge's decision not to suspend.<sup>109</sup>

- 2.87 It is not clear from this, however, what approach a court would take where there was no evidence of any other acts of DV, let alone "repeated acts of domestic violence committed over protracted periods of time".

## Other matters

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### Fact finding on sentencing

- 2.88 There are a number of principles governing how the court approaches fact finding for the purpose of sentencing:
- § it is for the court to determine the facts relevant to sentencing - these may arise in evidence at trial or in the course of sentencing proceedings
  - § the court's view of these facts must be consistent with the jury's verdict
  - § facts found against the offender must be arrived at beyond reasonable doubt
  - § it is sufficient for matters favourable to the offender be proved on the balance of probabilities

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109. *R v Francis* [2012] SASFC 50 [36]-[38].



§ there is no general requirement that the court must sentence the offender on the most favourable version of facts, although this may occur because of the requirement to resolve any reasonable doubt in the offender’s favour.<sup>110</sup>

### Other consequences of guilt

2.89 A number of other consequences flow when an offender is convicted of an offence that falls within the definition of “domestic violence offence” under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). These consequences are that:

§ the offence and certain other offences must be recorded as a DV offence on the offender’s criminal record

§ an ADVO must generally be imposed to protect the victim of the offence, and

§ the offender is excluded from eligibility for a home detention order in certain circumstances, in particular where the victim would likely be a co-resident.

2.90 A DV offence is defined as a “personal violence offence committed by a person against another person with whom the person who commits the offence has or has had a domestic relationship”.<sup>111</sup> A “personal violence offence” is any one of the offences listed in s 4 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).<sup>112</sup>

2.91 The recently enacted offences of assault causing death<sup>113</sup> and the various offences of break and enter<sup>114</sup> (sometimes committed after a relationship has ended) are not included in the list of personal violence offences.

### Recording domestic violence offences

2.92 Under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), upon conviction for an offence, when the court is satisfied that the offence was a DV offence, “the court is to direct that the offence be recorded on the person’s criminal record as a domestic violence offence”.<sup>115</sup> If the court makes such a direction, the prosecution may apply for further offences on the person’s record to be recorded as “domestic violence offences”.<sup>116</sup>

2.93 The relevant provision includes a note drawing attention to the fact that s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) lists a record of previous convictions as an aggravating factor to be taken into account when determining the appropriate sentence for an offence. The intention of the legislators seemed to be that previous DV offences should be taken into account on sentencing.

2.94 This conclusion could be supported by the full text of the aggravating factor which is that “the offender has a record of previous convictions (particularly if the offender is being sentenced for a serious personal violence offence and has a record of

110. *R v Isaacs* (1997) 41 NSWLR 374, 377-378; *Cheung v R* [2001] HCA 67; 209 CLR 1 [14]-[20]; *R v SG* [2003] NSWCCA 220 [24]; *R v Olbrich* [1999] HCA 54; 199 CLR 270 [27].

111. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 11.

112. See the list at para [1.11] above.

113. *Crimes Act 1900* (NSW) s 25A, s 25B.

114. *Crimes Act 1900* (NSW) s 109-113.

115. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 12(2).

116. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 12(3).

previous convictions for serious personal violence offences).<sup>117</sup> “Serious personal violence offence” in s 21A means “a personal violence offence (within the meaning of the *Crimes (Domestic and Personal Violence) Act 2007*) that is punishable by imprisonment for life or for a term of 5 years or more”.<sup>118</sup> Excluded from the list of offences<sup>119</sup> are the offences of common assault and act of indecency<sup>120</sup> both of which are subject to maximum penalties of less than 5 years imprisonment.

2.95 The definition of “personal violence offence”, despite being sourced from the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (and possibly aimed at the type of offences committed in the DV context) does not, in the context of this s 21A aggravating factor, require that the violence have a domestic connection.

2.96 However, notwithstanding that some offences are not included in the particular definition of serious personal violence offence, the CCA has noted that the courts are entitled to have regard to an offender’s prior criminal record “so as to give more weight to retribution, personal deterrence and the protection of the community than would be the case if such a record did not exist”.<sup>121</sup>

### *Court must generally impose an apprehended domestic violence order*

2.97 A court must also, on convicting an offender of a DV offence, make an ADVO for the protection of the victim unless satisfied that an order is “not required”.<sup>122</sup>

### *Exclusion from home detention*

2.98 A court may not make a home detention order where any of the offences being sentenced are, among other things, a “domestic violence offence against any person with whom it is likely the offender would reside, or continue or resume a relationship, if a home detention order were made”.<sup>123</sup> Even if there are no issues of residency with the victim, home detention is also not available for an offence of stalking or intimidating a person with the intention of causing the person to fear personal injury<sup>124</sup> and for offences that can often involve DV, such as murder, attempted murder, manslaughter, sexual assault, sexual offences involving children, offences involving the use of a firearm, and assault occasioning actual bodily harm (or other more serious assault).<sup>125</sup>

2.99 A court may also not make a home detention order for an offender who has at any time in the previous 5 years been convicted of most of the offences listed above (except for the assault and firearms offences).<sup>126</sup> Home detention is also not available for an offender who is, or who in the previous 5 years has been, subject to

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117. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(d).

118. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(6).

119. Set out above at para [1.11].

120. *Crimes Act 1900* (NSW) s 61, s 61N.

121. *R v Wood* [2014] NSWCCA 184 [79]. See also *R v Phanekham (No 3)* [2014] NSWSC 508 [63]-[64]; *R v Hiroki* [2015] NSWSC 496 [47].

122. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 39, formerly *Crimes Act 1900* (NSW) s 562BE.

123. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 76(g).

124. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 76(f) currently in *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13.

125. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 76(a), (b), (d), (e).

126. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 77(1)(a), (b), (c).

an apprehended violence order (AVO) intended to protect a person with whom the offender is likely to reside.<sup>127</sup>

This exclusion does not apply in the case of other non-custodial options, including intensive correction orders (ICOs). This raises the issue of whether a DV offender might be sentenced to an ICO and required to live at home with the victim. The NSW Law Reform Commission has recommended that DV offences committed against a likely co-resident should automatically exclude offenders from home detention and ICOs.<sup>128</sup> This matter will be dealt with in the Sentencing Council's review of ICOs that will be completed in 2016.

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127. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 77(e).

128. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) rec 9.2.



### 3. Incidence of domestic violence offences

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- 3.1 The domestic violence (DV) matters that we examine in this report represent only a small proportion of the DV offences that are actually committed.
- 3.2 In particular, the data that we have obtained from NSW Bureau of Crime Statistics and Research (BOCSAR) for Chapter 4 for 2013 and 2014, relates only to sentences imposed where the selected offence was the principal offence.
- 3.3 The numbers of matters sentenced where the selected offences were the principal offences in 2013 and 2014 are set out in Table 3.1.

**Table 3.1: Offenders sentenced in the NSW District and Local Courts for selected principal offences in 2013 and 2014**

Offence type	Non-DV	DV
Common assault	5359	7786
Contravene apprehended violence order (AVO)	529	6189
Assault occasioning actual bodily harm	3545	4289
Stalk/intimidate	1447	3784
Destroy or damage property	2141	848
Reckless wounding	247	147
Reckless grievous bodily harm	156	43

*Source: NSW, Bureau of Crime Statistics and Research (jf15-13323).*

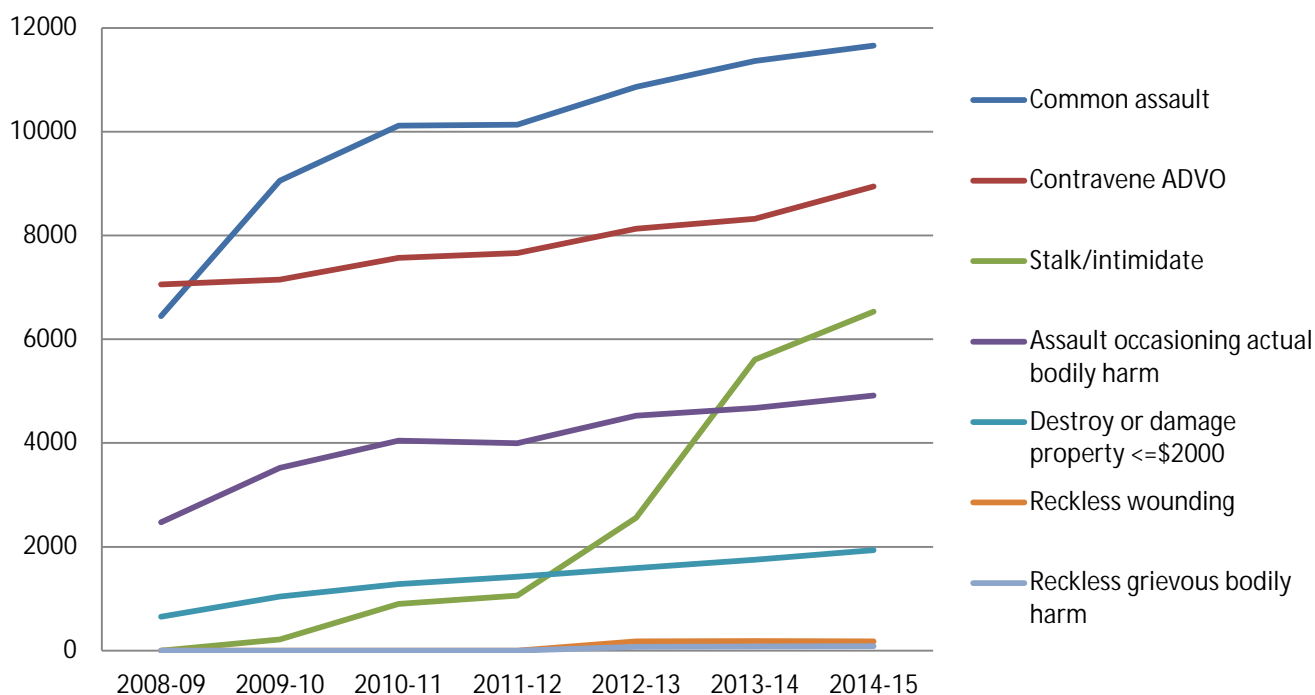
- 3.4 The above figures represent only a small proportion of the DV offences actually committed in the two-year period covered. The following data provides a more comprehensive picture of DV occurrence in NSW and shows the number of charges laid and the outcomes of those charges.

#### Charges laid

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- 3.5 Figure 3.1 shows the number of charges laid - evidenced by court attendance notices (CANs) issued - against DV offenders for the selected offences in each financial year, from 2008-09 to 2014-15.

Figure 3.1: Number of CANs issued in each financial year containing selected DV offences, 2008-09 to 2014-15

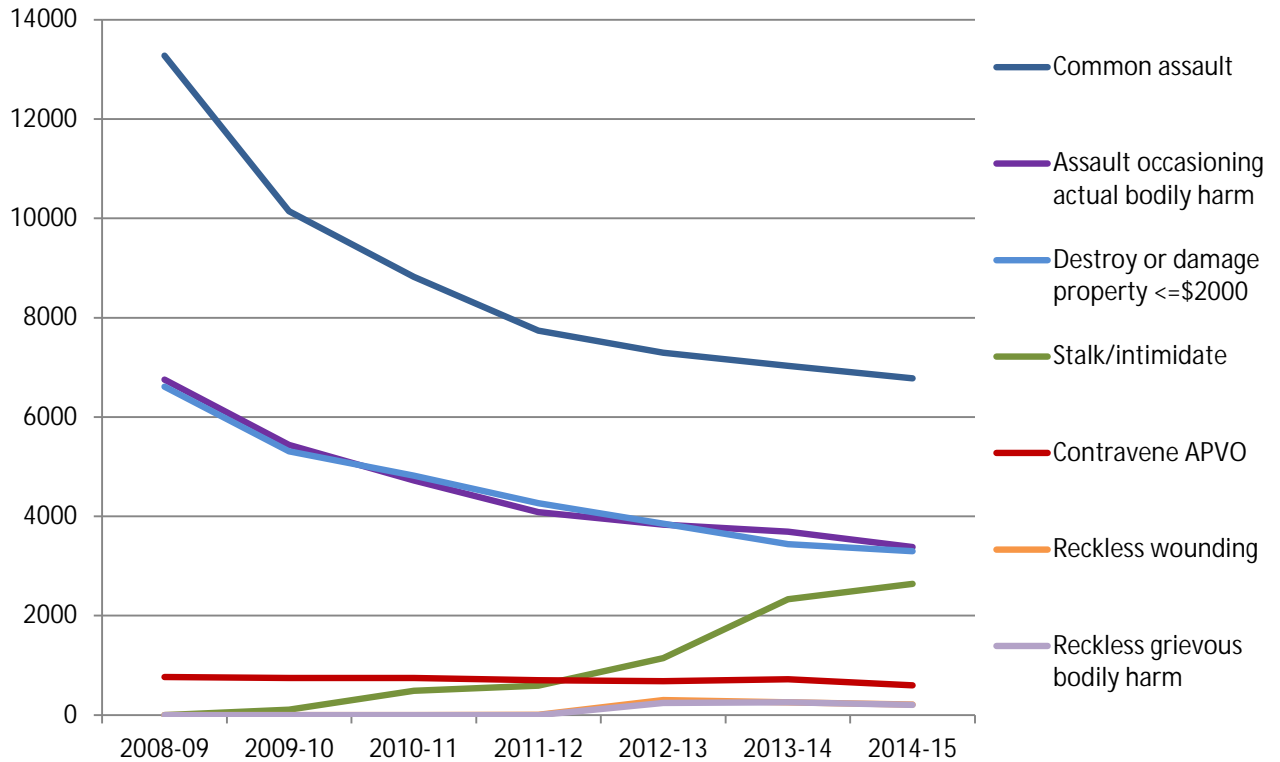


Source: NSW Police Force.

- 3.6 Figure 3.1 shows a steady increase in charges for four of the DV offences – common assault, contravene apprehended domestic violence order (ADVO), assault occasioning actual bodily harm and destroy or damage property valued at \$2000 or less. The current version of the offence of stalk or intimidate<sup>1</sup> came into effect in March 2008 and, therefore, shows a steep rise from a zero base. The current offences of reckless wounding and reckless grievous bodily harm came into effect on 21 June 2012 and have not shown any discernible increase over their three full years of operation.
- 3.7 There are a number of possible reasons for the steady increase in the number of DV charges. One possible reason is that more DV matters are proceeding to charge that might not otherwise have proceeded to charge in the past. Another possible reason is that more offences are being identified as DV-related. Each possible reason may have implications for the characteristics of the additional offences and offenders and, therefore, may possibly be relevant to ultimate sentencing outcomes.

1. The offence was previously contained in *Crimes Act 1900* (NSW) s 545AB(1) in effect from 12 March 2007 until 9 March 2008 and in *Crimes Act 1900* (NSW) s 562AB(1) in effect from 26 April 2000 until 11 March 2007.

Figure 3.2: Number of CANs issued in each financial year containing selected non-DV offences



Source: NSW Police Force.

3.8 By way of comparison, Figure 3.2 shows a decrease in charges for three of the non-DV offences – common assault, assault occasioning actual bodily harm and destroy or damage property valued at \$2000 or less. The offence of stalk or intimidate,<sup>2</sup> like its DV counterpart, shows a steep rise from zero base after it came into effect in March 2008. The offence of contravene an apprehended personal violence order (APVO) shows little change over the period. The current offences of reckless wounding and reckless grievous bodily harm came into effect on 21 June 2012 and have also not shown any discernible increase over their three full years of operation.

3.9 Some, but not all of the decline in charges for three of the offences could be the result of more matters being identified as DV-related.

## Charge outcomes

3.10 Table 3.2 shows the number of finalised charges, by charge outcome, for selected DV (using DV law parts) and non-DV offences in 2014. These figures refer to the number of DV and non-DV charges brought, rather than the number of people charged for each offence.

2. The offence was previously contained in *Crimes Act 1900* (NSW) s 545AB(1) in effect from 12 March 2007 until 9 March 2008 and in *Crimes Act 1900* (NSW) s 562AB(1) in effect from 26 April 2000 until 11 March 2007.

3.11 These figures provide an idea of attrition rates. Again, the figures highlight the differences between offences and, within offence categories, the differences between those committed by DV offenders and those committed by non-DV offenders.

**Table 3.2: Number of finalised charges for selected DV (using DV law parts) and non-DV offences by charge outcome, 2014**

		Total	Withdrawn	Guilty plea	Guilty/ convicted	Not guilty finding	Mental Health/ illness	Otherwise disposed of
Common assault	Non-DV	7800	21.8%	51.4%	13.3%	7.7%	4.7%	1.1%
	DV	13259	27.9%	47.0%	11.7%	9.2%	3.9%	0.4%
Assault occasioning actual bodily harm	Non-DV	3804	23.0%	49.3%	13.1%	10.3%	3.3%	0.9%
	DV	5144	30.3%	42.6%	12.2%	11.5%	3.2%	0.3%
Reckless grievous bodily harm	Non-DV	232	37.9%	38.8%	8.2%	13.8%	0.9%	0.4%
	DV	85	50.6%	24.7%	5.9%	14.1%	3.5%	1.2%
Reckless wounding	Non-DV	271	17.7%	57.9%	10.7%	9.6%	3.3%	0.7%
	DV	184	28.3%	42.4%	12.5%	10.9%	4.3%	1.6%
Destroy or damage property <=\$2000	Non-DV	3967	11.1%	62.8%	15.1%	3.4%	4.6%	2.9%
	DV	2017	14.5%	64.2%	13.3%	3.6%	4.0%	0.4%
Contravene AVO	Non-DV	827	8.6%	47.0%	16.6%	8.5%	9.3%	10.0%
	DV	9451	12.0%	66.4%	11.5%	5.7%	3.8%	0.6%
Stalk/intimidate	Non-DV	2669	19.9%	50.0%	15.5%	6.6%	6.8%	1.2%
	DV	6401	23.4%	51.0%	12.0%	8.7%	4.3%	0.5%

Source: NSW Bureau of Crime Statistics and Research (sr15-13590).

3.12 The following paragraphs will examine the selected offences according to the four principal outcomes:

- § charges withdrawn by the prosecution
- § guilty plea
- § finding of guilt/convicted, and
- § finding of not guilty.

It should be noted that the offences of reckless grievous bodily harm and reckless wounding have low numbers of both DV and non-DV charges. These small samples may sometimes lead to unusually high and unusually low percentages.

3.13 The data in the following paragraphs shows a relatively higher percentage of charges withdrawn for DV charges when compared with non-DV charges and also a



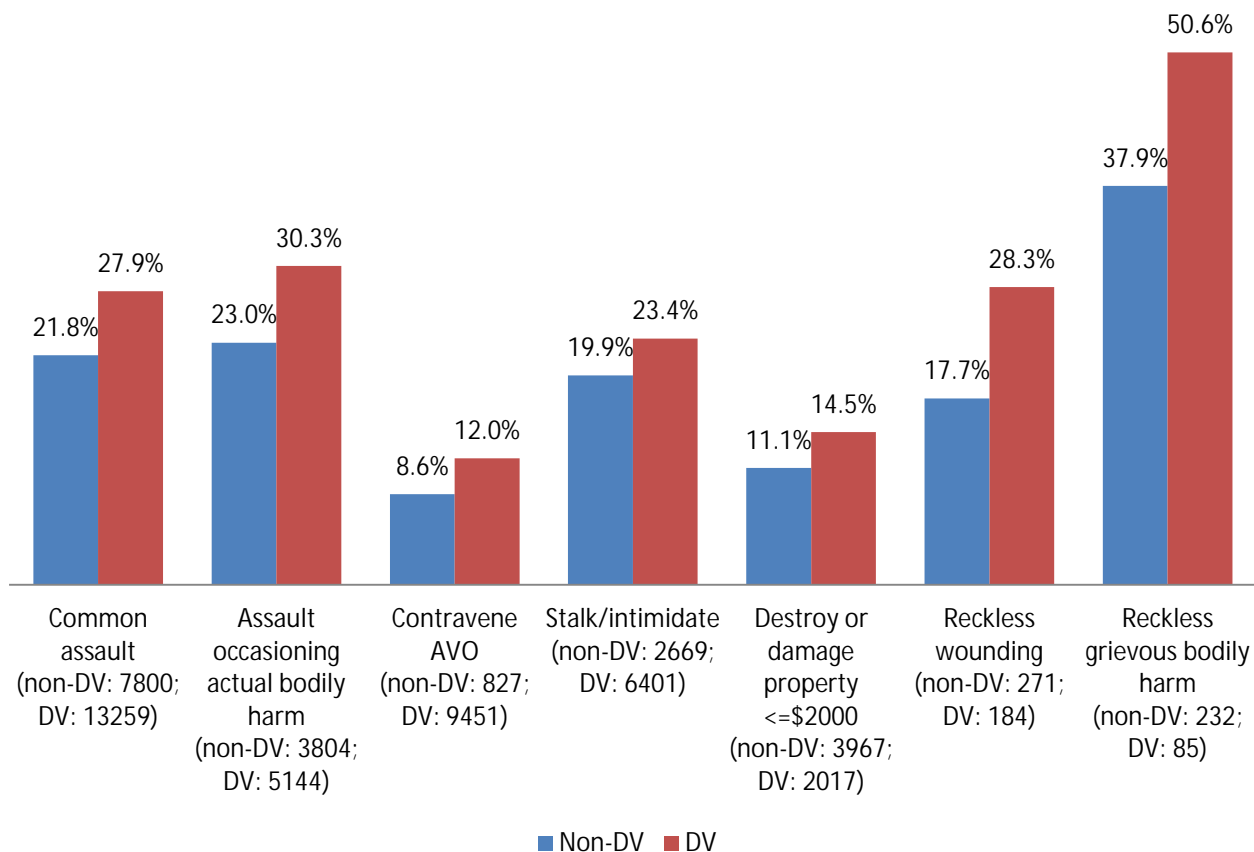
relatively higher percentage of convictions for non-DV charges when compared with DV charges for the selected offences. There have been a number of recent initiatives to address these disparities, including:

- § Proactive policing initiatives, which include policies that require police to apply for ADVOs to protect a victim; legislation to allow senior police to approve provisional ADVOs, and direct or detain defendants for the purpose of serving the order; legal action targets so that police take action wherever there is sufficient evidence of a crime, and investigate proactively alleged breaches of ADVOs and charge offenders in addition to any other offences that the breach may constitute.
  - § Support for DV victims through the court process, including: It Stops Here Safer Pathway which provides a coordinated interagency approach to managing DV victims; referral and advocacy from the Women's Domestic Violence Court Assistance Scheme; providing legal advice under the Domestic Violence Practitioner Scheme; legal services offered by a specialist Domestic Violence Unit in Legal Aid NSW; police Domestic Violence Liaison Officers who provide advice and assistance to victims, and review and oversee DV reports and cases; Police Prosecutors who provide assistance to victims prior to attendance at court, and manage the Prosecutors Pre-Hearing Clinic.
  - § Improved court processes to ensure DV matters and ADVO applications are dealt with efficiently and swiftly by: specialist DV list days in Local Courts; Local Court practice notes that set timeframes for DV matters; and allowing DV victims to give their evidence in chief by prior recorded video or audio statement.
- 3.14 There is a need to monitor the effectiveness of these initiatives in assisting DV charges to proceed, including the willingness of the courts to convict an offender in the absence of evidence from the victim.

### Charges withdrawn by prosecution

3.15 Figure 3.3 shows the percentage of charges withdrawn for the selected offences in 2014.

Figure 3.3: Percentage of charges withdrawn for selected offences, 2014



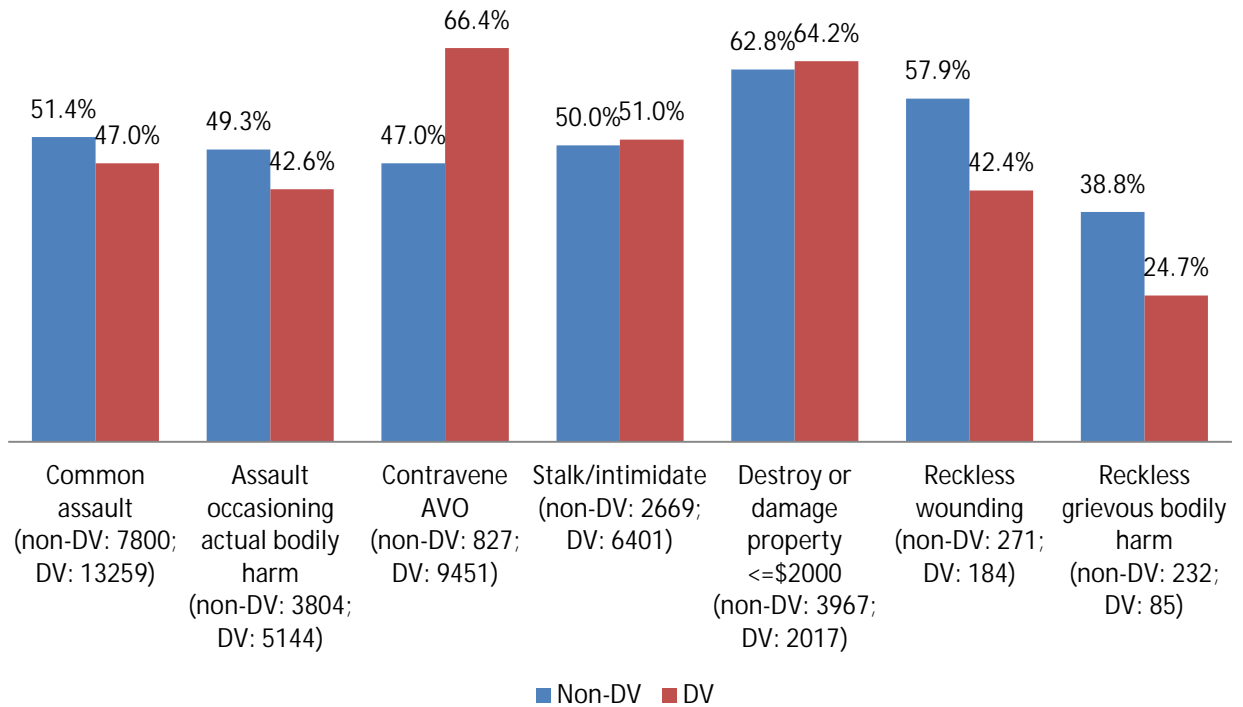
Source: NSW Bureau of Crime Statistics and Research (sr15-13590).

3.16 Across all offence types, a greater percentage of DV charges were withdrawn than non-DV charges for the selected offences.

### Guilty plea

3.17 Figure 3.4 shows the percentage of charges that resulted in a guilty plea for the selected offences in 2014.

Figure 3.4: Percentage of charges resulting in a guilty plea for selected offences, 2014



Source: NSW Bureau of Crime Statistics and Research (sr15-13590).

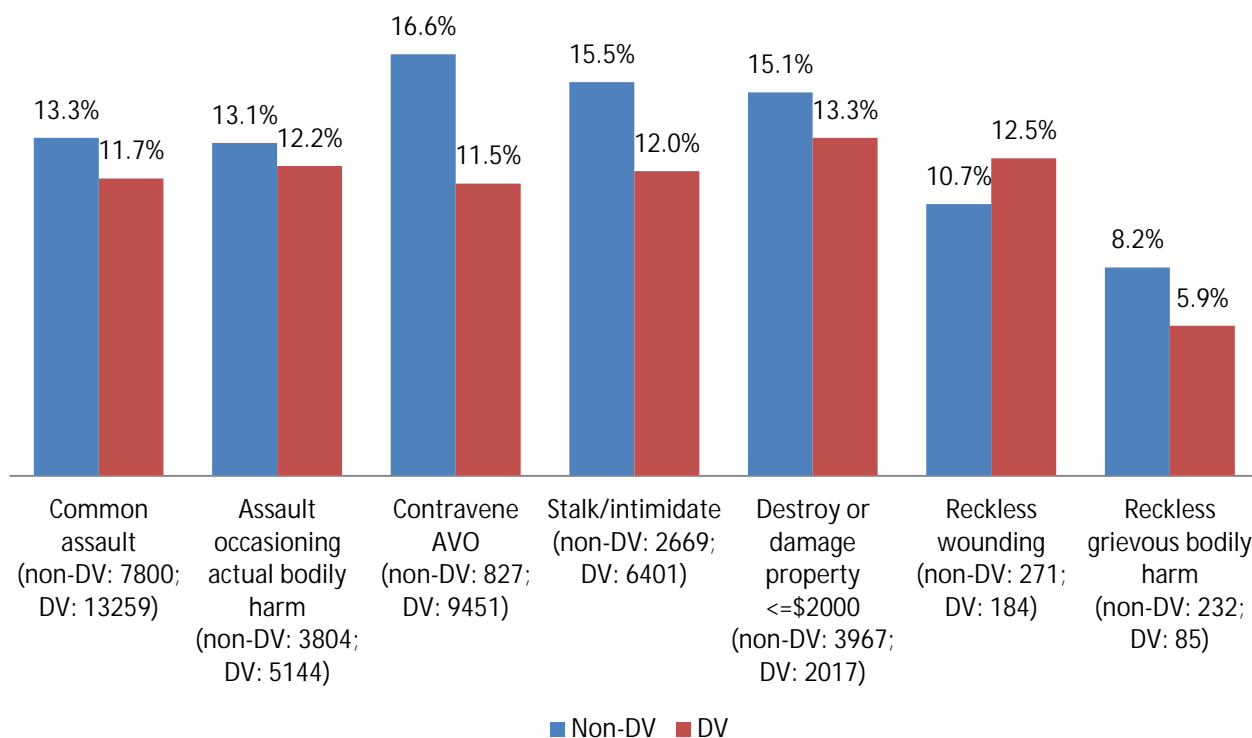
3.18 A guilty plea was the most common charge outcome for all of the selected offences, whether DV-related or not, except for reckless grievous bodily harm that was DV-related.

3.19 For the four selected offences involving personal injury, a smaller percentage of DV charges resulted in a guilty plea than non-DV charges. In the case of the offences of destroy or damage property and stalk or intimidate, a slightly greater percentage of DV charges resulted in a guilty plea than non-DV charges. Finally, a far greater percentage of DV charges resulted in a guilty plea for the offence of contravening an apprehended violence order.

### Finding of guilt or conviction

3.20 Figure 3.5 shows the percentage of charges that resulted in a finding of guilt or conviction for the selected offences in 2014.

