Chapter 7 Aggravated assault based on victim status

7.1 Introduction

The current Terms of Reference have been referred to the Council on the assumption that:

- the Queensland community expects that police officers and other frontline emergency service workers, corrective services officers and other public officers who face inherent dangers in carrying out their duties, should not be the subject of assault during the execution of their duties.
- public officers need to have confidence that the criminal justice system properly reflects the inherent dangers they face in the execution of their duty and the negative impacts that an assault in the course of these duties has on those workers, their colleagues and their families.

A threshold question for the Council in responding to the Terms of Reference is the basis on which assaults and assault related offences where committed against a public officer should be treated as more serious than the same conduct when committed against people who are not public officers, or specific classes of public officer.

Historically in Queensland and other common law jurisdictions,[421] assaults of police officers and any other person performing a lawful duty have been treated at law as more serious. This is expressed in Queensland, in particular, through the existence of section 340 of the *Criminal Code*. At the time section 340 first appeared in the Code in 1899 (in force from 1 January 1901), the maximum penalty was 3 years' imprisonment — 2 years higher than for common assault, but fixed at the same level as for assaults occasioning bodily harm (AOBH) and wounding. However, as discussed in the preceding chapters of this paper the maximum penalty has increased significantly over time to its current level of 7 years for non-aggravated forms of serious assault, and 14 years where there are aggravating circumstances following changes introduced in 2012 and 2014. This has resulted in a widening gap between the maximum penalties for these offences and other offences that might otherwise be charged in the absence of section 340.

Other classes of victims that aggravate what would otherwise be an offence of common assault, or AOBH across jurisdictions are quite broad and include: women, including pregnant women,[422] school students and members of school staff at school,[423] people over a prescribed age

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421 On equivalent interstate and overseas provisions, see discussion in Chapter 6 of this paper.

422 ACT: *Crimes Act 1900* ss 24(2), 48A(2). Offence of assault occasioning actual bodily harm is aggravated if committed on a pregnant woman causing loss of or serious harm to the pregnancy or the death of or serious harm to any child born alive from the pregnancy; NT: *Criminal Code* s 188(2)(b) (female victim and male offender); Tas: *Criminal Code* s 184A (assault on pregnant woman); Vic: *Summary Offences Act 1966* s 24(1)(a) (penalty for aggravated assault of female).

423 NSW: *Crimes Act 1900* s 60E(1), 60E(2) (offence is aggravated if actual bodily harm is caused). It is also an offence to stalk, harass or intimidate a school student or member of staff of a school: Ibid s 60E(1).

(60 years in Queensland),[424] people suffering a physical or mental disability,[425] members of parliament,[426] persons connected to legal proceedings (including judicial officers),[427] members of crew on board an aircraft,[428] members of clergy[429] and spouses, domestic partners and children.[430]

While some types of assaults are treated as aggravated when committed against specific classes of victim, it has equally been recognised: 'Equality before the law is a fundamental principle which ensures that individuals are not subject to discrimination in the enjoyment of their legal rights and entitlements'.[431]

The Queensland *Human Rights Act 2019* (Qld) ('HRA') has given legislative recognition to the right to equality before the law, and to the equal protection of the law without discrimination, as important human rights. As discussed in Chapter 3 of this paper, these rights may be limited provided the limit is 'reasonable and justifiable' with reference to factors that include the nature of the human right, the nature and purpose of the limitation, the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose, whether there are any less restrictive and reasonably available ways to achieve the purpose, and the importance of the purpose of the limitation.

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424 NT: *Criminal Code* s 188(2)(c) (where victim under 16 years and offender is an adult); Qld: *Criminal Code* s 340(1)(g) (person aged 60 or more); SA: *Criminal Law Consolidation Act 1935* s 5AA(1)(e)(ii) (general circumstance of aggravation to commit offence knowing the victim is under 12), 5AA(1)(f) (general circumstance of aggravation to commit an offence knowing the victim is over 60), 20(3)(b) (aggravated assault); Vic: *Summary Offences Act 1966* s 24(1)(a) (assault of male 14 years or younger, or female victim of any age); WA: *Criminal Code* ss 221(1)(d), 313(1)(a) (assault of person who is of or over the age of 60 years).

425 NT: *Criminal Code* s 188(2)(d) (person unable because of infirmity, age, physique, situation or other disability to effectively defend or retaliate); Qld: *Criminal Code* s 340(1)(h) (person who relies on a guide, hearing or assistance dog, wheelchair or other remedial device); SA: *Criminal Law Consolidation Act 1935* s 5AA(1)(j) (general circumstance of aggravation to commit an offence knowing the person is in a position of vulnerability because of physical disability or cognitive impairment), 20(3)(b) (aggravated assault).

426 NT: *Criminal Code* s 188(2)(e) (assault of member of parliament). SA: *Criminal Law Consolidation Act 1935* s 83E(4) (offence to assault a public officer (includes member of parliament: s 83D(1)) intending to participate or reckless as to participation in the criminal activity of a criminal group. Note: the definition of a 'public officer' in Queensland includes persons holding office under the Crown: *Criminal Code* s 1, including for purposes of s 340 Criminal Code.

