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Sisters Inside Inc. is an independent community organisation that advocates for the human rights of women in the criminal justice system

25 June 2020
Queensland Sentencing Advisory Council
C/- Council Secretariat
By email only: submissions@sentencingcouncil.qld.gov.au

Dear Council Secretariat

Review of penalties for assaults on police and other frontline emergency service workers, corrective service officers and other public officers

Thank you for the opportunity to provide feedback on the findings presented in the Issues Paper and the questions posed in the Terms of Reference.

Sisters Inside is an independent community organisation that advocates for the collective human rights of women and girls in prison, and their families. This submission is informed by our support work with criminalised women and girls.

Through our work, we have observed that prison has become a first resort for women with needs that are deemed too complex by the social services system (e.g. homelessness, substance use, disability, mental illness and poverty). We believe that all changes to sentencing legislation and practices must support decarceration: a reduction in the numbers of women in prison or subject to formal supervision by Queensland Corrective Services.

Summary of Position

Sisters Inside's overall position is that s 340 as it relates to public officers should be repealed.[1] It is inappropriate that the legislation creates different penalties for the same action, with the only relevant distinction being the victim's profession. We do not support any criminal offences that delineate punishment on the basis of the victim's profession rather than the harm caused. The harm suffered by a public officer is the same as experienced by a civilian exposed to the same offending. Further, the separate offence of serious assault is gratuitous in that no correlation between higher penalties and reduced offending can be demonstrated.

[1] *Criminal Code 1899* (Qld) ss 340(1)(b), (2) and (2AA) ('Criminal Code').

Sisters Inside does not support increased penalties or mandatory sentencing provisions for assaults on public officers. We do not support expanding the definition of 'public officer' to include public transport operators, security guards or other professions. Sisters Inside opposes any further expansion of the scope of s 340 on the grounds that it is unwarranted, unjust and unlikely to have a deterrent effect.

We propose that the Council should make recommendations directed at reducing assaults on public officers, rather than increasing penalties and criminalisation. The argument that increasing penalties will effect a change in 'culture' and increase personal responsibility is flawed.[2] As the Literature Review demonstrates, increasing penalties and sentencing people to imprisonment is not demonstrated to result in specific or general deterrence.[3]

We submit that the Council should advocate for preventative measures that address the causes of assaults on public officers.

Sisters Inside has identified the following key issues for comment:

Disproportionate Penalties

The threshold for charging under s 340 is ill-defined and too low. As stated in the Issues Paper, 90% of serious assault cases are sentenced in the Magistrate's Court and the average custodial sentence imposed is seven months. This can be compared to the average custodial sentence of six months imposed on persons convicted of common assault. These trends demonstrate that the 90% of actions charged under the serious assault provision are about as serious as a common assault.

The unclear threshold between the summary and indictable offences and the disproportionate penalties attached to s 340 places the onus on the judiciary to impose proportionate penalties. The legislation should clarify the s 340 application and penalties to better respond to the character of the actions for which people are charged.

Imposing a maximum penalty of 14 years for an aggravated serious assault on a public officer is disproportionate to the penalties imposed on comparable and more serious offences in the Criminal Code.[4] We assess that this has the effect of unfairly criminalising people and punishing them unduly.

Context of Offences

Following the 2012 and 2014 amendments, we have seen a demonstrable increase in the number of women charged and sentenced to imprisonment for the offence of serious assault. In our experience, the severe penalties for serious assaults and aggravated serious assaults disproportionately affect people with existing vulnerabilities and, in particular, Aboriginal and Torres Strait Islander women.

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[2] Explanatory Memorandum, *Safe Night Out Legislation Amendment Bill 2012* (Qld), 1.
[3] Gelb, Stobbs, Hogg, *Community-Based Sentencing Orders and Parole: A review of literature and evaluations across jurisdictions* (Report prepared for the Queensland Sentencing Advisory Council, 2019).
[4] Criminal Code (n 1) ss 245, 335, 339, 320.

The context in which the serious assault occurred is always relevant, but is often not given due consideration when charging or sentencing under s 340. In our experience, the women charged under s 340 usually have a cognitive or psychosocial disability and/or were intoxicated at the time of the incident.

For Aboriginal and Torres Strait Islander women, these vulnerabilities are compounded by the systemic racism and intergenerational trauma they have experienced, which make them more likely to be targeted by police and more likely to have a negative interaction with the police.

Women who are survivors of domestic violence or sexual assault experience a heightened imbalance of power when dealing with male police officers, paramedics or corrective services officers. In particular, being restrained or required to submit to a strip search can be very triggering.