Figure 3.5: Percentage of charges resulting in a finding of guilt or conviction for selected offences, 2014



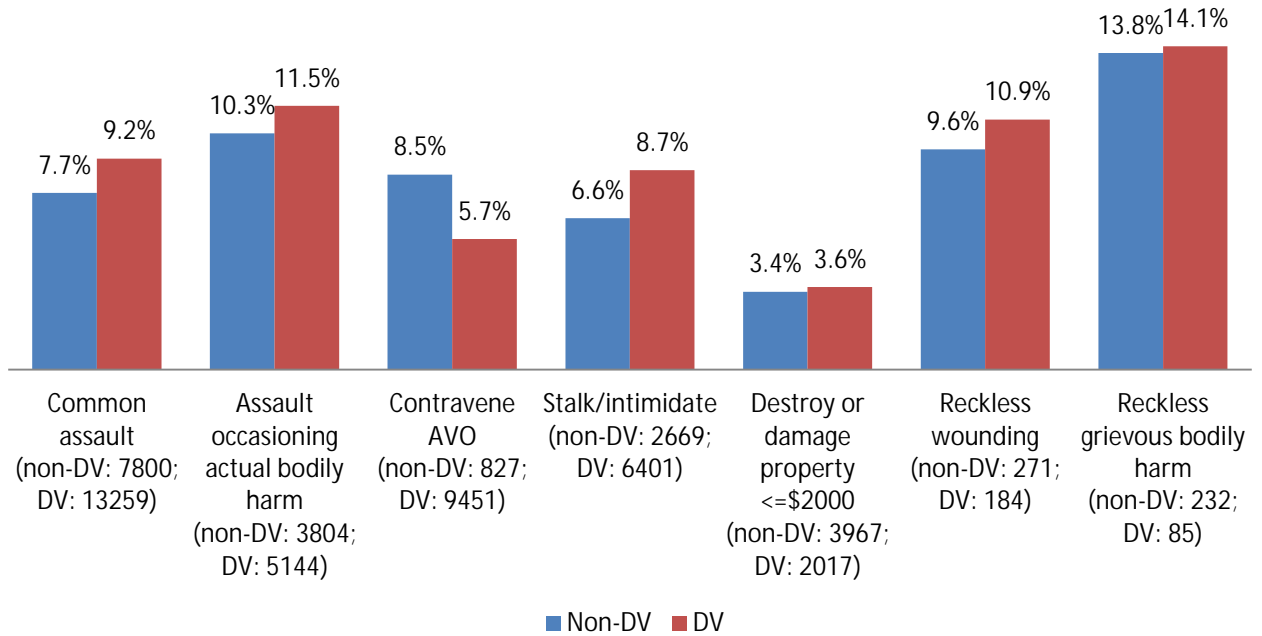
Source: NSW Bureau of Crime Statistics and Research (sr15-13590).

3.21 In all but one case, a slightly smaller percentage of DV charges resulted in a guilty finding or conviction than non-DV charges. The exception – reckless wounding – had a relatively small number of charges recorded in 2014.

### Finding of not guilty

3.22 Figure 3.6 shows the percentage of charges that resulted in a finding of not guilty for the selected offences in 2014.

Figure 3.6: Percentage of charges resulting in a finding of not guilty for selected offences, 2014



Source: NSW Bureau of Crime Statistics and Research (sr15-13590).

3.23 Apart from contravening an AVO, a slightly higher percentage of DV charges resulted in a not guilty finding, when compared with non-DV charges.



## 4. Comparing sentences for DV and non-DV offences

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4.1 We have been asked to compare sentences imposed for domestic violence (DV) offences with sentences imposed for the same personal violence offences (not classified as DV offences) for key offence types where we consider undertaking a such a comparison may demonstrate sentencing patterns between the two offence categories.

4.2 In responding to this part of the terms of reference, we have consulted a recent study of the NSW Bureau of Crime Statistics and Research (BOCSAR) - *Prison penalties for serious domestic and non-domestic assault*.<sup>1</sup> This report was published after we received the terms of reference. The BOCSAR study examines sentences

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1. N Donnelly and S Poynton, *Prison Penalties for Serious Domestic and Non-domestic Assault*, Bureau Brief No 110 (NSW Bureau of Crime Statistics and Research, 2015).

imposed for serious DV offences and compares them with the same serious personal violence offences, and takes into account other factors that are known to influence sentencing outcomes.

- 4.3 The first half of this chapter summarises the BOCSAR study's findings about serious assault offences. The BOCSAR study highlights the need for care in attempting to compare offenders for any given offence. The circumstances giving rise to DV offences are likely to be very different to those in relation to non-DV offences and the offenders may present with quite different subjective backgrounds.
- 4.4 The second half of this chapter compares a selection of serious and non-serious DV and non-DV offences using data supplied by BOCSAR and examines the sentences imposed; imprisonment terms and the offenders' characteristics. However, in comparing these offences and relevant characteristics, we have not been able to control for those factors that are known to influence sentencing outcomes. The observations in the second half of this chapter, therefore, can only point to trends and patterns that may require further investigation and analysis.

## **The BOCSAR study – serious DV assaults in 2009-2014**

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### **Previous research findings**

- 4.5 A previous study by Bond and Jeffries in 2014<sup>2</sup> suggested that non-DV offences received harsher penalties than DV offences in the NSW Local Court. The study was limited in the accuracy of its findings because the dataset used for analysis aggregated a diverse range of disparate offences, ranging from serious assaults and robbery to less serious common assaults, which attract equally diverse penalties.

### **Approach of the BOCSAR study**

- 4.6 In 2015, BOCSAR examined sentencing outcomes (imprisonment likelihood and length) for adult offenders found guilty of serious assault in the NSW Local Court between January 2009 and December 2014.
- 4.7 The BOCSAR study addressed the limitations of Bond and Jeffries' study in two ways. First, by restricting the analysis of sentencing outcomes to include only matters that involve serious assault resulting in injury. Two different types of serious assault resulting in injury were considered: assault occasioning actual bodily harm (ABH) and assault occasioning grievous bodily harm (GBH). These offences were separated into DV related assaults and non-DV related assaults. The DV related assaults were identified using DV specific lawpart codes.
- 4.8 Secondly, the BOCSAR study adjusted for all the factors that are known to influence sentencing outcomes: age, gender, Indigenous status, offence seriousness, number of concurrent offences, prior criminal record, previous community-based sanction, previous sentence of imprisonment and pleading guilty in the current case.
- 4.9 The study also examined the interaction between Indigenous status and violence type (DV or non-DV) and the impact of these factors on sentencing outcomes.

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2. C Bond and S Jeffries, "Similar punishment? Comparing sentencing outcomes in domestic and non-domestic violence cases" (2014) 54 *British Journal of Criminology* 849.



## General conclusions

- 4.10 The study found no evidence that the Local Court sentences serious non-DV assault matters more harshly than serious DV assault matters, once the factors that are known to influence sentencing outcomes are taken into account.
- 4.11 There were also no significant differences in penalty length for domestic and non-domestic serious assault offenders who were imprisoned.
- 4.12 The study showed that Indigenous offenders found guilty of serious DV assault are more likely to be sentenced to imprisonment than Indigenous offenders found guilty of non-DV assault. Indigenous offenders also appear to receive a higher rate of imprisonment for DV offences when compared with non-Indigenous DV offenders. On the other hand, BOCSAR found that non-Indigenous offenders guilty of serious DV assault were equally likely to be imprisoned as non-Indigenous offenders guilty of serious non-DV assault.
- 4.13 BOCSAR has suggested that further research should be undertaken to determine why Indigenous offenders found guilty of serious DV related assaults are more likely to receive prison sentences than Indigenous offenders found guilty of non-DV related assaults.

## Sentencing trends for DV and non-DV serious assault offences

- 4.14 The following paragraphs describe the sentencing trends taken from the BOCSAR study into prison penalties for DV and non-DV serious assault offences.<sup>3</sup> Figures 4.1.-4.4 relate to adult offenders in NSW found guilty of serious assault as their principal offence in the Local Court between January 2009 and December 2014. The figures describe the following:
- § principal penalties for serious assault offences
  - § mean sentence lengths for DV and non DV serious assaults
  - § Indigenous and non-Indigenous imprisonment percentages for DV and non DV serious assaults, and
  - § the probability of imprisonment for serious assault among non-Indigenous and Indigenous offenders as a function of various characteristics.

The data was extracted from BOCSAR's Reoffending Database.

- 4.15 Serious assaults were defined as offences of "serious assault resulting in injury". Assault offences for which there is no DV equivalent were excluded from the sample. Assaults committed in company or that involved wounding were also excluded because they attract different statutory maximum penalties than other serious assault offences.

### *Principal penalties*

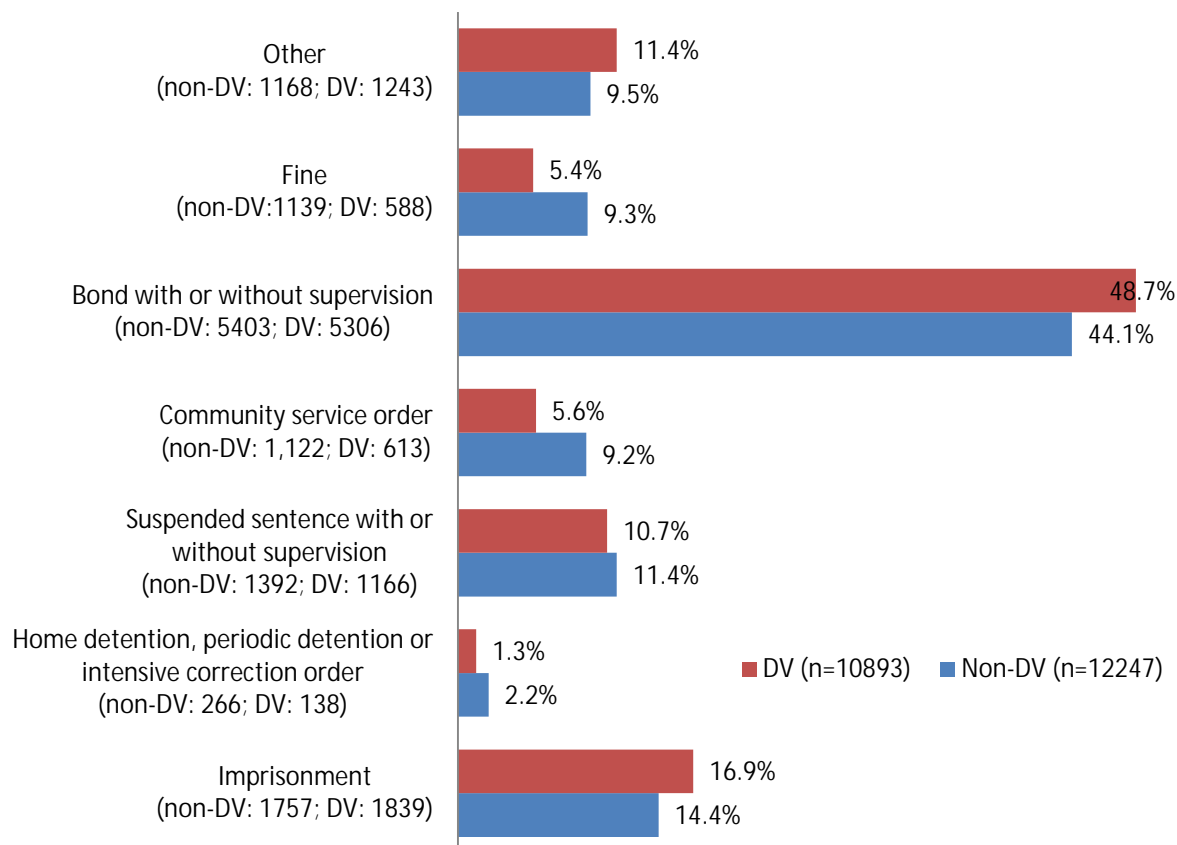
- 4.16 Figure 4.1 shows the principal penalties handed down in the NSW Local Court for DV and non-DV serious assault offences in 2009-2014. These are sentencing

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3. N Donnelly and S Poynton, *Prison Penalties for Serious Domestic and Non-domestic Assault*, Bureau Brief No 110 (NSW Bureau of Crime Statistics and Research, 2015).

trends only for DV and non-DV offenders. They have not been adjusted to take account of factors that are known to influence sentencing outcomes.

**Figure 4.1: Principal penalty for serious assault offences in 2009-2014**



Source: N Donnelly and S Poynton, *Prison Penalties for Serious Domestic and Non-domestic Assault*, Bureau Brief No 110 (NSW Bureau of Crime Statistics and Research, 2015).

"Other" includes: bond without conviction, no conviction recorded, conviction without penalty, and nominal sentence.

4.17 A greater percentage of DV offenders received the following sentences:

§ imprisonment (16.9% compared with 14.4%)

§ bond with or without supervision (48.7% compared with 44.1%).

4.18 A smaller percentage of DV offenders received the following sentences:

§ home detention, periodic detention or intensive correction order (1.3% compared with 2.2%)

§ suspended sentence (10.7% compared with 11.4%)

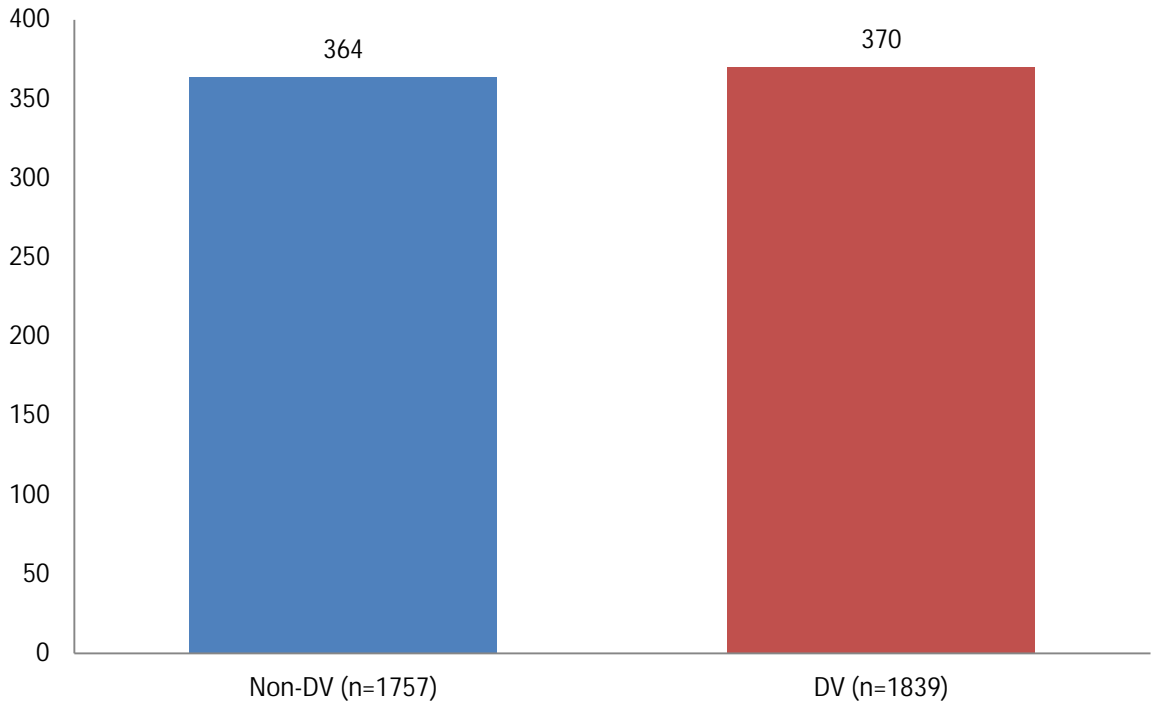
§ community service order (5.6% compared with 9.2%)

§ fine (5.4% compared with 9.3%).

*Mean sentence length*

4.19 Figure 4.2 shows the mean sentence length in days for DV and non-DV serious assaults in 2009-2014.

Figure 4.2: Mean sentence length in days for DV and non-DV serious assaults in 2009-2014



Source: N Donnelly and S Poynton, *Prison Penalties for Serious Domestic and Non-domestic Assault*, Bureau Brief No 110 (NSW Bureau of Crime Statistics and Research, 2015).

4.20 The mean number of total prison days imposed for each sentence was 370 for DV offenders and 364 for non-DV offenders. Both DV and non-DV offenders had a median of 365 days total term imprisonment.<sup>4</sup>

4.21 BOCSAR found that there was no significant difference at the bivariate level between sentence length for DV and non-DV offenders. This was one of two exceptions to the list of variables that BOCSAR found did have a significant bivariate relationship with sentence length. The variables that did have a significant relationship included assault severity, age, gender, Indigenous status, plea, concurrent offences, prior appearances for serious assault, prior prison, and breach of prior orders.<sup>5</sup>

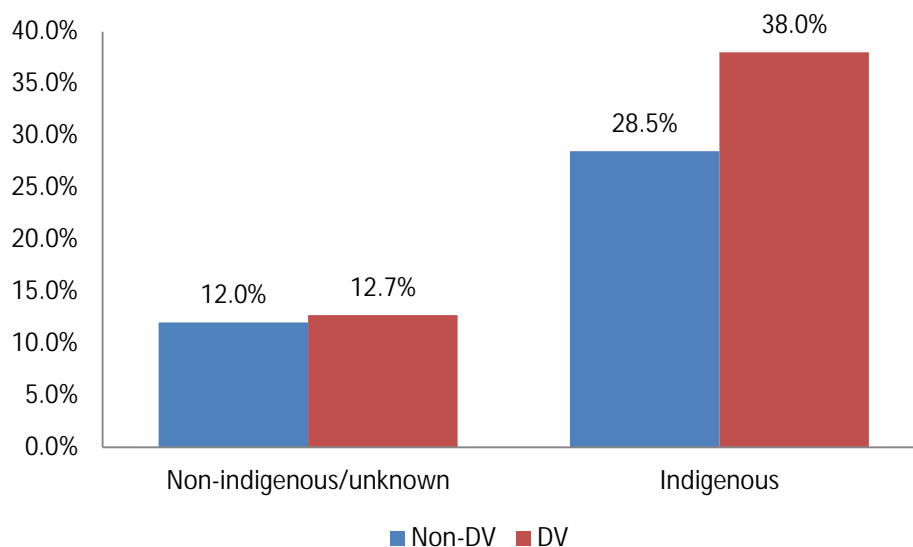
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4. N Donnelly and S Poynton, *Prison Penalties for Serious Domestic and Non-domestic Assault*, Bureau Brief No 110 (NSW Bureau of Crime Statistics and Research, 2015) 9-10.  
 5. N Donnelly and S Poynton, *Prison Penalties for Serious Domestic and Non-domestic Assault*, Bureau Brief No 110 (NSW Bureau of Crime Statistics and Research, 2015) 10.

*Indigenous and non-Indigenous imprisonment rates*

4.22 Figure 4.3 shows the percentage of Indigenous and non-Indigenous offenders sentenced to imprisonment for DV and non-DV serious assaults in 2009-2014, unadjusted for variables that are known to influence sentencing outcomes.

**Figure 4.3: Imprisonment percentage for Indigenous and non-Indigenous offenders, DV and non-DV serious assaults in 2009-2014**



Source: N Donnelly and S Poynton, *Prison Penalties for Serious Domestic and Non-domestic Assault*, Bureau Brief No 110 (NSW Bureau of Crime Statistics and Research, 2015).

4.23 The Local Court sentenced a slightly higher percentage of non-Indigenous offenders to imprisonment for a DV serious assault than for a non-DV serious assault (12.7% compared with 12%). However, the Local Court sentenced a significantly higher percentage of Indigenous offenders to imprisonment for a DV assault than a non-DV assault (38% compared with 28.5%).

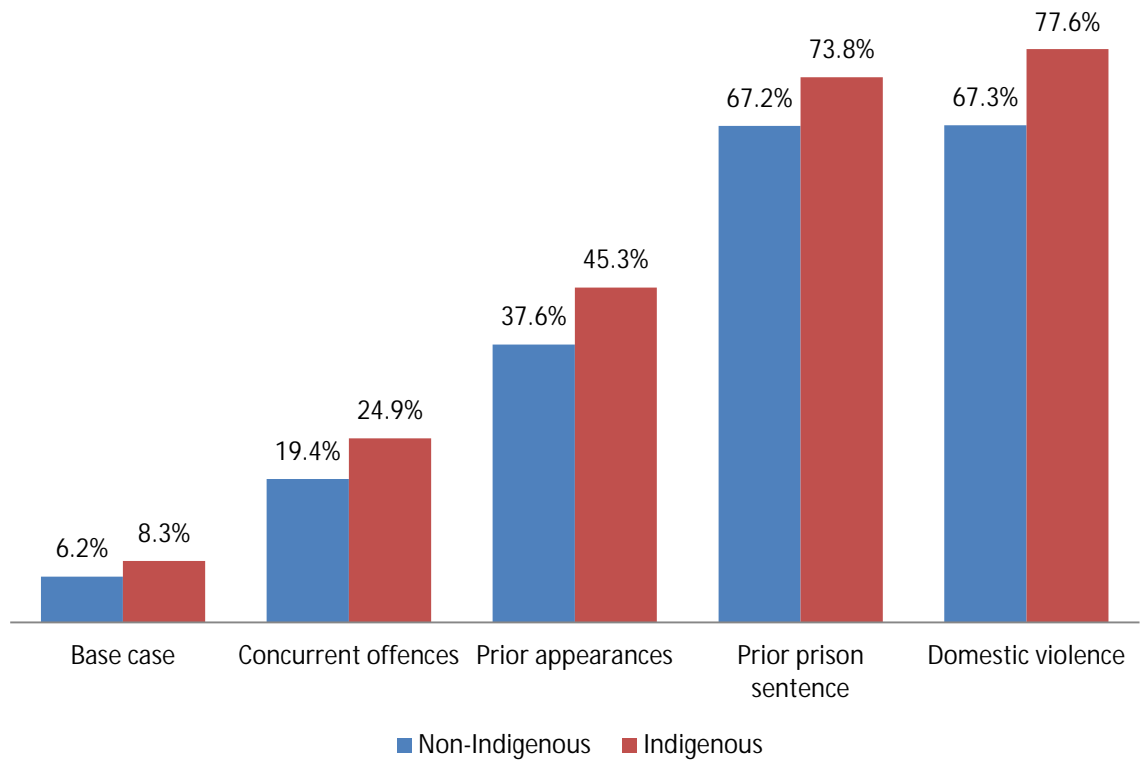
4.24 The Local Court sentenced a greater percentage of Indigenous offenders to imprisonment for a non-DV serious assault than non-Indigenous offenders (28.5% compared to 12%).

4.25 The Local Court sentenced a greater percentage of Indigenous offenders to imprisonment for a DV serious assault than non-Indigenous offenders (38% compared with 12.7%).

*Impact of various characteristics on the probability of imprisonment*

4.26 Figure 4.4 shows the estimated probability of Indigenous and non-Indigenous offenders being sentenced to imprisonment, after the more important explanatory variables have been taken into account.

Figure 4.4: Probability of imprisonment for serious assault among non-Indigenous and Indigenous offenders as a function of various characteristics 2009-2014



Source: N Donnelly and S Poynton, *Prison Penalties for Serious Domestic and Non-domestic Assault*, Bureau Brief No 110 (NSW Bureau of Crime Statistics and Research, 2015).

4.27 For the purposes of comparison the ‘base case’ was defined as male, aged 25-34, who pleaded guilty to a non-DV assault occasioning actual bodily harm and had his matter finalised in 2012-2014 with one concurrent offence, no prior court appearances, no prior breaches of violence/non-violence orders, no prior suspended sentences, and no prior prison penalties.

4.28 If a non-Indigenous offender had all the base case characteristics the probability of imprisonment is estimated at 6%:

§ With the base case characteristics and three or more concurrent offences the probability of imprisonment increases to nearly 20%.

§ If three or more prior court appearances are added, the probability of imprisonment increases to 38%.

§ If, in addition, they also had one prior prison sentence, the probability of imprisonment increases to 67%.

§ If a non-Indigenous offender had all these characteristics and committed a serious assault that was DV related the predicted probability would remain at 67%.

- 4.29 If an Indigenous offender had all the base case characteristics the probability of imprisonment is estimated at 8%:
- § With the base case characteristics and three or more concurrent offences the probability of imprisonment increases to nearly 25%.
  - § If three or more prior court appearances are added, the probability of imprisonment increases to 45%.
  - § If, in addition, they also had one prior prison sentence the probability of imprisonment increases to almost 74%.
  - § If an Indigenous offender had all these characteristics and committed a serious assault, that was DV related, the predicted probability would increase to 78%.

## A comparison of selected DV and non-DV offences in 2013 and 2014

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- 4.30 For the current study we have analysed data from BOCSAR for the following DV and non-DV offences:
- § common assault<sup>6</sup>
  - § assault occasioning actual bodily harm<sup>7</sup>
  - § destroy or damage property valued at \$2,000 or less<sup>8</sup>
  - § contravene an apprehended violence order (AVO),<sup>9</sup> and
  - § stalk or intimidate.<sup>10</sup>
- 4.31 The offence categories and their frequencies for 2013 and 2014 are set out in Table 4.1.

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6. *Crimes Act 1900* (NSW) s 61.

7. *Crimes Act 1900* (NSW) s 59(1).

8. *Crimes Act 1900* (NSW) s 195(1)(a), law parts 820 and 64882.

9. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14(1).

10. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13(1).

Table 4.1: Offenders sentenced in the NSW District and Local Courts for selected principal offences in 2013 and 2014

Offence type	Non DV	DV
Assault occasioning actual bodily harm	3545	4289
Contravene an AVO	529	6189
Common assault	5359	7786
Destroy or damage property <= \$2,000	2141	848
Stalk or intimidate	1447	3784

Source: NSW, Bureau of Crime Statistics and Research (sr15-13480).

### Proportion of offenders sentenced to imprisonment

- 4.32 The data collected from BOCSAR shows the number of offenders sentenced to imprisonment in the NSW District and Local Courts in 2013 and 2014.
- 4.33 The following paragraphs set out the imprisonment rates of DV and non-DV offences for all offenders as well as for offenders with the following characteristics:
- § offenders with no prior proven offences, and
  - § offenders with prior proven offences in the previous 5 years.
- 4.34 The answer to the question whether or not an offender has prior proven offences in the previous 5 years is an important determinant in sentencing. However, adjusting only for prior proven offences is still less reliable than the matched-offenders approach used by the BOCSAR study<sup>11</sup> because it does not take into account as many differences between offenders. It is possible that apparent differences in sentence outcome are the result of unmeasured differences between offenders. This is particularly likely with offences like common assault that reflect a range of facts, circumstances, and levels of culpability. Additionally, the data has not been tested for significance. It remains unknown whether the data shows meaningful difference rather than what might be achieved by chance or natural variation. Nevertheless, the current study provides a useful starting point for analyzing sentencing outcomes for DV and non-DV offences by identifying possible patterns that deserve a more sophisticated analysis.
- 4.35 Our general view is that there is nothing in the data that identifies a problem with the sentencing of DV offenders.
- 4.36 The figures below which describe the age of offenders for each of the DV and non-DV offences<sup>12</sup> and the tables describing the other offender characteristics for each offence<sup>13</sup> show that the offender profiles for some of the offences vary depending on whether they were committed in a DV or non-DV context. These profiles contain

11. See para [4.6]-[4.13].

12. Figures 4.13, 4.17, 4.21, 4.25 and 4.29.

13. Tables 4.2-4.6.



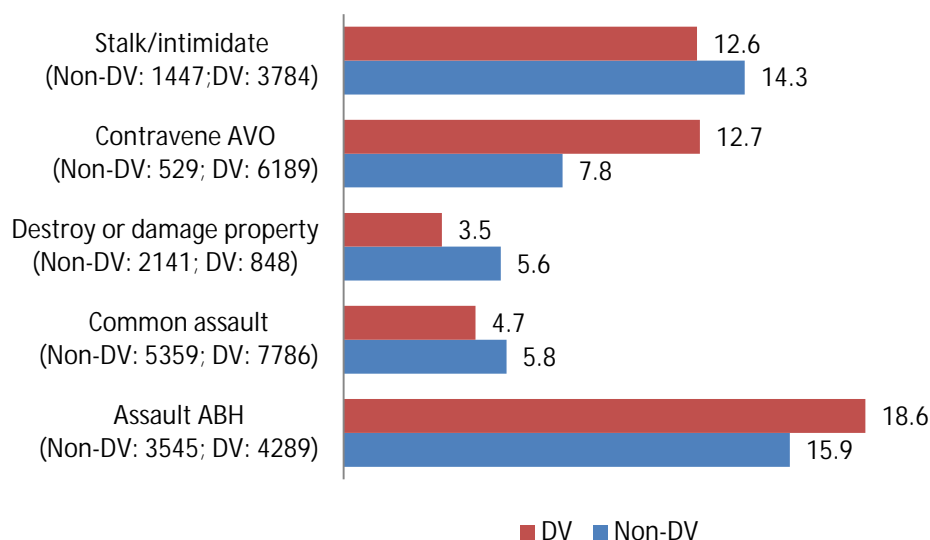
variables that can possibly influence sentence severity, including age, prior criminal record and plea.

- 4.37 Further investigation is required to identify what other factors are influencing the sentencing outcome in these cases. For example, some differences might be expected to arise from the different age profiles of the DV and non-DV offenders for some offences. A younger age profile of non-DV first time offenders might mitigate a sentence. However, it is also possible that older DV first time offenders may receive some mitigation for prior good character. It is possible that other factors, for example, multiple concurrent offences (identified by BOCSAR in the study outlined above) may also influence outcomes. Unlike the BOCSAR data outlined above, we have not controlled for these factors. Any causal relationship between these factors and sentencing outcomes will require further investigation.
- 4.38 The seriousness of the offending behaviour may also be a factor that influences sentencing outcomes. It may be possible that, with the increase in the charges for common assault in a DV context over the past 5 years, more DV matters that are otherwise objectively less serious are being charged and, notwithstanding the percentage of withdrawals, are ultimately being sentenced. This, however, cannot be measured without an analysis of the actual sentencing decisions.

### *All offenders*

- 4.39 Figure 4.5 sets out the percentage of DV and non-DV offenders who received a sentence of imprisonment for the selected offences in 2013 and 2014.

**Figure 4.5: Percentage of offenders receiving imprisonment as penalty for principal offence in 2013 and 2014**



Source: NSW Bureau of Crime Statistics and Research, reference (jf15-13323).