427 For example: Cth: *Crimes Act 1914* s 36A (threaten, intimidate, restrain, use violence to, inflict an injury on or cause or procure violence, damage, loss or disadvantage to a witness); and in Queensland: *Criminal Code* ss 119B(1) (cause or threaten to cause injury or detriment to a judicial officer, juror, witness or member of a community justice group in retaliation for something lawfully done by that person and includes causing injury or detriment to a member of the family of that person) with a maximum penalty of 7 years, or 10 years if committed with a circumstance or aggravation; and s 122 (attempt to influence juror by threat or intimidation).

428 For example, NT: *Criminal Code* s 191 (with intent to affect the performance by the crew member of their functions and duties); NSW: *Crimes Act 1900* s 206 (includes crew of vessels so as to interfere with their function or duty); Qld: Criminal Code s 338A (Assault etc with intent to affect the performance by the crew member of their functions and duties) which carries a 14 year maximum penalty; Tas: *Criminal Code* s 276E; WA: *Criminal Code* s 318A.

429 NT: *Criminal Code* s 125 and *Summary Offences Act 1923* s 46C(b) (person lawfully officiating or a person assembled for religious worship); NSW: *Crimes Act 1900* s 56; Qld: Criminal Code s 206 (assault etc minister of religion), carrying a maximum penalty of 2 years, and s 207 (person officiating at religious worship) – 2 months' imprisonment, or fine of $10; Tas: *Criminal Code* ss 120, 121.

430 For example, Qld: *Penalties and Sentences Act 1992* s 9(10A) (commission of a domestic violence offence is an aggravating factor, unless court considers it is not reasonable because of exceptional circumstances); SA: *Criminal Law Consolidation Act 1935* ss 5(1) (definition of aggravated offence), 5AA(1)(g) (general circumstance of aggravation to commit against spouse, domestic partner, former spouse and domestic partner and certain children), 20(3)(b) (aggravated assault); WA: *Criminal Code* ss 313(1)(a), 221(1)(a) (circumstance of aggravation).

431 Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (4th ed, 2017) 152 with reference to Article 7 of the Universal Declaration of Human Rights.

While the HRA does not specifically recognise the human rights of victims of crime, the offence of serious assault, and any reforms which might establish new aggravated forms of assault where committed against a public officer, or particular classes of officer, engage the right to equal protection of the law because these measures result in a special offence, or form of offence, being established that applies only to victims of assault in certain occupations — namely police officers and other emergency service workers, corrective services officers and other public officers.

The below case study illustrates how offences against victims may be treated differently at law even where the criminal conduct involved is the same and committed by the same offender in similar circumstances.

Case study 1 (Lisa): AOBH and serious assault

Lisa, who was a young woman of 20 at the time, attended a concert, having consumed six shots of vodka before arriving at the venue and then having a further two shots of vodka shortly after entering the venue. A security guard evicted her from the venue due to her extreme intoxication. As he was assisting her into a taxi Lisa bit his arm. She was then detained by security guards who called police. This formed a charge of AOBH as the private security guard did not meet the definition of a public officer. The maximum penalty for this offence is 7 years' imprisonment.

After police arrived, Lisa was transported to hospital, where she continued to act aggressively. When a nurse attempted to remove a catheter for Lisa's safety, she became further agitated and started yelling. Two other nurses, with the assistance of a wardsman, attended to assist the nurse. During this altercation, Lisa bit the wardsman on the right and his left index finger with enough force to draw blood through the latex glove. Because the hospital wardsman was a public officer, this formed the basis of a charge of serious assault with circumstances of aggravation, which carries a maximum penalty of 14 years.

Lisa had abstained from alcohol for some time after her arrest and had not engaged in any binge drinking activity since that time. A report by a forensic psychologist identified that Lisa suffered from an adjustment disorder with mixed anxiety and depression. Lisa received a probation order for the AOBH charge and was released under the supervision of a corrective services officer for a period of 2 years, with standard reporting conditions in addition to a requirement to submit to medical, psychiatric or psychological treatment as directed. For the serious assault with circumstances of aggravation. Lisa was sentenced to imprisonment for nine months, which was suspended, with a conviction recorded.

Although the HRA does not reference victim rights, the *Qld Charter of Victims' Rights*[432] describes the treatment a victim can expect to receive from Queensland Government agencies and funded service providers. The rights protected under the Charter are discussed in more detail in Chapter 8.

7.2 Judging offence seriousness

A common justification for treating assaults on public officers (or particular classes of victims) differently and applying higher penalties to the same criminal conduct when committed against these victims is that these offences are more serious when committed on people performing duties on behalf of the state.

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432 *Victims of Crime Assistance Act 2009* (Qld) sch 1AA.

As discussed in Chapter 4, the *Penalties and Sentences Act 1992* (Qld) ('PSA') requires judges to assess the seriousness of the offence when determining an appropriate sentence, including any physical, mental or emotional harm done to a victim[433] as well as the extent to which the offender is to blame for the offence,[434] among other matters.

Assessing the seriousness of an offence is a complex issue that has long been debated among academics and legal stakeholders. Over the last century, theorists have tackled the question of how to appropriately assess and 'rank' the impact (and therefore the seriousness) of various types of criminal offending. Dating back to a paper by Louis Thurstone in 1927,[435] academics have attempted to measure the differences and distances between crime types to gain an understanding of how to punish crimes based on their level of seriousness, how to commit policing and other resources more efficiently and how to ensure like offences are treated in a like manner.

