

# Chapter 11 Institutional responses

This chapter begins by outlining the importance of creating an environment where employees are encouraged to report an assault in the workplace. In this context, the Council outlines a discussion about two critical issues – that of under-reporting of workplace assaults, and the need for better data and information about occupational violence to monitor and enhance institutional responses to this issue. The chapter then sets out how institutions – both the organisations that employ victims of occupational violence, as well as the agencies that form part of the criminal justice system – currently respond to assaults on workers. The chapter focuses specifically on the potential for adult restorative justice conferencing as a response that might better serve those involved in occupational violence, either as victims, offenders or employers.

## 11.1 The importance of strong responses to workplace assault

As is clearly illustrated by the case studies provided to the Council and discussed in Chapter 5 of this report, the process of recovering from a workplace assault can be lengthy and complex. The investment in training and developing professionals – police, teachers, nurses and others – to perform their jobs effectively is substantial. While the Council has not calculated the financial and economic impact on the community incurred by having individual workers offline for short or longer periods, or in having workers decide to move out of their occupation altogether, it is presumably significant. The cost of retraining others to replace workers who permanently opt-out of frontline work must be considered.

One of the most important ways of ensuring there are effective responses to workplace assaults is to ensure there are appropriate systems to encourage the reporting of such incidents, and that the right forms of responses and interventions are available to respond to the harm done.

### 11.1.1 Under-reporting of occupational violence

Under-reporting is an issue identified and discussed in the Griffith University literature review, which summarises the key reasons why victims may choose not to report an assault. These are:

- the complexity of the internal process for reporting the incident;
- a lack of support for the victim following the assault;
- lack of satisfaction with managerial responses;
- a view that workplace violence is seen as ‘part of the job’; and
- a view that reporting the incident is unlikely to make any difference.<sup>1</sup>

These barriers to reporting have been confirmed in submissions from professional bodies and employee unions representing workers. For example, the Australasian College for Emergency Medicine (ACEM) submitted:

Violence in EDs [Emergency Departments] is under-reported due to perceptions among ED staff that it is an inherent part of the job. ED staff who are exposed to workplace violence also under-report incidents due to barriers associated with complex and lengthy reporting systems, lack of time, unclear policies and procedures, confidentiality issues, peer pressure, the stigma of victimisation, and fear of retaliation by hospital administrators. This culture of under-reporting suggests that the quantitative evidence on violence in EDs is limited and of poor quality. For instance, few studies have monitored trends in ED violence or evaluated the effectiveness of interventions over time. To understand the cumulative effects of violence on ED staff, as well as appropriate prevention and intervention strategies, instituting a culture of reporting is essential.<sup>2</sup>

The Queensland Teachers’ Union (QTU) noted the following barriers to reporting for teachers:

- a perception that the organisation will take no action and not provide support;
- a perception that the needs of children are valued over the issue of worker safety; and
- an expectation that assaults by children will not be prosecuted due to the age of the offenders.<sup>3</sup>

As noted in Chapter 5, QTU advised that students or teachers and principals may be required to change schools following an assault. This is another potential barrier for teachers and principals to report, as their careers may be severely affected. QTU provided a case study example of a deputy principal who was professionally set back after

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<sup>1</sup> Christine Bond et al, *Assaults on Public Officers: A Review of Research Evidence* (Griffith Criminology Institute for Queensland Sentencing Advisory Council, March 2020) 17.

<sup>2</sup> Submission 19 (Australasian College for Emergency Medicine) 1.

<sup>3</sup> Preliminary Submission 13 (Queensland Teachers’ Union) 7.

an assault in 2016. As of mid-2020 she has been unable to secure an ongoing position at the same level, in her field, and continues to experience ongoing anxiety, which affects her performance in interview processes.<sup>4</sup>

Submissions from the QTU and the Independent Education Union suggest there is a lack of data available about the scope and extent of occupational violence experienced by staff in schools and TAFE. Without having a system to collect information about this issue, little can be done to respond to violence and improve prevention strategies in these workplaces. There is also no way of measuring the extent of under-reporting. However, the QTU note the longer-term nature of the relationships a school and its staff will have with a particular family, with very few options to have a child excluded from a school:

In effect, this means that even when a student or family member at a state school infringes on community standards of behaviour established under law, a state school and the Department of Education must continue to interact with that person or risk infringing other legal obligations.<sup>5</sup>

The Independent Education Union echoed this concern about data<sup>6</sup> and ongoing relationships:

In the context of schools, an occupational violence approach is consistent with the need for school staff to maintain working relationships with parents and students in order to achieve educational outcomes. This is particularly acute for teachers working in State Schools, where exclusion of students/families is more challenging.<sup>7</sup>

It is likely this will contribute in such cases to the under-reporting of assaults to police.

### 11.1.2 Increasing visibility – better and improved data collection

A number of submissions raised the need for accurate data collection of all incidents of occupational violence by individual organisations, to assist with risk identification and response. In line with the argument for improved preventative measures, several submissions raised the importance of understanding the nature and extent of the problem to provide an evidence base for future work.

The Queensland Council for Unions was concerned that a failure by employers to keep aggregate data could raise questions about whether that employer is complying with their duties under the *Work Health and Safety Act 2011* (Qld):

As stated, a PCBU [Person Conducting a Business of Undertaking] has a duty [under the *Work Health and Safety Act 2011*] to put in place controls to, so far as is reasonably practicable, eliminate, or where this is not able to be done reasonably practicably, to implement measures to minimise risks to workers. The PCBU further has a duty to maintain and review those control measures. It is doubtful that an employer, who is not keeping aggregate data on such a prevalent and seemingly escalating risk, is complying with these duties.<sup>8</sup>

The ACEM point out that there are few studies monitoring trends and responses to violence in Emergency Departments (EDs), and that a culture of reporting is central to understanding the effects of violence on ED staff, as well as what might be effective in prevention and intervention. The issue of data gaps was particularly raised by the United Workers Union and the Independent Education Union in relation to the education sector:

Reporting and recording instances of occupational violence in Queensland schools is currently inconsistent, and instances of violence often remain unaddressed.<sup>9</sup>

For the purposes of this submission, we acknowledge that there is a lack of data related to prevalence and seriousness of occupational violence experienced by teachers and other school staff and would encourage Governments, and/or other agencies, to support collection of data to inform future prevention strategies.<sup>10</sup>

The Transport Workers' Union also raised the importance of data collection in its submission to the Council:

We also emphasise the importance of collecting relevant data, and making information available to guide the assessment of risks, as well [as] improving reporting avenues and responding to the needs of victims more effectively.<sup>11</sup>

From the Council's perspective, the availability of high-quality data is critical to provide an evidence-based response to assaults on workers, including the way the criminal justice system responds to such incidents. In preparing data

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<sup>4</sup> Submission 20 (Queensland Teachers' Union) Annexure 2–3.

<sup>5</sup> Preliminary Submission 13 (Queensland Teachers' Union). 6

<sup>6</sup> Submission 13 (Independent Education Union) 3.

<sup>7</sup> Ibid.

<sup>8</sup> Submission 16 (Queensland Council of Unions) 2.

<sup>9</sup> Submission 11 (United Workers Union) 4.

<sup>10</sup> Submission 13 (Independent Education Union) 1.

<sup>11</sup> Submission 12 (Transport Workers' Union) 11.

to inform the Council's work, it has become evident that information about victims of crime that can be linked to offender-related data is not collected with any reliability. Nor is there any information about the circumstances of offences that is collected in a way that can easily be reported on.

The only readily available source of information to the Council on the broader context within which offending and sentencing occurs is through the time-consuming and manual process of analysing sentencing remarks, which are only available from the higher courts. However, the qualitative analysis of sentencing remarks comes with its own set of limitations, as was discussed in section 4.2.1 of Chapter 4. Whenever the Council observes particular trends that require further investigation, a separate set of research activities must be designed to understand why these trends are occurring.

## 11.2 Preventing assault – applying a workplace health and safety lens

### 11.2.1 Findings of the Griffith Criminology Institute's literature review

In reviewing the issue of the effectiveness of penalty enhancements or mandatory minimum sentencing schemes, the Griffith Criminology Institute's literature review concludes:

although amendments to sentencing frameworks can clearly communicate the unacceptability of the behaviour, prevention strategies may be a better strategy for reducing the incidence of assaults against public officers. In other words, well-targeted interventions may achieve more in terms of reducing the incidence of these assaults.<sup>12</sup>

The literature review outlines that interventions explored in the research essentially fall into three groups:

- Those focusing on the *relationship of the officer with the 'client'* (e.g. appropriate risk assessment tools, training in skills to de-escalate interactions, clearer instructions and policies for the public).
- Those focusing on the *workplace environment* (e.g. physical barriers, the organisation of the workplace, public awareness/education posters, surveillance technology).
- Those focusing on the *relationship of the officer with the organisation* (e.g. simpler and clearer internal reporting processes, supportive management, a culture of safety).

The literature review reports that evidence about the effectiveness of these kinds of interventions is 'ad hoc' and that using a crime prevention framework, including strategies like target hardening<sup>13</sup> and reducing opportunities, might assist in this regard.<sup>14</sup>

### 11.2.2 The Work Health and Safety Act 2011

The legislative framework that supports the health and safety of workers in Queensland and aims to reduce the risks of workplace accidents and injuries in Queensland is the *Work Health and Safety Act 2011* (Qld) (WHS Act). The WHS Act requires that a business or undertaking must ensure, as far as is reasonably practicable, the health and safety of workers while at work.<sup>15</sup> This primary duty of care requires a person conducting a business or undertaking to exercise due diligence to ensure they comply with this duty.<sup>16</sup> Section 27(5) of the Act further describes due diligence as including taking steps to:

- acquire and keep up-to-date knowledge of work health and safety matters;
- gain an understanding of the nature of the operations of the business or undertaking and generally of the hazards and risks associated with those operations;
- ensure that the person conducting the business or undertaking has appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking; and
- ensure the person conducting the business or undertaking has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information.

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<sup>12</sup> Bond et al (n 1) v.

<sup>13</sup> 'Target hardening' refers to strategies aimed at reducing the risk of an offence occurring, commonly through the use of physical barriers and other security measures. For example, the use of physical barriers on buses: *Ibid* 22.

<sup>14</sup> *Ibid*.

<sup>15</sup> *Work Health and Safety Act 2011* (Qld) s 19(1).

<sup>16</sup> *Ibid* s 27(1).

Section 28 of the Act imposes duties on a worker to:

- take reasonable care for his or her own health and safety and to ensure his or her acts or omissions do not adversely affect the health and safety of others;
- comply with reasonable instructions to allow the person conducting the business or undertaking to comply with the Act; and
- cooperate with any reasonable policy or procedure relating to health and safety in the workplace.