- 4.40 Compared with non-DV offenders, a smaller percentage of DV offenders received sentences of imprisonment for the following principal offences:
- § common assault (4.7% compared with 5.8%)
  - § destroy or damage property (\$2000 or less) (3.5% compared with 5.6%), and
  - § stalk/intimidate (12.6% compared with 14.3%).

4.41 A greater percentage of DV offenders received sentences of imprisonment for the following principal offences:

§ assault occasioning actual bodily harm (18.6% compared with 15.9%), and

§ contravene AVO (12.7% compared with 7.8%).

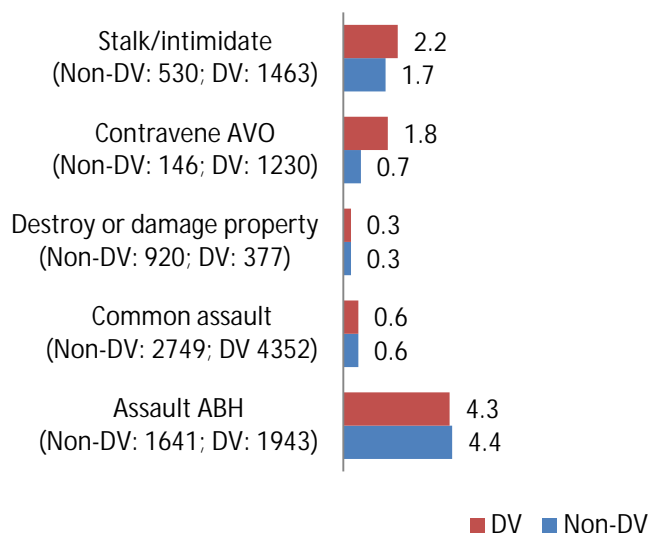
4.42 Within some of the DV and non-DV offence categories there is the possibility for considerable internal variation in the severity of the index offence that cannot be controlled for. For example, the non-DV offence of destroy/damage property might include juveniles engaged in low level vandalism, with a value closer to \$100, whereas the DV offence might involve damage to property closer to the upper end of the \$2,000 range, such as breaking doors, house and car windows which therefore may be treated more seriously.

4.43 One possible reason for the higher percentage of non-DV offenders receiving imprisonment for stalk or intimidate is that non-DV victims of this offence are sometimes police officers who are threatened by offenders in the course of their duty. The courts often reflect the seriousness of such offences in imposing prison sentences. This anecdotal evidence requires further investigation to test whether it is the reason for a greater proportion of non-DV offenders receiving a sentence of imprisonment.

*Offenders with no prior proven offences in the previous 5 years*

4.44 Figure 4.6 shows the percentage of DV and non-DV offenders in 2013 and 2014 who had no prior convictions in the previous 5 years, and who received imprisonment for the principal offence.

Figure 4.6: Percentage of offenders with no prior proven offences in the previous 5 years receiving imprisonment for principal offence in 2013 and 2104



Source: NSW Bureau of Crime Statistics and Research (jf15-13323).

4.45 As might be expected for offenders with no prior proven offences in the previous 5 years, Figure 4.6 shows that a relatively small percentage of all such offenders received a sentence of imprisonment.

4.46 Three of the offences showed little or no difference between the percentage of DV and non-DV offenders who received sentences of imprisonment when the fact that they had no prior proven offences in the previous 5 years was taken into account:

- § common assault (0.6% for both DV and non-DV offenders)
- § destroy or damage property (valued at \$2000 or less) (0.3% for both DV and non-DV offenders), and
- § assault occasioning actual bodily harm (4.4% for non-DV offenders and 4.3% for DV offenders).

4.47 A greater percentage of DV offenders with no prior proven offences in the previous 5 years received sentences of imprisonment for the following offences:

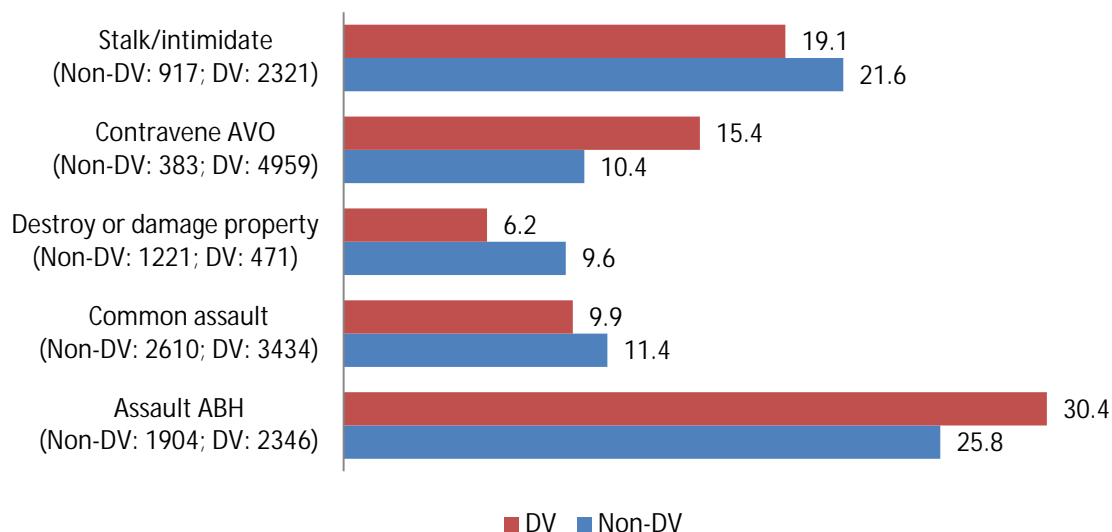
- § contravene apprehended violence order (1.8% compared with 0.7%), and
- § stalk/intimidate (2.2% compared with 1.7%).

#### *Offenders with prior proven offences in the previous 5 years*

4.48 Figure 4.7 shows the percentage of DV and non-DV offenders in 2013 and 2014 who had prior proven convictions in the previous 5 years, and who received imprisonment for the principal offence.

4.49 Prior offending here refers to any prior offending, not just offending that takes place in a DV context.

**Figure 4.7: Percentage of offenders with prior proven offences in the previous 5 years receiving imprisonment for principal offence in 2013 and 2014**



Source: NSW Bureau of Crime Statistics and Research (jf15-13323).

4.50 The percentages of those sentenced to imprisonment are generally higher once you exclude those without prior offences in the previous 5 years.

4.51 Compared with non-DV offenders with prior proven offences in the previous 5 years, a smaller percentage of DV offenders received sentences of imprisonment for the following principal offences:

- § common assault (9.9% compared with 11.4%)
  - § destroy or damage property (valued at \$2000 or less) (6.2% compared with 9.6%), and
  - § stalk/intimidate (19.1% compared with 21.6%).
- 4.52 A greater percentage of DV offenders with prior proven offences in the previous 5 years received sentences of imprisonment for the following offences:
- § assault occasioning actual bodily harm (30.4% compared with 25.8%), and
  - § contravene AVO (15.4% compared with 10.4%).
- 4.53 This unadjusted data suggests it is possible that there is something of a bifurcation in sentencing with the most serious domestic violence offences being treated more harshly than their non-DV counterparts. However, it only controls for recent criminal record and makes no adjustment for other offender characteristics or for offending seriousness and therefore does not provide a fuller explanation for the variations in judicial approaches to DV and non-DV offences.

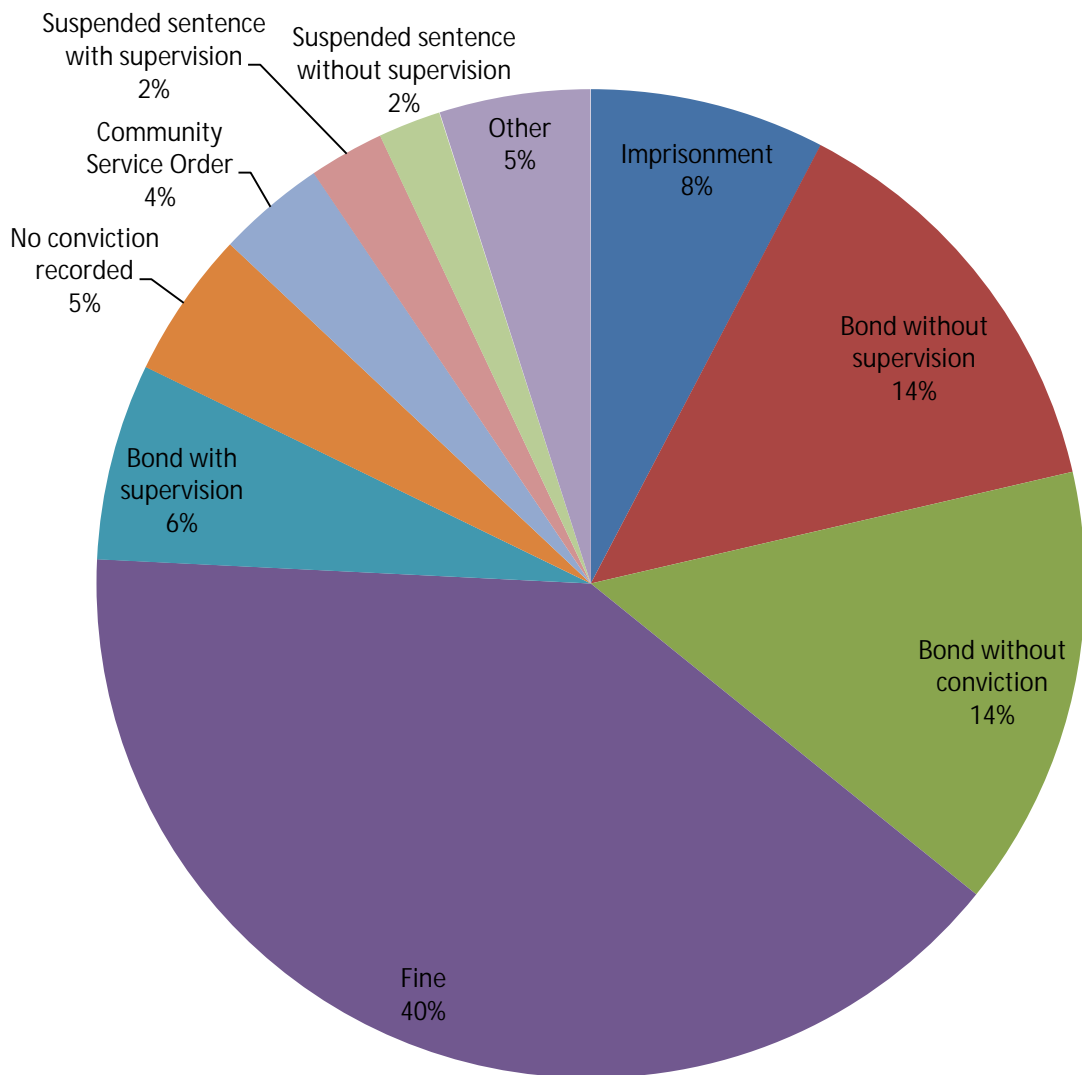
### Other data relevant to the offences

- 4.54 The remainder of this chapter sets out further data obtained from BOCSAR about offenders and penalties for the offences of:
- § common assault
  - § assault occasioning actual bodily harm
  - § destroy or damage property valued at \$2000 or less
  - § contravene AVO, and
  - § stalk or intimidate.
- 4.55 The data on offender characteristics sets out variables that can possibly influence sentence severity, including age, prior criminal record, Indigenous status and plea. Further investigation is required to identify how these factors may influence sentencing outcomes in these cases.

### General sentencing data

- 4.56 The data for the selected offence categories can be compared with the sentencing patterns for all offences sentenced in the Local Court in 2014 (Figure 4.8) and the sentencing patterns for all offences involving acts intended to cause injury sentenced in the Local Court in 2014 (Figure 4.9). The vast majority of offences considered in this chapter (98% or more in each case) were sentenced in the Local Court.
- 4.57 There are some apparent differences between these general sentencing trends and the sentencing trends of the selected offences; and between the sentencing trends for DV and non-DV offenders in relation to each of the selected offences. The differences may be due to other factors and characteristics shared by the different offenders who commit the DV and non-DV related offences. Without further detailed analysis, we cannot tell if it is the particular characteristics of DV and non-DV offenders that have led to the differences in sentencing outcomes.

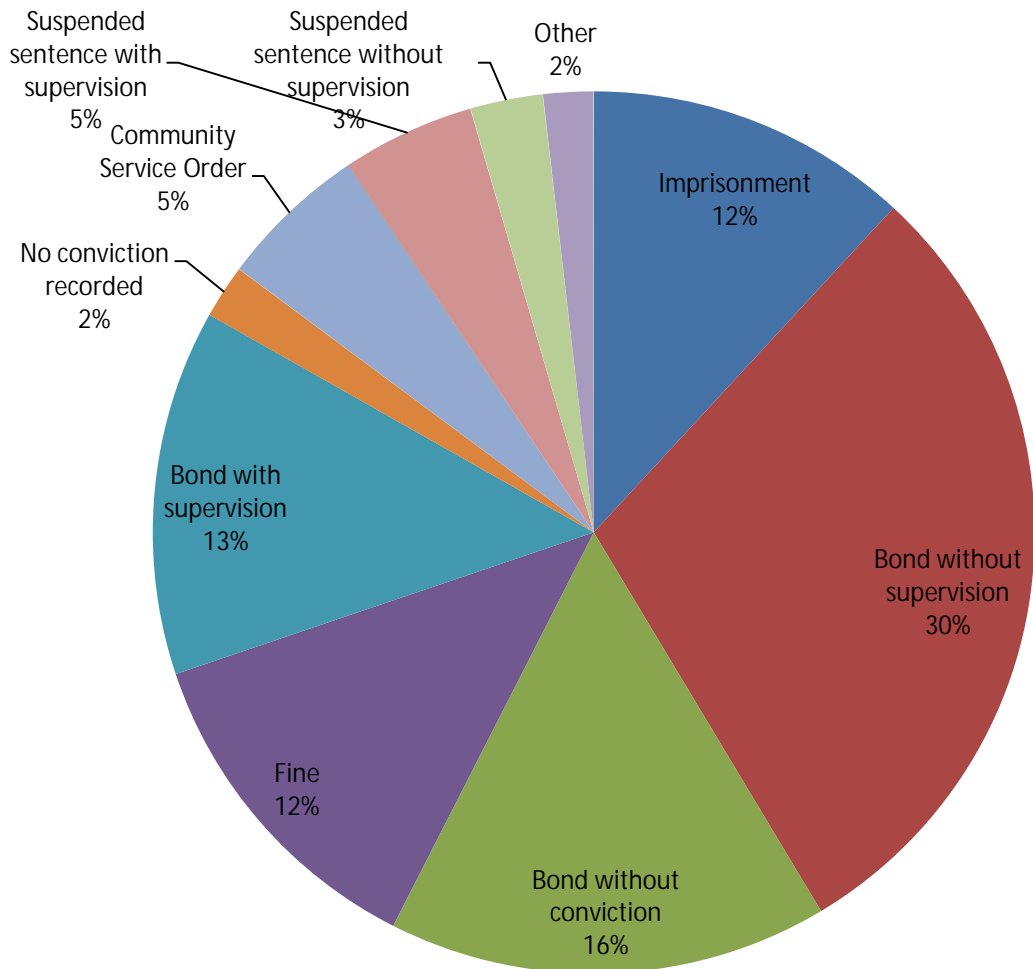
Figure 4.8: Penalty for the principal offence for all Local Court appearances in 2014



Source: BOCSAR Criminal Court Statistics

"Other" includes: Conviction without penalty, Intensive Correction Order, Nominal sentence, Home detention, Other proven outcomes.

Figure 4.9: Penalty for acts intended to cause injury as principal offence, Local Court, 2014



Source: BOCSAR Criminal Court Statistics.

"Other" includes: Nominal sentence, Conviction without penalty, Intensive correction order, Home detention.

4.58 The data in Figure 4.8 shows that fines (40%) are the most common penalty handed down in the Local Court in 2014. The proportion of fines imposed for all offences is far greater than the proportion generally imposed for offences involving acts intended to cause injury (12%) as set out in Figure 4.9. The data also shows that a greater percentage of sentences of imprisonment are imposed for offences involving acts intended to cause injury than are imposed for all offences (12% compared with 8%).

4.59 When compared with the figures for specific DV and non-DV offences set out below, the data on offences involving acts intended to cause injury in Figure 4.9 shows:

§ a lesser reliance on fines than is the case for non-DV common assault (see Figure 4.10, below), and

§ a greater reliance on imprisonment than is the case for both DV and non-DV common assault (see Figures 4.10 and 4.11).

On the other hand, it also shows:

- § a greater reliance on fines than is the case for both DV and non-DV assault occasioning actual bodily harm (see Figures 4.15 and 4.16), and
- § a lesser reliance on imprisonment.

This confirms the point that common assault (both DV and non-DV) is relatively less serious than other offences that would come within the category of intent to cause injury.

- 4.60 The varying profiles for DV and non-DV offenders for each of the offences considered below highlights potential differences in the types of circumstances that courts may take into account when sentencing. The data, as we have it, gives no clear indication of how the various characteristics interact. We can only observe aggregated differences in the profile of offenders. A causal link between these different characteristics and the sentencing outcomes cannot be demonstrated with any certainty on the data currently available to us.

### Common assault

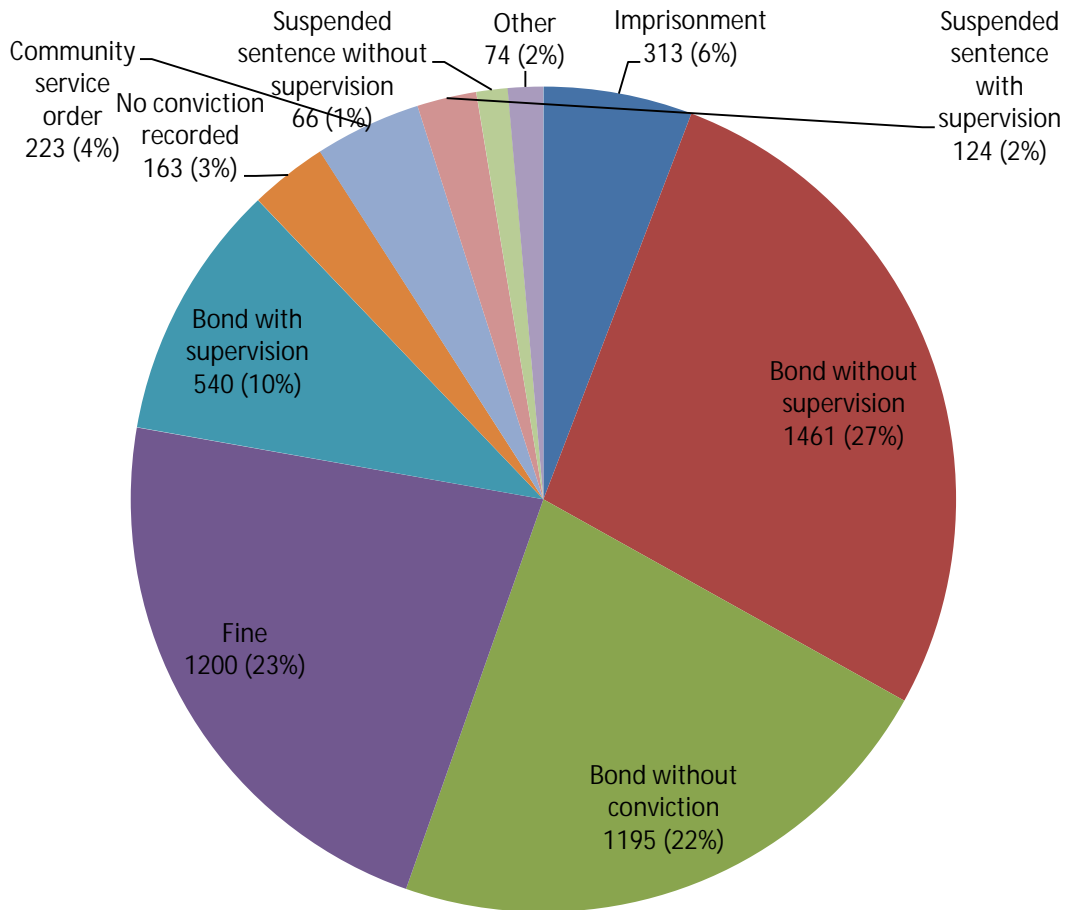
- 4.61 Section 61 of the *Crimes Act 1900* (NSW) provides that it is an offence to assault any person (“although not occasioning actual bodily harm”). The maximum penalty is 2 years imprisonment.



*Type of penalty imposed*

4.62 Figures 4.10 and 4.11 show the sentences imposed for common assault that are DV and non-DV related.

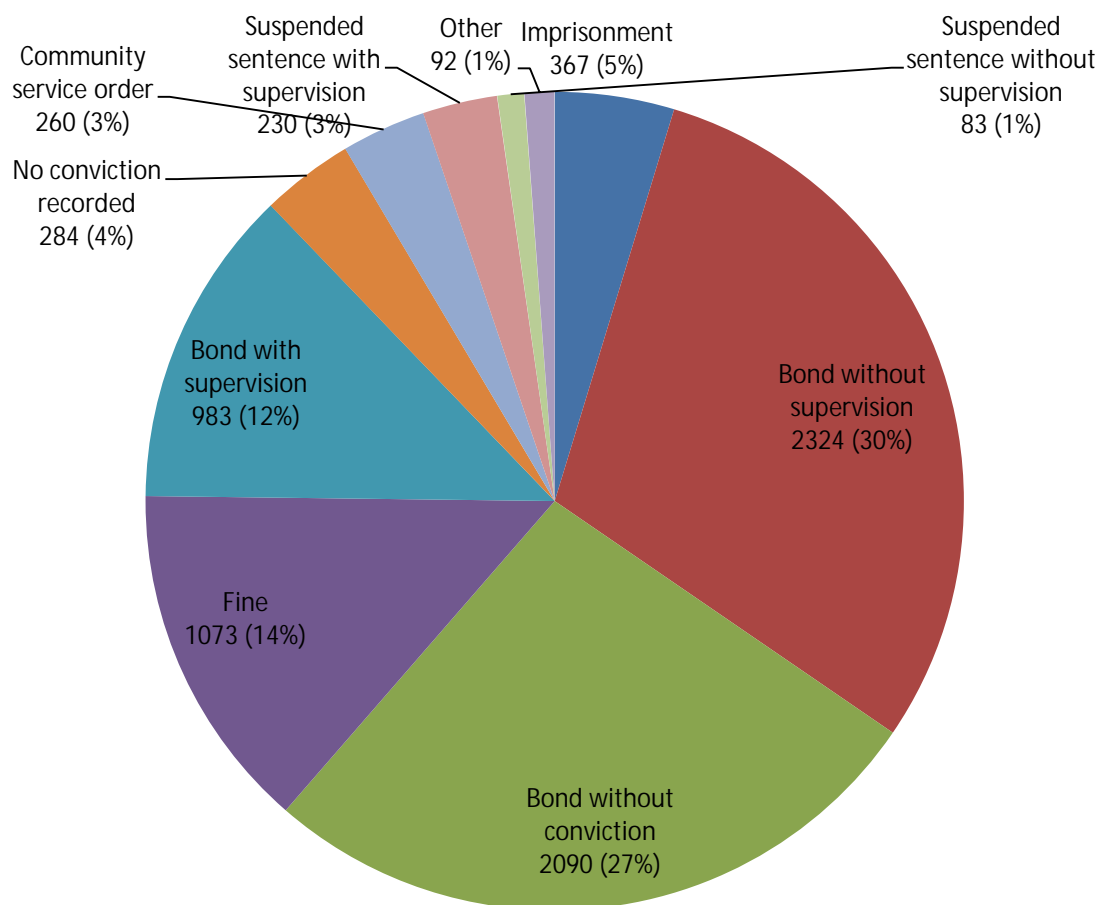
Figure 4.10: Sentence type imposed for the principal offence of non-DV common assault in 2013 and 2014 (n = 5359)



Source: NSW Bureau of Crime Statistics and Research (jf15-13323).

"Other" includes: Conviction without penalty (51); Intensive correction order (20); Home detention (2); Nominal sentence (1).

Figure 4.11: Sentence type imposed for the principal offence of DV common assault in 2013 and 2014 (n = 7786)



Source: NSW Bureau of Crime Statistics and Research (jf15-13323).

"Other" includes: Conviction without penalty (59); Intensive correction order (31); Home detention (1); Nominal sentence (1).

4.63 Figure 4.10 shows that, compared with DV offenders, a greater percentage of non-DV offenders received the following sentences where common assault was the principal offence:

§ fine (22.4% compared with 13.8%), and

§ imprisonment (5.8% compared with 4.7%).<sup>14</sup>

4.64 A greater percentage of offenders received a fine for non-DV common assault than generally received a fine for acts intended to cause injury. It is possible that the courts have relied on the fine more heavily in non-DV cases because, unlike some DV cases, it will not also affect the victim where finances are shared with the offender.<sup>15</sup>

14. Very small differences were noted for: community service order (4.2% compared with 3.3%); suspended sentence without supervision (1.2% compared with 1.1%); conviction without penalty (1% compared with 0.8%).

15. See para [2.76]-[2.78].

4.65 Figure 4.11 shows that, compared with non-DV offenders, a greater percentage of DV offenders received the following sentences where common assault was the principal offence:

§ bond without supervision (29.8% compared to 27.3%)

§ bond without conviction (26.8% compared to 22.3%), and

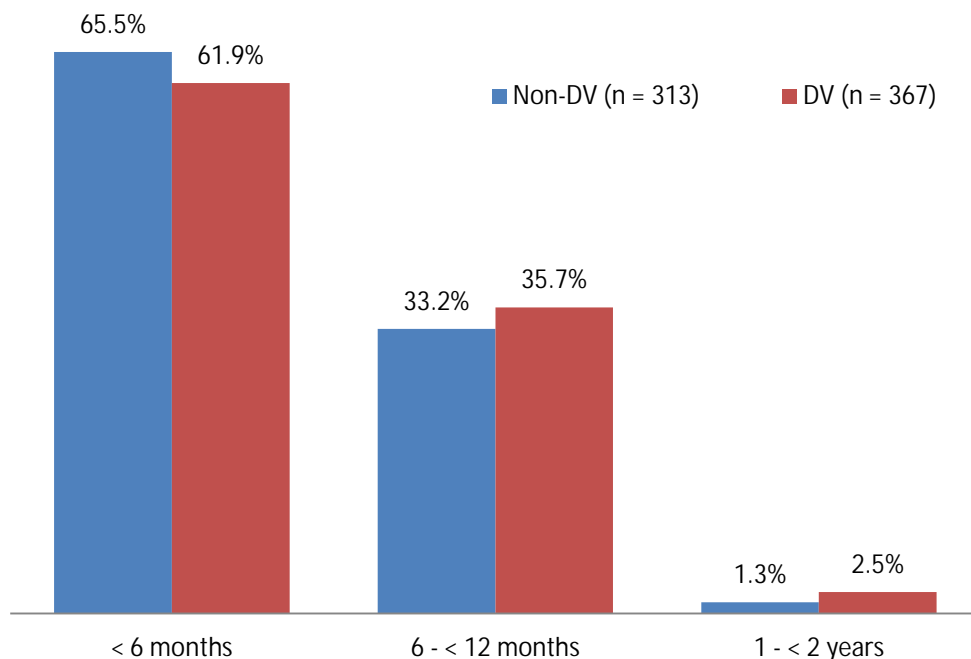
§ bond with supervision (12.6% compared to 10.1%).<sup>16</sup>

4.66 The trend shows that bonds are more commonly handed down for DV common assault offences than for non-DV common assault offences. The greater reliance on bonds may be because the courts are using bonds as an alternative to the fine in DV matters. However, without further detailed analysis we cannot tell if the characteristics of the DV and non-DV offenders influenced the differences in the use of the various sentencing options.

*Length of sentences of imprisonment*

4.67 Figure 4.12 shows the length of non-parole periods where common assault, DV and non-DV, was the principal offence.

Figure 4.12: Length of non-parole period where common assault is the principal offence in 2013 and 2014



Source: NSW Bureau of Crime Statistics and Research (jf15-13323).

4.68 A higher percentage of non-parole periods of 6 months or more were imposed on DV offenders. This shows that when DV offenders, whose principal offence is

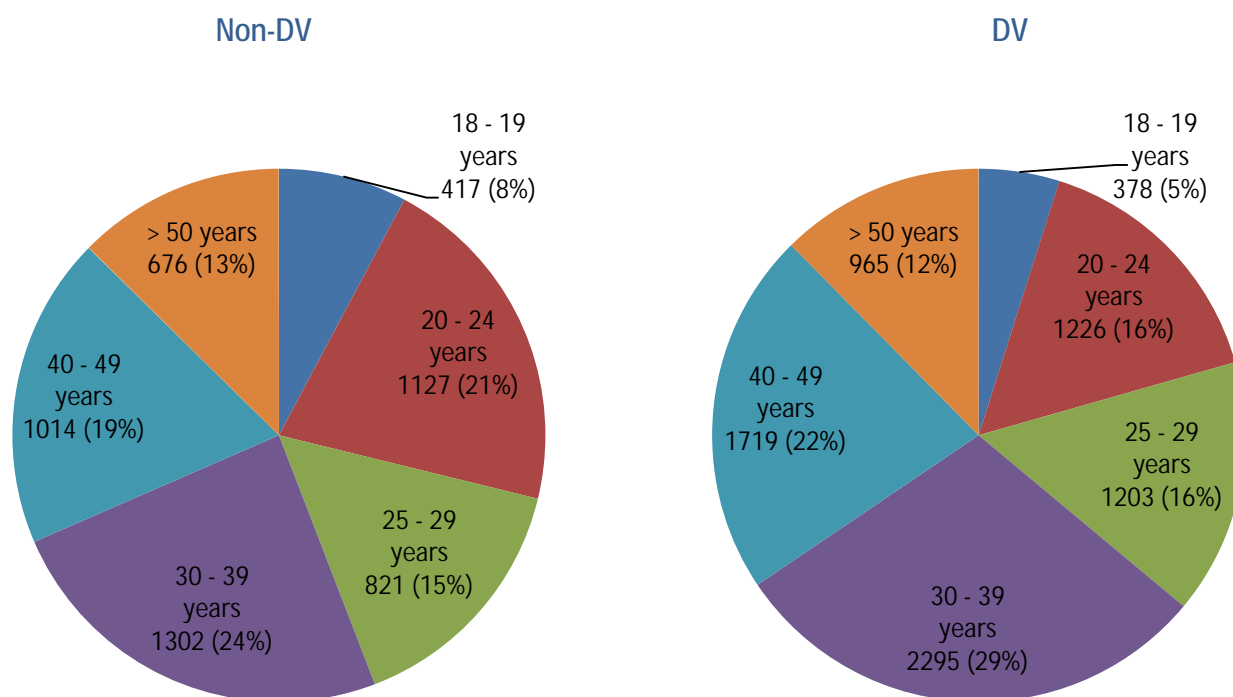
16. Very small differences were noted for suspended sentence without supervision (3% compared to 2.3%).

common assault, are sentenced to imprisonment, they receive slightly longer non-parole periods than non-DV offenders.