One approach has been to assess the views of different groups in the community about offence seriousness using survey techniques, asking participants to rank various offences according to perceptions of seriousness, to choose between multiple pairs of offence types to assess views about severity, or to assign a score according to their sense of the seriousness of particular vignettes.[436] While these studies provide a useful insight into the views and opinions of different groups in the community, they have often been criticised for weaknesses in the survey sample approach and for other aspects of research design (e.g. Cullen et al).[437]

Over more recent decades, commentators have acknowledged the need for a somewhat more sophisticated approach to incorporate metrics such as sentencing outcomes, maximum penalties set by Parliament, and the costs, impacts and prevalence of particular offence categories as an indicator of where on the continuum of seriousness an offence lies.

The literature describes offence seriousness as comprising two key components as central to the question of seriousness — the harm done by the offence (the 'harmfulness'), and the culpability of the offender (the 'wrongfulness'):

> Analytically, the seriousness of criminal conduct has two major components: harm and culpability. (…) Harm refers to the degree of injury done or risked by the act. Culpability refers to the factors of intent, motive, and circumstance that bear on the actor's blameworthiness — for example, whether the act was done with knowledge of its consequences or only in negligent disregard of them, or whether, and to what extent, the actor's criminal conduct was provoked by the victim's own misconduct.[438]

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433 *Penalties and Sentences Act 1992* (Qld) s 9(2)(c).

434 Ibid s 9(2)(d).

435 Louis Thurstone, 'The Method of Paired Comparisons for Social Values' (1927) 21(4) *The Journal of Abnormal and Social Psychology* 384.

436 Ibid; Thorsten Sellin and Marvin E. Wolfgang, *The Measurement of Delinquency* (Wiley, 1964); Peter H. Rossi et al, 'The Seriousness of Crimes: Normative Structure and Individual Differences' (1974) 39(2) *American Sociological Review* 224; Marvin E. Wolfgang et al, *The National Survey of Crime Severity* (US Department of Justice, 1985); Mark Warr 'What is the Perceived Seriousness of Crimes?' (1989) 27(4) *Criminology* 795; Michael O'Connell and Anthony Whelan 'Taking Wrongs Seriously: Public Perceptions of Crime Seriousness' (1996) 36(2) *British Journal of Criminology* 299.

437 Francis T. Cullen et al, 'Consensus in Crime Seriousness: Empirical Reality or Methodological Artefact?' (1985) 23(1) *Criminology* 99.

438 Andrew von Hirsch 'Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and their Rationale' (1983) 74(1) *Journal of Criminal Law and Criminology* 209, 214.

While the element of culpability refers to the person who commits the offence, e.g. their age, mental health, intentions, or whether the person was intoxicated,[439] the element of harm refers to the 'physical, mental or emotional harm done to a victim'.

The Victorian Sentencing Advisory Council has acknowledged that harm and culpability are not sufficient to assess seriousness of offending and added another element to recently conducted research: the circumstances of the offence — involving the victim, the offender, or the nature of the offence.[440] While the Victorian study limited its investigation of the role of victim characteristics to age and gender, other factors relating to the victim's identity may be relevant to conceptualising offence seriousness, including:

- the perceived vulnerability of the victim;
- the symbolic significance of the victim's identity; and
- the social impact of the offence.

The concepts of harm and culpability are considered further below.

7.2.1 Assessing harm

Academics and criminologists have, for some time, acknowledged the need for a better approach to assessing the impact of crime than using a simple measure such as sheer numbers of offences. For example, Sherman et al comment that: 'All crimes are not created equal. Counting them as if they are fosters distortion of risk assessments, resource allocation, and accountability'.[441]

Over the last few decades, there have been attempts to assess the impact of crime by quantifying the degree of harm arising from different offences. There are, of course, several ways that harm can be conceptualised and offences ranked. Victoria Greenfield and Letizia Paoli (and mirrored by Adriaenssen et al) have set out a 'taxonomy' of harm, by looking separately at different types of harm (functional integrity, material interest, reputation and privacy), as well as the different 'bearers' of harm (individuals, private sector entities, government entities and the environment).[442]

In the United Kingdom, where sentencing guidelines have been in place since the early 2000s to assist judicial officers guide sentencing decisions (see further below), the Cambridge Crime Harm Index was created based on the 'starting point' for sentencing of each crime type, multiplied by the number of crime events in that category.[443] As the authors indicate, this approach measures the concept of harm without reference to culpability — the reason being that the same crime committed by a first offender as opposed to a serious recidivist offender, results in the same level of harm.

New Zealand, like Queensland, does not have sentencing guidelines to assist in setting the 'starting point' for sentencing, so the New Zealand Crime Harm Index quantifies harm by reference

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439 Queensland Sentencing Advisory Council, *Queensland Sentencing Guide* (2019, 2nd ed).

440 Sentencing Advisory Council (Victoria), *Community Attitudes to Offence Seriousness* (State of Victoria, 2012) 7–8.

441 Lawrence Sherman, Peter William Neyroud and Eleanor Neyroud, 'The Cambridge Crime Harm Index: Measuring Total Harm from Crime Based on Sentencing Guidelines (2016) 10(3) *Policing* 171.