The Act establishes offence provisions relating to breaches of these obligations.

### 11.2.3 Stakeholder perspectives

Many submissions were concerned that the Council acknowledge that sentencing is only one small aspect of what must be a much broader response to the issue of occupational violence. This was expressed best by John Martin from the Queensland Council of Unions (QCU) in a meeting with the Council:

To the extent that sentencing will impact upon creating a safer workplace we support it ... To some extent it's putting the ambulance at the bottom of the cliff rather than the guardrail at the top of the cliff.<sup>17</sup>

Given so many assaults on workers occur in the context of heightened emotions, mental health breakdown, drug and alcohol misuse, and where rational thought and an understanding of consequences are not present, there were concerns that increasing maximum penalties and introducing mandatory sentencing are unlikely to have the effect of deterring this behaviour. Many stakeholders spoke about the need to use a workplace health and safety approach to the issue of occupational violence and made valuable suggestions about what additional measures could be taken to reduce and prevent workplace assaults.

In relation to the delivery of health services, the Queensland Nurses and Midwives' Union (QNMU), for example, described penalties and sentencing as unlikely to create a safe working environment on their own. Its submission lists a range of preventative measures that should be in place to provide safe workplaces, including adequate staffing, appropriate training, policies and procedures, and appropriate workplace design.<sup>18</sup>

The promotion of a preventative approach was echoed in submissions from the Transport Workers' Union, UWU, QCU, Queensland Advocacy Incorporated, Sisters Inside, the Aboriginal and Torres Strait Islander Legal Service, and the Queensland Human Rights Commission (QHRC):

We would also support the introduction of initiatives that would provide training and support for public officers in working with vulnerable people, people with disabilities and other initiatives that invest in treatment and preventative strategies which address root causes of offending, and de-escalate and reduce conflict.<sup>19</sup>

The QCU takes a workplace health and safety (WHS) approach to violence against public officials and other workers ... We also adopt a position that it is far better to prevent risk rather than consider what is to be done after the event ... Consultations with our affiliate unions have indicated that a focus on prevention, through elimination or minimising risks, does not occur across all industries or sectors.<sup>20</sup>

... strategies that cater to students' individual learning needs and support both teachers and teacher aides to do their best jobs possible are far more vital to the well-being of all parties involved than mandatory sentencing. Indeed, enforcing legislation in schools serves staff and students best when it is focused on workplace health and safety, by making sure that measures to prevent and risk injury are adequately implemented and subject to regular evaluation ... Unpacking these events reveals the complexity inherent in emergency situations and how understanding challenging behaviour is often of more use to frontline workers than the implementation of penalties to perpetrators ... Interventions that can be controlled by organisations, such as strictly adhering to WHS legislation, education and training, internal and external communication, developing resources and targeted research, are of more use to frontline UWU workers than mandatory sentencing. Employers must equip frontline workers with targeted skills, training, communication strategies and research findings that evolve with new information and the dynamic contexts in which paramedics and health workers interact with patients, and teacher aides interact with students.<sup>21</sup>

There is a need for improved education and training for all public officers. In particular, there is a need for improved de-escalation training for police and emergency response workers. Preventing offending by changing police procedures on the targeting of people with mental illness, people with cognitive disabilities and Aboriginal and

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<sup>17</sup> Consultation with John Martin, Queensland Council of Unions (Queensland Sentencing Advisory Council, 17 June 2020).

<sup>18</sup> Submission 14 (Queensland Nurses and Midwives' Union) 4.

<sup>19</sup> Submission 12 (Transport Workers' Union) 11.

<sup>20</sup> Submission 16 (Queensland Council of Unions) 2.

<sup>21</sup> Submission 11 (United Workers Union) 3–5.

Torres Strait Islander people is likely to be a more effective tactic to reduce assaults on public officers than increasing the severity and scope of serious assault provisions.<sup>22</sup>

We propose that the Council should make recommendations directed at reducing assaults on public officers, rather than increasing penalties and criminalisation ... All prison staff should be trained to interact with women within a health and wellbeing framework. Women's mental health, wellbeing and dignity are too readily subjugated to prison management's first priority: 'safety'. For instance, women who are at risk of self-harm or suffering from an acute psychosocial disability episode should be treated at a hospital; they should not be aggressively restrained or placed in solitary confinement ... We recommend proactive policy changes that address the causes of conflict between civilians and public officers:

- Invest in the community by redistributing police and prison funding into more publicly funded rehabilitation and mental health services;
- Invest in education and employment pathways for Aboriginal and Torres Strait Islander people in frontline public officer roles;
- Prioritise trauma-informed and cultural competency training for frontline public officers (including CSOs);
- Facilitate a shift in police culture to prioritise risk-assessment and de-escalation.<sup>23</sup>

In our view, changes in laws, policies and procedures to support greater use of de-escalation (for the majority of cases) and containment (for the minority of cases) would be the greatest course of improvement for frontline safety.<sup>24</sup>

In our earlier submission we noted an international survey of paramedics across 13 countries, which found that to address violence there was a need for better training, better options for restraint, improved communication, advanced warning, improved public education, better situational awareness, and improved inter-agency cooperation... We also support the submissions of other stakeholders that investment in prevention will perhaps be the best means of addressing the issues identified in the Terms of Reference, particularly over the long term. These include more training for staff on de-escalation and managing vulnerable clients.<sup>25</sup>

The QHRC goes on to recommend:

- ... the policy development process more broadly, would be assisted by the introduction of a Justice Impact Test,<sup>26</sup> as recently recommended by the Queensland Productivity Commission.
- Effective alternative measures are available to help address many of the issues identified in the Terms of Reference, including:
  - Addressing the underlying causes of offending behaviour;
  - A renewed focus on justice reinvestment initiatives; and
  - A greater recognition of victims in the Human Rights Act.<sup>27</sup>

The QHRC cited the finding of the NSW Inspector of Custodial Services that inmates serving longer sentences have fewer incentives for good behaviour, and therefore, perversely, longer terms of imprisonment may increase the risk of assault on correctional officers. This report also found:

violence [in correctional centres] was linked to structural or situational factors such as prison design, security levels, management practices, population profile, activity levels, and outside environmental influences (such as overcrowding).<sup>28</sup>

The need for a focus on a strong workplace health and safety framework was also expressed in one of the case studies included in a submission made by the Queensland Occupational Violence Strategy Unit:<sup>29</sup>

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<sup>22</sup> Submission 23 (Queensland Advocacy Incorporated) 6.

<sup>23</sup> Submission 17 (Sisters Inside) 2, 5, 6.

<sup>24</sup> Submission 22 (Aboriginal and Torres Strait Islander Legal Service) 7.

<sup>25</sup> Submission 18 (Queensland Human Rights Commission) 6 [20], 15–16 [57].

<sup>26</sup> A 'Justice Impact Test' as envisaged by the Queensland Productivity Commission, is one that would assess all costs and benefits of the proposal; impacts on key stakeholders, including community members, government and community agencies; and alternative options: Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism* (Final Report, August 2019) Recommendation 4. This is based on a similar model that operates in the UK. For example, changes introduced under the *Assaults on Emergency Workers (Offences) Act 2018* were required to be the subject of a separate assessment by the Ministry of Justice to estimate the impact of the maximum penalties for the new offence of assault or battery on emergency workers and the statutory aggravating factor – including costs to the criminal justice system and impact on the prison population: Explanatory Notes, *Assaults on Emergency Workers (Offences) Bill* (UK) [35].

<sup>27</sup> Ibid 17 [61].

<sup>28</sup> Ibid 5 [16].

<sup>29</sup> Submission 9a (Queensland Occupational Violence Strategy Unit), Appendix 1 (confidential, reproduced with permission).

The job can never be 'safe', but it can be safer, or at least have better control measures in place. (Case study 4)

Like the QHRC, the Office of the Public Guardian (OPG) emphasised that preventative approaches that aim to address the underlying causes of anti-social behaviour by adults with impaired decision-making capacity are more important than 'sentencing options and increased penalties'.<sup>30</sup> Further noting:

The prevalence of such incidences amongst adults with impaired decision-making capacity indicates the need for appropriate mental health services and funding support for people with intellectual disabilities and acquired brain injury. If investment was made in preventative strategies, as opposed to increasing punitive measures, we would anticipate the prevalence of offending would significantly decrease.<sup>31</sup>

The OPG also voiced concerns about the importance of preventative strategies for children and young people. It noted that children with cognitive or intellectual disabilities may have early exposure to the criminal justice system due to their behaviours, and that such early interaction 'can do lasting damage to their development'.<sup>32</sup> The OPG suggested that:

True protection of the community from criminal behaviours, including public officers, relies on the community recognising the value of investment in early interventions that promote children and young peoples' education, health and wellbeing and prevent them from engaging in offending behaviour from the outset.<sup>33</sup>

#### 11.2.4 Current workplace responses by public sector agencies in Queensland

During the consultation process, several agencies referred the Council to their work to create safer workplaces for their staff in relation to occupational violence and followed up with additional information in their written submissions.

The Queensland Police Service (QPS) indicated to the Council that they have done considerable work in the area of addressing assaults on frontline officers, based on research into trends in officer assault and on analysis of injury reports:

Research suggests that reducing officer assaults requires strategies that enhance officer preparedness during confrontations, as well as broader strategies aimed at enhancing community safety and perceptions of police as well as addressing social issues (i.e. substance misuse) (Hine et al 2018, Barrick, Hickman and Strom 2014, Bierie 2017).<sup>34</sup>

The QPS outlined their implementation of a range of strategies to help their frontline staff to manage situations in which assault may occur:

- verbal and non-verbal communication skills and de-escalation training;
- use of personal protection equipment;
- alternative less-lethal use of force options (i.e. taser and capsicum spray);
- dynamic interactive scenario training (including situational use of force);
- incorporation of body-worn cameras;
- cultural awareness training for interacting more effectively with people from Aboriginal and Torres Strait Islander and other culturally diverse backgrounds;
- mandatory mental illness and substance misuse training;
- mental health partnerships to support officers responding to an individual affected by mental illness;
- support for First Year Constables and Field Training Officers;
- promotion of procedural justice to enhance police-community relationships and maximise police legitimacy; and
- addressing substance misuse within community to mitigate risk of officer assault.<sup>35</sup>

As part of operational skills training, the QPS requires all police and recruits in Queensland to practise de-escalation and communication as core skills to achieve the goals of using the minimum amount of force required to resolve a situation. The *Policing with Influence – Tactical Communications* training forms part of the assessment process for

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<sup>30</sup> Submission 24 (Office of the Public Guardian) 4.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid 5.