*Offender characteristics*

4.69 Figure 4.13 and Table 4.2 set out various characteristics of DV and non-DV offenders for the offence of common assault including age, gender, Indigenous status, plea, bail status at finalisation, and criminal history.

Figure 4.13: Age of offender where common assault was the principal offence in 2013 and 2014



Source: NSW Bureau of Crime Statistics and Research (jf15-13323).

4.70 Compared with non-DV offenders, DV offenders whose principal offence was common assault have a higher proportion of offenders aged 30 years or older (63% compared with 56%).

Table 4.2: Other characteristics of offenders convicted of common assault as the principal offence in 2013 and 2014

Characteristic	Non-DV		DV	
	No.	%	No.	%
Indigenous	1050	19.6%	1319	16.9%
<b>Gender</b>				
Male	4075	76.0%	6249	80.3%
Female	1284	24.0%	1537	19.7%
<b>Plea</b>				
Guilty plea	4282	79.9%	6282	80.7%
Not Guilty plea	623	11.6%	954	12.3%
<b>Bail status at finalisation</b>				
On bail	1635	30.5%	4012	51.5%
In custody	413	7.7%	478	6.1%
Bail not required/ dispensed with	3311	61.8%	3296	42.3%
<b>Criminal history</b>				
Prior proven offences in the previous 5 years	2610	48.7%	3434	44.1%
Prison episodes in the previous 5 years	568	10.6%	622	8.0%
<b>Jurisdiction</b>				
Local Courts	5346	99.8%	7782	99.9%

Source: NSW Bureau of Crime Statistics and Research (j15-13323).

4.71 Compared with non-DV offenders, a higher proportion of DV offenders convicted of common assault as the principal offence were:

§ male (80.3% compared with 76%)

§ on bail (51.5% compared with 30.5%).<sup>17</sup>

4.72 Compared with DV offenders, a higher proportion of non-DV offenders convicted of common assault as the principal offence:

§ were Indigenous (19.6% compared with 16.9%)

§ were female (24% compared with 19.7%)

17. Much smaller differences applied in the case of entered a not guilty plea (12.3% compared with 11.6%) and entered a guilty plea (80.7% compared with 79.9%).

- § were in custody at finalisation (and bail not required or dispensed with) (7.7% compared with 6.1%)
  - § had prior proven offences in the previous 5 years (48.7% compared with 44.1%)
  - § had prior prison episodes in the previous 5 years (10.6% compared with 8%).
- 4.73 The differences in some of these characteristics, when compared with the characteristics for offenders whose principal offence was assault occasioning actual bodily harm (see Figures 4.17 and Table 4.3), may explain the comparatively harsher trend in sentences imposed for non-DV offenders who were convicted of common assault as a principal offence. This would particularly be the case with offenders who were remanded in custody before sentencing, and had a prior criminal history (including imprisonment).

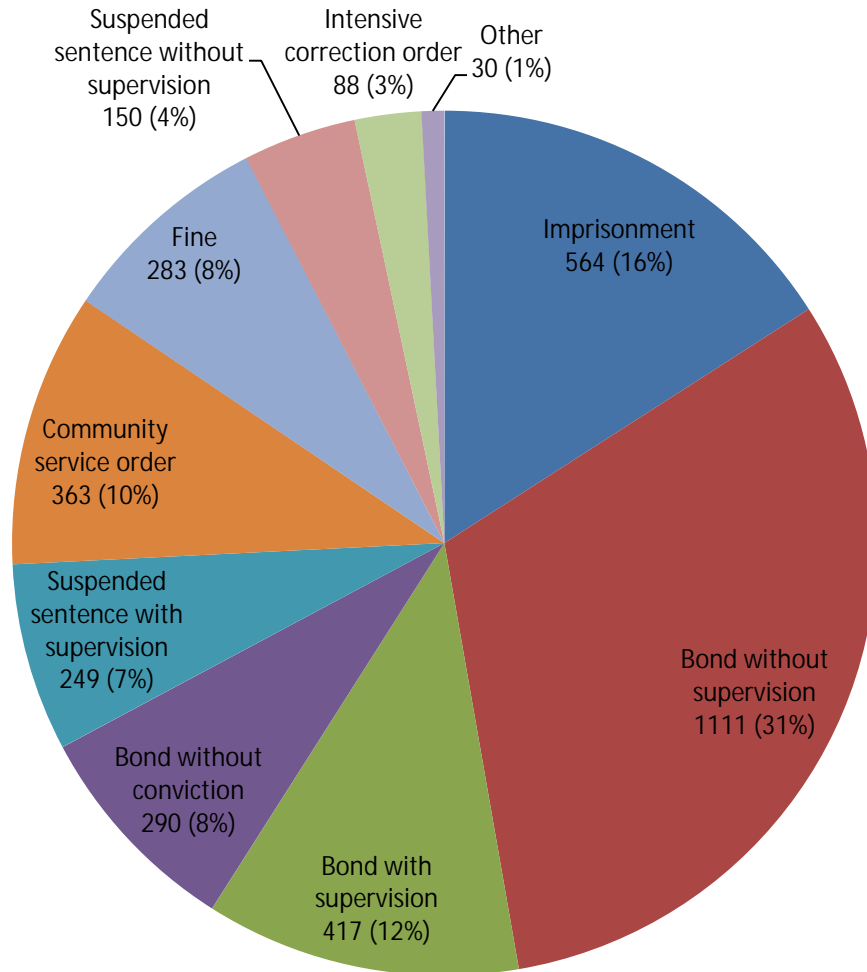
### **Assault occasioning actual bodily harm**

- 4.74 Subsection 59(1) of the *Crimes Act 1900* (NSW) provides that it is an offence to assault a person occasioning actual bodily harm. The maximum penalty is 5 years imprisonment.

#### *Type of penalty imposed*

- 4.75 Figures 4.14 and 4.15 set out the sentences imposed where assault occasioning actual bodily harm was the principal offence.

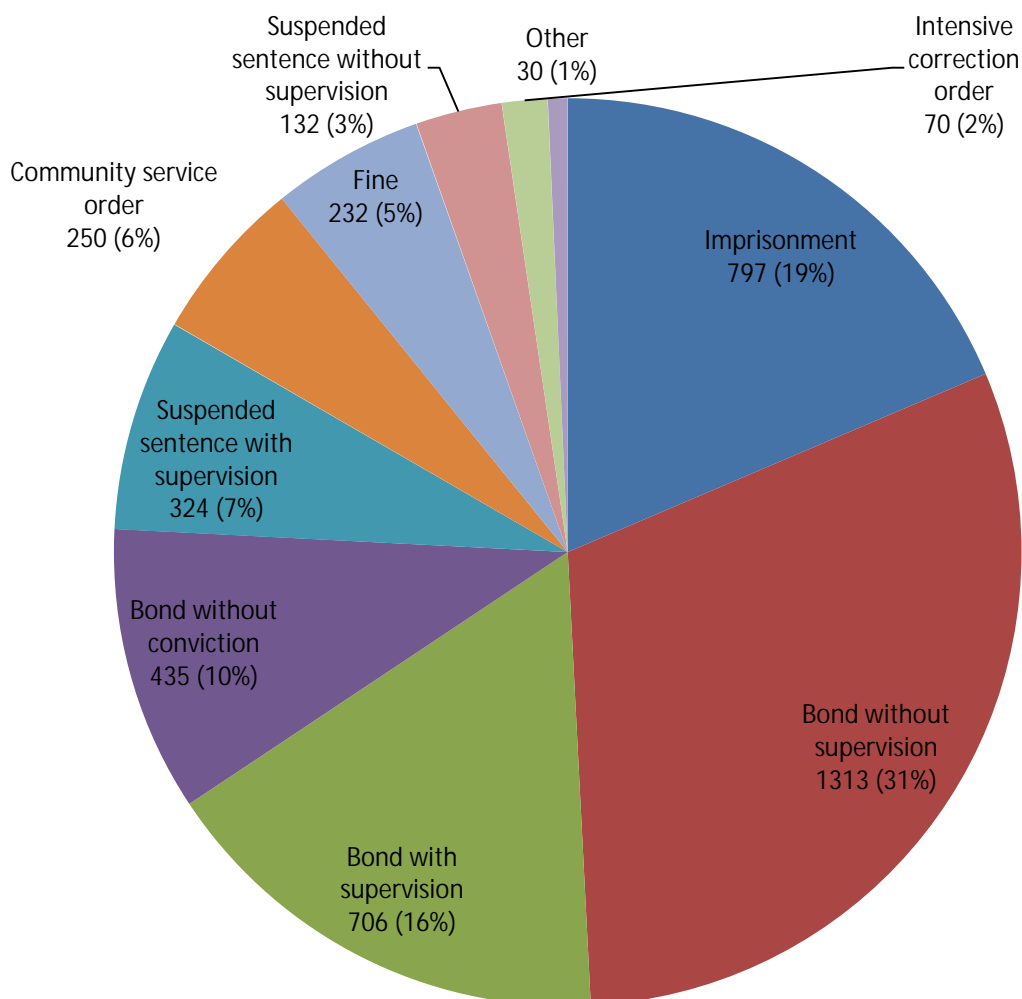
Figure 4.14: Sentence type imposed for the principal offence of non-DV assault occasioning actual bodily harm in 2013 and 2014 (n = 3545)



Source: NSW Bureau of Crime Statistics and Research (jf15-13323).

"Other" includes: No conviction recorded (16); Conviction without penalty (12); Home detention (1); Nominal sentence (1).

Figure 4.15: Sentence type imposed for the principal offence of DV assault occasioning actual bodily harm in 2013 and 2014 (n = 4289)



Source: NSW Bureau of Crime Statistics and Research (jf15-13323).  
 "Other includes": No conviction recorded (23); Conviction without penalty (7).

4.76 Figure 4.14 shows that, compared with DV offenders, a greater percentage of non-DV offenders received the following sentences where assault occasioning actual bodily harm was the principal offence:

- § suspended sentence without supervision (4.2% compared with 3.1%)
- § community service order (10.2% compared with 5.8%)
- § fine (8% compared with 5.4%).<sup>18</sup>

4.77 Figure 4.15 shows that, compared with non-DV offenders, a greater percentage of DV offenders received the following sentences where assault occasioning actual bodily harm was the principal offence:

18. Very small differences were noted for: bond without supervision (31.3% compared with 30.6%); intensive correction order (2.5% compared with 1.6%).

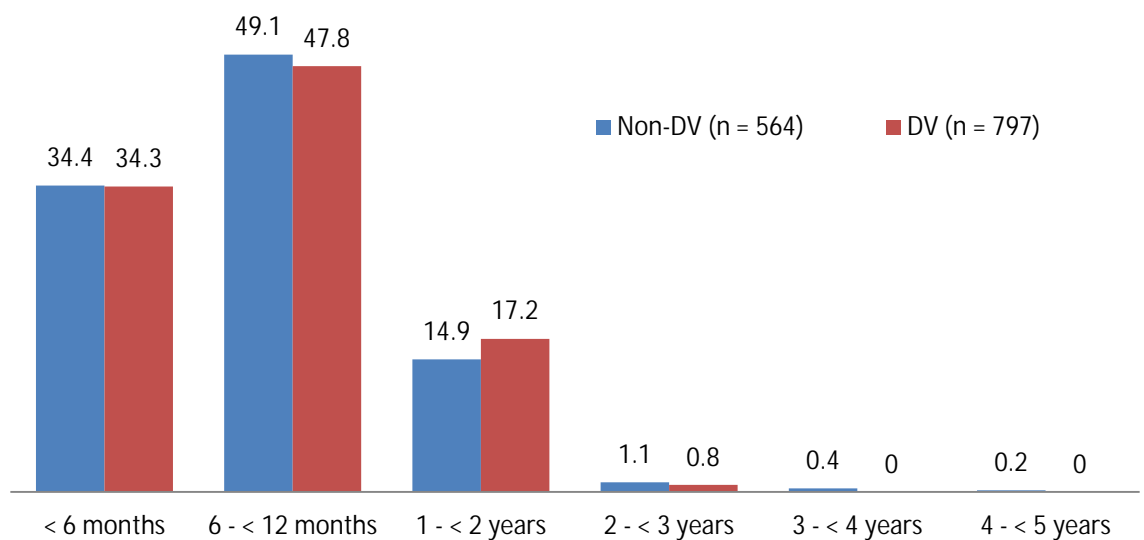


- § imprisonment (18.6% compared with 15.9%)
- § bond with supervision (16.5% compared with 11.8%)
- § bond without conviction (10.1% compared with 8.2%).<sup>19</sup>

*Length of sentences of imprisonment*

4.78 Figure 4.16 shows the length of the non-parole period, for DV and non-DV offenders, where assault occasioning actual bodily harm is the principal offence.

Figure 4.16: Length of non-parole period where assault occasioning actual bodily harm is the principal offence for 2013 and 2014



Source: NSW Bureau of Crime Statistics and Research (jf15-13323).

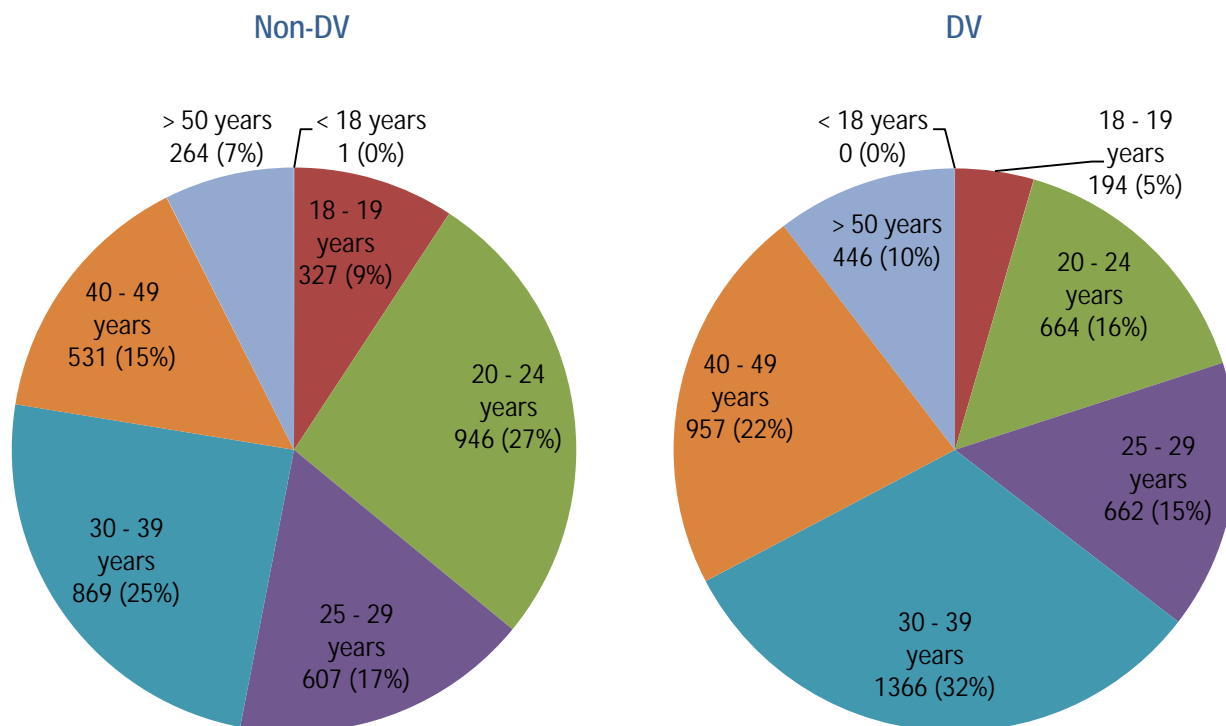
- 4.79 There is a slightly greater percentage of DV offenders in the 1-2 years range; but, overall there is very little difference between the non-parole periods for DV and non-DV offenders.
- 4.80 In looking at this data, it should be noted that the Local Court’s jurisdictional limits will have had an effect on the sentences recorded. For many of the matters recorded there is a jurisdictional limit of 2 years for a head sentence where the court sentences one offence and 5 years for a total sentence where the court imposes consecutive sentences.

*Offender characteristics*

4.81 Figure 4.17 and Table 4.3 set out various characteristics of DV and non-DV offenders for the offence of assault occasioning actual bodily harm. The characteristics include age, gender, Indigenous status, plea, bail status at finalisation, and criminal history.

19. Very small differences were noted for suspended sentence with supervision (7.6% compared with 7%).

Figure 4.17: Age of the offender where assault occasioning actual bodily harm was the principal offence in 2013 and 2014



Source: NSW Bureau of Crime Statistics and Research (jf15-13323).

4.82 In the case of the non-DV offenders, over half (53%) were under 30 years of age. In the case of the DV offenders, over half (64%) were aged 30 years or over.

Table 4.3: Other characteristics of offenders convicted of assault occasioning actual bodily harm as the principal offence in 2013 and 2014

Characteristic	Non-DV		DV	
	No	%	No.	%
Indigenous	765	21.6%	1043	24.3%
<b>Gender</b>				
Male	2907	82.0%	3476	81.0%
Female	638	18.0%	813	19.0%
<b>Plea</b>				
Guilty plea	2807	79.2%	3375	78.7%
Not Guilty plea	550	15.5%	691	16.1%
<b>Bail status at finalisation</b>				
On bail	1573	44.4%	2392	55.8%
In custody	468	13.2%	767	17.9%
Bail not required/ dispensed with	1504	42.4%	1130	26.3%
<b>Criminal history</b>				
Prior proven offences in the previous 5 years	1904	53.7%	2345	54.7%
Prison episodes in the previous 5 years	469	13.2%	602	14.0%
<b>Jurisdiction</b>				
Local Courts	3488	98.4%	4267	99.5%

Source: NSW Bureau of Crime Statistics and Research (jf15-13323).

4.83 Compared with non-DV offenders, a higher proportion of DV offenders convicted of assault occasioning actual bodily harm as the principal offence were:

§ Indigenous (24.3% compared with 21.6%)

§ on bail (55.8% compared with 44.4%)

§ in custody (17.9% compared with 13.2%).<sup>20</sup>

4.84 Compared with DV offenders, a higher proportion of non-DV offenders had bail not required or dispensed with (42.4% compared with 26.3%).<sup>21</sup>

20. Very small differences were noted where the offenders were female (19% compared with 18%); had entered a not-guilty plea (16.1% compared with 15.5%); had prior proven offences in the previous 5 years (54.7% compared with 53.7%); had a prison episode in the previous 5 years (14% compared with 13.2%).

21. Very small differences were noted where the offenders were male (82% compared with 81%); and entered a guilty plea (79.2% compared with 78.7%).

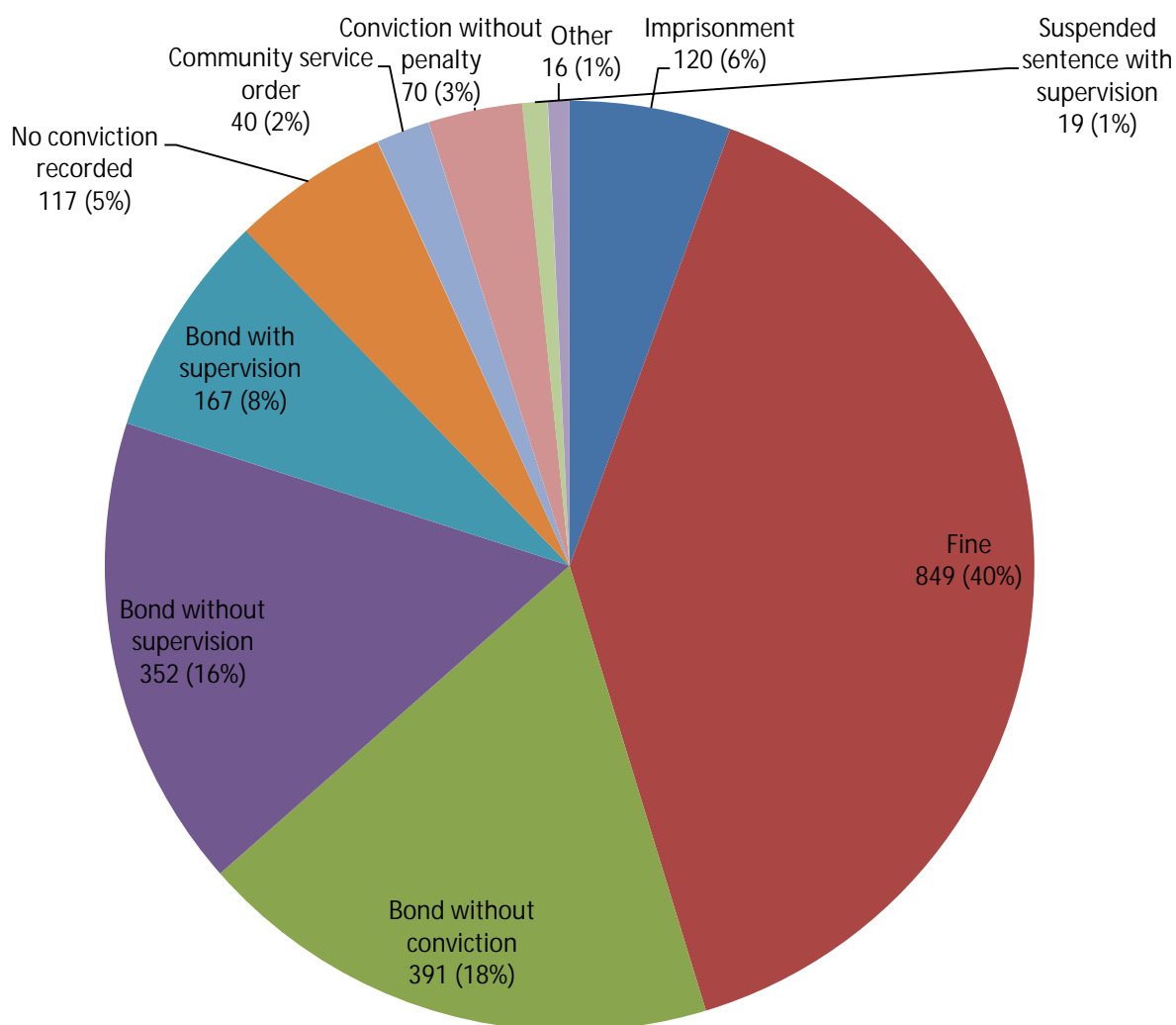
### Destroy or damage property valued at \$2000 or less

4.85 Under s 195(1)(a) of the Crimes Act 1900 (NSW) a person who intentionally or recklessly destroys or damages another's property is liable to a maximum penalty of 5 years imprisonment.

#### *Type of penalty imposed*

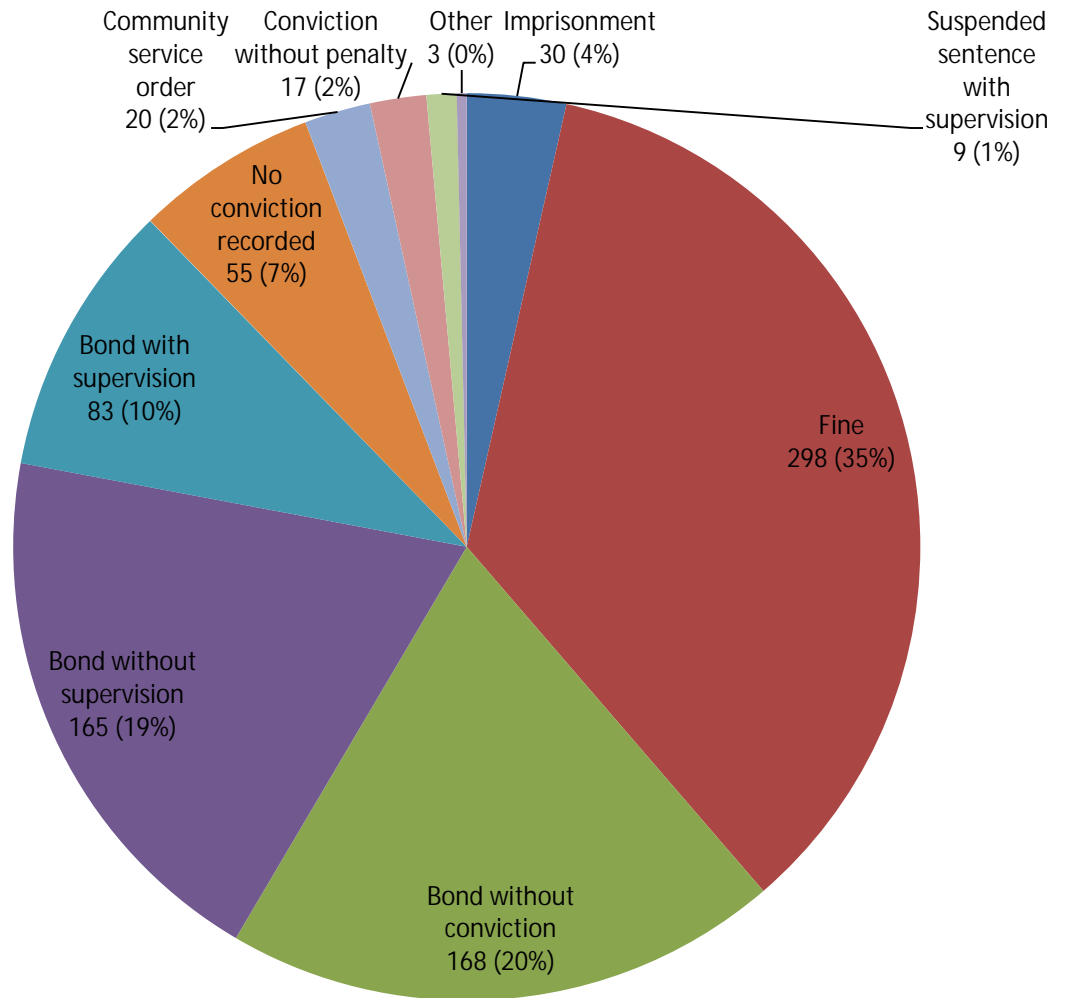
4.86 Figures 4.18 and 4.19 show the sentences imposed where destroy or damage property was the principal offence and the property was valued at \$2,000 or less.

**Figure 4.18: Sentence type imposed for the principal offence of non-DV destroy or damage property valued at \$2000 or less in 2013 and 2014 (n = 2141)**



Source: NSW Bureau of Crime Statistics and Research (jf15-13323).  
 "Other includes": Home detention (0), Intensive correction order (4), Suspended sentence without supervision (12), Nominal sentence (0).

Figure 4.19: Sentence type imposed for the principal offence of DV destroy or damage property valued at \$2000 or less in 2013 and 2014 (n = 848)



Source: NSW Bureau of Crime Statistics and Research (jf15-13323).  
 "Other includes": Home detention (0), Intensive correction order (0), Suspended sentence without supervision (3), Nominal sentence (0).

4.87 Figure 4.18 shows that, compared with DV offenders, a greater percentage of non-DV offenders received the following sentences where destroy or damage property valued at \$2000 or less was the principal offence:

- § fine (39.7% compared with 35.1%)
- § imprisonment (5.6% compared with 3.5%)
- § conviction without penalty (3.3% compared with 2.0%).

4.89 Figure 4.19 shows that, compared with non-DV offenders, a greater percentage of DV offenders received the following sentences where destroy or damage property valued at \$2000 or less was the principal offence:

§ bond without supervision (19.5% compared with 16.4%)

§ bond without conviction (19.8% compared with 18.3%)

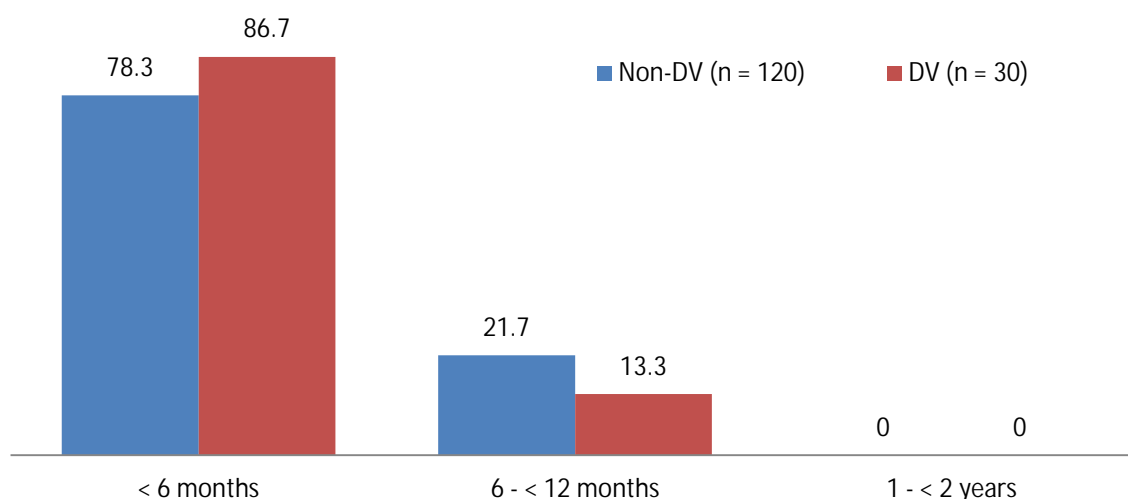
§ bond with supervision (9.8% compared with 7.8%).<sup>22</sup>

4.90 The data shows a much greater proportion of fines imposed on DV offenders for this offence than for the other DV offences considered.

### *Length of sentences of imprisonment*

4.91 Figure 4.20 shows the length of non-parole periods imposed where the offence of destroy or damage property (valued at \$2000 or less) was the principal offence.