442 Victoria A. Greenfield and Letizia Paoli 'A Framework to Assess the Harms of Crimes' (2013) 53(5) *British Journal of Criminology* 868; An Adriaenssen, Letizia Paoli, Susanne Karstedt, Jonas Visschers, Victoria A. Greenfield and Stefaan Pleysier, 'Public Perceptions of the Seriousness of Crime: Weighing the Harm and the Wrong' (2018) 17(2) *European Journal of Criminology*, 6.

443 Sherman et al (n 441).

to the average sentence length (translated into 'equivalent prison days') actually served by offenders over a 10-year period for particular offence types.[444]

A Crime Harm Index developed in Queensland as a collaboration between Griffith University and the Queensland Police Service has resulted in a weighted ranking of 33 broad crime types which integrates community and police views on crime seriousness and harm, but does not incorporate sentencing trends, maximum penalties or offence prevalence.[445]

An understanding of the incidence (or prevalence) of a particular crime type has also been considered worthy of using to help understand the concept of seriousness. For example, while homicide clearly results in the most extreme and catastrophic impact on an individual, the incidence of homicide is very low in comparison to the crime of assault which, while the personal harm may not be anywhere near the harm impact of homicide, occurs far more often than homicide. Therefore, the overall harm of assault may not be as far from the overall impact of homicide is one might think. The prevalence, or recently increased prevalence of a particular crime type has been acknowledged as a legitimate element to incorporate into setting sanctions in the context of the principle of deterrence.[446]

7.2.2 Assessing culpability

The 'wrongfulness of an offence', or the degree of blameworthiness of the offender, is the other central component to consider when thinking about offence seriousness, with increasing culpability associated with increasing penalty outcomes.

Fox and Freiberg conceptualise culpability into three categories ranked according to their level of seriousness — an act can be done intentionally (most serious), recklessly or negligently (least serious), relating to the level of an offender's awareness and motivation.[447] This has been expanded by the Victorian Sentencing Advisory Council to recognise a five-level taxonomy, from least to most serious:

- strict liability (which does not encompass intent);
- dangerousness (falling between an accident and criminal negligence);
- criminal negligence;
- recklessness; and
- intention.

Two other elements also contribute to the culpability of an offender:

- offender characteristics, for example where an offender has a cognitive impairment which can mitigate the level of his or her culpability; and
- offence characteristics, for example if a particularly vulnerable person has been the target of an offence, or if weapons have been used as part of the offence.

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444 Sophie Curtis-Ham and Darren Walton, 'The New Zealand Crime Harm Index: Quantifying Harm Using Sentencing Data' (2017) 12(4) *Policing* 455.

445 Janet Ransley, Kristina Murphy, David Bartlett, Susanne Karstedt and Harley Williamson, 'Final Summary Report: Queensland Crime Harm Project' (unpublished, 2018).

446 Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (Lawbook Company, 3rd ed, 2014) 164.

447 Richard Fox and Arie Freiberg, 'Ranking Offence Seriousness in Reviewing Statutory Maximum Penalties' (1990) 23 *Australian and New Zealand Journal of Criminology* 169.

7.2.3 What makes 'serious assault' serious?

As discussed in Chapter 3 of this paper, the offence of serious assault is treated as an aggravated form of assault on the basis that the criminal conduct involved is targeted at certain classes of person, including police, corrective services officers and other public officers.

In considering the harm caused by this form of criminal conduct, there is no doubt that personal (or individual) harm is a central element of the offence. This can include physical injury, damage to a body part or function (either temporary or permanent), and/or psychological injury (either temporary or permanent). These harms can impact the ability of the individual to continue to do their job, function as a family member, or continue to enjoy life (social contact, recreational activities, etc.). In turn, these can impact other family members, either directly or indirectly, materially or psychologically. Of less direct impact, but no less important, are the impacts on family and friends of the direct victim, who might be considered 'indirect' victims of the offence.

There are also the broader impacts on the material interests of the assault victim – the costs associated with the injuries (medical care, counselling), loss of income leading to impacts on housing or other material issues (sometimes impacting indirect victims).

The offence may further impact on the reputation or the privacy of an individual assault victim – such as how they are viewed in the workplace and the disclosure of their identity in media reports. Family members may experience similar impacts.

In addition to the impacts on individual victims, a serious assault may impact on the government entity employing the individual, such as resulting in lost productivity, and the potential to permanently lose a staff member who has had considerable training invested to skill them to perform their duties.

Finally, and of relevance to assaults on public officers, there is potential for assaults on these officers to impact public confidence in government, the justice system and the institutions employing these officers. In the case of a police officer who is assaulted, for example, it may undermine public confidence that police are adequately protected from assault, and therefore able to adequately protect others from dangerous individuals. The status of the victim as being a person performing a duty on behalf of the state, and the associated harm to the state that ensues, generally has been accepted as increasing the seriousness of the offence for the purposes of sentencing. Or to put this more succinctly as this principle applies to law enforcement officers:

> An assault on a law enforcement officer is considered as being more serious than an assault on an ordinary citizen because it is considered an assault on the state itself and because police are charged with protecting the community.[448]

The Queensland Court of Appeal recently commented on 'the interest that the community has in the maintenance of an effective police force and the protection of police officers from harm':[449]

> The establishment of a state sanctioned body of police serves a number of important and obvious purposes. One of these purposes is to ensure that the community need not rely upon self-help or upon vigilantism to protect itself against criminal acts. The community does not need to take such measures because some among us have volunteered to undertake this difficult and hazardous duty as members of the Queensland Police Service. There is, therefore,

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448 Osman Isfen and Regina E Rauzloh, 'Police Officers as Victims: Sentencing Standards and their Justifications in England and Germany' (2017) 81(1) *The Journal of Criminal Law* 33, 34.