<sup>34</sup> QPS, *Assault on Frontline Officers*, 30 September 2019, unpublished internal briefing provided via personal communication on 7 July 2020.

<sup>35</sup> Email from Strategic Policy Branch, Policy and Performance, Queensland Police Service to Manager – Policy, Queensland Sentencing Advisory Council 7 July 2020 citing Queensland Police Service, *Strategy and Tactics, Intelligence and Covert Services Command, 'Assault on Frontline Officers'* (30 September 2019) 1–2.

recruits and for annual refresher training for sworn police officers and has been shared across other Queensland Government departments to inform communication training in sectors such as corrections, health, youth justice, and transport.<sup>36</sup>

In addition, contact between members of the police service and people who are vulnerable or who have cultural needs is guided by chapter 6 of the *Operational Procedures Manual* (OPM). This guidance aims to support police in accommodating their responses to vulnerable people to ensure they are not placed at a disadvantage in their interactions with police.<sup>37</sup> The QPS has established a Cultural Engagement Unit that develops and maintains relationships with non-English-speaking and Aboriginal and Torres Strait Islander communities to create stronger relationships with these communities. The Police Liaison Officer program is also intended to provide a communication role between police and diverse community groups to build greater trust and understanding in order to enhance informal connection and discussion.<sup>38</sup>

The QPS has indicated they undertake continual review of current practices, policies, training and prevention activities in line with the research evidence to ensure effective prevention of frontline assault remains a key focus.

A submission to the Council from QCS provided information about training for corrective services officers (CSOs):

CSOs are trained in violence reduction and prevention programs, including the use of relevant tools de-escalation techniques. In addition to this, QCS has implemented measures to increase staff safety, including increasing staffing levels, rolling out body worn cameras and load bearing vests across corrective services facilities, installing additional bunk beds, demand management strategies, extension of prison industries from five to seven days, and implementation of a Modified Unit Routine to alleviate overcrowding pressures.<sup>39</sup>

In response to a report titled *Occupational Violence Prevention in Queensland Health's Hospital and Health Services Taskforce Report 31 May 2016*, Queensland Health established the Queensland Occupational Violence Strategy Unit (QOVSU) and the Occupational Violence Implementation Committee to implement the 20 recommendations made in the Taskforce Report. The QOVSU is responsible for developing, trialling, implementing and evaluating initiatives to prevent and respond to occupational violence in healthcare settings.<sup>40</sup>

The QOVSU provided the Council with copies of the following resources it has developed and implemented since its establishment in 2016:

- a poster campaign titled 'Respect our Staff';
- an occupational Violence Incident Response Kit, developed to provide managers with a resource to support employees when they have been subject to occupational violence;
- the Healthcare Security Officer *Clinical Insider Series*, developed to provide resources to security staff on a range of clinical conditions that may have an impact on the security-patient interaction;
- a fact sheet series;
- the Occupational Violence Competency Framework, which outlines training against a series of core competencies to improve staff skills to prevent occupational violence, techniques to use during a violent incident, and post-incident support processes;
- the Unacceptable Behaviour – Discharge from Care framework, which provides staff with guidance regarding the steps to take when they feel at immediate risk of harm due to violent or aggressive behaviour displayed by a patient, with the aim to use discharge as a last resort; and
- the Peer Support Program, which establishes a trained network of Peer Support Responders who can deliver psychological first aid and provide a 'caring ear for their peers to reach out to in times of need but also provide information to link staff with additional services when needed'.<sup>41</sup>

Some of these initiatives have been evaluated, and many have been rolled out state-wide.

Several stakeholders identified that people with disability, including cognitive impairment, are likely to be overrepresented among those sentenced for assaults on public officers. Although there is no evidence or data to underpin this, other than knowing that people with a mental illness are considerably overrepresented in the prison

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<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

<sup>39</sup> Submission 21 (Queensland Corrective Services) 7.

<sup>40</sup> 'About Us', material provided by Clinical Lead, Queensland Occupational Violence Strategy Unit, Queensland Health by e-mail to Manager – Policy, Queensland Sentencing Advisory Council, 1 June 2020.

<sup>41</sup> Ibid.

population more generally,<sup>42</sup> this is very likely to be the case. A submission received by the Council from the Public Advocate emphasised the need for a broader understanding among frontline staff about the needs and likely behavioural problems that may be displayed by people with disability, and the need for greater awareness of this group in the community:

Consideration of the needs of people with impaired decision-making capacity may extend beyond the scope of legislation to include the mandatory training of front-line staff. This would ensure they are better equipped to deal with people with a range of disabilities and conditions and able to recognise behaviours related to communication difficulties or an expression of pain or discomfort. This could potentially reduce the number of people with impaired decision-making capacity being charged with offences of this nature in the future.<sup>43</sup>

Another mechanism for managing aggressive and violent behaviour from people with disability or mental illness is a suite of interventions known as 'restrictive practices'. These primarily include restraint (chemical, mechanical, social or physical) and seclusion with the primary aim of protecting the person or others from harm. They have the effect of restricting the rights or freedom of movement of a person with disability or mental illness.<sup>44</sup> The use of restrictive practices is authorised under the *Mental Health Act 2016* (Qld) under certain circumstances.<sup>45</sup>

In its submission to the Council, the ACEM spoke about the use of restrictive practices in the ED as being, in many instances, 'a symptom of system failure':

ACEM acknowledges that restrictive practices (including sedation or physical restraint) are often needed to manage agitated or violent patients who pose a risk to themselves, staff or other patients and when all other de-escalation techniques have been unsuccessful. Evidence suggests that patients who are intoxicated with alcohol or other drugs are less likely to respond to verbal forms of de-escalation and are more likely to require sedation compared to patients with a sole diagnoses of mental illness.<sup>46</sup>

The submission goes on to indicate that while the use of restrictive practices is strongly regulated in most jurisdictions, the use of these mechanisms is not routinely documented and data do not exist to indicate how often these approaches are being used in the ED. This indicates a concerning policy gap in relation to the lack of regulation of restrictive practices in Queensland, which the ACEM recommends be addressed by creating clear clinical governance frameworks, standardised documentation tools and clear reporting pathways to enable the issue to be monitored. The Council notes that the National Safety and Quality Health Service (NSQHS) Standards (second edition), released in November 2019, include the following standard requirements for restrictive practices:

Where restraint is clinically necessary to prevent harm, the health service organisation has systems that:

- Minimise and, where possible, eliminate the use of restraint
- Govern the use of restraint in accordance with legislation
- Report use of restraint to the governing body<sup>47</sup>

The primary aim of the NSQHS Standards is 'to protect the public from harm and to improve the quality of health service provision'. All public and private hospitals in Australia are required to be accredited to the NSQHS Standards.<sup>48</sup>

### 11.2.5 Council's view

Most occupational groups the Council spoke to, or who provided submissions, viewed the issue of occupational violence from a workplace health and safety perspective. As outlined here, it has become clear to the Council that a great deal of effort has been invested into preventing and responding to this issue by some industries and agencies. Some workplaces have done a very thorough and extensive job of putting in place mitigation strategies to prevent or reduce the likelihood of staff assault. Others have further to go.

The Council sees great scope for collaboration across workplaces and industry groups to learn from one another about the different approaches taken to prevent and respond to occupational violence. While it has not been the

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<sup>42</sup> Submission 1 (The Public Advocate) 1.

<sup>43</sup> Ibid 2.

<sup>44</sup> Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Report 124, August 2014) 243.

<sup>45</sup> See *Mental Health Act 2016* (Qld) s 24.

<sup>46</sup> Submission 19 (Australasian College for Emergency Medicine) 2.

<sup>47</sup> Australian Commission on Safety and Quality in Health Care, *National Safety and Quality Health Service Standards* (2<sup>nd</sup> ed, 2017) 46.

<sup>48</sup> Australian Commission on Safety and Quality in Health Care, 'Assessment to the NHQHS Standards', (Web Page) <<https://www.safetyandquality.gov.au/standards/national-safety-and-quality-health-service-nsqhs-standards/assessment-nsqhs-standards>>.



primary focus of this review, the Council can see merit in government considering the establishment of a cross-agency working group that includes union membership to advance the work being done in this area. In particular, this work should ensure frontline officers are trained in effective forms of de-escalation, and that approaches involving the use of restraint or force be reserved as options of last resort.

Finally, as indicated in the literature review undertaken by the Griffith Criminology Institute, prevention strategies to reduce and minimise occupational violence require greater research and evaluation, where a crime prevention focus may prove beneficial.<sup>49</sup>

### 11.3 Victims and the criminal justice system

For most victims of crime, the criminal justice response is a critical aspect of acknowledging the full consequences of the offending they have experienced. For each individual victim of crime, what they seek from the criminal justice system may differ. For some, simply reporting the incident to police regardless of the outcome is a symbol that they have taken an important stance against violence at work. For others, a criminal conviction and a substantial term of imprisonment is the outcome they seek.<sup>50</sup>

The sentencing purpose of denunciation encapsulates the function of sentencing as a means of public condemnation of the offending behaviour, thereby reaffirming the core community values that the offender has violated. In publicly denouncing relevant conduct, the court is conveying the community's disapproval. This process is intended to provide an important symbolic acknowledgement that community standards of morality have been offended through the damage done to the dignity of the individual.<sup>51</sup> This was noted in 2013 by the High Court in this way:

the long-standing obligation of the state to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence.<sup>52</sup>

The Queensland Court of Appeal expanded on this sentiment more recently:

The rational connection between sentencing, denunciation and the moral sense of the community has to be explored further in order to understand the role played by s 9(1)(d) of the *Penalties and Sentences Act*. The late Professor Jean Hampton offered an explanation for the relationships between these ideas. Professor Hampton distinguished between wrongs that result only in loss or harm to an individual and wrongs that, whether or not they also cause loss or harm, violate moral standards in a way that constitutes an affront to a victim's value or dignity. Such an affront causes a moral injury. A wrongful act might result in compensable loss but might also be morally excusable – particularly if the wrongdoer accepts responsibility and immediately offers recompense. On the other hand, when a wrong is constituted by an action that treats the victim as worth less as a human being than the offender, or treats the victim as entirely worthless, the commission of the wrong is both an affront to the victim's dignity and an affront to shared community values. The wrong done to the victim constitutes an insult to the community because it disparages one of the community's essential values, namely the value placed upon each precious individual. If permitted, such affronts might eventually corrode general acceptance of such values.<sup>53</sup>

Another interpretation of the principle of denunciation is that, in invoking this as part of the sentencing process, it has the effect of 'social rehabilitation':

the process of social and personal recovery which we attempt to achieve in order to ameliorate the consequences of a crime can be impeded or facilitated by the responses of the courts. The imposition of a sentence often constitutes both a practical and ritual completion of a protracted painful period. It signifies the recognition by society of the nature and significance of the wrong that has been done to affected members, the assertion of its values and the public attribution of responsibility for that wrongdoing to the perpetrator. If the balancing of values and considerations represented by the sentence which, of course, must include those factors which militate in favour of mitigation of penalty, is capable of being perceived by a reasonably objective member of the community as just, the process of recovery is more likely to be assisted. If not, there will almost certainly be created a sense of injustice in the community generally that damages the respect in which our criminal justice system is held and

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<sup>49</sup> Christine Bond et al, *Assaults on Public Officers: A Review of Research Evidence* (Griffith Criminology Institute for Queensland Sentencing Advisory Council, March 2020) 22.