**Figure 4.20: Length of non-parole period where destroy or damage property (\$2000 or less) is the principal offence in 2013 and 2014**



Source: NSW Bureau of Crime Statistics and Research (jf15-13323).

4.92 Compared with DV offenders, a greater percentage of non-DV offenders received a non-parole period of 6 months or more for the offence. However, the small number of offenders who received a sentence of imprisonment (120 in the case of non-DV offenders and 30 in the case of DV offenders) should be noted.

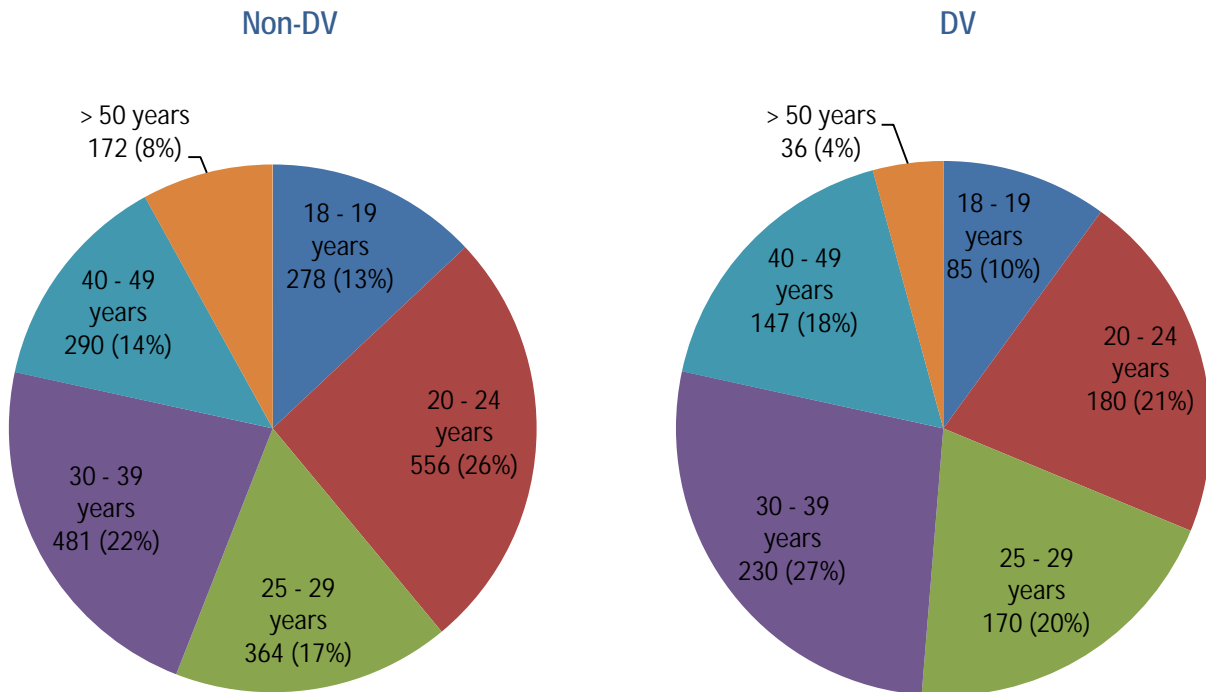
### *Offender characteristics*

4.93 Figure 4.21 and Table 4.4 set out various characteristics of DV and non-DV offenders for the offence of destroy or damage property (where the property was

22. Very small differences were noted for no conviction recorded (6.5% compared with 5.5%); community service order (2.4% compared with 1.9%); and suspended sentence with supervision (1.1% compared with 0.9%).

valued at \$2,000 or less). The characteristics presented include age, gender, Indigenous status, plea, bail status at finalisation, and criminal history.

Figure 4.21: Age of offender where destroy or damage property valued at \$2000 or less was the principal offence in 2013 and 2014



Source: NSW Bureau of Crime Statistics and Research (jf15-13323).

4.94 The data shows a slightly younger profile for non-DV offenders.

**Table 4.4: Other characteristics of offenders convicted of destroy or damage property valued at \$2000 or less as the principal offence in 2013 and 2014**

Characteristic	DV		Non-DV	
	No	%	No	%
Indigenous	206	24.3%	428	20.0%
<b>Gender</b>				
Male	681	80.3%	1826	85.3%
Female	167	19.7%	315	14.7%
<b>Plea</b>				
Guilty plea	689	81.3%	1708	79.8%
Not Guilty plea	45	5.3%	109	5.1%
<b>Bail status at finalisation</b>				
On bail	332	39.2%	433	20.2%
In custody	57	6.7%	178	8.3%
Bail not required/ dispensed with	459	54.1%	1530	71.5%
<b>Criminal record</b>				
Prior proven offences in the previous 5 years	471	55.5%	1221	57.0%
Prison episodes in the previous 5 years	96	11.3%	315	14.7%
<b>Jurisdiction</b>				
Local Courts	847	99.9%	2139	99.9%

Source: NSW Bureau of Crime Statistics and Research (jf15-13323).

4.95 Compared with non-DV offenders, a higher proportion of DV offenders convicted of destroying or damaging property valued \$2000 or less were:

- § Indigenous (24.3% compared with 20%)
- § female (19.7% compared with 14.7%)
- § on bail (39.2% compared with 20.2%).

4.96 Compared with DV offenders, a higher proportion of non-DV offenders convicted of destroying or damaging property valued at \$2,000 or less:

- § were male (85.3% compared with 80.3%)
- § were in custody (8.3% compared with 6.7%)
- § were bail not required/dispensed with (71.5% compared with 54.1%)
- § had prior proven offences in the previous 5 years (57% compared with 55.5%)



§ had prison episodes in the previous 5 years (14.7% compared with 11.3%).

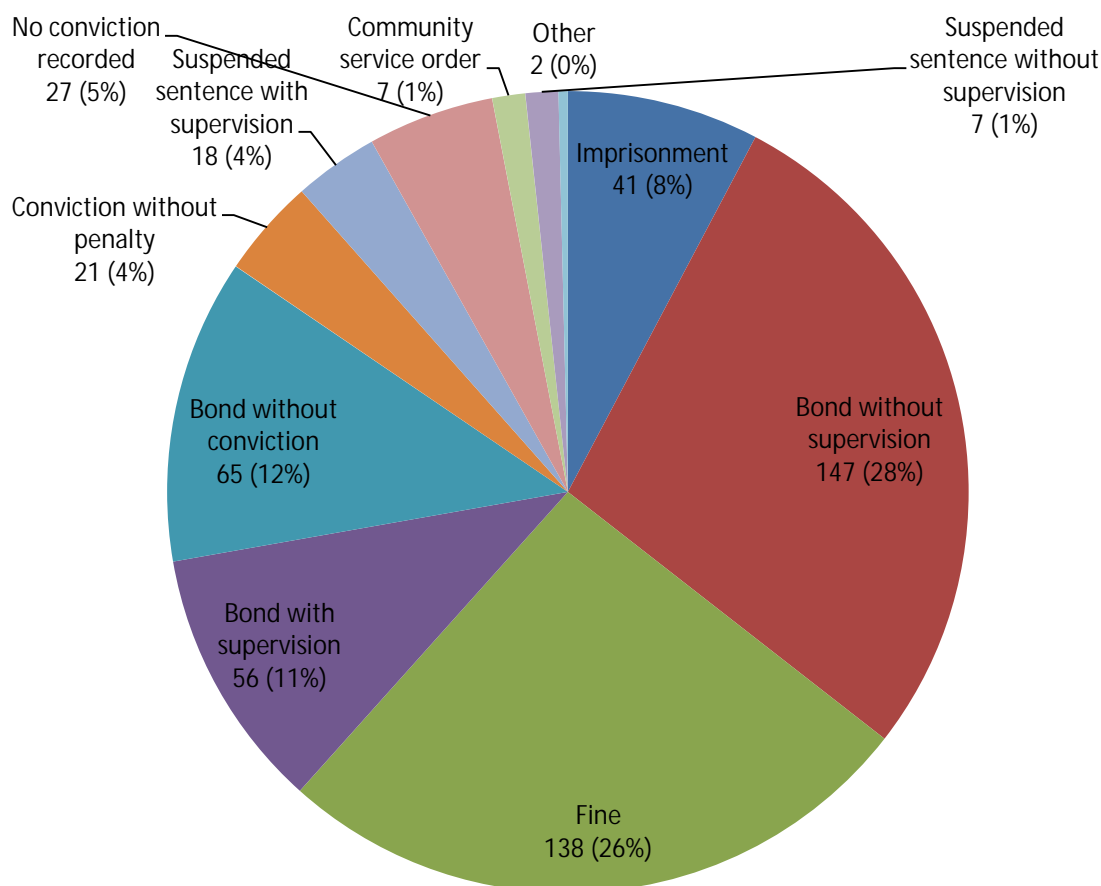
### Contravene apprehended violence order

4.97 Under s 14(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) a person who knowingly contravenes a prohibition or restriction specified in an apprehended violence order is liable to a maximum penalty of 2 years imprisonment or 50 penalty units (\$5500) or both.

### Type of penalty imposed

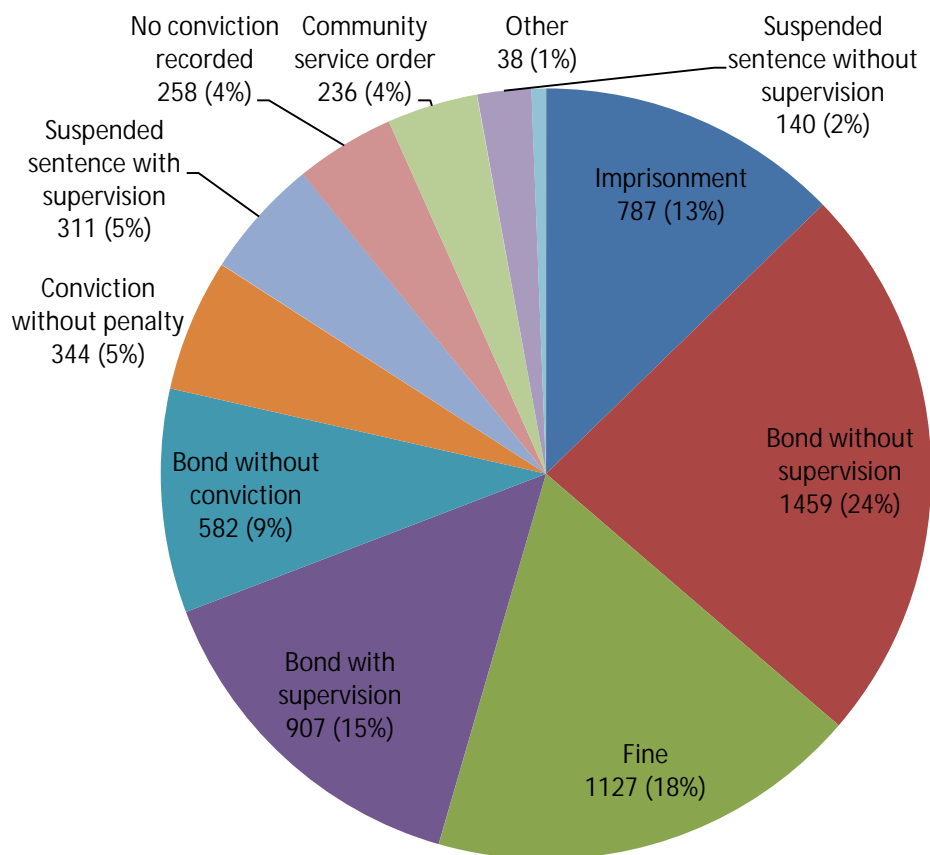
4.98 Figures 4.22 and 4.23 show the sentences imposed where contravene an apprehended violence order was the principal offence for both apprehended personal violence orders (APVO) and apprehended domestic violence orders (ADVO).

Figure 4.22: Sentence type imposed for the principal offence of contravene apprehended personal violence order in 2013 and 2014 (n = 529)



Source: NSW Bureau of Crime Statistics and Research (jf15-13323)..  
 "Other" includes: Intensive correction order (1); Nominal sentence (1)

**Figure 4.23: Sentence type imposed for the principal offence of contravene apprehended domestic violence order in 2013 and 2014 (n = 6189)**



Source: NSW Bureau of Crime Statistics and Research (jf15-13323)..  
 "Other" includes: Intensive correction order (31); Nominal sentence (6); Home detention (1).

4.99 Figure 4.22 shows that, compared with offenders who contravened an ADVO, a greater percentage of offenders who contravened an APVO received the following sentences where the contravention was the principal offence:

- § bond without supervision (27.8% compared with 23.6%)
- § fine (26.1% compared with 18.2%)
- § bond without conviction (12.3% compared with 9.4%)
- § non conviction recorded (5.1% compared with 4.2%).

4.100 Figure 4.23 shows that, compared with offenders who contravened an APVO, a greater percentage of offenders who contravened an ADVO received the following sentences where the contravention was the principal offence:

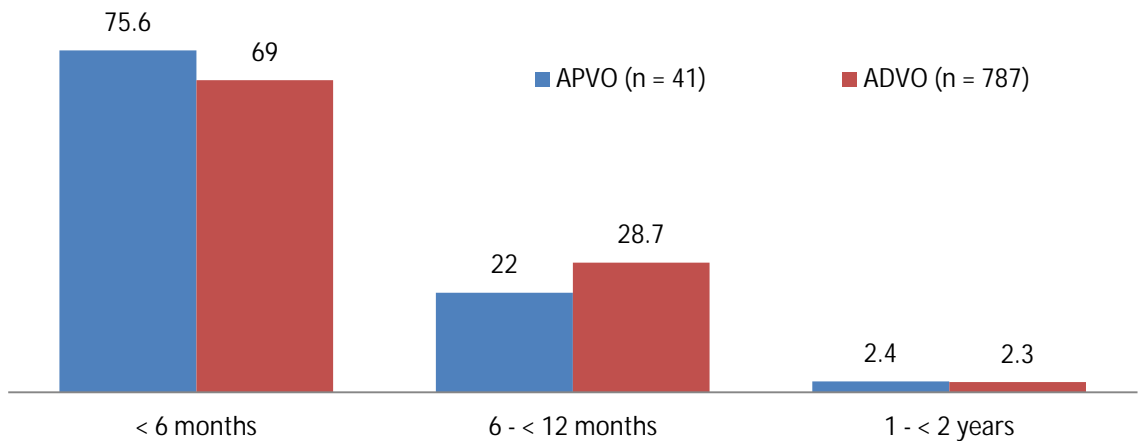
- § imprisonment (12.7% compared with 7.8%)
- § suspended sentence with supervision (5% compared with 3.4%)
- § suspended sentence without supervision (2.3% compared with 1.3%)
- § community service order (3.8% compared with 1.3%)

- § bond with supervision (14.7% compared with 10.6%)
- § conviction without penalty (5.6% compared with 4%).

*Length of sentences of imprisonment*

4.101 Figure 4.24 shows the length of non-parole periods when contravening an ADVO or APVO is the principal offence.

Figure 4.24: Length of non-parole period where contravene AVO is the principal offence in 2013 and 2014



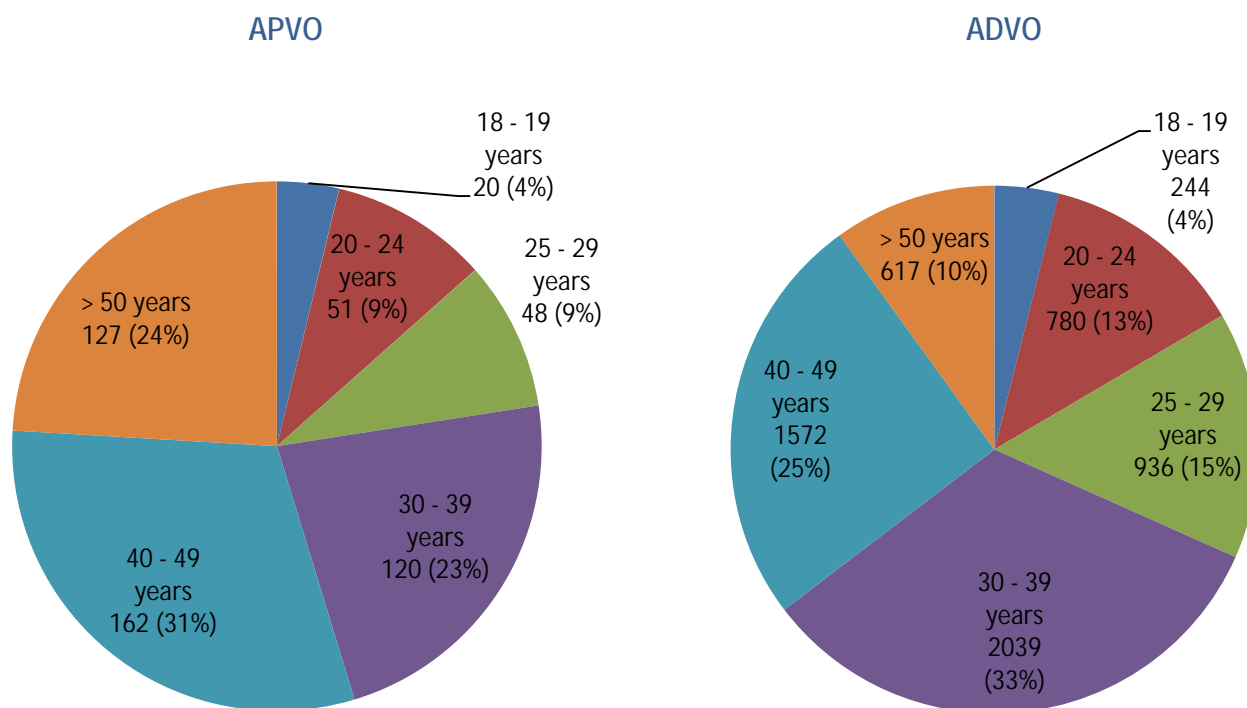
Source: NSW Bureau of Crime Statistics and Research (jf15-13323).

4.102 A higher percentage of non-parole periods of 6 months or more were imposed on DV offenders when compared with non-DV offenders.

*Offender characteristics*

4.103 Figure 4.25 and Table 4.5 set out various characteristics of offenders for the offence of contravening an APVO or ADVO including age, gender, Indigenous status, plea, bail status at finalisation, and criminal history.

Figure 4.25: Age of offender where contravene AVO was the principal offence in 2013 and 2014



Source: NSW Bureau of Crime Statistics and Research (jf15-13323).

4.104 The offence of contravene an APVO shows a markedly different age profile to all of the other profiles considered in this report in that the majority of offenders were over 40 years old, with almost one-quarter being over 50.

4.105 Figure 4.25 shows an age profile for contravene ADVO that is similar to that of DV offenders where assault occasioning actual bodily harm is the principal offence (see Figure 4.17).

Table 4.5: Other characteristics of offenders convicted of contravene APVO and ADVO in 2013 and 2014

Characteristic	APVO		ADVO	
	No	%	No	%
Indigenous	124	23.4%	1649	26.6%
<b>Gender</b>				
Female	187	35.3%	752	12.2%
Male	342	64.7%	5437	87.8%
<b>Plea</b>				
Guilty plea	374	70.7%	5257	84.9%
Not Guilty plea	104	19.7%	548	8.9%
<b>Bail status at finalisation</b>				
On bail	288	54.4%	3400	54.9%
In custody	64	12.1%	1106	17.9%
Bail not required/ dispensed with	177	33.5%	1683	27.2%
<b>Criminal record</b>				
Prior proven offences in the previous 5 years	383	72.4%	4958	80.1%
Prison episodes in the previous 5 years	71	13.4%	1386	22.4%
<b>Jurisdiction</b>				
Local Courts	529	100.0%	6183	99.9%

Source: Bureau of Crime Statistics and Research (jf15-13323)

4.106 Compared with offenders who contravened APVOs, a slightly higher proportion of offenders convicted of contravening an ADVO as the principal offence:

- § were Indigenous (26.6% compared with 23.4%)
- § were male (87.8% compared with 64.7%)
- § entered a guilty plea (84.9% compared with 70.7%)
- § were in custody (17.9% compared with 12.1%)
- § had prior proven offences in the previous 5 years (80.1% compared with 72.4%)
- § had a prison episode in the previous 5 years (22.4% compared with 13.4%).

4.107 Compared with offenders who contravened ADVOs, a higher proportion of offenders who contravened APVOs as the principal offence:

- § were female (35.3% compared with 12.2%)

§ entered a plea of not guilty (19.7% compared with 8.9%)

§ were bail not required/dispensed with (33.5% compared with 27.2%).

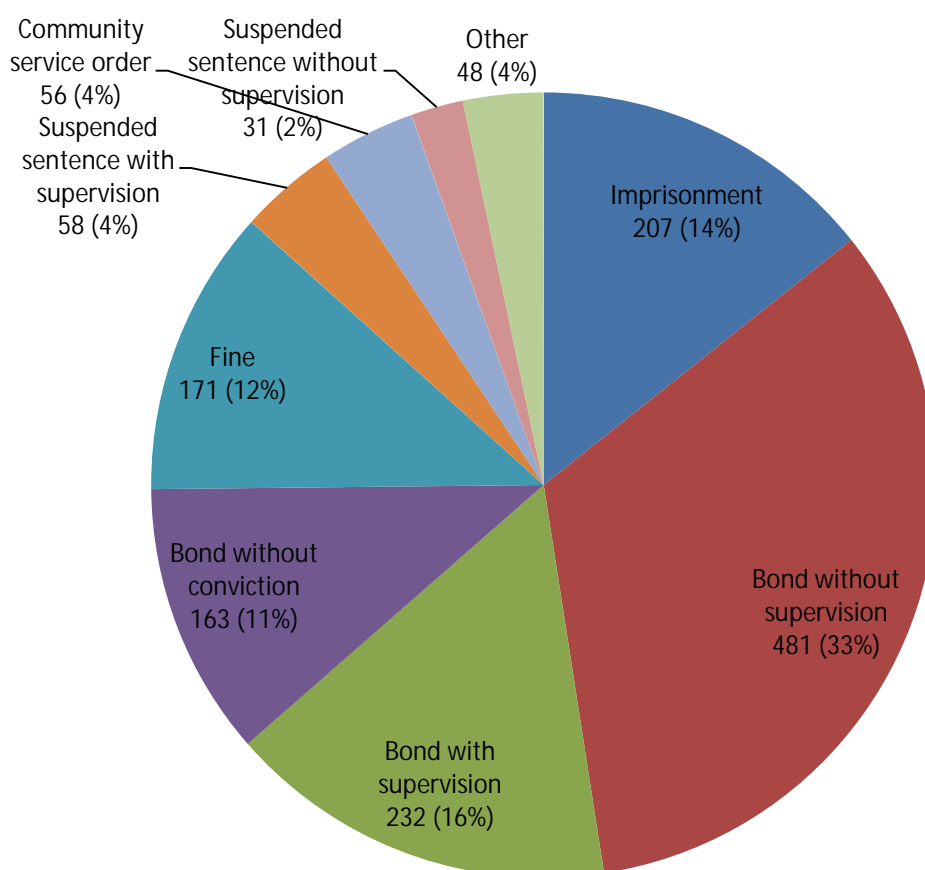
### Stalk or intimidate

4.108 Under s 13(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) a person who stalks or intimidates another person with the intention of causing the other person to fear physical or mental harm, is liable to a maximum penalty of 5 years imprisonment or 50 penalty units (\$5500) or both.

#### *Type of penalty imposed*

4.109 Figures 4.26 and 4.27 show the sentences imposed where stalk or intimidate was the principal offence in both personal and domestic circumstances.

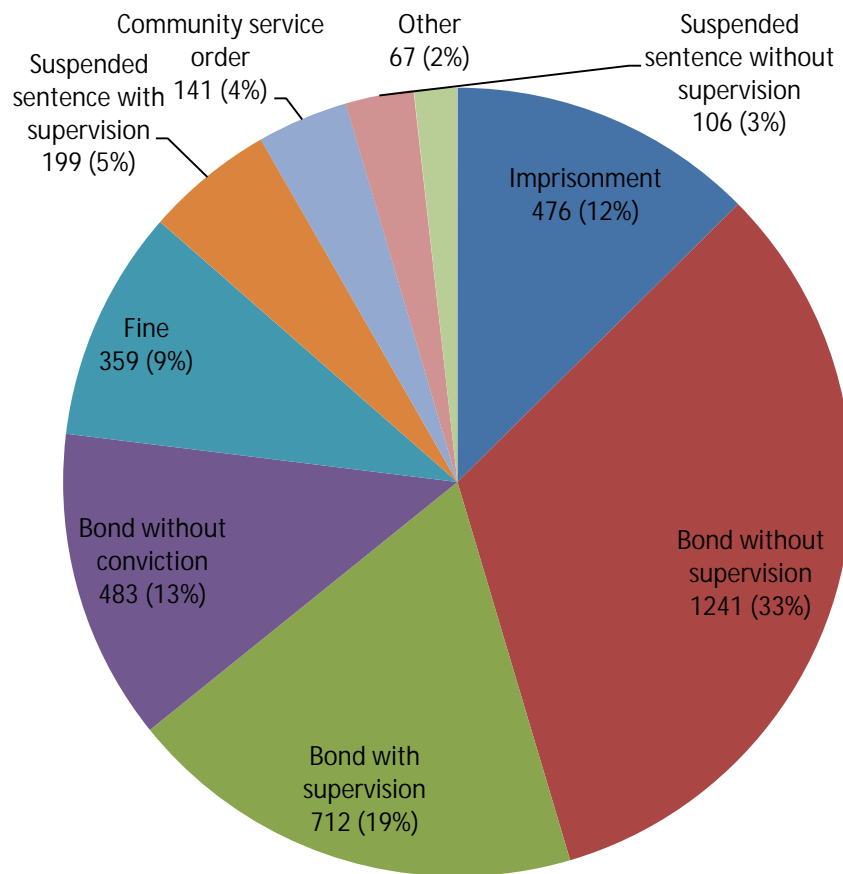
**Figure 4.26: Sentence type imposed for the principal offence of stalk/intimidate (personal) in 2013 and 2014 (n = 1447)**



Source: NSW Bureau of Crime Statistics and Research (jf15-13323)..

"Other" includes: No conviction (24); Conviction without penalty (17); and Intensive correction order (7).

Figure 4.27: Sentence type imposed for the principal offence of stalk/intimidate (domestic) in 2013 and 2014 (n = 3784)



Source: NSW Bureau of Crime Statistics and Research (jf15-13323).

"Other" includes: No conviction (25); Conviction without penalty (24); Intensive correction order (17); and Nominal sentence (1).

4.110 There is very little difference between the sentencing type imposed for personal and domestic versions of the stalk or intimidate offences in 2013 and 2014.

4.111 Figure 4.26 shows that, compared with the data for the DV offence, a greater percentage of offenders received the following sentences where the personal violence category of stalk or intimidate was the principal offence:

§ fine (11.8% compared with 9.5%)

§ imprisonment (14.3% compared with 12.6%).<sup>23</sup>

4.112 Figure 4.27 shows that, compared with the data for the personal violence version of the offence, a greater percentage of offenders received the following sentences where the domestic violence version of stalk or intimidate was the principal offence:

§ bond with supervision (18.8% compared with 16%)

23. Very small differences were noted for bond with supervision (33.2% compared with 32.8%) and community service order (3.9% compared to 3.7%)

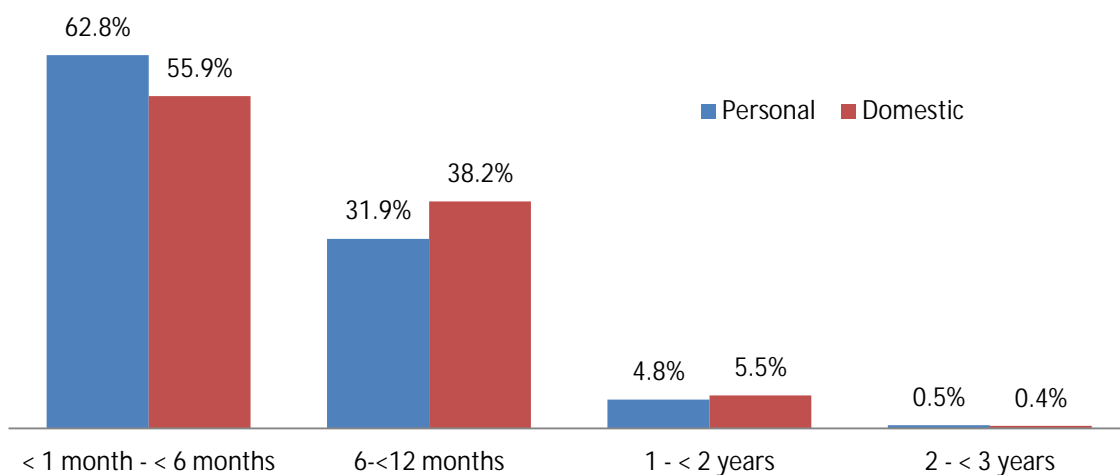
§ bond without conviction (12.8% compared with 11.3%)

§ suspended sentence with supervision (5.3% compared with 4.0%).<sup>24</sup>

*Length of sentences of imprisonment*

4.113 Figure 4.28 shows the length of the non-parole period imposed where stalk or intimidate was the principal offence.

**Figure 4.28: Length of non-parole period where stalk/intimidate is the principal offence in 2013 and 2014**



Source: NSW Bureau of Crime Statistics and Research (jf15-13323).