449 *R v Patrick (a pseudonym)* [2020] QCA 51, 8 [30] (Sofronoff P, Fraser JA and Boddice J agreeing).

> a public interest in ensuring that, so far as laws can do so, police officers are protected against harm in the execution of their duties and that offenders are punished when they harm police.[450]

Turning to culpability, questions about the intentionality of the behaviour, the cognitive capacity and other characteristics of the offender, or any premeditation are all relevant factors for sentencing considerations. The fact a person has assaulted, resisted or obstructed a public officer in the performance of their duties (or because of this) is also of relevance to the assessment of culpability because the behaviour is targeted at someone who is doing their job on behalf of the state, and may therefore be more vulnerable to being victimised in this way.

Few studies reviewed assessing offence seriousness specifically focused on the offence of assaulting a police officer or other public official. However, those that did indicated that the fact the victim was a police officer made the offence more serious in the eyes of those surveyed:

- Rossi et al ranked 140 offences in their survey, finding that the 'planned killing of a police officer' ranked as the most serious offence of all, with 'planned killing of a person for a fee' ranking second. In addition, 'impulsive killing of a police officer' was ranked at number 5, ahead of 'impulsive killing of a spouse' (ranked 19) and 'planned killing of an acquaintance' (ranked 7). 'Assault with a gun on a police officer' ranked at number 11 ahead of 'assault with a gun on a stranger' ranked at number 18.[451]
- In their 1996 article, O'Connell and Whelan selected 10 offences to gauge the perceived seriousness of their cohort of 623 participants.[452] Their study included the offence of assaulting a police officer, which respondents ranked as fourth most serious, mirroring an earlier finding by Levi and Jones (1985).[453] Unfortunately, because there was no comparison offence of assaulting a non-police officer it is not known whether a similar assault against another member of the community would have ranked as seriously.
- A 1994 paper outlining the crime seriousness rankings of 25 offences by 115 New Zealanders found that 'aggravated assault of a police officer' ranked higher at number 9 than did 'aggravated assault' at number 10.[454]

As discussed in Chapter 6, the higher perceived offence seriousness of assaults on police and other public officers is recognised in other jurisdictions in a variety of ways — through the creation of stand-alone offences, aggravated forms of existing offences of general application, and by recognising the fact the victim of a relevant offence was a public officer in legislation as an aggravating factor.

In England and Wales, which have adopted formal sentencing guidelines with 'starting points' and sentencing ranges, different tariffs have been set regarding the offences of 'assault with intent to resist arrest' and 'common assault'.[455] As illustrated in Table 7-1 below, these sentencing guidelines make it clear that assaults against police are considered more serious than assaults against any other person.

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450 Ibid.

451 Peter H. Rossi et al (n 436).

452 O'Connell and Whelan (n 436).

453 Michael Levi and S Jones 'Public and Police Perceptions of Crime Seriousness in England and Wales' (1985) 25(3) *British Journal of Criminology*.

454 Stephen A.B. Davis and Simon Kemp, 'Judged Seriousness of Crime in New Zealand' (1994) 27 *Australian and New Zealand Journal of Criminology* 254.

455 Sentencing Council (UK), *Magistrates' Court Sentencing Guidelines Online*, 2020, Sentencing Council (UK), https://www.sentencingcouncil.org.uk/offences/.

Table 7-1: Starting point for sentencing of three assault offences, England and Wales

	Category 1	Category 2	Category 3
Assault on a police constable in execution of his duty	12 weeks' custody	Medium level community order	Band B fine[456]
Assault with intent to resist arrest	26 weeks' custody	Medium level community order	Band B fine
Common assault	High level community order	Medium level community order	Band A fine[457]

Source: Sentencing Council of England and Wales

7.3 Historical justifications and the approach in other jurisdictions

The current section 340 of the *Criminal Code* may have had its origin in an Imperial Act (1&2 George IV C 88) which provided for a separate penalty to be imposed for assault or wounding of a constable, officer, or any other person with intent to obstruct, resist or prevent the lawful arrest or detention of a person charged with a suspected felony, if the offender was convicted of a misdemeanour. This separate penalty, of between 6 months and 2 years' imprisonment, was to be imposed in addition to any penalty imposed for the offence.

The justification for the original provisions was stated in terms of general deterrence – 'it might tend more effectually to prevent the Commission of Such Offences if further Provisions were made for the Punishment of Persons who may hereafter be convicted thereof …' (emphasis in original).

If this provision was the precursor to the current serious assault provision, it may suggest that the intended focus was on the prevention of the commission of such offences by applying the principle of deterrence, rather than necessarily on victim status.