Mental Health

Women are routinely charged with a serious assault for an incident occurring after they have called the ambulance or presented to the hospital *because* they were experiencing a severe mental health crisis or an adverse reaction to drugs or alcohol.

For example, we support a very young woman who started using methylamphetamines and became extremely paranoid and delusional. She called an ambulance looking for help. By the time the paramedics arrived she was no longer in touch with reality and she said threatening things and resisted their interventions. She shoved a paramedic and was charged under s 340. We support another woman who was charged with an aggravated serious assault after she spat on a nurse while voluntarily presenting to the Mental Health Unit because she wanted help with her mental health.

Criminalising people in this context undermines the integrity and purpose of our public health services and does nothing to reduce crime or increase community safety.

Aboriginal and Torres Strait Islander People

In our experience, police racially profile and are more likely to intercept Aboriginal and Torres Strait Islander adults and children on the street.

There is always a power imbalance and intergenerational trauma and systemic racism will be a factor in every interaction with police. An interaction that a public officer might consider to be benign is likely to be experienced very differently by a an Aboriginal and Torres Strait Islander person.

There are not enough Aboriginal and Torres Strait Islander or culturally competent front-line workers. Furthermore, many public officers have their own prejudices and shortcomings and most are not trained to work in a culturally competent or trauma informed manner.

Police Discretion to Charge with a Summary or Indictable Offence

Police Powers and Responsibilities Act 2000 (Qld)

The Police Powers and Responsibilities Act 2000 (Qld) ('PPRA') and the Criminal Code both contain offences for obstruction and assaults on police officers. The requirements for establishing whether an action should be charged as a summary or indictable offence are not clear and too much discretion is afforded to police. In our experience police misuse this discretionary power and always elect to charge a person with the indictable offence.

For example, we support a young woman who was taken into police custody while under the influence of methylamphetamines and was not coping well. She was asked to submit to a strip search and took off all of her clothes and threw her underwear at the officer. She was charged with an aggravated serious assault because her underwear was supposedly soiled from wearing them for too many days in a row. Aggravated serious assault attracts a maximum penalty of 14 years. It was open to the police to charge her with the summary offence of obstruction under s 790(1)(b) of the PPRA, which attracts a maximum penalty of 6 months in prison. It was also open to the police not to charge her for this objectively minor infraction, but this is contrary police culture and standard practices.

It is problematic that s 340 is so broadly defined that it captures low-level behaviour from unwell, vulnerable people and criminalises them instead of diverting them to mental health services and rehabilitation centres.

Legislation and police guidelines should be drafted to recognise that actions on the lower end of the spectrum that do not cause bodily harm should rightly remain summary offences.

Corrective Services Act 2006 (Qld)

The penalty for assaulting a corrective services officer ('CSO') differs depending on whether the person is charged under the Corrective Services Act 2006 (Qld) ('CSA') or the Criminal Code. Under the CSA the maximum penalty is 2 years,[5] compared to 7 under the Criminal Code.[6] The threshold for establishing assault under the CSA compared to serious assault under the Criminal Code is not clearly delineated, which means that people in prison are often charged with serious assault for actions that should have been dealt with under the CSA.

For example, Urshula*[i] is a woman in prison who suffers from mental health conditions and severe cognitive impairments. Urshula was being detained in the safety unit in solitary confinement and asked for a blanket. When her request was glibly denied, Urshula became highly agitated and used the back of her hand to hit a cup of hot water through the meal hatch in the door. The hot water made contact with a CSO's shoe. The hot water was not boiling and did not burn the staff member. Urshula was charged under s 340 for the serious assault of a corrective services officer and faces a maximum penalty of 7 years.

The Australian Institute of Health and Welfare conducted a national review of prisoner health in 2018 and found that 65% of women in prison reported a history of mental health conditions.[7] This demonstrates the vast criminalisation of women with mental health conditions; a problem that is being contributed by the current s 340. Given the prevalence of psychosocial and cognitive disabilities in women's prisons it is problematic that prison management policies don't prioritise mental health informed processes, trauma informed practices or conflict de-escalation training.

Queensland Corrective Services Protocols

Furthermore, we submit that Queensland Corrective Services ('QCS') protocols create circumstances that are likely to precipitate s 340 violating behaviours.

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[5] *Corrective Services Act 2006* (Qld) s 124(b) ('Corrective Services Act').
[6] Criminal Code (n 1) s 340.
[7] The Australian Institute of Health and Welfare, *The Health of Australia's Prisoners* (2018) 27.