<sup>50</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Executive Summary and Parts I and II* (Royal Commission into Institutional Responses to Child Sexual Abuse, 2017) 159–160. While these comments were made in relation to child sexual abuse victims, they echo the needs of the victim groups more broadly.

<sup>51</sup> Arie Freiberg, Hugh Donnelly and Karen Gelb, *Sentencing for Child Sexual Abuse in Institutional Context* (Royal Commission into Institutional Responses to Child Sexual Abuse 2015) 39–40.

<sup>52</sup> *Munda v The State of Western Australia* [2013] HCA 38 [54] as cited in Freiberg, Donnelly and Gelb (n 51) 40.

<sup>53</sup> *R v O'Sullivan; Ex parte A-G (Qld)* [2019] QCA 300, 36–7 [144] (Sofronoff P and Gotterson JA and Lyons SJA) (citation omitted).

which may never be removed. Indeed, from the victim's perspective, an apparent failure of the system to recognise the real significance of what has occurred in the life of that person as a consequence of the commission of the crime may well aggravate the situation.<sup>54</sup>

In this way, an effective criminal justice response is central to ensuring victims of crime have the confidence in the system to report criminal conduct.<sup>55</sup> In turn, the individual experiences of victims of crime have an important flow-on effect. When a victim of crime has a negative experience (which can exacerbate the victim's trauma), or where a victim's expectations of the criminal justice response are not met, this can influence the views of other members of the community, leading to broader community dissatisfaction and higher levels of under-reporting of offences. As the Council found during its work on sentencing for child homicide offences, better information and support for victims of crime can greatly enhance their experience of the criminal justice system<sup>56</sup> and has potential to contribute to building greater public confidence in the system.

This rest of this chapter considers the current approach to incorporating the 'voice' or experience of a victim of crime in the prosecution and sentencing of an offence, and alternative approaches.

### 11.3.1 Current approach

#### The rights of victims of crime

The Queensland Charter of Victims' Rights sets out the rights and entitlements of victims of crime in Queensland.<sup>57</sup> In summary, these rights include:

- to be treated with courtesy, compassion, respect and dignity, taking into account each victim's needs;
- to have their personal information protected from unauthorised disclosure, and to be protected against unnecessary contact with the accused, or violence or intimidation during court proceedings by the accused, defence witnesses and family members and supporters of the accused;
- to be informed at the earliest practicable opportunity about services (including support services) and remedies available to them;
- to be informed about the progress of the criminal justice process, including progress of the investigations, charges brought against the defendant and substantial changes to these charges or acceptance of a plea of guilty to a lesser charge, and details of court proceedings.

Under the Charter and the provisions of the *Penalties and Sentences Act 1992* (Qld) (PSA), victims also have a right to make a Victim Impact Statement (VIS), which is described further below.

The rights of victims as outlined in the Charter reflect different aspects of procedural justice. Adherence to these principles is important to victims feeling heard and part of the process.

Criminal justice agencies are required to meet certain minimum standards in providing support and assistance to victims. These standards are set out under the *Victims of Crime Assistance Act 2009* (Qld) or VOCAA. Significant changes were introduced to the VOCAA on 1 July 2017 following a review of the legislation,<sup>58</sup> to ensure the legislation 'continues to provide an effective response to assist victims of crime'.<sup>59</sup>

Changes included replacing the former 'Fundamental Principles of Justice for Victims of Crime' in the Act with the current Charter.<sup>60</sup> The Charter informs victims about what they can expect from government departments and non-government agencies that support crime victims. It also places an onus on relevant agencies to provide information to victims proactively, if appropriate and practical to do so. The Charter applies to the QPS and the Office of the Director of Public Prosecutions (ODPP) – the key agencies involved in investigating and prosecuting offences – as well as to non-government agencies funded to provide support to victims.

Information to be provided under the Charter includes:

- the progress of a police investigation (unless this may jeopardise the investigation);

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<sup>54</sup> *DPP v DJK* [2003] VSCA 109 [18], cited in Freiberg, Donnelly and Gelb (n 51) 40–1.

<sup>55</sup> See *DPP v Twomey* [2006] VSCA 90 [22]–[24], cited in Freiberg, Donnelly and Gelb (n 51) 41.

<sup>56</sup> Queensland Sentencing Advisory Council, *Sentencing for Criminal Offences Arising from the Death of a Child* (Final Report, October 2018) 171–2.

<sup>57</sup> *Victims of Crime Assistance Act 2009* (Qld) sch 1AA, pt 1, divs 1–2.

<sup>58</sup> These amendments were made by the *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld).

<sup>59</sup> Explanatory Notes, *Victims of Crime Assistance and Other Legislation Amendment Bill 2016* (Qld) 1.

<sup>60</sup> *Victims of Crime Assistance Act 2009* (Qld) ch 2 and sch 1AA.

- major decisions made about the prosecution of an accused person, including the charges brought against the accused person (or a decision not to bring charges), any substantial changes to the charges, and the acceptance of a plea of guilty to a lesser or different charge;
- the name of the person charged;
- information about court processes including hearing dates and how to attend court, and the outcome of criminal court proceedings against the accused person, including the sentence imposed and the outcome of any appeal; and
- if the victim is a witness at the accused's trial, information about the trial process and the victim's role as a witness.<sup>61</sup>

There are processes that provide for a victim to make a complaint if they feel the Charter has not been followed, but the Charter does not create enforceable legal rights. Victim Assist Queensland (VAQ) can receive complaints about breaches of the Charter relating to any agency, although complaints can also be made directly to the agency concerned.

In the case of a serious assault that occurs in circumstances where the victim is a police officer, the QPS's OPM provides that, where practicable, investigation of the offence should be undertaken by an independent investigation office, such as criminal investigation branch, or child protection investigation unit.<sup>62</sup> There are a number of matters set out to which a senior officer, who is not involved in the relevant incident, must have regard when determining whether an independent officer should investigate the assault including the serious nature of the assault, the injuries sustained, the complexity of the incident, the number of victims and witnesses, the number of suspects, and the availability of resources.<sup>63</sup> It further states as a relevant consideration that 'where practicable the investigator should be senior in rank to the victim'.<sup>64</sup>

### Victims impact statements

The criminal trial in the adversarial legal system is centred on the principle of the independent, impartial and fair prosecution of criminal offending.<sup>65</sup> In the adversarial system, offences are prosecuted by the state rather than by the individual victim of the offence; victims, therefore, appear in court as a witness and/or observer during the process.<sup>66</sup>

As discussed in Chapter 6, where an offence involved the use of, or attempted use of, violence against another person, or that resulted in physical harm, a court must have regard primarily to a number of additional factors. These include the need to protect any members of the community from the risk of physical harm if a custodial sentence were not imposed, the nature and extent of the violence used, or intended to be used, in the commission of the offence, and the personal circumstances of any victim.<sup>67</sup>

The primary way courts currently take the impact on the victim into account is through the use of a victim impact statement (VIS). A VIS is a mechanism for a victim of crime to provide a written account of the impact of an offence on them, which is presented to the sentencing court – most often in a written format to the judge, although sometimes the victim can read the statement to the court, or the prosecutor can read it to the court.<sup>68</sup> This forms part of the court's assessment of the seriousness of the offence and may be accompanied by other evidence of harm tendered to the court in the schedule of facts, a document that generally presents the agreed facts relevant to the case before the sentencing court.

All Australian states and territories have now introduced legislation to facilitate the use of a VIS in the sentencing process, which generally provides:

- who may give a VIS;
- the form a VIS must take; and
- what information a VIS can contain.

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<sup>61</sup> Ibid sch 1AA, pt 1, div 2.

<sup>62</sup> Queensland Police Service, 'Chapter 2 – Investigative Process', *Operational Procedures Manual* (31 July 2020, Issue 77, Public Edition) 26 [2.5.3] 'Investigation of serious assault offences where police officers performing duty are victims'.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Victorian Law Reform Commission 2016) 133.

<sup>66</sup> Edna Erez, 'Victim Impact Statements' (1991) *Trends and Issues in Crime and Criminal Justice* (33) 1.

<sup>67</sup> *Penalties and Sentences Act 1992* (Qld) ss 9(2A)–(3).

<sup>68</sup> Ibid ss 179M–179N.

There is no mandatory requirement for a person to provide a VIS, nor can a court draw any inference about the level of harm caused to a person if no VIS has been provided. The court has discretion to determine how they take the information contained in a VIS into account and how much weight to give to information provided in a VIS. The content of a VIS may also be challenged, particularly if detail contained in the VIS is inconsistent with information previously provided by the person in a police statement or in evidence given to a court.