More recently, the justifications pointed to by members of Parliament, sentencing councils and others as to why these assaults against public officers should be treated as more serious and/or attract higher penalties include:

- the higher level of vulnerability of public officers and the risks inherent in their role (as well as other people providing a service to the public, including private employees): 'people in public facing roles are more exposed to the possibility of harm and consequently more vulnerable';[458]
- the protection of those providing a public service: 'someone who is working in the public interest merits the additional protection of the courts'; [459]

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456 A Band B fine starts at 100% of relevant weekly income and ranges from 75–125% of relevant weekly income.

457 A Band A fine starts at 50% of relevant weekly income and ranges from 25–75% of relevant weekly income.

458 Sentencing Council for England and Wales, Assault Occasioning Bodily Harm/Racially or Religiously Aggravated ABH: Definitive Guideline (effective from 13 June 2011) under 'other aggravating factors', <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/assault-occasioning-actual-bodily-harm-racially-religiously-aggravated-abh/> text under 'Offence committed against those working in the public sector or providing a service to the public'. See also Australian Capital Territory, Explanatory Notes: Crimes (Protection of Police, Firefighters and Paramedics) Amendment Bill 2019, 5–6.

459 Sentencing Council for England and Wales, Assault Occasioning Bodily Harm/Racially or Religiously Aggravated ABH: Definitive Guideline (effective from 13 June 2011) under 'other aggravating factors', <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/assault-occasioning-actual-bodily-harm-racially-religiously-aggravated-abh/> text under 'Offence committed against those working in the public sector or providing a service to the public'.

- denunciation of acts of violence against people who are acting to protect the community and uphold the rule of law,[460] save the lives of others,[461] and 'who put themselves on the line in emergency situations on behalf of the community;'[462]
- deterrence: to send 'a clear message to perpetrators of these acts that violence against emergency workers will not be tolerated and will be met with strong penalties'.[463]

During the 2018 Victorian parliamentary debates on the Justice and Legislation Miscellaneous Amendment Bill, which narrowed the 'special reasons' on which courts can depart from mandatory minimum sentences for assaults on emergency workers, one Member of Parliament commented:

> We need to send a strong message to the community at large and to offenders that it is not okay to attack emergency workers who are attempting to save lives, and that if you attack an emergency worker you will be given special treatment. That is what the bill does. Yes, we are giving special treatment for special offences. We are making an exception so that if you attack an emergency worker, you will be dealt with a bit differently to any other person. That is not because we believe we should discriminate between humans. Everyone should be equal; that principle is sound. But what we are saying here is that you will be harshly dealt with if you attack emergency workers.[464]

As discussed in Chapter 6, in New Zealand, the distinction appears to have been made on the basis that, in contrast to other members of the community, police and other frontline emergency workers do not have the choice to leave dangerous or risky situations 'because their jobs require them to protect and save the lives of others'.[465]

However, the special protection afforded to police and emergency workers, as well as other public officer victims, is not universal. For example, under German penal law, the position of the victim as a public officer does not afford any special protection (with some exceptions, such as coercion and resistance against enforcement officers). Instead, the general offences under the criminal law apply. Further, German penal law does not allow for different weighting of victims for sentencing purposes based on their status:

> In other words, the protection of a lawfully acting office-holder cannot call for a more serious penal consequence, as this would imply that a police officer is more valuable than an ordinary citizen. Where the state intends to ensure additional protection of its authorities beyond the general penal law provisions, this is achieved through special provisions such as §113 (resisting enforcement officers), as well as through offences of state protection, but not through an officially sanctioned increased sentence practice.[466]

The German position, which opposes the concept that police officers are deserving of greater protection than ordinary citizens has been said to be 'based on the fact that the police force has

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460 New Zealand, *Parliamentary Debates*, House of Representatives, 12 April 2011, Sentencing (Aggravating Factors) Amendment Bill — First Reading 17, 951 (Judith Collins, Minister for Police).

461 Ibid. See also statements made to this effect by the Victorian Attorney-General: Victoria, *Parliamentary Debates*, Legislative Assembly, 26 June 2014, 2397 (Robert Clark, Attorney-General).

462 Ibid.

463 Ibid. See also similar comments made by the WA Attorney-General in introducing mandatory minimum sentencing reforms: Western Australia, Parliamentary Debates, Legislative Assembly, 4 December 2008, 965 (Christian Porter, Attorney-General).

464 Victoria, Legislative Council, *Parliamentary Debates*, 18 September 2018, 5014 (Cesar Melhem, Member for Western Metropolitan electorate).

465 New Zealand, *Parliamentary Debates*, 12 September 2012, Sentencing (Aggravating Factors) Amendment Bill — Third Reading 5193 (Judith Collins, Minister for Justice).