4.114 A higher proportion of DV offenders received a sentence of 6 months or more.

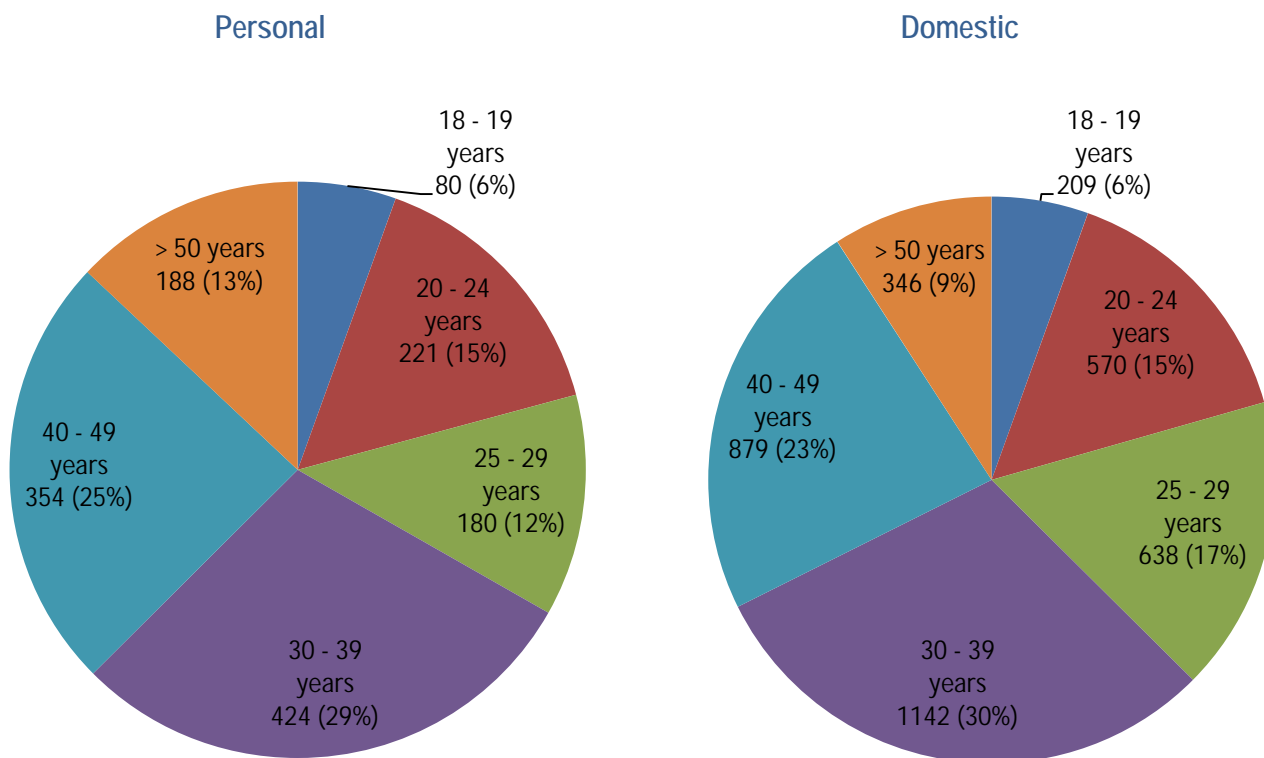
24. A very small difference was noted for suspended sentences without supervision (2.8% compared with 2.1%).



*Offender characteristics*

4.115 Figure 4.29 and Table 4.6 set out various characteristics of personal violence and DV offenders for the offence of stalk or intimidate. The characteristics include age, gender, Indigenous status, plea, bail status at finalisation, and criminal history.

Figure 4.29: Age of offender where stalk/intimidate was the principal offence in 2013 and 2014



Source: NSW Bureau of Crime Statistics and Research (jf15-13323).

4.116 There is less variation in age between the personal violence and DV offenders for stalk or intimidate than between the DV and non-DV offenders for the other offences considered.

4.117 The age profile between personal violence and DV offenders is roughly similar, although, there is a slightly younger profile for the DV offenders. This, and the other characteristics outlined below, may go some way to explaining the smaller proportion of sentences of imprisonment for DV offenders when compared with non-DV offenders where stalk or intimidate was the principal offence.

**Table 4.6: Other characteristics of offenders convicted of stalk/intimidate in 2013 and 2014**

Characteristic	Personal		Domestic	
	No	%	No	%
Indigenous	373	25.8%	792	20.9%
<b>Gender</b>				
Male	1193	82.4%	3453	91.3%
Female	254	17.6%	331	8.7%
<b>Plea</b>				
Guilty plea	1097	75.8%	3020	79.8%
Not Guilty plea	214	14.8%	491	13.0%
<b>Bail status at finalisation</b>				
On bail	661	45.7%	2012	53.2%
In custody	243	16.8%	613	16.2%
Bail not required/ dispensed with	543	37.5%	1159	30.6%
<b>Criminal record</b>				
Prior proven offences in the previous 5 years	917	63.4%	2321	61.3%
Prison episodes in the previous 5 years	296	20.5%	603	15.9%
<b>Jurisdiction</b>				
Local Courts	1432	99.0%	3781	99.9%

Source: NSW Bureau of Crime Statistics and Research (jf15-13323).

- 4.118 Compared with personal violence offenders, a higher proportion of DV offenders where stalk or intimidate was the principal offence:
- § were male (91.3% compared with 82.4%)
  - § on bail (53.2% compared with 45.7%)
  - § entered a guilty plea (79.8% compared with 75.8%).
- 4.119 Compared with DV offenders, a higher proportion of personal violence offenders where stalk or intimidate was the principal offence:
- § were Indigenous (25.8% compared with 20.9%)
  - § female (17.6% compared with 8.7%)
  - § entered a not guilty plea (14.8% compared with 13%)
  - § were in custody (16.8% compared with 16.2%)

- § were bail not required/dispensed with (37.5% compared with 30.6%)
- § had a prior proven offence in the previous 5 years (63.4% compared with 61.3%)
- § had a prison episode in the previous 5 years (20.5% compared with 15.9%).



## 5. Sentences actually served for DV and non-DV offences

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- 5.1 We have been asked to compare sentences actually served for domestic violence (DV) offences with sentences actually served for the same personal violence offences (not classified as DV offences).

### Corrective Services NSW data

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- 5.2 In responding to this part of the terms of reference, we requested information from Corrective Services NSW about the difference in sentences actually served between DV and non-DV offenders for the selected offences outlined in Chapter 1.<sup>1</sup> Corrective Services NSW responded with aggregate figures for DV and non-DV offenders sentenced to imprisonment. These figures are set out in Table 5.1
- 5.3 The figures show:
- § how many offenders were released at the expiry of their non-parole period – referred to as the “earliest date of release” (EDR)
  - § how many offenders were released after this date and before the end of their total sentence, and
  - § how many offenders were released at the end of their total sentence.
- 5.4 Corrective Services NSW strictly defined the relevant cohort to ensure that the aggregate sentence being served was comparable for DV and non-DV offences (non-DV offences are referred to in the table as PV offences). The data, therefore, includes episodes of imprisonment where:
- § the most serious offence was a DV or non-DV offence
  - § there were no further legal matters such as a remand warrant issued on or after the earliest release date
  - § the court set a non-parole period (that is, no fixed term sentences), and
  - § there was no current breach of parole attached to the episode.
- 5.5 The category of "PV (with DV)" in Table 5.1 refers to offenders who had been sentenced for DV offences but the principal offence was a non-DV offence.

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1. Para [1.15].

Table 5.1: Prisoners released for selected offences, 1 January 2008 - 30 August 2015

Principal offence	DV only		PV (with DV)		PV only	
	No	%	No	%	No	%
<b>Parole status</b>						
Released at EDR	2621	95.4%	1625	95.7%	4415	93.4%
Parole revoked before release	114	4.2%	64	3.8%	183	3.9%
Parole refused	11	0.4%	9	0.5%	130	2.7%
<b>Total</b>	<b>2746</b>	<b>100.0%</b>	<b>1698</b>	<b>100.0%</b>	<b>4728</b>	<b>100.0%</b>
<b>Released after EDR</b>						
Total held beyond EDR	125	4.6%	73	4.3%	313	6.6%
Served entire sentence	42	1.5%	19	1.1%	83	1.8%
Percentage of offenders held beyond EDR		33.6%		26.0%		26.5%

Source: *Corrective Services NSW*.

### Release at earliest release date

- 5.6 The data shows that the vast majority of offenders are released at their earliest release date. That is, the date for release set by the court in accordance with the non-parole period imposed at sentencing.

### Release after earliest release date

- 5.7 Of the small number who were detained beyond their earliest release date, the vast majority had their parole revoked before release. This would be expected given the large number of offenders sentenced to a total sentence of 3 years or less.<sup>2</sup> These offenders would be subject to automatic release on the expiry of the non-parole period, barring revocation before the release date in response to developments during the period in custody.
- 5.8 The data shows that non-DV offenders were more commonly held beyond their earliest release date compared with DV offenders (6.6% compared with 4.6%). However, a significant proportion of the non-DV offenders detained beyond the earliest release date (41.5%) were parole refused, indicating a total sentence of more than 3 years imprisonment. This can be compared with the smaller proportion of DV offenders detained beyond their earliest release date who were parole refused (8.8%).

2. Of the offenders surveyed, the median aggregate sentence was 365 days for DV only offenders and 426 days for PV only offenders. See also the figures on mean sentences imposed for serious violence offences: Figure 4.2; and on non-parole periods imposed for principal offence: Figures 4.12, 4.16, 4.20, 4.24, 4.28.

### Release at end of sentence

5.9 Only 1.5% of DV offenders and 1.8% of non-DV offenders served the entire aggregate sentence in custody. Corrective Services NSW further noted that DV offenders held beyond their earliest release date were more likely than non-DV offenders to serve out their entire sentence in custody. However, it should be noted that:

§ the numbers are relatively small (42 and 83 respectively over a period of more than 7.5 years), and

§ such an outcome would be expected where short sentences are being served and the reason for revocation before the earliest release date was other than a relatively easily curable problem, for example, absence of suitable post release accommodation.





## 6. Reoffending

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6.1 We have been asked to compare the reoffending rates for people convicted of domestic violence (DV) offences with the reoffending rates for the same personal violence offences (not classified as domestic violence offences). One of the Premier's Priorities is to reduce the proportion of domestic violence perpetrators who re-offend.

6.2 The selected offences considered are:

- § common assault<sup>1</sup>
- § assault occasioning actual bodily harm<sup>2</sup>
- § destroy or damage property valued at \$2,000 or less<sup>3</sup>
- § contravene an apprehended violence order (AVO)<sup>4</sup> and
- § stalk or intimidate.<sup>5</sup>

6.3 In responding to this request, we have examined data provided by the NSW Bureau of Crime Statistics and Research (BOCSAR) for 2013 which shows the percentage of those sentenced for one of the selected offences who have reoffended:

- § within 12 months of the original sentence (in the case of non-custodial penalties), or
- § within 12 months of liberty (in the case of those sentenced to imprisonment for the original offence).

### General observations

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6.4 The data for the selected offences shows that:

- § where the offenders were sentenced to a non-custodial penalty, generally a greater percentage of DV offenders reoffended within 12 months compared with non-DV offenders, and

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1. *Crimes Act 1900* (NSW) s 61.

2. *Crimes Act 1900* (NSW) s 59(1).

3. *Crimes Act 1900* (NSW) s 195(1)(a), law parts 820 and 64882.

4. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14(1).

5. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13(1).

- § where the offenders, at sentencing for the index offence, had no prior offences in the previous 5 years, a greater percentage of DV offenders reoffended within 12 months compared with non-DV offenders.
- 6.5 However, this pattern is not replicated for the offenders who, at sentencing for the index offence, had prior offences in the previous 5 years. In such cases a slightly smaller percentage of DV offenders reoffended within 12 months compared with non-DV offenders.
- 6.6 The data also shows greater reoffending rates for offenders whose index offence was contravening an AVO – either an apprehended domestic violence order (ADVO) or apprehended personal violence order (APVO) – when compared with the other selected offences. Reoffending is most strongly associated with offenders whose index offence was contravening an ADVO.
- 6.7 The comparisons are made only between the selected offences. We do not have data on general reoffending rates or on offences other than those selected. The reoffending counted here is reoffending by committing any offence, not just committing a DV or non-DV related offence.
- 6.8 This initial data suggests that further attention may need to be given to managing offenders who are sentenced for contravening an ADVO when they undergo their non-custodial sentences, particularly those who have a prior offending history.
- 6.9 Further information and analysis is required concerning the initial offence, the nature of the reoffending behaviour, and the offenders' characteristics. In particular, in the case of contravening an ADVO, we do not know whether a contravention sentenced as part of the index offence is a “technical” or a “substantive” breach. Further information is also required on what programs, if any, the relevant offenders took part in, either while in prison, on parole, or while undergoing a non-custodial sentence.
- 6.10 There are a number of factors that are known to predict reoffending including: prior convictions, prior incarceration, Indigenous status, gender, age, and residential geography. The data presented here could reflect differences in the cohort of offenders who are convicted of DV and non-DV offences. Some of these are set out in Chapter 4.<sup>6</sup> Apart from prior offending, these other factors have not been controlled for in the following data. The better practice would be to control for all these factors and then measure whether there is a difference in reoffending for DV offenders compared with non-DV offenders.
- 6.11 The following data has not been tested for significance, so there is no assessment as to whether the data shows a meaningful difference rather than what might result from chance or natural variation. Some of the numbers are very small, especially for those offenders who were initially sentenced to imprisonment.

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6. Para [4.61]-[4.118].

## Reoffending by offenders with non-custodial sentences

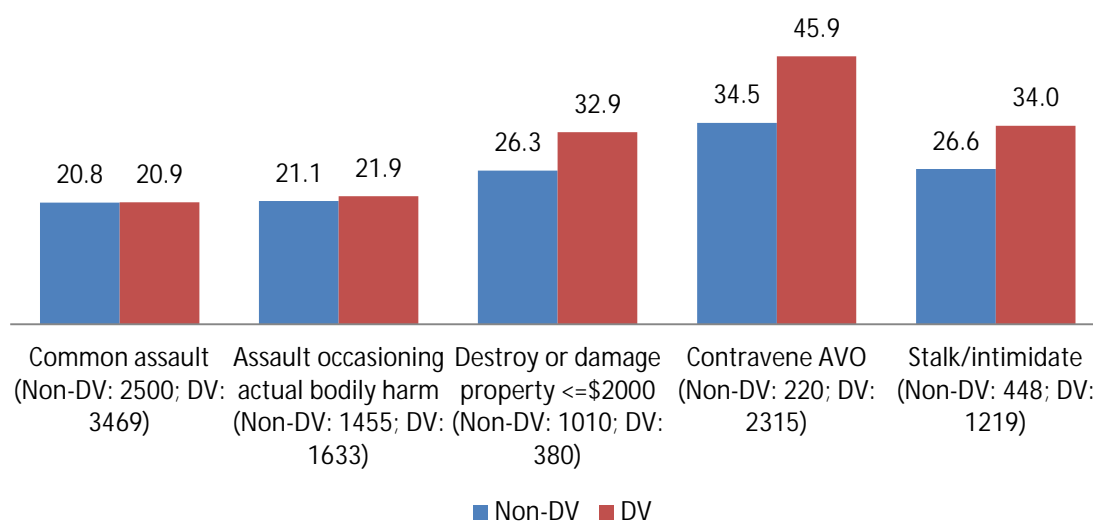
6.12 The following paragraphs will examine the reoffending rates, for selected DV and non-DV offences, for those offenders who received a non-custodial sentence for their initial conviction in 2013. The reoffending rates for the following categories will be examined:

- § all offenders
- § offenders with no recent prior convictions, and
- § offenders with recent prior convictions.

### All offenders

6.13 Figure 6.1 shows the reoffending rates for all DV and non-DV offenders (regardless of whether or not they had prior convictions) who were sentenced to a non-custodial penalty for the selected offences.

Figure 6.1: Percentage of offenders convicted in 2013 of a relevant principal offence and sentenced to a non-custodial penalty who were reconvicted within 12 months of sentence



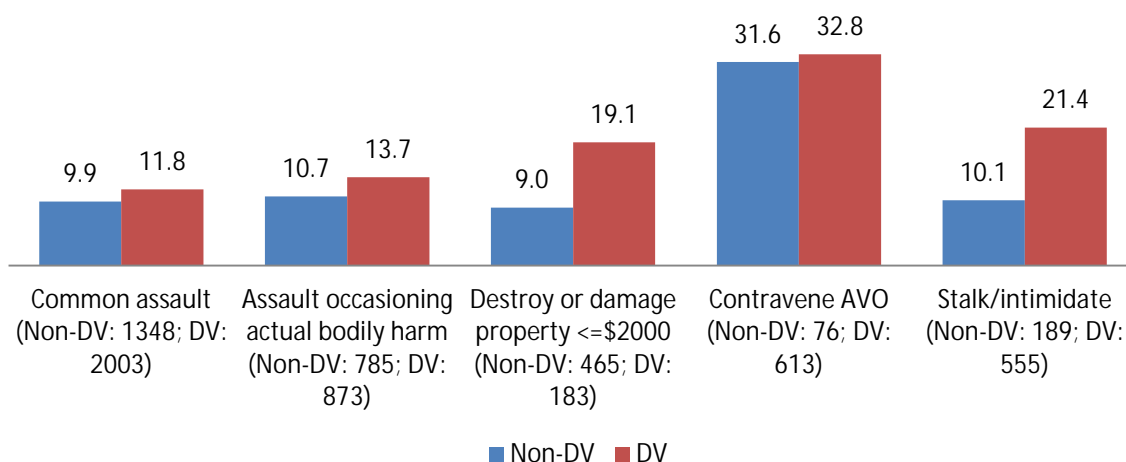
Source: NSW Bureau of Crime Statistics and Research, reference 15-13335.

6.14 For each selected offence, a greater percentage of DV offenders reoffended within 12 months of sentence, compared with non-DV offenders. In particular, the DV offenders had higher reoffending rates when their initial offence was contravene an AVO and stalk or intimidate.

### Offenders with no recent prior convictions

6.15 Figure 6.2 shows the reoffending rates for DV and non-DV offenders with no recent prior convictions who were sentenced to a non-custodial penalty for the selected offences.

Figure 6.2: Percentage of offenders (with no prior convictions in the previous 5 years) convicted in 2013 of a relevant principal offence and sentenced to a non-custodial penalty who were reconvicted within 12 months of sentence



Source: NSW Bureau of Crime Statistics and Research, reference 15-13335.

6.16 For each selected offence, a greater percentage of DV offenders reoffended within 12 months of sentence, compared with non-DV offenders.

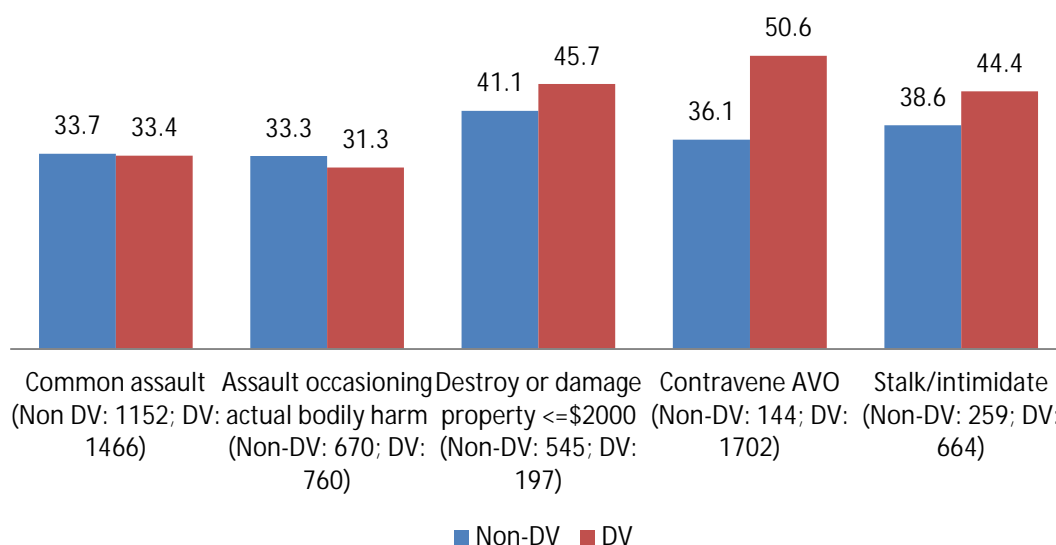
6.17 This data shows an underlying high rate of reoffending for offenders whose index offence was an AVO offence, even where they had no prior convictions in the previous 5 years.

6.18 In the case of destroy or damage property, the difference between the DV and non-DV-related offenders is more marked where the offender had no priors in the previous 5 years. This may reflect the differences in the seriousness of the offending and offender characteristics in the DV and non-DV contexts.

### Offenders with recent prior convictions

- 6.19 Figure 6.3 shows the reoffending rates for DV and non-DV offenders with recent prior convictions, who were sentenced to a non-custodial penalty, for the selected offences.

Figure 6.3: Percentage of offenders (with prior convictions in the previous 5 years) convicted in 2013 of a relevant principal offence and sentenced to a non-custodial penalty who were reconvicted within 12 months of sentence



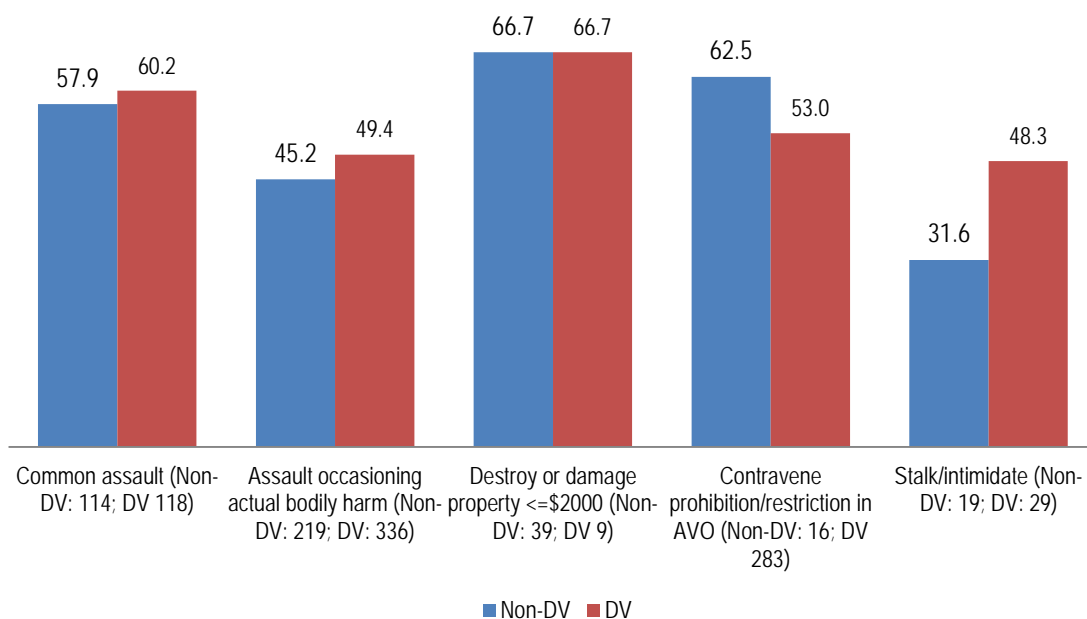
Source: NSW Bureau of Crime Statistics and Research, reference 15-13335.

- 6.20 While a greater percentage of DV offenders reoffended in the nominated period for the offences of destroy or damage property, contravene an AVO and stalk or intimidate, there was a greater percentage of non-DV offenders for the offences of common assault and assault occasioning actual bodily harm.
- 6.21 More information is needed about the nature of the reoffending and the prior convictions; but, there would appear to be a strong correlation between reoffending and the index offence of contravene an ADVO.

## Reoffending by offenders with custodial sentences

6.22 Figure 6.4 shows, for the selected offences, the reoffending rates after release for DV and non-DV offenders who were sentenced to imprisonment.

Figure 6.4: Percentage of offenders convicted in 2012 of a relevant principal offence and sentenced to imprisonment who were reconvicted within 12 months of liberty, to June 2015



Source: NSW Bureau of Crime Statistics and Research, reference 15-13336. Offenders with less than 12 months of liberty after the reference court appearance are excluded.

6.23 The reoffending rates for offenders sentenced to imprisonment are generally higher than for offenders sentenced to non-custodial penalties, including those with prior convictions in the previous 5 years (see Figures 6.1 and 6.3). One possible explanation for this higher rate is that offenders sentenced to imprisonment will generally have a serious criminal history and, therefore, an already higher risk of reoffending.

6.24 The number of offenders sentenced to imprisonment for each offence generally appears to be too small to allow for a meaningful comparison between the reoffending rates of DV and non-DV offenders.

## 7. Contravening an order – NSW and other jurisdictions

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- 7.1 We have been asked to “compare the available sentences, sentencing outcomes and sentences served for the NSW offence of contravening an apprehended domestic violence order (s 14 *Crimes (Domestic and Personal Violence) Act 2007*) with the comparable offences in other Australian jurisdictions”.

### Available sentences

---

- 7.2 Table 7.1 sets out the available sentences throughout Australia for offences of contravening the equivalent of an apprehended domestic violence order (ADVO).

Table 7.1: Maximum penalties for breach of domestic violence order offences

	Maximum penalties (imprisonment and/or fine)		Escalated penalties for repeat offences/aggravated form (imprisonment and/or fine)			Provisions
	Imprisonment	Fine	Aggravation	Imprisonment	Fine	
NSW	2 years	\$5,500 [50 penalty units]				<i>Crimes (Domestic and Personal Violence) Act 2007 (NSW) s 14</i>
Victoria	2 years	\$36,400.80 [240 penalty units]	Intending to cause harm or fear for safety	5 years	\$91,002 [600 penalty units]	<i>Family Violence Protection Act 2008 (Vic) s 123, s 123A, s 125</i>
			Persistent contravention on at least 2 other occasions within 28 days in relation to same protected person or same order	5 years	\$91,002 [600 Penalty units]	
Queensland	3 years	\$13,200 [120 penalty units]	Previous conviction for offence within 5 years	5 years	\$26,400 [240 penalty units]	<i>Domestic and Family Violence Protection Act 2012 (Qld) s 177</i>
Western Australia	2 years	\$6,000				<i>Restraining Orders Act 1997 (WA) s 61(1) and (2a)</i>
South Australia	2 years	\$10,000 Mag Ct \$35,000 District Ct \$75,000 Sup Ct <sup>1</sup>				<i>Intervention Orders (Prevention of Abuse) Act 2009 (SA) s 31</i>
Tasmania	12 months	\$3,080 [20 penalty units]	2nd offence	18 months	\$4,620 [30 penalty units]	<i>Family Violence Act 2004 (Tas) s 35</i>
			3rd offence	2 years	\$6,160 [40 penalty units]	
			4th offence or more	5 years		

1. *Criminal Law (Sentencing) Act 1988 (SA) s 34.*



	Maximum penalties (imprisonment and/or fine)		Escalated penalties for repeat offences/aggravated form (imprisonment and/or fine)			Provisions
	Imprisonment	Fine	Aggravation	Imprisonment	Fine	
Australian Capital Territory	5 years	\$75,000 [500 penalty units]				<i>Domestic Violence and Protection Orders Act 2008 (ACT) s 90</i>
Northern Territory	2 years	\$61,200 [400 penalty units]	Previously guilty of DVO offence	7 days minimum (unless no harm and court thinks it appropriate)		<i>Domestic and Family Violence Act (NT) s 120-122</i>
New Zealand	3 years					<i>Domestic Violence Act 1995 (NZ) s 49</i>

7.3 Some jurisdictions also have separately named orders issued by the police on an interim basis. Victoria has family violence safety notices and Western Australia has police orders. In Victoria, the penalty for contravention, like that for contravention of a family violence intervention order, is a maximum 2 years imprisonment or a maximum fine of 240 penalty units, or both.<sup>2</sup> In Western Australia, the penalty for contravention, like that for contravening a violence restraining order, is a maximum 2 years imprisonment or a maximum fine of \$6,000, or both.<sup>3</sup>

7.4 The NSW and Australian Law Reform Commissions, in their family violence report published in 2010, did not make any recommendations about consistency of maximum penalties for contravening protection orders for the following reasons:

- § stakeholders had not identified the level of maximum penalties as a key issue of concern
- § the disparity of views about an appropriate maximum penalty and the absence of an empirical basis for determining it, and
- § consistency in sentencing, rather than maximum penalties, was “the more pertinent issue in practice”.<sup>4</sup>

7.5 The Commissions noted that there were many ways of achieving consistency:

including through a national bench book, guidelines—such as those developed by the Sentencing Advisory Council (Victoria)—education and training, and the use of sentencing databases which are intended to assist a court in deciding

2. *Family Violence Protection Act 2008 (Vic) s 37(2).*

3. *Restraining Orders Act 1997 (WA) s 61(2a).*

4. NSW Law Reform Commission, *Family Violence: A National Legal Response*, Report 128 (2010) [12.176]-[12.178].

whether a proposed sentence 'is in any way inside or outside the normal range of penalties imposed for similar offences in past cases'.<sup>5</sup>

## Sentencing outcomes

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### Limitations in comparing data for the offences

- 7.6 While it is a simple enough task to compare the available sentences for contravening an ADVO or equivalent, it is a difficult and more complex task to compare the data from the different jurisdictions for such offences. This is because in each jurisdiction the offences cover a range of orders, some of which relate to personal violence other than domestic violence. Additionally, the penalty levels range widely and some jurisdictions provide for escalated penalties for further offending, additional sentencing guidance, and various exemptions. For example:
- § The offences in each jurisdiction cover a range of variously titled final, interim and provisional orders made by courts and, in some cases, the police. In some jurisdictions, not all orders are covered by the one offence provision. Victoria, for example, has separate provisions relating to family safety notices issued by the police. Western Australia has separate offence provisions relating to violence restraining orders, misconduct restraining orders, and police orders.
  - § In some jurisdictions the orders that are subject to offence provisions cover both DV and non-DV situations,<sup>6</sup> in others the orders relate only to domestic violence.<sup>7</sup>
  - § Penalties for the basic offences of contravening orders that apply in DV situations range from 12 months imprisonment or 20 penalty units in Tasmania to 5 years imprisonment or 500 penalty units in the ACT. The most common maximum term of imprisonment is 2 years.
  - § Some jurisdictions provide for an escalating series of penalties for subsequent offences. Queensland, for example, provides for escalated penalties where the offender has had a previous conviction for the offence in the previous 5 years. Tasmania has escalating penalties for second, third, and fourth and subsequent offences. If an offender was previously guilty of contravening a domestic violence order, the Northern Territory requires the court to imprison the offender for at least 7 days unless there was no harm from the contravention and the court thinks it appropriate not to impose imprisonment. Victoria has a more restricted provision imposing a maximum penalty of 5 years imprisonment where the offender has contravened an order on at least two other occasions within 28 days in relation to the same protected person or the same order.
  - § Some jurisdictions expressly adjust the sentencing principles or considerations that apply to offenders who contravene an order. In NSW, for example, a court must sentence an offender to imprisonment if the contravening act involved violence against the person, unless the court otherwise orders or the offender is under 18 years. Western Australia identifies an additional aggravating circumstance - that a child was exposed to an act of abuse. The Northern

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5. NSW Law Reform Commission, *Family Violence: A National Legal Response*, Report 128 (2010) [12.178].