The statutory requirements applying to the use of victim impact statements were summarised by the Queensland Court of Appeal in *R v Evans*:<sup>69</sup>

- section 15 of the VOCAA [since omitted — but inserted in a modified form in s 179K of the PSA] allows for a VIS to be given to a sentencing court detailing the harm caused to the victim by the offence for the purpose of informing the sentencing court, with provision for the prosecutor to determine what details (if any) are appropriate to be given to the sentencing court, but having regard to the victim's wishes; however, the fact the details of the harm caused to a victim by the offence are absent at sentencing does not give rise to an inference the offence caused little or no harm to the victim;
- section 15 of the PSA provides that 'In imposing sentence on an offender, a court may receive any information ... that it considers appropriate to enable it to impose the proper sentence';
- in accordance with section 132C of the *Evidence Act 1977* (Qld), a sentencing judge or magistrate may act on an allegation of fact that is admitted or is not challenged or, if the allegation of fact is not admitted or is challenged, to act on it if satisfied on the balance of probabilities that the allegation is true (the level of satisfaction varying according to the consequences, adverse to the person being sentenced, or finding the allegation to be true).<sup>70</sup>

In this same judgment, Chesterman JA acknowledged that a VIS not only may serve a therapeutic purpose, but 'may serve other purposes, such as informing the court of 'details of the harm caused ... by the offence', which is often a factor relevant to the level of sentence imposed'.<sup>71</sup>

The potential benefits of using a VIS in sentencing have been identified as including that they:

- allow the victim greater input into the formal court process, thereby reducing the perception of the victim's lack of involvement in the criminal justice process;
- provide a cathartic and psychological benefit to the victim as the victim is allowed to prepare the statement in their own words with less formality than police statements;
- contribute to proportionality<sup>72</sup> and accuracy in sentencing as a result of information provided about the harm experienced by the victim;<sup>73</sup>
- assist in making the sentencing process more transparent and more reflective of the community's response to crime; and
- aid the sentencing court in making an informed decision, particularly when the offender has pleaded guilty and the court has not had an opportunity to hear the complainant's testimony.<sup>74</sup>

However, other commentators have raised concerns about the use and utility of VISs. For example, having the ability to submit a VIS may create unrealistic expectations for victims regarding the level of influence their VIS will have on the sentence outcome.<sup>75</sup> It has been suggested that if victim expectations are not realised in the sentencing process, there is a risk of amplifying victim resentment and disappointment with the criminal justice system, which is contrary to the aims of a VIS.<sup>76</sup> There is also potential for inequity based on the literacy competence of the victim preparing the VIS, and the ability for the victim to clearly understand and articulate the likely future impacts of the crime. This is particularly the case where the real impacts on a victim's life are not evident for some time and may not yet have become apparent at the time of sentencing.

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<sup>69</sup> [2011] 2 Qd R 571.

<sup>70</sup> Ibid 574 [4] — 576 [7] (McMurdo P, Chesterman JA agreeing as to this approach at 577 [15]–[19]).

<sup>71</sup> Ibid 577 [17] (Chesterman JA).

<sup>72</sup> Proportionality is a sentencing principle that sets out that the punishment of an offender should fit the crime. See further Chapter 6.

<sup>73</sup> Edna Erez, 'Victim Participation in Sentencing: Rhetoric and Reality' (1990) 18(1) *Journal of Criminal Justice* (1990) 19.

<sup>74</sup> Joan Baptie, 'The Effect of the Provision of Victim Impact Statements on Sentencing in the Local Courts of New South Wales', (2004) 7(1) *Judicial Review* 73.

<sup>75</sup> Erez (n 73).

<sup>76</sup> Sam Garkawe, 'The Effect of Victim Impact Statements on Sentencing Decisions' (Conference Paper, Sentencing: Principles, Perspectives and Possibilities, 10–12 February 2006).

Others have suggested that the subjective contents contained in a VIS may:

- have the effect of skewing an objective process with the inclusion of possible emotional and vengeful content;
- influence the court to give too great a weight to the effect of the crime on the victim, neglecting other considerations such as the rehabilitation of the offender;
- result in inconsistent sentences when one victim complains of greater psychological injury than another more robust victim; and
- undermine the court's impartiality from unacceptable public pressures.<sup>77</sup>

It is not known how many victims of serious assault provide a VIS as part of the sentencing process in Queensland.

### **Financial assistance and support for victims of crime**

Victims of an act of violence<sup>78</sup> can apply for financial assistance under the VOCAA of up to \$75,000 to aid in their recovery, which may include reimbursement of medical and counselling expenses, incidental travel expenses, loss of earnings of up to \$20,000, loss or damage to clothing, and other exceptional circumstance expenses (e.g. relocation expenses or costs of securing a place of residence). In addition, they can be eligible to be granted up to \$500 in legal assistance incurred by the victim in applying for assistance under the VOCAA.<sup>79</sup>

However, financial assistance cannot be granted under the VOCAA if the person who is the victim of the crime has received, or will receive, payment of an amount in relation to the act of violence from another source.<sup>80</sup> For victims of serious assault, therefore, an application for assistance from WorkCover must be made and finalised before applying for financial assistance under the VOCAA.

Chapter 2 presents information from WorkCover regarding applications for assistance by workers who have been victims of workplace violence.

In its submission to this review, Legal Aid Queensland proposed two potential amendments to this framework, as follows:

- that the limitations imposed under Part 3 of VOCAA in relation to the payments of special assistance could be removed to enable public officers injured in the course of their duties to be paid a special recognition payment regardless of whether they are paid any lump sum payment under the *Workers' Compensation and Rehabilitation Act 2003* (Qld) if an act of violence has been committed against them while they have been performing duties; and
- amendment to the circumstances listed in section 1(3) of Schedule 2 to enable an 'uplift' from a lower to a higher category in special assistance payments on the basis that the victim was a public officer injured in the course of their duties.<sup>81</sup>

The QNMU noted the financial impact to nurses and midwives who must attend court, which is often during their work hours. The QNMU acknowledged assistance may be provided by the hospital and health service but believes 'it is worth considering as part of responding to a victim's needs'.<sup>82</sup>

The Council has not specifically addressed these recommendations on the basis that they do not directly relate to the request to provide advice about the current offence, penalties and sentencing framework that guides responses to these offences. However, to the extent that these sorts of measures may contribute to greater support for victims of these offences, they may be matters worthy of further investigation.

### **Restitution and compensation**

As part of the sentencing process, and in addition to any other sentence imposed, a court may order that an offender:

- make restitution of property that has been damaged or taken in association with the commission of an offence (a restitution order);

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<sup>77</sup> Erez (n 66); William Cox, 'Sentencing and the Criminal Law: Address at the University of Tasmania Faculty of Law Graduation Ceremony' (2005) 24(2) *University of Tasmania Law Review* 173.

<sup>78</sup> See *Victims of Crime Assistance Act 2009* (Qld) s 21.

<sup>79</sup> *Ibid* ss 37–39.

<sup>80</sup> *Ibid* s 21(4).

<sup>81</sup> Submission 29 (Legal Aid Queensland) 4.

<sup>82</sup> Submission 14 (Queensland Nurses and Midwives' Union) 4.

- pay compensation to a person for loss or destruction of property in connection with the commission of an offence (a compensation order);
- pay compensation for an injury suffered by someone because of the commission of an offence (a compensation order).<sup>83</sup>

Restitution 'means the return or redelivery of particular property', as distinct from 'compensation for damage to it'.<sup>84</sup> Therefore, 'It follows that compensation orders for damage or loss to property or the person will be made in the majority of cases'.<sup>85</sup>

Such orders are not a form of punishment [although they are part of the sentence] but a summary and inexpensive method of compensating a person, avoiding the need to institute separate proceedings to establish civil liability. The potentially punitive consequences of such an order are relevant in considering the appropriateness of the overall sentence taking into account here that the applicant might be sent to prison for non-payment of the compensation.<sup>86</sup>

Any order made by the court under section 35 of the PSA can include details as to the amount of money to be paid by way of restitution or compensation, the person to whom the money is to be paid, the timeframe within which the money must be paid, and the details of how the money must be paid.<sup>87</sup> The court may also order that the offender may be imprisoned if they fail to pay the restitution or compensation. On written application to the court, the length of time to pay may be extended.<sup>88</sup>

The PSA twice states that, if necessary, the imposition of a fine comes second to compensating a victim. A sentencing court must give preference to making an order for compensation – but may also impose a sentence other than imprisonment – if the offender cannot pay both the compensation and the fine or similar amount, even though both would be appropriate.<sup>89</sup> Also, where it would be appropriate both to impose a fine and to make a restitution or compensation order, a sentencing court must give more importance to restitution or compensation, if the offender does not have the means to pay both.<sup>90</sup>

The imposition of a term of imprisonment may mean that compensation is not a reasonable prospect. The Court of Appeal has stated that:

In the absence of cogent evidence that an offender has the capacity to pay compensation after release from a term of actual imprisonment imposed as part of a sentence, courts are reluctant to order offenders to pay compensation after serving a term of imprisonment. To do so may jeopardise the offender's prospects of rehabilitation; it would be apt to amount to a crushing sentence and would risk setting up the offender to fail at the time of release from prison when most in need of support to reintegrate into society.<sup>91</sup>

In that case, the default term of imprisonment the offender was liable to serve if he or she failed to pay the compensation upon his or her release, would, as a matter of law, be cumulative on the term imposed for the offence itself – 'the court held that this order made the overall sentence manifestly excessive'.<sup>92</sup>

Table 11-1 shows that Court data from the Courts Database for the period 2012–13 to 2018–19 indicates that, of the 7,912 cases involving a serious assault, 14.5 per cent involved one or more compensation orders (n=1,150). The average amount of compensation ordered was \$773.42, and the highest amount of compensation was \$14,500.00. Unfortunately, the data are unable to differentiate between compensation that relates to property and compensation that relates to a personal injury, so this detail cannot be provided. These compensation orders relate only to sentencing orders made under section 35 of the PSA and do not include compensation or financial assistance provided to victims that is not part of the sentencing process, such as a victim's right to seek

<sup>83</sup> *Penalties and Sentences Act 1992* (Qld) s 35.

<sup>84</sup> *R v Ferrari* [1997] 2 Qd R 472, 475 (McPherson JA, Davies JA and White J agreeing), citing *R v Beldan, Ex parte A-G* [1986] 2 Qd R 179, 198.

<sup>85</sup> John Robertson and Geraldine MacKenzie, Thomson Reuters, *Queensland Sentencing Manual* (online at 3 March 2020) [15.2050].

<sup>86</sup> *R v Allison* [2012] QCA 249, 5 [27] (Douglas J, Fraser and White JJA agreeing), citing *R v Ferrari* [1997] 2 Qd R 472, 477 for the first sentence, and *R v Matauaina* [2011] QCA 344, [35] for the second. As to the statutory power to provide a set period of time within which to pay (or referral under the *State Penalties Enforcement Act 1999* (Qld)) and power to order imprisonment if the offender fails to comply with the order, see *Penalties and Sentences Act 1992* (Qld) ss 36–39.

<sup>87</sup> *Penalties and Sentences Act 1992* (Qld) s 36.

<sup>88</sup> *Ibid* s 38.

<sup>89</sup> *Ibid* s 14.

<sup>90</sup> *Ibid* s 48(4).

<sup>91</sup> *R v Flint* [2015] QCA 275, 9 [24] (McMurdo P, Morrison JA and Jackson J agreeing). See also *R v Jacobs* [2016] QCA 028.

<sup>92</sup> Robertson (n 85) [15.2125]. See also [15.2120] discussing *R v Silasack* [2009] QCA 88.

compensation by making a WorkCover claim and, once their WorkCover application has been finalised, to seek financial assistance under VOCAA.

Restitution orders were imposed in 137 cases involving a serious assault (1.7% of cases) with an average amount of \$729.10 per case.