466 Isfen and Rauzloh (n 448) 43.

special training, legal authority and special equipment, which puts them in a stronger position than the offender, who feels vulnerable when faced with the force of the law'.[467]

In fact, critics of the arguments for increasing penalties for the offence of resist police in Germany (from two to three years) have raised concerns that 'having such a strong charge at their disposal for relatively minor acts of resistance gives the police too much power to ensure the submission of citizens'.[468]

7.4 Stakeholder views on victim status

There was recognition in various stakeholder preliminary submissions to the Council of the particular risks to public officers in performing their duties, and the need for legislation to have a protective effect. Feedback included:

> Assaults on nurses, midwives, police, emergency service workers, corrective service officers and other public officers is unacceptable. Nurses and midwives are particularly vulnerable to assaults while at work as often the people they care for are unwell, upset, stressed, unpredictable and potentially volatile … The impact of these assaults in Queensland's HHSs [Hospital and Health Services] is far reaching. "There is a victim; and employee who is potentially injured physically, psychologically or emotionally in the course of their work" (Queensland Government, 2016, p. 5). And there are other individuals such as colleagues and patients as well as the profession, the organisation and the overall quality of health care which can be negative impacted by assaults (Queensland Government, 2016).[469]

> It is the QPU's position that police and emergency workers deserve adequate legislative protection for simply doing their duty and serving the people of Queensland.[470]

> 'What? There needs to be submissions on this topic to warrant further action/protection against people [who] injure those [who] want to protect and keep safe public officers from harm? Isn't that an inalienable right for these people? … C'mon. This is a no-brainer.'[471]

The Queensland Teachers' Union (QTU) raised concerns that assaults on school staff not only have an impact on the direct victims of these assaults, but also have a psychological impact on students.[472] It referred to evidence from other jurisdictions, particularly Victoria and the ACT, which suggests a close link between attitudes to domestic and family violence and occupational violence experienced in schools.[473] Because the majority of teachers are women, the QTU suggested the psychological impacts of students witnessing violence against teachers and principals 'is significant and a basis for concern'.[474]

The view that the position of public officers is unique and warranting of special protection was not shared by Sisters Inside which submitted:

> The harm suffered by a police or public officer is the same as experienced by a civilian exposed to the same offending. … it is inappropriate that the legislation creates different penalties for

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467 Ibid 43–4.

468 Ibid 48.

469 Preliminary submission (Queensland Nurses and Midwives' Union) 3. The QNMU also argued for other health care workers working in private health facilities, private aged care facilities and agency nurses and midwives to be extended the same protections. See discussion below at 9.2 – 'The definition of a public officer'.

470 Preliminary submission 23 (Queensland Police Union of Employees) 1.

471 Preliminary submission 16 (M Griffin).

472 Preliminary submission 13 (Queensland Teachers Union) 8.

473 Ibid.

474 Ibid.

> the same action, with the only relevant distinction between cases being the claimant's profession. This is especially problematic considering how low the threshold is for making out a charge of serious assault.[475]

Sisters Inside put forward the following case example as illustrating what it submitted were disproportionately high maximum penalties for serious assault relative to those applied for the same conduct committed against a member of the public:

> Tracey* is an Aboriginal woman who was charged under s 340(2AA)(a) of the Criminal Code for spitting at a bus driver. After a trivial dispute with the driver, Tracey was denied entry onto the only transport to her destination. Tracey has significant long-term mental health issues and sometimes reacts negatively to what she perceives to be unfair or disrespectful use of authority. Her significant history of trauma causes her to display strong emotional outbursts when she experiences feelings of disconnection or unfairness. In this case, Tracey reacted by swearing and spitting at the bus driver. Tracey was charged with serious assault and now faces a maximum penalty of 14 years in prison for spitting at a public officer, an action which is characterised by the legislation as an aggravated form of 'serious assault.' If she had spat on a civilian, she would most likely have been charged with common assault and be facing a maximum sentence of 3 years. We submit that this is unjust; the maximum penalty should not be 11 years higher for an offence committed against a police or public officer compared to a civilian.[476]

Pointing to the original justification for making express reference to public officers in section 340 of the *Criminal Code* being 'to protect Queensland's frontline officers from the dangers inherent in their duties and to ensure the appropriate punishment and deterrence of such offending conduct', Sisters Inside submitted:

> We contend that there are no 'inherent dangers' in the duties of bus drivers. For contrast, the work of a taxi or Uber driver, while not a public role, could not be said to be less dangerous than that of a public transport driver. We hold that it is arbitrary to assign greater penalties to assaults on public transit officers than to civilians doing similar work. People should be treated equally before the law, regardless of their profession.[477]

Sisters Inside's submission was supported by the Prisoners' Legal Service.[478]

7.5 Issues

As discussed in Chapters 6 and 9, other jurisdictions have adopted different approaches to the treatment of assaults on police and other frontline emergency workers, corrective service officers and other public officers and justified this in various ways.

Generally, higher penalties apply to assaults committed against certain categories of victims. The way these categories are defined, however, differs by jurisdiction.

The NT has introduced a stand-alone *Criminal Code* offence of assault on workers which applies to assaults on *any* worker who is working in the performance of his or her duties.[479] The maximum penalty for this offence is 7 years if the victim suffers harm (3 years if dealt with summarily), and 5 years (or 2 years if dealt with summarily) if no harm resulted.

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475 Preliminary submission 21 (Sisters Inside Inc) 2.

476 Ibid.

477 Ibid.

478 Preliminary submission 26 (Prisoners' Legal Service Inc) 1.

479 *Criminal Code* (NT) s 188A.

A separate offence provision applies to assaults on police or emergency workers, which carries a 7-year maximum penalty if the officer or emergency worker suffers harm, or 5 years otherwise. The maximum penalty is 16 years' imprisonment if the victim has suffered serious harm.

