



Queensland  
**Human Rights  
Commission**

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# Penalties for assaults on frontline public officers

**Submission  
to  
Queensland Sentencing Advisory Council**

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25 June 2020

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## Introduction

1. The Queensland Human Rights Commission (the Commission) has functions under the *Anti-Discrimination Act 1991* and the *Human Rights Act 2019* to promote an understanding and discussion of human rights in Queensland.
2. We note that the Council has drawn upon our earlier submission to inform the human rights discussion in the Issues Paper. We support this review in light of community concern about assaults on corrective services officers, police and other frontline emergency service workers, such as paramedics and hospital emergency department staff.
3. The Issues Paper highlights that these officers are highly skilled in their work, and are adept at de-escalating violent and volatile situations. These workers often deal with the most complex and challenging people in our community and deserve to undertake their critical duties in a safe working environment. Nonetheless, treating assaults against particular categories of victims as more serious, and imposing higher penalties, will limit rights. For example, the recent COVID-19 pandemic has also highlighted that measures may be necessary to protect 'frontline' private workers such as those in the retail sector. Human rights are not absolute, and may be limited in certain circumstances.
4. The Issues Paper and accompanying Griffith University research paper provide a comprehensive analysis of the issues involved in this Review and properly identify the human rights issues that must be considered. Our submission focusses on issues relevant to human rights and our functions.
5. In summary, as the Council has identified, a threshold question for this review is the purpose of any proposed reform. This will inform answers to the other questions raised including which measures will be most effective, which workers should be covered, and if any limitations on human rights are justified. Two purposes emerge from the Council's work to date – to denounce assaults upon frontline public officers and to prevent future attacks from occurring. While the Commission agrees both are worthy goals, it is arguable that there are ways of achieving either or both with less limitations on human rights than imposing higher penalties. Certainly, any law reform imposing such changes would have to be accompanied by evidence-based justification for why it is the least restrictive way of achieving one or both of these goals.

## Application of Human Rights

6. Law reform based on the victim of an offence will be likely to engage and fulfil several human rights protected in the *Human Rights Act 2019* (HRA) including:
  - right to life;<sup>1</sup>
  - right to equality;<sup>2</sup>
  - right to liberty and security;<sup>3</sup>
  - right to a fair hearing;<sup>4</sup> and
  - protection from cruel, inhuman or degrading treatment.<sup>5</sup>
7. The HRA draws upon rights in the *International Covenant on Civil and Political Rights* (ICCPR). Article two of the ICCPR obliges state parties to respect the rights of all individuals, and where not already provided for by existing legislation, take steps to amend laws to recognise rights. The United Nations Human Rights Committee has commented that this obligation includes ensuring individuals are protected not only by the State, but against violations of their rights by private persons. This includes taking appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.<sup>6</sup>
8. Section 13(2) of the HRA sets out criteria for deciding whether a limit on a right is reasonable and justified. Key criteria for this review include the purpose of the limitation, and whether there are any less restrictive and reasonable ways to achieve that purpose. Section 13(2)(g) requires that in assessing compatibility, the importance of the purpose of the limitation must be balanced against the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right.

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<sup>1</sup> *Human Rights Act 2019* (HRA) s 16.

<sup>2</sup> HRA s 15.

<sup>3</sup> HRA s 29.

<sup>4</sup> HRA s 31.

<sup>5</sup> HRA s 17.

<sup>6</sup> United Nations Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80<sup>th</sup> session, CCPR/C/21/Rev.1/Add. 1326, May 2004 (29 March 2004).

## Purpose of reform?

### 4. Does the current sentencing processes in Queensland adequately meet the needs of public officer victims?

#### 14 Do existing offences, penalties and sentencing practices in Queensland provide an adequate and appropriate response to assaults against police and other frontline emergency service workers, corrective services officers and other public officers?

9. The Commission submits that these questions are the most important for this review as they establish the purpose of potential reform. The process of justifying limitations on human rights produces effective public policy. As the Issues Paper notes:

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

10. The review has essentially identified two main reasons for making offences against public officers more serious (whether that is through specific offences, aggravating factors, or increased maximum penalties) namely:
- to **deter** the conduct and **protect** these officers because they are more vulnerable due to the nature of their work; and
  - to **denounce and condemn** acts of violence against officers who are acting to protect the community, save the lives of others, upholding the rule of law, and performing duties on behalf of the state.
11. Both purposes acknowledge that as well as the impacts on individual victims, a serious assault on particular workers may impact public confidence in government, the justice system, and the institutions that employ them.
12. As the Issues Paper explores in some length, there are challenges in using increased penalties to denounce and condemn conduct, and measuring whether such a purpose is achieved can also be difficult. In contrast, the success of deterring behaviour can at least be informed by research and experience in other jurisdictions.