**Table 11-1: Restitution and compensation orders for serious assaults of a public officer**

| Order               | N<br>(cases) | %<br>(of all cases) | Average<br>amount<br>(by case) | Minimum | Maximum     |
|---------------------|--------------|---------------------|--------------------------------|---------|-------------|
| <b>Compensation</b> | 1,150        | 14.5%               | \$773.42                       | \$10.00 | \$14,500.00 |
| <b>Restitution</b>  | 137          | 1.7%                | \$729.10                       | \$8.90  | \$5,000.00  |

Data include adult and juvenile, lower and higher courts, sentenced 2012–13 to 2018–19.

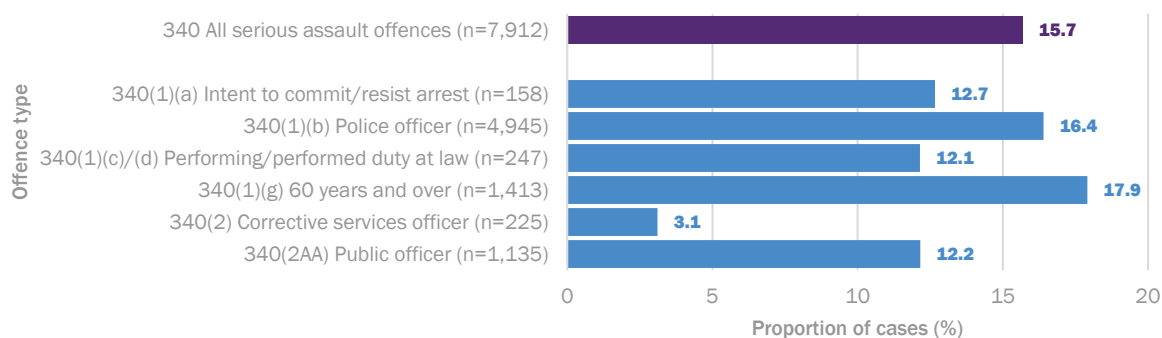
Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

Note: Orders within a case were summed to create a total compensation amount and a total restitution amount per case and then averaged.

In the subsequent analyses, restitution orders and compensation orders are examined collectively. Due to the small number of cases involving restitution, and the fact that the data do not distinguish between compensation involving property and compensation involving personal injury, it was not possible to analyse these penalties separately.

Approximately one in six serious assault cases involved a compensation and/or restitution order (15.7%). This percentage was slightly higher when the offence was serious assault of a person aged 60 years and over (17.9%) or a police officer (16.4%). Assault of a corrective services officer was the least likely to result in a compensation and/or restitution order being made – see Figure 11-1.

**Figure 11-1: Proportion of serious assault cases receiving a compensation and/or restitution order**



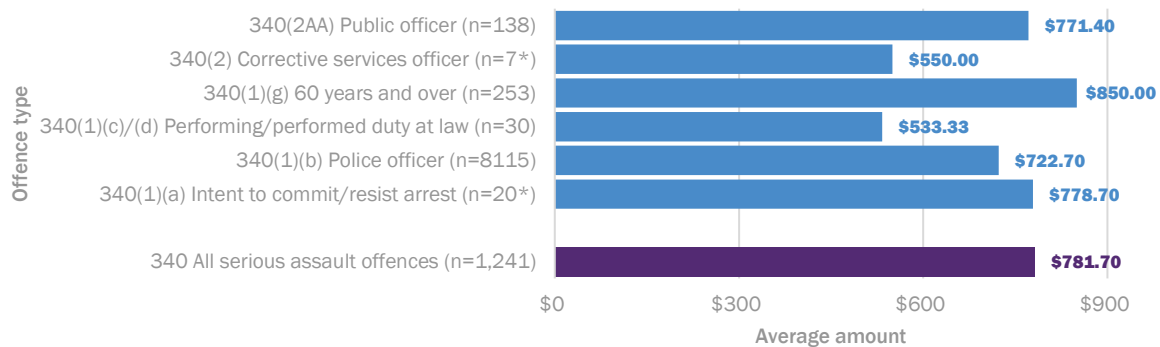
Data include adult and juvenile, lower and higher courts, sentenced 2012–13 to 2018–19.

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

The average amount of compensation and/or restitution was \$781.70 per case. The average payment was highest when the assault involved a victim aged 60 years and over at \$850.00, and lowest for assault of a person performing/performed a duty at law – see Figure 11-2.

For more information about the amount of restitution and/or compensation for specific subsections of section 340, please refer to Table A4-4 in Appendix 4.

**Figure 11-2: Average amount of compensation and/or restitution ordered for serious assault cases**



Data include adult and juvenile, lower and higher courts, sentenced 2012–13 to 2018–19.

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

Note: (\*) Small sample sizes

Submissions commenting on the criminal justice system response, and the many technical issues associated with it in the prosecution and sentencing for assaults on public officers, have been cited throughout this report. Victims of workplace assault have provided comments that are set out in Chapter 5.

### 11.3.2 Council's view

Many victims of crime who shared their stories with the Council spoke about their dissatisfaction with the criminal justice system. A 2019 report on imprisonment and recidivism by the Queensland Productivity Commission (QPC), discussed further below, eloquently describes the criminal justice system as being strongly built around offenders, leaving victims little role to play:

The criminal justice system mainly focuses on criminals, not on the victims of crime.

In criminal matters, the state is currently the litigant and victims largely play a passive role in the process. The offender's 'debt' is paid to the state, often in the form of a prison sentence. The victim plays no role in the setting of the sentence and typically receives no compensation from the offender for the harm done and there is little opportunity for restoration.<sup>93</sup>

The Council's 2018 report on sentencing for offences arising from the death of a child observed the need for improvement in the provision of information and support for family members who engage with the criminal justice system through prosecution of homicide offenders. The Council made specific recommendations for this sub-group of victims, whose considerable loss was acknowledged and deserving of much better assistance through the court process than was available at the time.<sup>94</sup>

It is clear that more could be done to ensure all victims of crime, particularly victims of personal offences, are supported and kept informed about the progress of court matters once they have reported an assault to police.

The QPC recommends that a victim restitution and restoration system be adopted in Queensland. In its response to the recommendations made by the QPC in its report, the Queensland Government has acknowledged the potential for restitution and restorative justice approaches to deliver improved outcomes for victims, offenders and communities and has committed to 'develop an updated Adult Restorative Justice Conferencing model and will consider opportunities to expand the use of restorative justice conferencing in Queensland with a view for improving outcomes for victims of crimes and offenders'.<sup>95</sup>

The Council endorses an approach to improving the experience of victims of crime that includes adult restorative justice conferencing.

<sup>93</sup> Queensland Productivity Commission (n 26) xxxii.

<sup>94</sup> Queensland Sentencing Advisory Council (n 56) xxxix-xl.

<sup>95</sup> Queensland Government, *Queensland Productivity Commission Inquiry into Imprisonment and Recidivism: Queensland Government Response* (Queensland Government, January 2020) 7.



## 11.4 Restorative justice – the potential for improved outcomes

Restorative justice is commonly defined as follows:

A process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future.<sup>96</sup>

Restorative justice conferencing has been a mechanism in place for children for several decades. Conferencing was initially trialled in Queensland in 1997 as a dual diversion and sentencing option. Following its evaluation it was expanded until, in 2013, court-referred conferencing was ended as part of the then government's election commitment, leaving only police referrals for conferencing. After a change of government in 2015, both diversionary and court-ordered restorative justice processes were reinstated and have been a key feature of the youth justice system ever since.<sup>97</sup>

A youth justice restorative justice process can take the form of a conference or an alternative diversion program.<sup>98</sup> Police can refer children to conferencing, diverting them from the court system.<sup>99</sup> Courts can make:

- a court diversion referral, to allow the offence to be appropriately dealt with without making a sentence order;<sup>100</sup> or
- a pre-sentence referral (to help the court make an appropriate community-based order or detention order).<sup>101</sup>

A restorative justice conference under the *Youth Justice Act 1992* (Qld) involves a meeting between (amongst others entitled to participate) a young person who has committed an offence, the victim of the offence (or victim participation through attendance of their representative or a representative of an organisation that advocates on behalf of victims of crime, or the victim's pre-recorded communication),<sup>102</sup> a trained convenor and a support person for both parties, with the aim being to restore the harm done through an agreement between the parties.<sup>103</sup>

The conference ends with the making of a 'conference agreement' or when the convenor ends it because the child fails to attend or denies committing the offence at the conference or the convenor concludes that an agreement is unlikely to be made due to 'a participant's conduct or failure' or is unlikely to be made within an appropriate time.<sup>104</sup>

The signed conference agreement involves the child admitting to having committed the offence and undertaking to address the harm caused. It cannot 'provide for the child to be treated more severely for the offence than if the child were sentenced by a court or in a way that contravenes the sentencing principles' in the YJA.<sup>105</sup>

An evaluation of the Restorative Justice Project, which reinstated court-referred conferencing and enhanced the existing model, was published in 2018 and demonstrated that after the first 12 months, the following outcomes had been reached:

- There was a high rate of compliance with completing the agreements reached during conferencing, with 96 per cent having been completed during the 12-month period. These resulted in apologies, restitution, completion of volunteer work and participation of young people in therapeutic or educational programs.
- Of the 300 young people who had participated, 59 per cent did not reoffend in the six months following the conference, 7 per cent showed a substantial decrease in the magnitude of reoffending, and 11 per cent showed a small decrease in the magnitude of their offending;

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<sup>96</sup> Tony F Marshall, *Restorative Justice: An Overview* (Home Office: London, 1999).

<sup>97</sup> Department of Child Safety, Youth and Women, *Restorative Justice Project: 12-Month Program Evaluation* (Queensland Government, 2018) 13–14 [1.2]–[1.3]. See Part 3 of the *Youth Justice Act 1992* (Qld) ('Restorative justice processes').

<sup>98</sup> *Youth Justice Act 1992* (Qld) s 31. 'An alternative diversion program is a program, agreed to by the chief executive and the child, that involves the child participating in any of the following to address the child's behaviour – (a) remedial actions; (b) activities intended to strengthen the child's relationship with the child's family and community; c) educational programs': Ibid s 38(1). It must be designed to '(a) help the child to understand the harm caused by his or her behaviour; and (b) allow the child an opportunity to take responsibility for the offence committed by the child': s 38(2).

<sup>99</sup> Ibid s 22. The referral is done instead of bringing the child (who must admit to committing the offence and be willing to comply with the referral) before a court for the offence.

<sup>100</sup> Ibid ss 163(1)(d)(i) and 164.