The equivalent maximum penalties in the NT for harm caused to a member of the community who is not a police officer, emergency worker, or other worker assaulted while performing his or her duties are:

- 1 year for common assault, with no circumstance of aggravation;[480]
- 5 years for common assault where circumstances of aggravation apply, including that the person assaulted: suffers harm, is female if the offender is male, is under the age of 16 years if the offender is an adult, is unable because of infirmity, age, physique, situation or other disability effectually to defend themselves or to retaliate, is a member of Parliament and the assault is committed because of this, is assisting a public sector employee or justice of the peace in the exercise of their functions, or is threatened with a firearm or other dangerous or offensive weapon [481] and
- 14 years if the assault results in serious harm.[482]

The ACT has introduced a Bill that, if passed, will introduce a new offence of assaulting a police officer, firefighter or paramedic into the *Crimes Act 1900* (ACT).[483] The need for this new offence has been justified on the basis that: 'Police officers, firefighters and paramedics are required to place themselves in harm's way in service to the community, and it is appropriate for the law to reflect this vulnerability'.[484]

As is now the case in Queensland, the ACT has a *Human Rights Act 2004* (ACT) which requires consideration of any limitations on human rights in the development of new legislation. In this case, while the Government has accepted the new offence limits the right to equal protection of the law on the basis it elevates the protection of victims who are employed in certain occupations, namely police officers, firefighters and paramedics, it has submitted that: 'the limitation is not significant, as the maximum penalty stipulated for the new assault offence is in line with the penalty for common assault' (2 years).

The Victorian Government, which over recent years has introduced a raft of sentencing reforms targeting assaults on public officers and, like the ACT and Queensland, has human rights legislation in place,[485] has not specifically addressed whether the differential treatment of victims limits their right to equality. Instead, when considering this right, its focus has been on the potential of these laws to disproportionately impact vulnerable groups with protected attributes, such as young offenders, Aboriginal people and persons with impaired mental functioning.[486]

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480 Ibid s 188(1). In Queensland, it is an offence to assault another in interference with freedom of trade or work under section 346 of the *Criminal Code*, but in this case the offence is only committed if the requisite intention (to hinder or prevent the other person from working at or exercising their lawful trade, business or occupation, or from buying selling, or otherwise dealing, with any property intended for sale) has been established.

481 Ibid s 188(2).

482 Ibid s 181.

483 Crimes (Protection of Police, Firefighters and Paramedics) Amendment Bill 2019 (ACT) cl 5 proposing to insert a new section 26A. 'Emergency worker' is defined to mean: (a) a police officer; or (b) a member of the fire and rescue service; or a member of the ambulance service who is employed as a paramedic of patient transport officer.

484 Explanatory Statement: Crimes (Protection of Police, Firefighters and Paramedics) Amendment Bill 2019 (ACT) 5–6.

485 *Charter of Human Rights and Responsibilities Act 2006* (Vic).

486 See, for example, Victoria, *Parliamentary Debates*, Legislative Assembly, 4 March 2020, 680 'Sentencing Amendment (Emergency Worker Harm) Bill 2020 — Statement of Compatibility' (Jill Hennessy, Attorney-General).

In Queensland, higher maximum penalties apply under section 340 of the *Criminal Code* to assaults on public officers than would apply if the same conduct was committed against another member of the public, although these penalties were introduced long before the commencement of the new HRA. As an example, while the maximum penalty for non-aggravated forms of serious assault is 7 years imprisonment, a 3 year maximum penalty applies to common assault. The aggravated form of serious assault further results in a 14-year maximum penalty applying in some circumstances that would otherwise constitute a common assault, such as spitting on the victim. Where bodily harm is caused, a 14-year maximum penalty applies to the offence of serious assault if this resulted from an assault committed on a public officer, in comparison to the 7-year maximum penalty that applies to AOBH (or 10 years if the offender is, or pretends to be armed or is in company with another person) where such act is committed on any other person.

Any future reforms introduced in Queensland which might limit the right to equal treatment – such as the extension of the offence of serious assault to apply to other occupational groups, or legislative reforms that may enhance current protections for public sector officers — will need to be justified under the new Queensland HRA. Consequently, the purpose of the limitation will need to be shown to be important, and the limitation rationally and necessarily connected to achieving its purpose as well as proportionate to achieving its objectives.

Understanding the basis on which different occupational groups are, or should be, treated differently under Queensland law is critical to providing this justification should any reforms to current legislation be proposed.

Questions: Aggravated assault based on victim status

1. Should an assault on a person while at work be treated by the law as more serious, less serious, or as equally serious as if the same act is committed against someone who is not at work, and why?
2. If an assault is committed on a public officer performing a public duty, should this be treated as more serious, less serious, or as equally serious as if the same act is committed on a person employed in a private capacity (e.g. as a private security officer, or taxi driver) and why?

   Note: the definition of 'public officer' is broad and includes any person who is discharging a duty imposed under an Act or of a public nature – including public service employees (as a broad category), police, ambulance officers, health service employees, corrective services officers, child safety officers and transit officers). For further discussion, see Chapter 9.
3. Should the law treat assaults on particular categories of public officers as being more serious than other categories of public officer, and why?

   Examples include: police officers, paramedics, fire and emergency services, corrective services officers, public school teachers, doctors and nurses working in the public health system, child safety officers, transit officers, fisheries inspectors, fair trading inspectors etc).