Women who are at risk of self-harming, deemed a risk to others, or whom other prisoners have assaulted can be placed on safety orders in the 'safety unit' for up to a month (consecutive orders are common).[8] While in the detention/safety unit a woman is isolated for 22 hours a day with no activities. This claustrophobic, unhealthy environment causes mental health deterioration and further strains interactions with corrective services officers ('CSOs') and health professionals.

We support Edna, a woman who has a chromosomal difference which results in physical and cognitive disabilities; she also has psychosocial disabilities. Her disabilities cause her to break prison rules and she regularly detained in the detention unit for long periods of time. Edna is very physically frail and weighs around 40 kilograms. She's known to spit when she is distressed. The way the CSOs manage the spit risk is that every time she needs to travel somewhere within the prison, for instance a legal visit, she is cuffed, spit-hooded and escorted by three officers. Recently she was charged with aggravated serious assault for spitting on one of the CSOs. The CCTV footage of the lead-up to the event shows her hand-cuffed and being held to the ground be three large, male officers attempting to put a spit-hood on her.

These 'safety' protocols are stressful and disempowering for women prisoners, particularly those with a history of sexual or physical violence. Women who are survivors of sexual or physical violence are re-traumatised by the domineering use of force and restraints. These protocols are highly likely to trigger a defence response, such as fighting back or spitting. We submit that these protocols exacerbate mental health distress and are likely to contribute to a woman assaulting, biting, spitting or throwing bodily fluids because of the extreme distress caused. Furthermore, these protocols are unduly harsh and degrading.

We recommend that extensive personal protective equipment ('PPE') be provided to staff working in prisons; this should include facemasks, goggles, gloves and plastic face shields. In all circumstances where a woman might be spit-hooded, the staff should instead wear appropriate PPE.

In all circumstances where there is deemed to be a reasonable risk of spitting, biting or throwing bodily fluids or faeces the staff should apply PPE before interacting with the woman. If the PPE prevents the biting, spitting or bodily fluids from making contact with the staff member, the woman should not be charged under s 340.

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.

Recommendations for Legislative Amendment

We advocate for ss 340(1)(b), (2) and (2AA) to be repealed; the Criminal Code creates offences sufficient to cover the conduct targeted by s 340.

[8] *Corrective Services Act* (n 5) s 53.

Alternatively, if the legislation is to be amended, we submit that serious assault must be defined more clearly to differentiate it from the offences under the PPRA and CSA and to correspond to the seriousness of the maximum penalty. Strict guidelines for charging should be issued to police. For s 340 offences it is desirable to specify different maximum penalties depending on whether or not bodily harm was caused and the seriousness of that harm.[9]

The legislation should facilitate greater judicial discretion by requiring that decisions be made on a case by case basis. The legislation should enumerate a non-exhaustive list of relevant sentencing considerations for serious assaults that include: Aboriginal or Torres Strait Islander identity, mental health, disability, drug and/or alcohol intoxication, history of trauma, intergenerational trauma, language barriers etc.

The aggravating circumstances contained in s 340(1)(b)(i)-(iii) and s 340(2AA) of the Criminal Code should be reconsidered. No other Australian jurisdiction specifies spitting as an aggravating feature of an assault on a police or public officer.

The s 340(1C) mandatory sentencing provision should be eliminated; intoxication in a public place should not be an aggravating circumstance to an assault.

Addressing Causal Factors

The Literature Review provides clear evidence that increasing penalties is unlikely to have the deterrent effect desired by the legislators; it is more useful to implement practical, bottom-up measures that will increase frontline workers' safety and job satisfaction and improve the quality of service they provide to the public.

We recommend proactive policy changes that address the causes of conflict between civilians and public officers:

1) Invest in the community by redistributing police and prison funding into more publicly funded rehabilitation and mental health services;

2) Invest in education and employment pathways for Aboriginal and Torres Strait Islander people in frontline public officer roles;

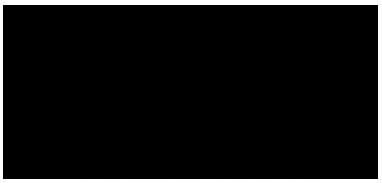
3) Prioritise trauma-informed and cultural competency training for frontline public officers (including CSOs);

    a. Facilitate a shift in police culture to prioritise risk-assessment and de-escalation.

[9] See, for example: *Crimes Act 1958* (Vic) s 31; *Crimes Act 1900* (NSW) s 60; *Criminal Law Consolidation Act 1935* (SA) s 20AA; *Criminal Code Act 1983* (NT) s 187; *Crimes Act 1900* (ACT) s 24, 26; *Criminal Code Act 1924* (Tas) s 114.

We thank you for the opportunity to make this submission.

Regards,



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[i] All names have been changed to protect confidentiality