<sup>101</sup> Ibid ss 163(1)(d)(ii) and 165.

<sup>102</sup> Ibid s 35(1).

<sup>103</sup> Ibid s 34.

<sup>104</sup> Ibid s 35(5).

<sup>105</sup> Ibid s 36.

- Most victims (89%) and young people (85%) indicated they were satisfied with the outcome of the conference.<sup>106</sup>

In the context of adult offending, the model is similar in the practical operation of conferences, but there is no explicit statutory power in sentencing legislation to order, or recognition of, such a procedure.<sup>107</sup> It is called ‘adult restorative justice conferencing’ (ARJC) and was previously known as justice mediation. The ability to use the process as a pre-sentence option stems from the courts’ powers to adjourn matters.<sup>108</sup> Queensland Government information notes that:

Participation in adult restorative justice conferencing is always voluntary. The court, police, prosecutor or corrective services can refer people to conferencing. Victims, defence solicitors and barristers can also suggest it ... A conference usually occurs before a court hearing or sentencing, but can happen at any stage of the criminal justice process.<sup>109</sup>

The key gatekeeper in terms of a matter’s eligibility for ARJC is the Department of Justice and Attorney-General’s Dispute Resolution Branch. The Dispute Resolution Branch applies eligibility criteria that are detailed in the relevant court referral form:

- a) that a person has been charged, or there is sufficient evidence to charge the offender at law
- b) that both the victim and offender express a willingness for the matter to be referred to an Adult Restorative Justice process
- c) the offender does not have a history of related offences within the last five (5) years; nor a conviction dealt with on indictment in the District or Supreme Court
- d) the offender is not in breach of any order at the time of the commission of the current offence
- e) the offender has not participated in an Adult Restorative Justice process previously
- f) the offence is not arising out of conduct about which an application for a domestic violence / protection order is based, has been made and/or any breach of such order
- g) the offender is not in breach of any release conditions
- h) there are no orders or conditions (including undertakings as to bail), which prevent contact between the parties for the purposes of an Adult Restorative Justice process.<sup>110</sup>

Being resource-specific, ARJC is not necessarily available in every court in Queensland. The QPS OPM notes that ‘qualified mediators from the Dispute Resolution Branch (DRB) of the Department of Justice and Attorney-General (DJAG) provide ARJC under the Dispute Resolution Centres Act for criminal matters’<sup>111</sup> in Magistrates Courts at nine locations: Brisbane City, Holland Park, Ipswich, Gold Coast, Coolangatta, Cleveland, Richlands, Townsville and Cairns. Further, ‘ARJC is provided from four offices in Southport, Brisbane, Townsville and Cairns. Additionally, the

<sup>106</sup> Department of Child Safety, Youth and Women (n 97) 8–9.

<sup>107</sup> However, Magistrates Courts have power, after a summons is issued (but before the matter is before the court) to ‘order the complainant to submit the matter to mediation under the *Dispute Resolution Centres Act 1990* ... [if] the magistrate or clerk considers that the matter would be better resolved by mediation than by proceeding on the summons; or ... the complainant consents to the order’: *Justices Act 1886* (Qld) s 53A. ‘If the complainant gives the clerk of the court written notice that the dispute has been resolved by mediation ... the summons may not be served, and no other action may be taken on the summons’: s 54(5)(b). See Queensland Police Service, ‘Chapter 3 – Prosecution Process’, *Operational Procedures Manual* (31 July 2020, Issue 77, Public Edition) 11 [3.3.3] ‘Clerk or Magistrate order for referral for restorative justice conferencing after proceedings have been commenced’. Note that a summons includes a notice to appear: s 53B (note), citing *Police Powers and Responsibilities Act 2000* (Qld), s 388(2)(a). ‘Mediation includes— (a) the undertaking of any activity for the purpose of promoting the discussion and settlement of disputes; and (b) the bringing together of the parties to any dispute for that purpose, either at the request of 1 of the parties to the dispute or on the initiative of a director; and (c) the follow-up of any matter the subject of any such discussion or settlement’: *Dispute Resolution Centres Act 1990* (Qld) s 2.

<sup>108</sup> See, for instance, *Justices Act 1886* (Qld) s 88(1B): ‘The power to adjourn a hearing conferred upon justices or a justice by subsection (1) includes power to adjourn a hearing to enable the matter of a charge of a simple offence or breach of duty to be the subject of a mediation session under the *Dispute Resolution Centres Act 1990*’.

<sup>109</sup> Queensland Government, ‘About adult restorative justice conferencing’ (15 June 2018), <https://www.qld.gov.au/law/legal-mediation-and-justice-of-the-peace/settling-disputes-out-of-court/restorative-justice/about>.

<sup>110</sup> Queensland Government, *Adult Restorative Justice Conferencing Conference Referral* (Form 1a) 3 <[https://www.justice.qld.gov.au/\\_\\_data/assets/pdf\\_file/0011/561917/referral-form-adult-restorative-justice-conferencing.pdf](https://www.justice.qld.gov.au/__data/assets/pdf_file/0011/561917/referral-form-adult-restorative-justice-conferencing.pdf)>.

<sup>111</sup> Queensland Police Service, ‘Chapter 3 – Prosecution Process’, *Operational Procedures Manual* (31 July 2020, Issue 77, Public Edition) 9 [3.3] ‘Adult Restorative Justice Conferencing’.

local Community Justice Groups from Mornington Island (Junkuri Laka) and Aurukun provide restorative justice services'.<sup>112</sup>

The QPS's OPM defines and describes the ARJC process as follows:

A restorative justice conference (RJC) generally involves a face-to-face meeting between an offender and a victim to discuss the impact of the offender's actions and reach agreement in relation to reparation for the harm caused to the victim and/or community by the offence committed by the offender. The RJC provides an opportunity for the offender to take responsibility for the offender's actions, and for the victim to hold the offender accountable in a way that is meaningful for the victim.

Restorative justice approaches conceptualise crime as a violation of another (the victim) which causes harm, rather than a violation of the law to be punished by the State. This violation creates obligations for the person who caused the harm (the offender), including the responsibility to make amends for the harm caused by:

- (i) accepting responsibility for the offender's actions;
- (ii) providing a meaningful apology;
- (iii) other steps, such as the provision of restitution or compensation; and/or
- (iv) completing counselling or other programs.

Restorative justice has unique benefits including increased victim satisfaction, offender responsibility for actions and compliance with outcomes compared with prosecution.

The objectives of restorative justice are:

- (i) supporting victims and enabling them to participate in the resolution process;
- (ii) repairing relationships damaged by crime;
- (iii) denouncing criminal behaviour as unacceptable and reaffirming community values;
- (iv) encouraging offenders to take responsibility for their behaviour;
- (v) identifying restorative, forward-looking outcomes; and
- (vi) reducing recidivism.<sup>113</sup>

In relation to the eligibility criteria for adult restorative justice conferencing, police are instructed to follow listed criteria, which largely reflect the Dispute Resolution Branch listed above.

The QPS criteria further stipulate that the offence is one that 'is dealt with summarily or, where appropriate, an indictable offence which cannot be dealt with summarily [and] can be substantiated by sufficient evidence'.<sup>114</sup>

The offender must have been an adult at the time of the offence and accept 'the general circumstances of the matter and expresses a willingness for the matter to be referred', and must not have been, at the time of the commission of the offence, subject to a community-based order, serving a term of imprisonment, on parole, or subject to a suspended sentence. Despite the criteria, the officer in charge 'of the relevant police prosecution corps may authorise the referral of a matter to ARJC'.<sup>115</sup>

The OPM notes that there are two forms of adult restorative justice conference open to police:

- (i) investigating officers, as an alternative to commencing proceedings for the offence ('police referral'); or
- (ii) police prosecutors, after proceedings for the offence have been commenced ('prosecutor referral').<sup>116</sup>

It further notes that:

Referrals can also be made pre-sentence after a guilty finding in the Court, and post-sentence for an offender who is serving a term of imprisonment or who is being managed by Queensland Corrective Services in the community.<sup>117</sup>

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<sup>112</sup> Ibid 10.

<sup>113</sup> Ibid 9.

<sup>114</sup> Ibid 10.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid. See also at 11 [3.3.2] 'Responsibilities for Adult Restorative Justice Conferencing'.

The current OPM contains a direction to police:

Officers and prosecutors are not to refer a matter involving a victim, who is an officer and was in the performance of the officer's duties at the time of the offence, to ARJC.<sup>118</sup>

In discussions with the Adult Restorative Justice Conferencing team within the Dispute Resolution Branch, which delivers conferencing in Queensland, it appears this was a policy decision made by DJAG in 2014 due to the potential conflict of interest that may operate in having police, who are the victims of an assault, but who are also bringing the charge, being involved in making the referral for a conference.<sup>119</sup> The Council has been advised that DJAG has now commenced work with the QPS to design a policy response to resolve potential conflicts of interest and overcome barriers for police officer complainants to access ARJC.<sup>120</sup>

Referral statistics provided by DJAG demonstrate that the number of referrals for adult restorative justice conferencing has been in decline since 2009–10. Referrals for serious assault offences are generally below 5 per cent of all referrals, although Table 11-2 shows that the highest proportion of referrals for serious assault were made in 2018–19. DJAG advised that it is important to note that, as regards the numbers in Table 11-2 below, there is no differentiation between serious assaults against police and other public officers and those against people over 60 – and the majority of these referrals may be for serious assaults against people over 60.<sup>121</sup>

**Table 11-2: Serious assault referrals for adult restorative justice conferencing as a percentage of all referrals, 2009–10 to 2018–19**

| Year    | Total referrals | Serious assault | Per cent |
|---------|-----------------|-----------------|----------|
| 2009–10 | 786             | 0               | –        |
| 2010–11 | 717             | 0               | –        |
| 2011–12 | 540             | 3               | 0.5      |
| 2012–13 | 524             | 20              | 3.8      |
| 2013–14 | 497             | 15              | 3        |
| 2014–15 | 513             | 18              | 3.5      |
| 2015–16 | 410             | 10              | 2.4      |
| 2016–17 | 440             | 20              | 4.5      |
| 2017–18 | 338             | 9               | 2.7      |
| 2018–19 | 333             | 23              | 6.9      |

Source: Unpublished data provided by Adult Restorative Justice Conferencing, Dispute Resolution Branch, DJAG.

Note: Data on serious assault in this table do not identify which s 340 victim category is the subject of these referrals. Victims of serious assault can include public officers, people aged over 60 years, and people who rely on a guide, hearing or assistance dog, wheelchair or other remedial device.