6. NSW, WA, SA, ACT.

7. Victoria, Queensland, WA, Tasmania, NT, NZ.

Territory provides that a court cannot direct that a term of imprisonment be served concurrently.

- § Some jurisdictions make special provision to exempt protected people from being convicted of contravening an order. NSW, for example, provides that a protected person cannot be complicit in the offence. South Australia provides that a protected person cannot be complicit in the offence unless the contravention is against another protected person.
- 7.7 Domestic or family violence is also defined or identified differently in each jurisdiction.
- 7.8 There are also some significant limitations on the usefulness of the available data and the capacity for relevant comparisons to be made between the data from different jurisdictions:
- § The available data available covers different time periods. For example, the data available from NSW covers a two year period from 1 January 2013 to 31 December 2014, while the data from Tasmania covers the period from 1 July 2010 to 29 June 2015.
  - § The data has been obtained from different courts. For example, the NSW data refers to cases sentenced in the Local and District Courts, while the data from Queensland refers to cases sentenced in the Magistrates', Children's, District, and Supreme Courts.
  - § There are different sentencing options available in different jurisdictions. There are also differences in the sentencing legislation applied by the courts in each jurisdiction when determining an appropriate sentence.
  - § Sentences are influenced by whether the defendant was convicted of one or multiple breach of order offences, and whether the defendant was sentenced for other offences on the same occasion.
  - § There are differences in the way data is collected and counted in different jurisdictions. For example, the data from NSW only refers to the sentence imposed on defendants convicted of breaching an apprehended violence order (AVO) as their principal offence, whereas the data from Queensland shows the principal sentence received by all defendants convicted of contravening a domestic violence order including where the contravention is not the defendant's principal offence.
  - § There is substantial variation in the general imprisonment rate across Australian jurisdictions. In 2014, the number of people imprisoned per 100,000 adult population (the crude imprisonment rate) in each jurisdiction is set out in Table 7.2.

Table 7.2: General imprisonment rate, 2014

Jurisdiction	Imprisonment rate per 100,000
Tasmania	112
Australian Capital Territory	130.4
Victoria	134.4
NSW	181.7
South Australia	187.9
Queensland	192.9
Western Australia	264.6
Northern Territory	829.4

Source: Australian Bureau of Statistics, *Prisoners in Australia 2014* (2014) Table 18.

## Overview

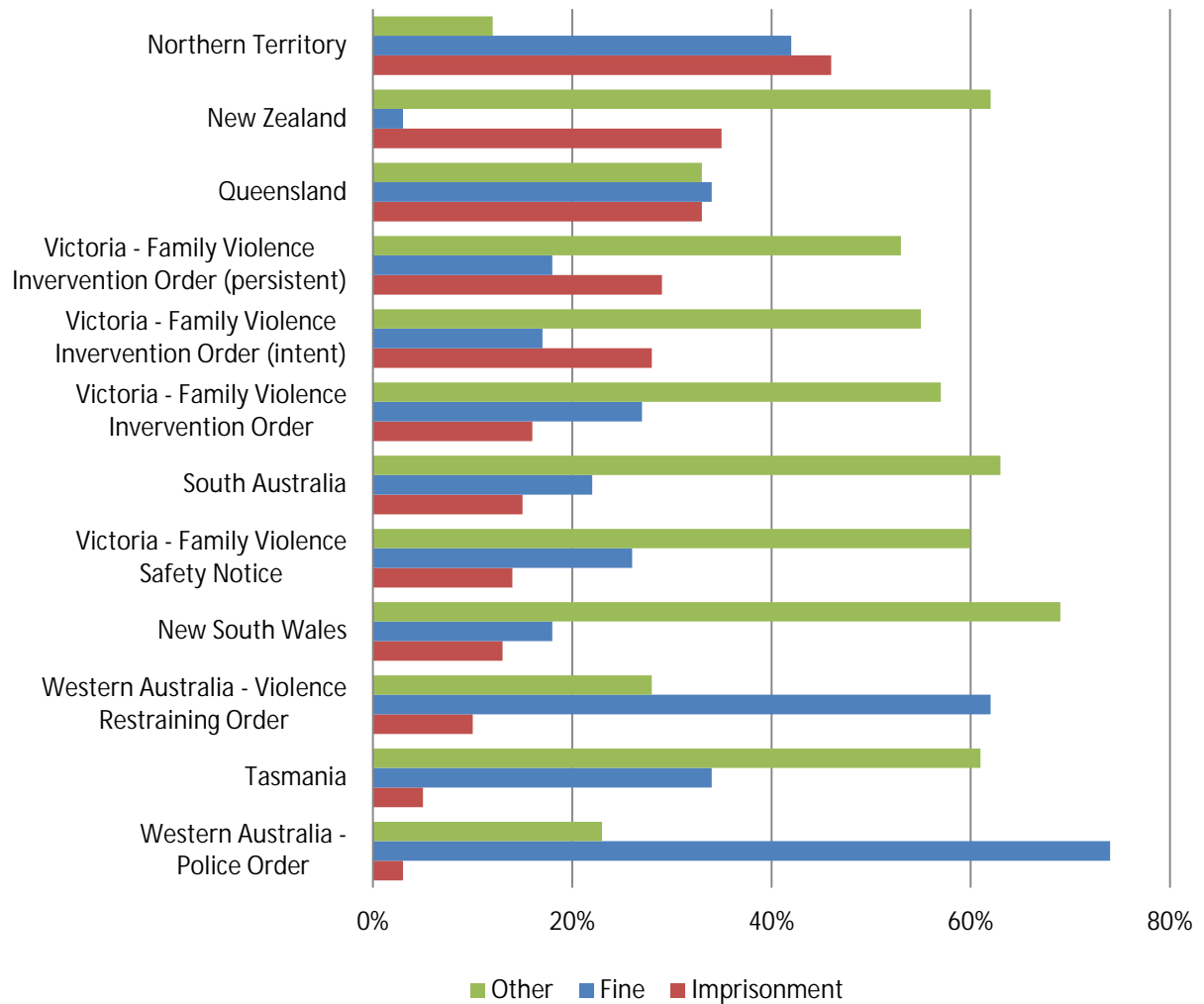
7.9 Subject to all of the disclaimers noted above, Figure 7.1 shows for each jurisdiction and, where relevant, each offence in each jurisdiction:

- § the percentage of sentences of imprisonment imposed for contravening an order
- § the percentage of fines imposed, and
- § the percentage of other sentences imposed.

The penalties imposed for each offence in each jurisdiction are set out in more detail in the remainder of this chapter.

7.10 One possible avenue for further investigation is to examine the impact of escalated penalties where offenders have committed previous offences. We note that three of the jurisdictions that have escalated penalties, Victoria, Queensland, and the Northern Territory have the highest proportion of sentences of imprisonment imposed for contravention of an order.

Figure 7.1: Sentences imposed for breach of domestic violence and related orders in Australia and NZ



Source: See Figures 7.2-7.13.

- 7.11 The data shows that, of the Australian jurisdictions, NSW is the least reliant upon fines and most reliant upon other sentences. Tasmania, consistent with its general imprisonment rate, uses imprisonment least. The Northern Territory, consistent with its general imprisonment rate, uses imprisonment most and uses other sentences least.
- 7.12 A number of submissions to the NSW and Australian Law Reform Commissions' family violence review in 2010 expressed concern about the low range sentences that were being imposed in some jurisdictions for breach of protection orders.<sup>8</sup>

8. NSW Law Reform Commission, *Family Violence: A National Legal Response*, Report 128 (2010) [12.148]–[12.152].

## New South Wales

### *The offence*

- 7.13 In NSW it is an offence to contravene a prohibition or restriction in an AVO.<sup>9</sup>
- 7.14 An AVO can be either an ADVO or an apprehended personnel violence order (APVO), and includes interim and provisional orders.
- 7.15 The maximum penalty is 50 penalty units or 2 years imprisonment or both. A court must sentence an offender to imprisonment if the act involved violence against a person, unless the court otherwise orders, or the offender is under 18 years old.
- 7.16 A person has a defence if the contravention was necessary to attend a mediation under the Act or was done in compliance with a property recovery order.
- 7.17 Attempt is expressly included in the offence. A protected person cannot be complicit in the offence.

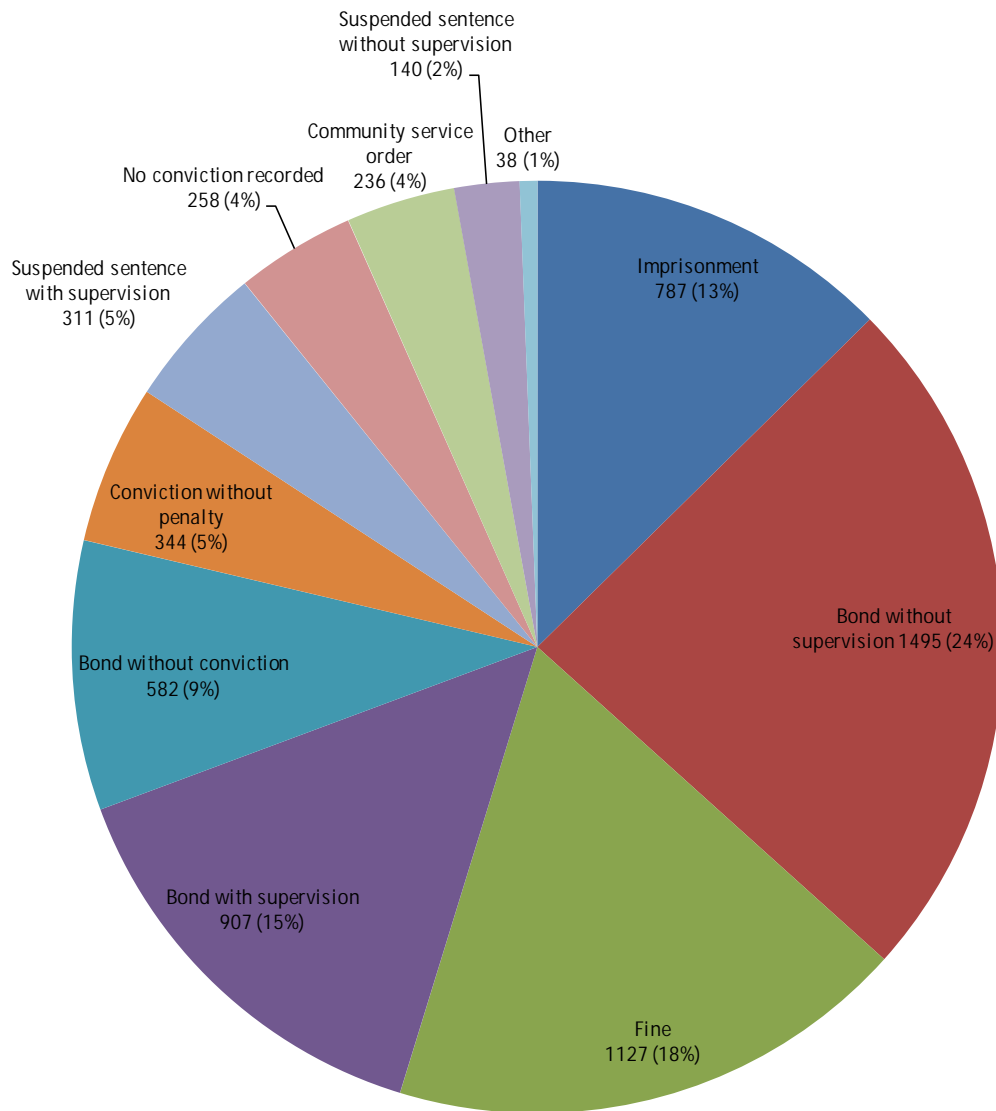
### *Statistics*

- 7.18 Figure 7.2 shows the sentences imposed on defendants convicted of contravening an ADVO as their principal offence in the Local and District Courts from 1 January 2013 to 31 December 2014.

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9. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14.

Figure 7.2: Sentences for contravene apprehended domestic violence order NSW Local and District Courts. 1 January 2013 to 31 December 2014 (n = 6225)



Source: BOCSAR ref jf15-133323.

"Other" includes: Intensive correction order (31); nominal sentence (6); home detention (1).

- 7.19 The most common sentence type was bond without supervision (24%), followed by a fine (18%), bond with supervision (15%), imprisonment (13%) and bond without conviction (9%).
- 7.20 Comparisons with sentences for contravening an APVO may be viewed in Chapter 4.<sup>10</sup>

10. Para [4.97]-[4.99].

## Australian Capital Territory

### *The offence*

- 7.21 In the Australian Capital Territory (ACT) it is an offence to contravene an order (including a condition of an order).<sup>11</sup> The orders may be domestic violence orders or personal violence orders and include interim, emergency (telephone), and workplace orders. The maximum penalty is 500 penalty units or 5 years imprisonment or both.
- 7.22 A note to the section draws attention to relevant considerations on sentencing under s 3 of the *Crimes (Sentencing) Act 2005* (ACT).

### *Statistics*

- 7.23 We were unable to obtain statistics for the ACT.

## Northern Territory

### *The offence*

- 7.24 In the Northern Territory it is an offence to contravene a domestic violence order.<sup>12</sup> The maximum penalty for the offence is 400 penalty units or 2 years imprisonment.
- 7.25 A court must impose a sentence of at least 7 days imprisonment where an offender has previously been guilty of a contravention offence, unless there was no harm and the court considers it appropriate not to impose the sentence.
- 7.26 The offence is one of strict liability. The provision also prevents the court from directing that a term of imprisonment for the offence be served concurrently with any other sentence.

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11. *Domestic Violence and Protection Orders Act 2008* (ACT) s 90.

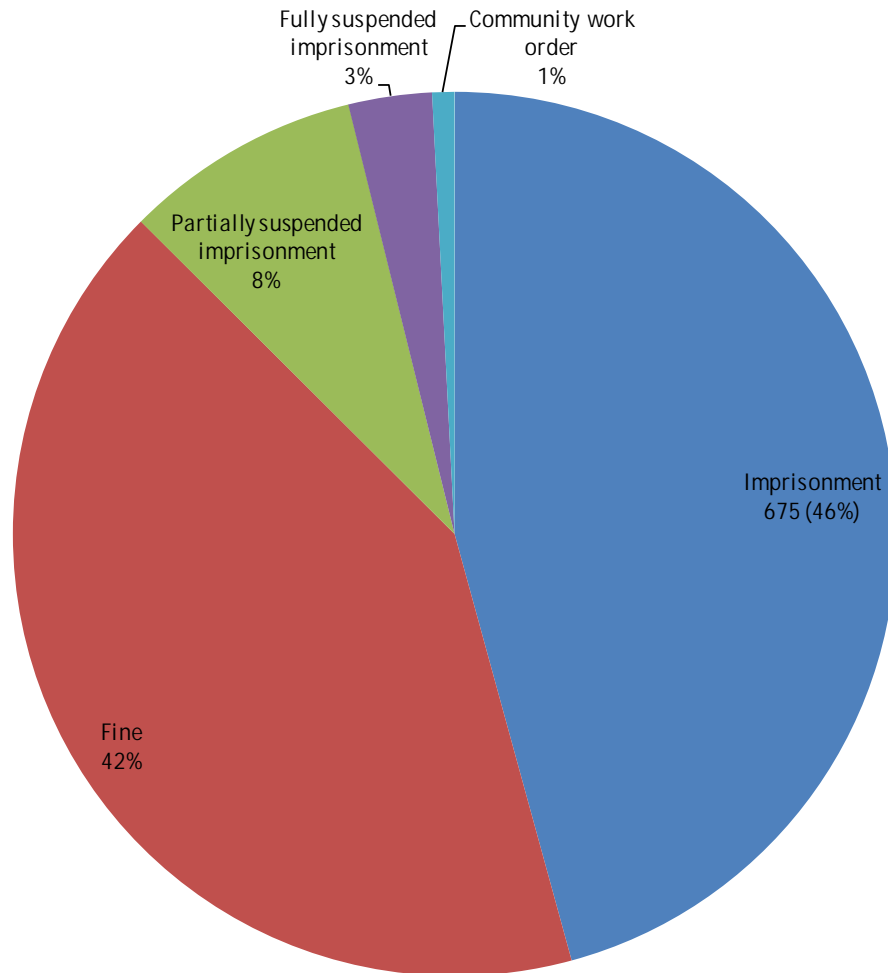
12. *Domestic and Family Violence Act* (NT) s 120-122.



**Statistics**

7.27 Figure 7.3 shows the type of sentence received by defendants convicted of breaching domestic violence orders in the financial year 2013-2014. The statistics reflect the principal outcome for the sentencing occasion, which may involve multiple charges and offences.

**Figure 7.3: Penalties for breach of domestic violence orders in the Northern Territory for 2013-14 (financial year) (n = 1495)**



Source: Northern Territory Department of Attorney General and Justice (extracted from Integrated Justice Information System 2 July 2014).

7.28 The most frequent sentence type was imprisonment (46%) followed by a fine (42%) and partially suspended imprisonment (8%).

7.29 It should be noted that the relatively high proportion of offenders sentenced to imprisonment is due, in part, to the fact that s 121 of the *Domestic and Family Violence Act* (NT) imposes a mandatory seven days imprisonment for a second breach of a domestic violence order where that breach caused harm. In addition, the Northern Territory has by far the highest general rate of imprisonment among

the Australian states and territories, with a rate of 829.4 prisoners per 100,000 adult population compared to 181.7 in NSW and the Australian average of 185.6.<sup>13</sup>

## Queensland

### *The offence*

- 7.30 In Queensland it is an offence to contravene a domestic violence order.<sup>14</sup> This includes a temporary protection order and a registered interstate order. The maximum penalty is 120 penalty units or 3 years imprisonment.
- 7.31 An escalated penalty is available where the offender has been convicted for the offence within the previous 5 years, namely, 240 penalty units or 5 years imprisonment.
- 7.32 The penalties were recently increased substantially from 60 penalty units or 2 years imprisonment and 120 penalty units or 3 years imprisonment respectively.

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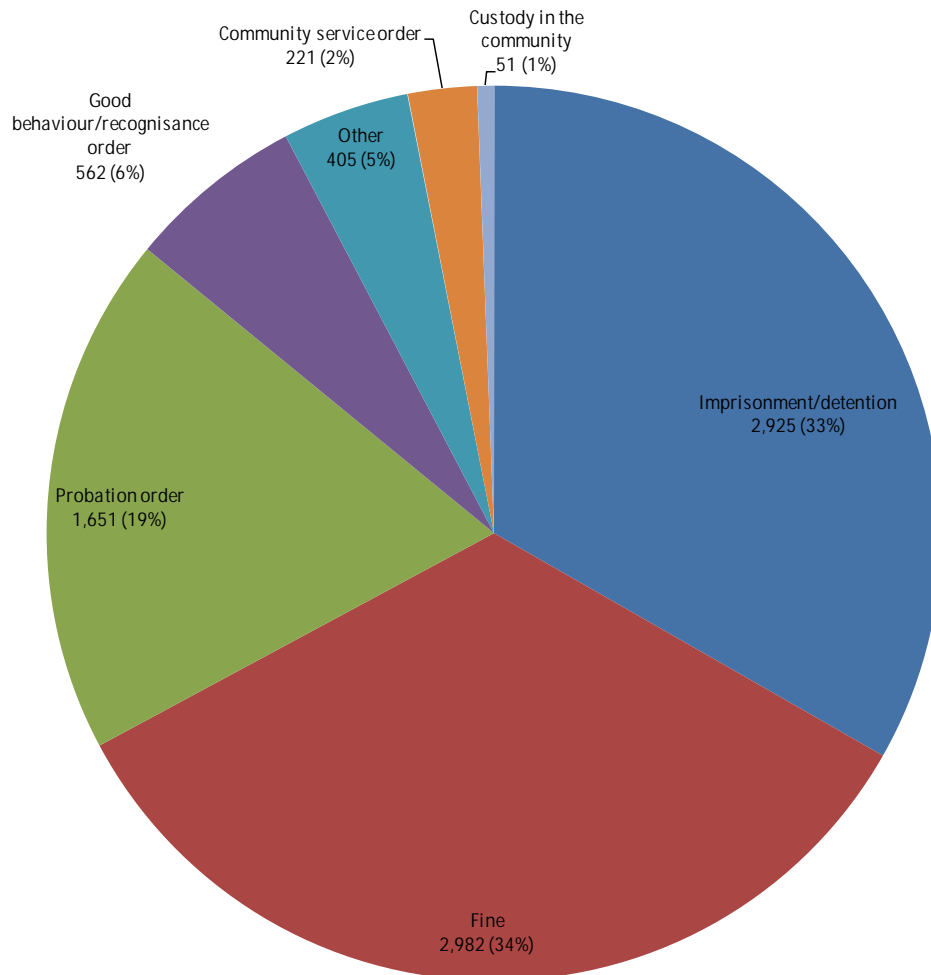
13. Australian Bureau of Statistics, *Prisoners in Australia 2014* (2014) Table 18.

14. *Domestic and Family Violence Protection Act 2012* (Qld) s 177.

**Statistics**

7.33 Figure 7.4 shows the type of sentence imposed on the 8797 offenders convicted of contravening a domestic violence order in the Queensland courts in the financial year 2014-15.

**Figure 7.4: Penalties for contravening domestic violence orders in Queensland 2014-15 (financial year) (n = 8797)**



Source: Queensland Wide Inter-linked Courts (14 September 2015).

7.34 The most common sentence type was imprisonment (33%), followed by fines (34%), and probation orders (19%).

7.35 Figure 7.4 sets out the principal sentence received by all defendants convicted of contravening a domestic violence order, not the sentence received by defendants convicted of contravening an order as their principal offence. This may explain the relatively high number of defendants who received a sentence of imprisonment when compared with the data from NSW, Victoria, South Australia, and Tasmania.

## South Australia

### *The offence*

- 7.36 In South Australia it is an offence to contravene a term of an intervention order.<sup>15</sup> Intervention orders, which include interim intervention orders, can be issued by the courts or the police and may be made in relation to domestic and non-domestic abuse.
- 7.37 The maximum penalty is 2 years imprisonment. A lesser maximum penalty of \$1250 (or \$160 expiation) is available for contravening a term of an intervention program.
- 7.38 In South Australia a protected person cannot be complicit in the offence unless the contravention is against another protected person.

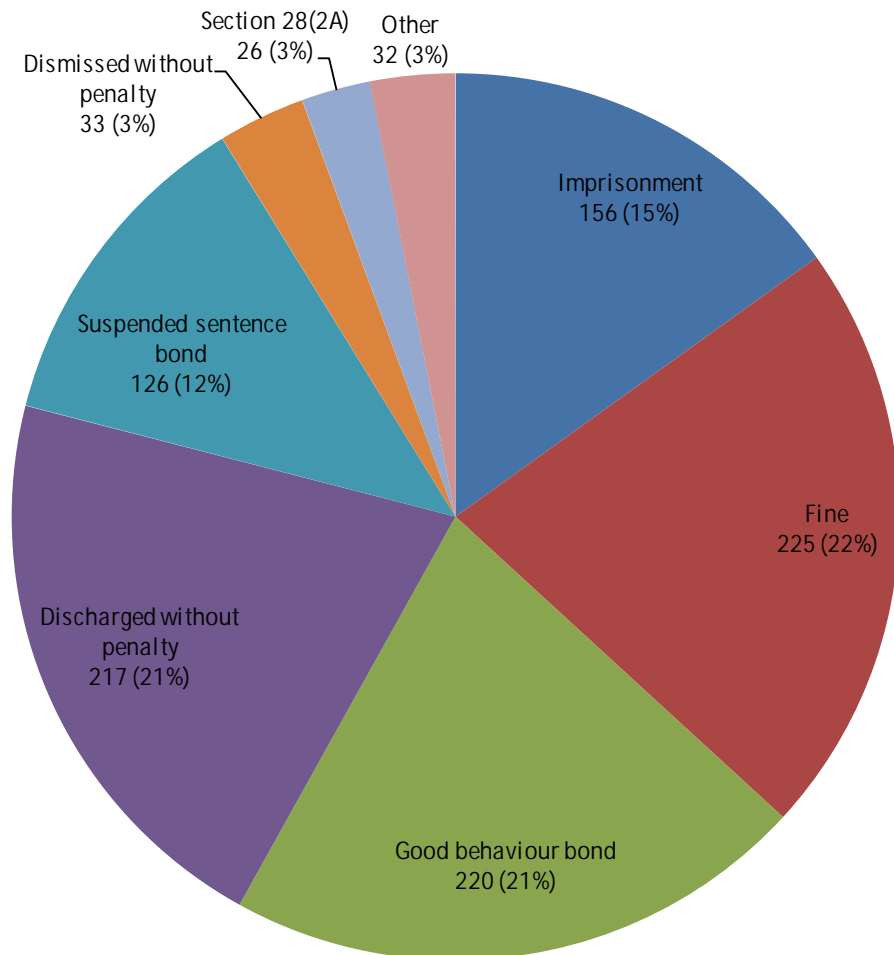
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15. *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 31.

**Statistics**

7.39 Figure 7.5 sets out the number of defendants convicted of breaching an intervention order in South Australia from 1 January 2014 to 31 December 2014.

**Figure 7.5: Penalties for breach of intervention orders in South Australia, 2014**



Source: South Australian Courts Administration Authority 29 October 2015.  
 "Other" includes community service order (8); compensation (10); costs only (13); and forfeiture order (1).

7.40 The most common sentence type was a fine (22%) followed by a good behaviour bond (21%), discharged without penalty (21%), imprisonment (15%) and suspended sentence bond (12%).

7.41 In South Australia, when a person who is subject to an intervention order breaches that order by allegedly committing an offence involving violence or the threat of violence, he or she becomes a prescribed applicant. The prescribed applicant status means that there is a presumption against granting bail. Generally, an offender is charged with the offence involving violence separately from the breach of the intervention order. The defendant may spend a significant period in custody on remand before the offence of violence is resolved and this time served in custody may ultimately be determined as the penalty. The penalty for the offence of breaching an intervention order may then be shown as a conviction with no further penalty when, in fact, the offender has served an immediate term of imprisonment for the offence.

## Tasmania

### *The offence*

7.42 In Tasmania it is an offence to contravene an order.<sup>16</sup> An order includes a family violence order, interim family violence order, and police family violence order. The maximum penalty for a first offence is 20 penalty units or 12 months imprisonment.

7.43 The maximum penalties for second and subsequent offences are:

§ **second offence:** 30 penalty units or 18 months imprisonment

§ **third offence:** 40 penalty units or 2 years imprisonment

§ **fourth offence or more:** 5 years imprisonment.

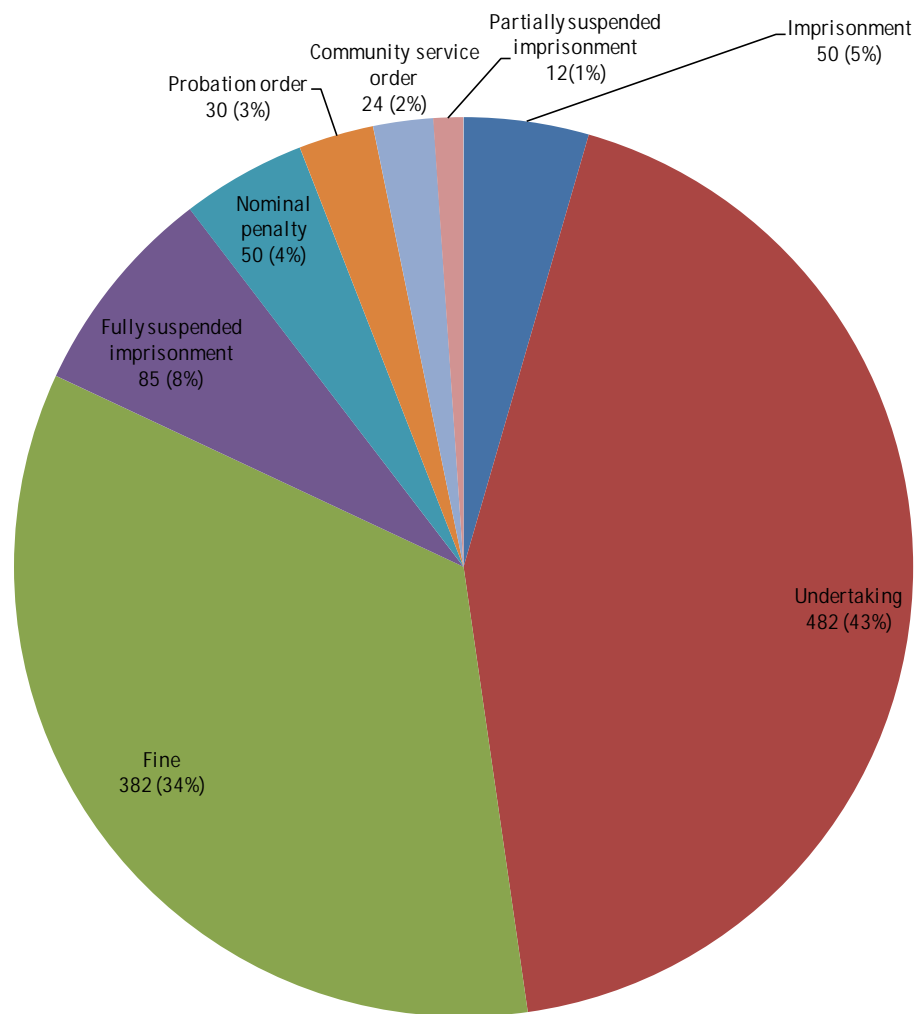
### *Statistics*

7.44 Figure 7.6 shows the sentencing outcomes in the Tasmanian Magistrates Court for the offences of contravening a family violence order, an interim family violence order, and a police family violence order from 1 July 2010 to 29 June 2015.

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16. *Family Violence Act 2004* (Tas) s 35.