A successful ARJC process will usually see the charges discontinued in court. As the OPM explains:

The completion of a restorative justice conference (RJC), including finalisation of all terms of the agreement, should result in the discontinuation of the investigation or prosecution of a matter. Continuation of an investigation or prosecution despite a successful RJC outcome may undermine the value of Adult Restorative Justice Conferencing.

Upon being notified by the Dispute Resolution Branch, Department of Justice and Attorney-General the restorative justice conference (RJC) has been successful, the investigating officer or prosecutor is to finalise the matter in the public interest ...

Continuing the investigation or prosecution of the matter despite a successful restorative justice conference should only occur if there are exceptional circumstances.

If it is determined an investigation or prosecution should proceed despite the completion of a RJC and the successful fulfillment of the terms of the Restorative Outcome Plan, the participation of the defendant may be submitted as mitigating factors at the sentence hearing.<sup>122</sup>

The QPC's Final Report, *Inquiry into Imprisonment and Recidivism*, devoted an entire chapter to 'A victim-focused system'. Recommendation 8 was that 'the Queensland Government should introduce victim-focused restitution and

<sup>118</sup> Ibid 10.

<sup>119</sup> Consultation with Richard Denning, Manager, Adult Restorative Justice Conferencing, 26 May 2020.

<sup>120</sup> Email from Manager, Adult Restorative Justice Conferencing, Dispute Resolution Branch DJAG to Director, Queensland Sentencing Advisory Council, 11 August 2020.

<sup>121</sup> Ibid.

<sup>122</sup> Queensland Police Service, 'Chapter 3 – Prosecution Process', *Operational Procedures Manual* (31 July 2020, Issue 77, Public Edition) 12 [3.3.6] 'Finalisation of an Adult Restorative Justice Conferencing referral'.

restoration into the sentencing process'. While its scope extends beyond an acceptance and even expansion of ARJC, it was highly supportive of ARJC as a part of sentencing in Queensland and included:

- giving victims the option of engaging in a pre-sentence restitution and restoration process;
- charging and/or the sentencing process which take into account agreements reached between the victim and offender; and
- making these options available for any offence where a victim is identifiable.<sup>123</sup>

It noted that 'the very small scale of adult restorative justice processes in Queensland forecloses one avenue for addressing high recidivism rates' and that 'restorative justice conferencing can reduce reoffending' and that 'in-prison restorative justice programs can also assist in reducing recidivism'.<sup>124</sup> Furthermore:

- For victims and offenders for whom restorative justice practices are suitable, the processes have been found to increase victim satisfaction with the criminal justice system.
- Consultations and stakeholder submissions provided strong support for an expansion of existing restorative justice processes.<sup>125</sup>

In its response, the Queensland Government acknowledged 'the potential for restitution and restorative justice approaches to improve outcomes for victims, offenders, and communities' and stated:

Consistent with the QPC's call for an expansion in the use of restitution and restorative justice, the Queensland Government will develop an updated Adult Restorative Justice Conferencing model and will consider opportunities to expand the use of restorative justice conferencing in Queensland with a view for improving outcomes for victims of crimes and offenders.

Specific QPC proposals will be considered as part of this process.<sup>126</sup>

The Council has been made aware of a Victorian report published in 2018 that raises the important issue of equality of access to diversionary mechanisms. The diversion schemes available in Victoria, such as restorative justice conferencing, can only be considered for a matter where the prosecution consents to its use. This report raises the potential need for some form of guidance to scaffold the discretion of Victoria Police informants and prosecutors to make referrals for diversionary schemes, to avoid inconsistent decisions being made in this regard.<sup>127</sup> Any enhanced adult restorative justice conferencing scheme in Queensland would need to ensure appropriate guidance is in place so access to such schemes is considered for all eligible cases.

#### 11.4.1 Stakeholder views

Submissions made by the Bar Association of Queensland, the Queensland Law Society, the Queensland Council of Unions, and Legal Aid Queensland all supported the potential for increased use of adult restorative justice conferencing for offences of assault on a public officer:

An element lacking in the sentencing process for adult offenders is the disconnect between the defendant and public officer victim. There is a superficial or general understanding of the impact violent actions have upon an individual complainant by the defendant, and in the reverse, no consistent means of complainants obtaining an understanding of the personal situation of the defendant.<sup>128</sup>

... a process that may be considered is a pre-sentence conference between the victim and defendant, though the availability and utility of such a conference will depend on the victim's willingness to participate and the defendant's remorse. Where adopted, the process could be therapeutic for both the victim and the defendant, allowing the victim to confront the defendant and the defendant to express their remorse.<sup>129</sup>

A further initiative which could be considered in lieu of harsher or increased penalties is the use of restorative justice, as a means of addressing in particular repeat offenders and potentially to reduce recidivism in certain cases, and the costs to the criminal justice system. In particular, restorative justice could be considered an appropriate policy response in circumstances, where there is an ongoing relationship between the parties, such

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<sup>123</sup> Queensland Productivity Commission (n 26) 276.

<sup>124</sup> Ibid 259.

<sup>125</sup> Ibid 250.

<sup>126</sup> Queensland Government (n 95) 7.

<sup>127</sup> Liberty Victoria and Rights Advocacy Project, *Justice Diverted? Prosecutorial Discretion and the Use of Diversion Schemes in Victoria* (Rights Advocacy Project 2018).

<sup>128</sup> Submission 27 (Bar Association of Queensland) 3.

<sup>129</sup> Submission 30 (Queensland Law Society) 3.

as between teachers, parents and/or children within the school system and local communities, which could otherwise result in the under-reporting of assaults or other forms of abuse.<sup>130</sup>

Restorative justice measures for adults are presently underutilised or deemed not suitable. Given personal deterrence is a significant factor in sentencing for these types of offences and the significance of the victim's role and duties in the circumstance of the offence, LAQ sees great benefit in broadening this option in these matters.<sup>131</sup>

A potential to enhance the process could be an adult restorative justice program to run parallel with the sentencing process. There could be a referral process at the point a plea of guilty is indicated and the process resolved prior to the matter finalising as a sentence. Not all of matters would require active involvement of the complainant, a victim liaison body could appear and place before the defendant any relevant issues on a complainant's behalf. In recent times the court has adapted to allow video link processes for sentence procedures involving prisoners. Similarly, incarcerated defendants could undergo restorative justice in this way. The public officer victim would have greater ownership or at least a platform to articulate their needs whilst adding an additional rehabilitative component to the sentencing process.<sup>132</sup>

The Aboriginal and Torres Strait Islander Legal Service (ATSILS) suggested that there might even be benefits in considering a 'compulsory mediation process', drawing on models that exist in personal injury cases and some other areas of law, which it suggested could provide 'a powerful contributor to improved frontline safety'.<sup>133</sup> It saw this as potentially avoiding this option being 'refused or discounted' without proper consideration first being given to its benefits.

The Queensland Teachers' Union saw potential in developing specialist responses that might be applied in a school context, commenting:

Some schools across Queensland currently use restorative justice principles to guide student behaviour management. It is not, therefore, a stretch to imagine that the system could be developed and enhanced in consultation with all stakeholders, but especially students, teachers, principals and parents, to uphold current protections under the law while delivering effective responses to victims of assaults in a school setting. The QTU does not have a formed view on what such a system might look like. The emphasis here is on development by and for the school communities of Queensland where such a system might be applied.<sup>134</sup>

This option was also viewed positively by a nurse victim of assault interviewed by the Council:

Yes. Absolutely. People need to know that I had to explain to my kids that when I went to do my job, I came home because you punched me, and I couldn't talk to them properly for two weeks. I couldn't eat properly for two weeks. Because they've [the offender] probably never thought about it again. That would be great. And I'm sure not everyone would want to do that. But I would. Absolutely. They need to know what they've done because I think they just don't see the impact.

#### 11.4.2 Council's view

The Council considers there is substantial merit in the Queensland Government investigating the expanded use and availability of adult restorative justice conferencing as part of a broader criminal justice response to assaults on public officers and others who are assaulted at work. This program, which gives victims the ability to meet face-to-face with the offender in a supportive environment, was viewed very positively by a wide range of stakeholders during consultations and in submissions.

Although restorative justice conferencing may not be an option all victims wish to pursue, many stakeholders commented on its potential to improve victim satisfaction by giving victims a role as active participants in the process and allowing them to communicate the harm that has been caused by the offender's actions other than through the making of a victim impact statement. It may also provide victims with greater confidence in the outcome.

In the case of less serious forms of offending — such as matters that otherwise might have been dealt with by way of a summary charge of assault or obstruct — such a process may operate as an effective diversionary measure. In other circumstances, involving more serious forms of offending and conduct, such as indictable charges dealt with under section 340 of the *Criminal Code*, such an option may be more suitably conceived as a supplementary option occurring either post-plea, but prior to sentencing, or following sentencing.

In any context in which it is used, it clearly needs to suit the circumstances of both the victim and the offender and must be carefully managed with appropriate safeguards in place to realise the potential benefits of this approach.

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<sup>130</sup> Submission 16 (Queensland Council of Unions) 3.

<sup>131</sup> Submission 29 (Legal Aid Queensland) 8.

<sup>132</sup> Submission 27 (Bar Association of Queensland) 3.

<sup>133</sup> Submission 22 (Aboriginal and Torres Strait Islander Legal Services) 6–7.

<sup>134</sup> Submission 20 (Queensland Teachers' Union) 6–7.

There may also be suitable alternative options for those direct victims of an assault who do not wish to participate in an adult restorative justice conference — for example, a representative of the organisation who employs the victim, or a union representative acting on the victim’s behalf might discuss the impact of these types of offences on victims of assault, while preserving the wishes of the victim not to be directly involved.

The Council notes that the Queensland Government has made a commitment to update and potentially expand the availability of adult restorative justice conferencing in response to the QPC’s recent report on imprisonment and recidivism. In the context of this work, it would be desirable to see this form of conferencing expanded to include offences of assault of police officers, as well as seeing an increase in referrals for conferencing being made across the board for assaults of frontline and emergency service workers. The Council also notes the need for equal access to any expanded adult restorative justice conference for all offenders, and that appropriate guidance is provided to ensure such a system is delivered consistently across Queensland.

**Recommendation 12–1: Review of Adult Restorative Justice Conferencing**

As part of the development of an updated Adult Restorative Justice Conferencing model, the Queensland Government should consider opportunities to expand the use of restorative justice conferencing in Queensland to improve outcomes for victims and offenders — with specific reference to victims of assaults on public officers and other victims assaulted while at work.

**Recommendation 12–2: Reinstatement of Adult Restorative Justice Conferencing as an option for police victims**

The reinstatement of Adult Restorative Justice Conferencing as an option for offences involving police as victims should be considered, provided appropriate safeguards can be developed and put in place.