Figure 7.6: Penalties for contravening a family violence, interim family violence, and police family violence orders in the Tasmanian Magistrates' Court for the period 1 July 2010 to 29 June 2015



Source: Tasmanian Sentencing Advisory Council SAC Stats <[www.sentencing.justice.tas.gov.au](http://www.sentencing.justice.tas.gov.au)>

- 7.45 The most common sentencing outcome was an undertaking (43%), followed by a fine (34%), and fully suspended imprisonment (8%). Only 5% of charges resulted in imprisonment.
- 7.46 Figure 7.6 includes information on charges rather than cases, and single rather than multiple charges. This means that only the sentence the defendant received for the offence of contravening an order is shown.
- 7.47 Tasmania has the lowest penalties for breach of a family violence order, and the lowest imprisonment rate of all Australian jurisdictions. The rate of imprisonment in Tasmania is 112 per 100,000 adult population, compared to 181.7 in NSW and an Australian average of 185.6.<sup>17</sup>

17. Australian Bureau of Statistics, *Prisoners in Australia 2014* (2014) Table 18.

## Victoria

### *The offences*

- 7.48 Victoria has two relevant offences.
- 7.49 **Family violence intervention order.** The first offence is contravene a family violence intervention order (FVIO).<sup>18</sup> This includes interim orders, but does not include family safety notices issued by the police under s 37 of the *Family Violence Protection Act 2008* (Vic). The maximum penalty is 240 penalty units or 2 years imprisonment.
- 7.50 There are two aggravated forms of the offence:
- § contravene an order while intending to cause harm or fear for safety - maximum penalty of 600 penalty units or 5 years imprisonment, and
  - § engage in persistent contravention, that is, contravene an order on at least 2 other occasions within 28 days in relation to the same protected person or the same intervention order - maximum penalty of 600 penalty units or 5 years imprisonment.<sup>19</sup>
- 7.51 A person has a defence if a family safety notice is applied to the same respondent and protected person.
- 7.52 **Family violence safety notice.** The second offence is contravene a family violence safety notice (FVSN). The maximum penalty is similarly 240 penalty units or 2 years imprisonment.<sup>20</sup>

### *Statistics*

- 7.53 Figure 7.7 shows the principal sentences imposed for contravention of a family violence order in the Magistrates' Court of Victoria for 2014-15, as reported by the Victorian Sentencing Advisory Council.

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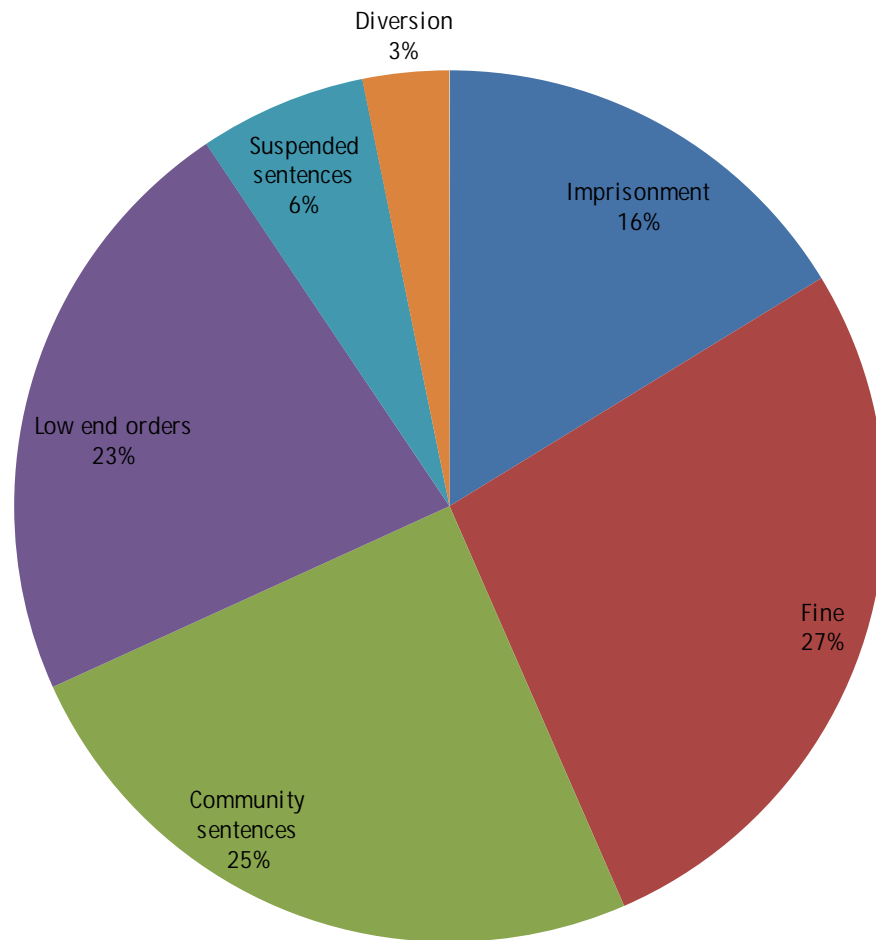
18. *Family Violence Protection Act 2008* (Vic) s 123.

19. *Family Violence Protection Act 2008* (Vic) s 123A and s 125.

20. *Family Violence Protection Act 2008* (Vic) s 37. There is also an offence of contravening a family violence safety notice intending to cause harm or fear for safety: s 37A.



Figure 7.7: Sentences for contravening a family violence intervention order by principal sentence attached to the charge, Magistrates' Court of Victoria 2014-15 (n = 4423)



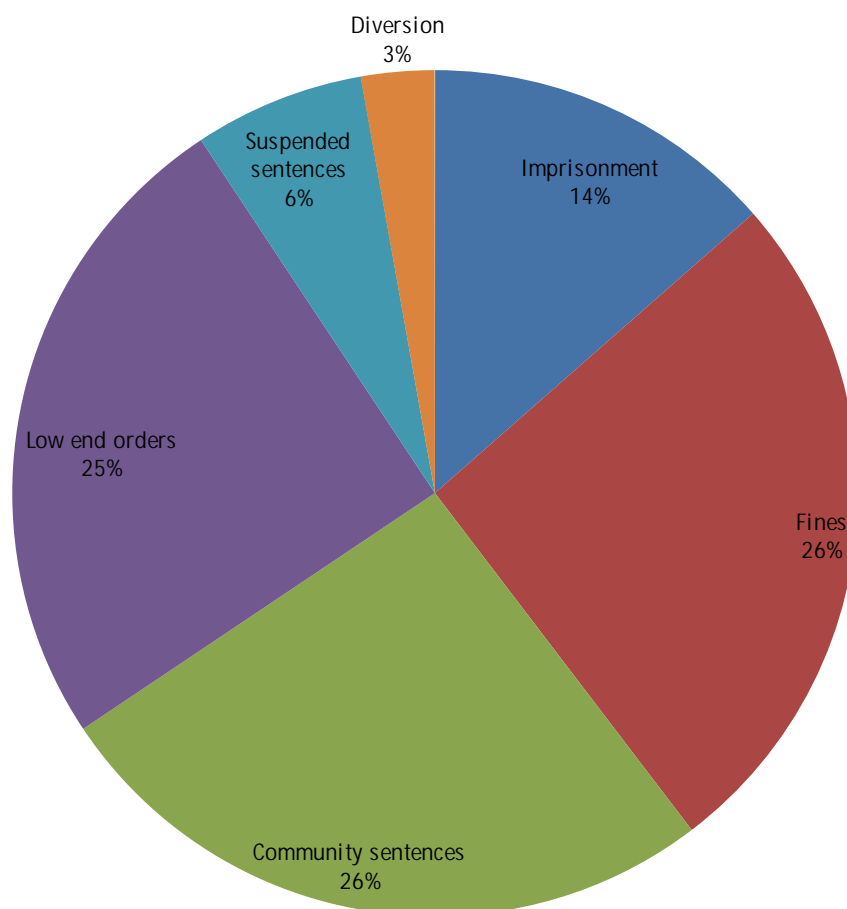
Source: Victorian Sentencing Advisory Council, Sentencing for Contravention of Family Violence Intervention Orders and Safety Notices Second Monitoring Report (December 2015)

Low-end orders includes adjourned undertakings, 'convicted and discharged' and dismissals.

Community sentences includes community-based orders, intensive correction orders and community correction orders.

- 7.54 The most common sentence type was a fine (27%), followed by community sentences (25%), low-end orders (23%), and imprisonment (16%).
- 7.55 The percentages are based on the number of cases sentenced. Each case that contained at least one proven charge of contravening a FVIO is counted once. The sentence captured is the sentence attached to FVIO contravention charges. Where multiple FVIO charges occur in a case, the principal sentence is the most severe sentence attached to those charges. Where only one FVIO charge occurs in a case, the principal sentence is the sentence attached to that charge.
- 7.56 Figure 7.8 shows the principal sentences imposed for contravention of a FVSN in the Magistrates' Court of Victoria in the 2-year period from 2013-14 to 2014-15.

Figure 7.8: Penalties for contravening a family violence safety notice by principal sentence attached to the charge in the Magistrates' Court of Victoria 2013-15 (n = 673)

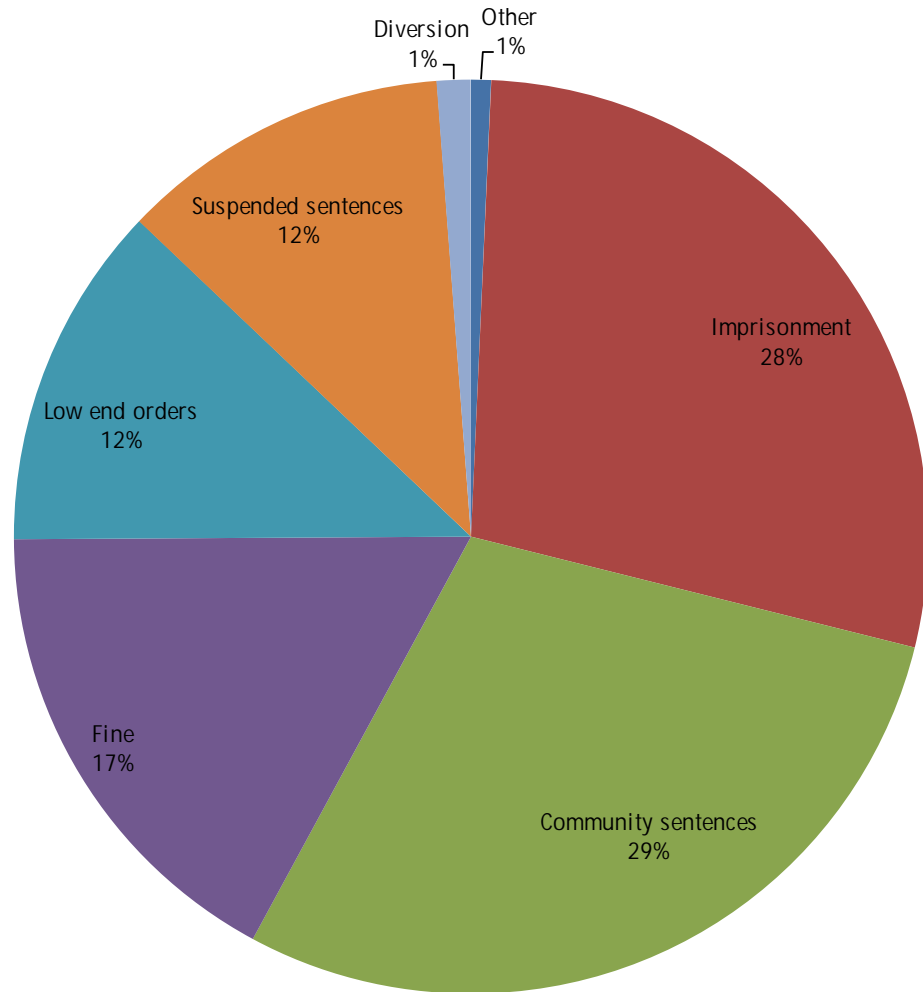


Source: Victorian Sentencing Advisory Council, Sentencing for Contravention of Family Violence Intervention Orders and Safety Notices Second Monitoring Report (December 2015)

"Low-end orders" includes adjourned undertakings, 'convicted and discharged' and dismissals. "Community sentences" includes community-based orders, intensive correction orders and community correction orders.

- 7.57 The most common sentence types were a fine (26%) and community sentences (26%), followed by low-end orders (25%), and imprisonment (14%).
- 7.58 Similarly to Figure 7.8, the percentages in Figure 7.9 are based on the number of cases sentenced, with each case where at least one charge of contravention of a FVSN was proven counted once. The sentence captured is that attached to the charge of contravening a FVSN.
- 7.59 Figure 7.9 shows the principal sentence imposed in the Magistrates' Court for cases where at least one offence was contravening a family violence order intending to cause harm or fear for safety for the 2-year period from 2013-14 to 2014-15.

Figure 7.9: Penalties for contravening a family violence order intending to cause harm or fear in the Magistrates’ Court of Victoria 2013-15 (two year period) (n = 1229)



Source: Victorian Sentencing Advisory Council, *Sentencing for Contravention of Family Violence Intervention Orders and Safety Notices Second Monitoring Report (December 2015)*

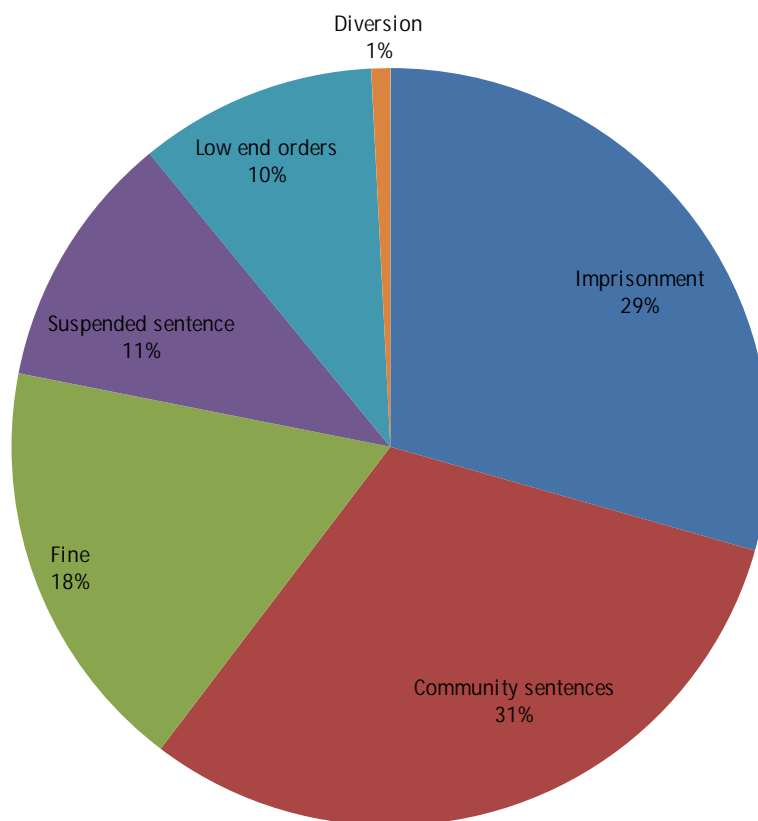
“Low-end orders” includes adjourned undertakings, ‘convicted and discharged’ and dismissals. “Community sentences” includes community-based orders, intensive correction orders and community correction orders.

“Other” includes rarely used sentences such a drug treatment orders and youth justice orders

7.60 Community sentences were most common (29%), followed by imprisonment (28%), fines (17%), low-end orders (12%), and suspended sentences (12%).

7.61 Figure 7.10 shows the principal sentence imposed in the Magistrates’ Court for cases where at least one offence was persistent contravention of a family violence order for the 2-year period from 2013-14 to 2014-15.

Figure 7.10: Penalties for persistent contravention of a family violence order in the Magistrates' Court of Victoria (two year period) 2013-15 (n = 1366)



Source: Victorian Sentencing Advisory Council, *Sentencing for Contravention of Family Violence Intervention Orders and Safety Notices Second Monitoring Report (December 2015)*

"Low-end orders" includes adjourned undertakings, 'convicted and discharged' and dismissals. "Community sentences" includes community-based orders, intensive correction orders and community correction orders.

7.62 Community sentences were most commonly imposed (31%), followed by imprisonment (29%), fine (18%), suspended sentence (11%), and low-end orders (10%).

7.63 The Victorian Sentencing Advisory Council has noted that there are significant differences in the outcomes of cases where other offences are also sentenced compared with cases without such offences. The Council found that cases where other offences were also sentenced were more likely to receive sentences at the higher end of the sentencing hierarchy, while cases without such offences were more likely to receive fines or low end orders. As the report noted, this is to be expected given the greater level of criminality represented by multiple offences.<sup>21</sup>

21. Sentencing Advisory Council, *Sentencing for Contravention of Family Violence Intervention Orders and Safety Notices Second Monitoring Report (December 2015)* 50.

## Western Australia

### *The offences*

- 7.64 Western Australia has two relevant offences.
- 7.65 **Breach of a violence restraining order.** The first offence is breach of a violence restraining order.<sup>22</sup> Violence restraining orders may be made in relation to an act of abuse that may include an act of family and domestic violence or an act of personal violence. The maximum penalty for the offence is \$6000 or 2 years imprisonment or both.
- 7.66 The provision identifies a particular circumstance of aggravation for the offence being that a child was exposed to an act of abuse.
- 7.67 The provision also requires a court to impose a sentence of imprisonment if the offender has committed at least 2 other offences within 2 years of the conviction, unless to do so would be unjust and the offender is not a threat to the victim or the community.
- 7.68 **Breach of a police order.** The second offence is breach of a police order.<sup>23</sup> Police orders relate only to family and domestic violence. The maximum penalty for the offence is \$6000 or 2 years imprisonment or both.
- 7.69 The provision identifies a particular circumstance of aggravation for the offence being that a child was exposed to an act of abuse.
- 7.70 The provision also requires a court to impose a sentence of imprisonment if the offender has committed at least 2 other offences within 2 years of the conviction, unless to do so would be unjust and the offender is not a threat to the victim or the community.

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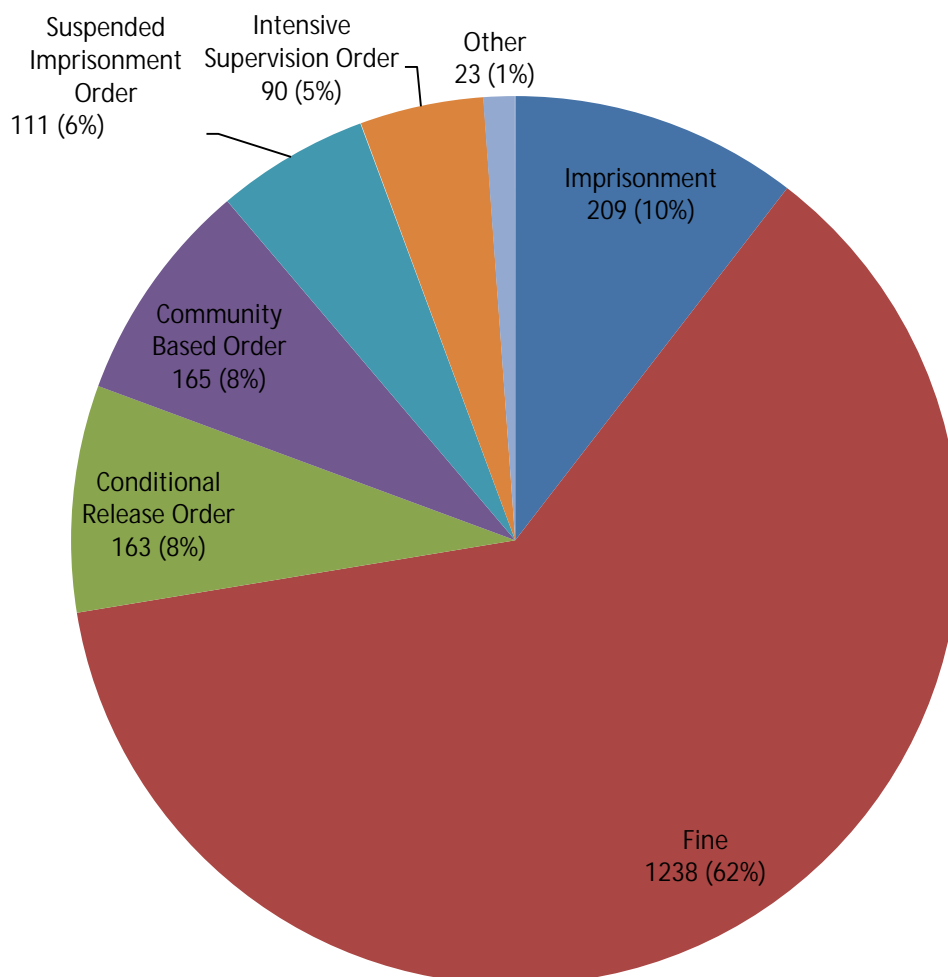
22. *Restraining Orders Act 1997 (WA)* s 61(1).

23. *Restraining Orders Act 1997 (WA)* s 61(2a).

**Statistics**

7.71 We have been provided with separate statistics for the offence of breach of violence restraining order (Figure 7.11) and breach of a police order (Figure 7.12) for 2014.

**Figure 7.11: Penalties for breach of violence restraining orders in Western Australia, 2014 (n = 1999)**



Source: Strategic Business Development, Court and Tribunal Services, Western Australia, Department of the Attorney General.

"Other" includes: Detention (5); Forfeiture order (3); Fine Section 59 (1); Intensive Youth Supervision Order (3); Juvenile Good Behaviour Bond (2); Order for return of property (1); Juvenile Conditional Release Order (2); Youth Community Based Order (6).

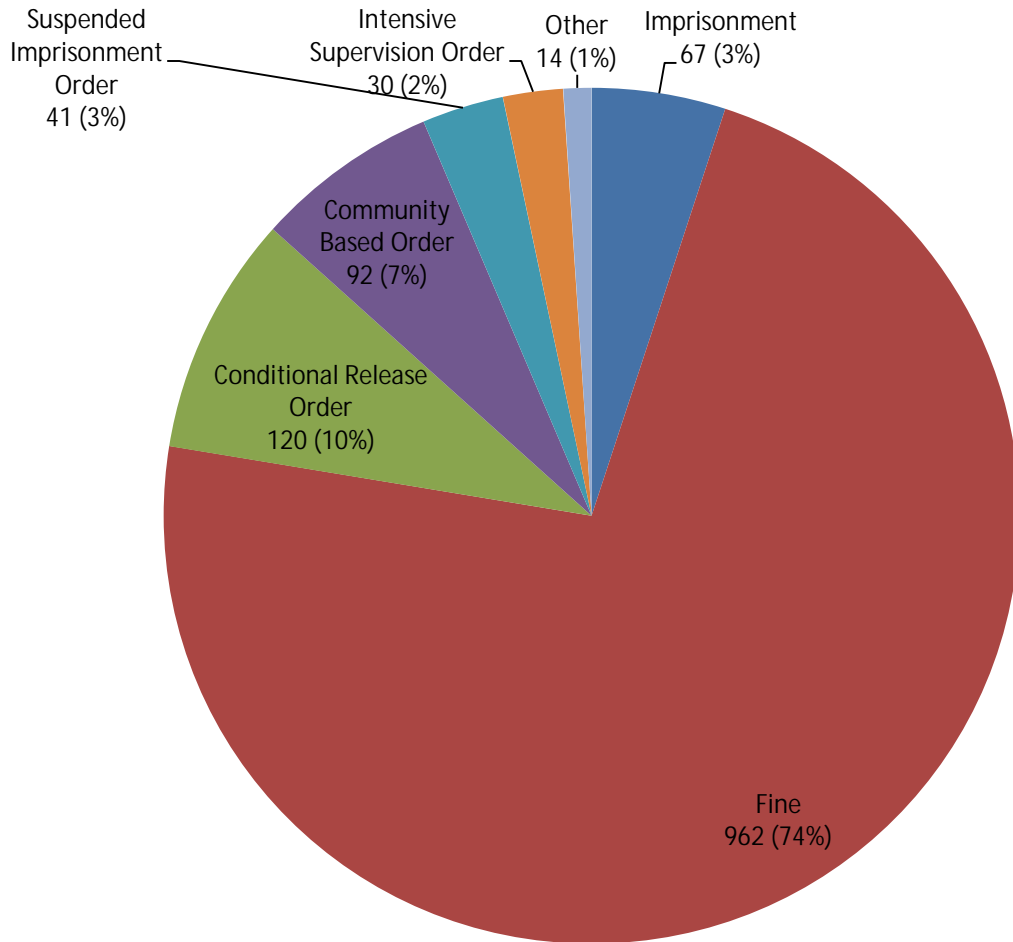
7.72 Figure 7.11 shows the sentence type imposed after conviction at a single appearance in 2014 for one or more charges of breach of a violence restraining order. In a small number of cases (49), the court imposed two different sentence types for the offences convicted at the one appearance. For example, fines were imposed for some proven charges in addition to other sentence types<sup>24</sup> for other proven charges.

24. Intensive supervision orders (2), conditional release orders (3), suspended imprisonment orders (10), forfeiture orders (2), imprisonment (4), community based orders (9). Suspended imprisonment orders were also combined with community based orders (7) and intensive

7.73 The data does not distinguish between offences involving an act of family and domestic violence and offences involving an act of personal violence.

7.74 The most common penalty was a fine (62%), followed by imprisonment (10%), conditional release orders (8%), and community based orders (8%).

Figure 7.12: Penalties for breach of police orders in Western Australia, 2014 (n = 1326)



Source: Strategic Business Development, Court and Tribunal Services, Western Australia, Department of the Attorney General.

"Other" includes Juvenile Good Behaviour Bond (5), Youth Community Based Order (4), Forfeiture Order (3), Fine Enforcement (Work And Development) Order (1); Conditional Suspended Imprisonment Order (1).

7.75 Figure 7.12 shows the sentence type imposed after conviction at a single appearance in 2014 for one or more charges of breach of a police order. In a small number of cases (6), the court imposed two different sentence types for the offences convicted at the one appearance.<sup>25</sup>

7.76 Police orders relate only to acts of family and domestic violence.

supervision orders (11). A community based order was also imposed together with a forfeiture order.

25. Fines were combined with conditional release orders (2), imprisonment (1), intensive supervision order (1), community based order (1) and forfeiture (1).

- 7.77 The most common penalty was a fine (74%), followed by conditional release orders (10%), and community based orders (7%). Imprisonment was imposed in only 3% of appearances.

## New Zealand

### *The offence*

- 7.78 In New Zealand it is an offence to contravene a protection order or to fail to comply with a condition of an order.<sup>26</sup> A protection order relates only to domestic violence. The maximum penalty for the offence is 3 years imprisonment.
- 7.79 The New Zealand provision includes a defence of having a reasonable excuse for breaching an order.

### *Statistics*

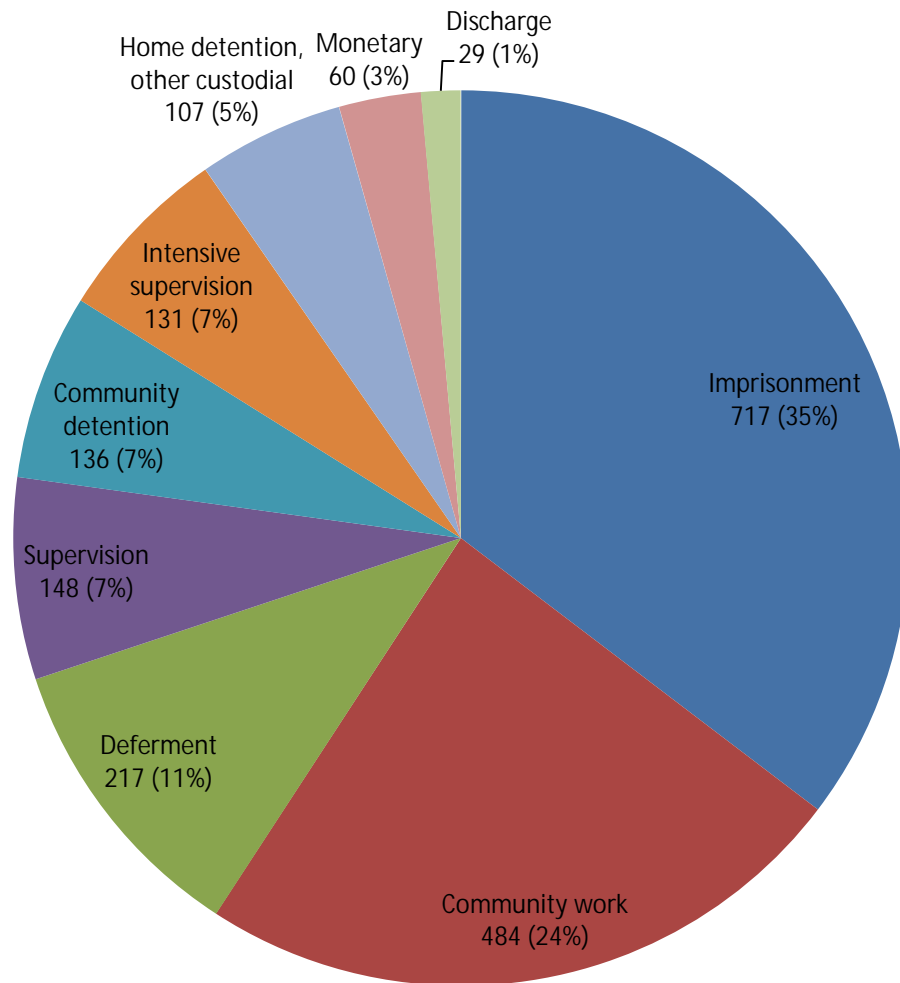
- 7.80 Figure 7.13 shows the most serious sentence imposed on offenders convicted of breaching a protection order in New Zealand in the year 2014.

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26. *Domestic Violence Act 1995* (NZ) s 49.



Figure 7.13: Penalties for offenders convicted of breach of protection order, most serious sentence in New Zealand, 2014/2015 (n=2029)



Source: NZ, Ministry of Justice, District Court (17 December 2015).

- 7.81 Imprisonment was the most common sentence (35%) followed by community work (24%), and deferment (11%). Fines were used in only 3% of cases.
- 7.82 This data is significantly different to the data for sentences imposed for all offences in New Zealand. In 2014/15, New Zealand courts imposed a fine on 30% of offenders (compared with 3% for breach of order) and imposed a sentence of imprisonment on 11% of offenders (compared with 35% for breach of order).<sup>27</sup>

27. Statistics New Zealand, "Adults convicted in court by sentence type - most serious offence fiscal year" <<http://nzdotstat.stats.govt.nz/>>.