### What factors increase assaults against public officers?

13. Research has identified some factors that increase the risk of assault for particular workers.
14. For example, the Issues Paper notes that **corrections officers** have among the highest acceptance rates of claims lodged with WorkCover (36%). Overcrowding is a particular risk factor these workers. The Queensland Crime and Corruption Commission's *Taskforce Flaxton*, report recommended improvements to prevent, detect, and deal with corruption risks, which it noted would improve staff safety, as overcrowding can:

...increase the risk of conflict, violence and serious assaults against prisoners and staff. An analysis of data from the last five years shows that as the utilisation rate (a measure of overcrowding) of Queensland prisons increased, so too did prisoner-on-prisoner and prisoner-on-staff assaults, self-harm incidents, and incidents requiring the use of force.<sup>7</sup>
15. Unions have previously cited overcrowding and a lack of investment in infrastructure as drivers of violence in Queensland prisons.<sup>8</sup>
16. The NSW Inspector of Custodial Services report notes that the persistent threat of violence stems from prisoners receiving longer sentences, which results in less incentive for good behaviour, as well as an increase in the numbers of mentally ill and violent prisoners. However, this Report also cautioned that while the pre-existing prisoner characteristics are clearly important (such as being a violent offender) the factors contributing to correctional centre violence 'are complex and defy anything other than comprehensive analysis'. It found violence 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>9</sup>
17. The WA Inspector of Custodial Services found that prisoners with mental health issues or cognitive impairments, particularly women, were over-represented in staff assault incidents, which 'aligned with international and local experience'. Other key drivers of assaults included prisoners with

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<sup>7</sup> Queensland Crime and Corruption Commission, *Taskforce Flaxton: An examination of corruption risks and corruption in Queensland Prisons* (Report, December 2018) 6.

<sup>8</sup> Toby Crockford, 'Six Queensland prison officers attacked in four days as overcrowding worsens', *Brisbane Times* (online, 12 August 2019) <<https://www.brisbanetimes.com.au/national/queensland/six-queensland-prison-officers-attacked-in-four-days-as-overcrowding-worsens-20180812-p4zx0j.html>>

<sup>9</sup> NSW Inspector of Custodial Services, *Report No. 1 – The Invisibility of Correctional Officer Work* (Report, May 2014) 13-14.

<<http://www.custodialinspector.justice.nsw.gov.au/Documents/Accessible%20Report%20No%201%20DRAFT.pdf>>

'idle hands', and prisoners being kept in more secure accommodation than was required for their classification.<sup>10</sup>

18. WorkCover data cited in the Issues Paper also found claims made by **police** had a high acceptance rate (33.7%). In 2009, Western Australia sought to address assaults against police through mandatory minimum sentencing laws, which the Issues Paper discusses in detail. It is unclear whether these laws actually resulted in a significant drop in assaults against police and public officers (as was claimed). In 2017, the outgoing WA Police Commissioner expressed a preference for investment in prevention and working with vulnerable families over mandatory sentencing.<sup>11</sup>
19. The Griffith University research paper notes that workers who visit clients in a domestic setting may be subject to greater risk of assault, including **child protection workers, residential care workers**, and police attending domestic disturbances. As such, addressing risks associated with such visits may reduce incidents of assault.
20. The Issues Paper also notes that **paramedics** are the most common victims of serious assault of a public officer under section 340(2AA) of the *Criminal Code*, and medical workers are the second most common victim occupation. 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.<sup>12</sup> The study nonetheless concludes that more research is needed into what strategies are most effective at protecting paramedics.<sup>13</sup> In relation to **healthcare workers** more broadly, the Griffith University research paper notes:

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<sup>10</sup> WA Inspector of Custodial Services, *Assaults on staff in Western Australian prisons* (Report, July 2014) <[https://www.oics.wa.gov.au/wp-content/uploads/2014/09/2014\\_0821-Final-report-Assault-on-staff.pdf](https://www.oics.wa.gov.au/wp-content/uploads/2014/09/2014_0821-Final-report-Assault-on-staff.pdf)>

<sup>11</sup> 'WA's top cop wants more forensic funding', *WA Today* (online 31 July 2017) <<https://www.watoday.com.au/national/western-australia/was-top-cop-wants-more-forensic-funding-20170731-gxml2b.html>>

<sup>12</sup> Central Queensland University, 'Properly Tested Solutions Needed to Tackle Violence Against Paramedics' (Media Release 18 March 2019) <<https://www.cqu.edu.au/cqunews/stories/general-category/2019/properly-tested-solutions-needed-to-tackle-violence-against-paramedics>>.

<sup>13</sup> Brian J. Maguire, Matthew Browne, Barbara J. O'Neill, Michael T. Dealy, Darryl Clare and, Peter O'Meara (2018) 'International Survey of Violence Against EMS Personnel: Physical Violence Report' *Prehospital and Disaster Medicine* 33(5), 526-531. Abstract at <<https://www.cambridge.org/core/journals/prehospital-and-disaster-medicine/article/international-survey-of-violence-against-ems-personnel-physical-violence-report/04FB890CA7AA1D019C757FD1E6DBC97#>>

- Physical violence against Australian nurses has been associated with system delays and proportions of patients waiting, as well as unanticipated changes in the patient population.
  - Canadian community living support staff perceived that improper client scheduling was one cause of violence from clients.
  - The environment has been shown to impact on behaviour, such as room temperature and noise levels.
  - Staffing issues, such as understaffing or staff overload, have been linked to physical assaults against Australian nurses.
  - Workplace safety issues have also been linked to physical assaults in the health sector, such as personal alarms.
21. As this brief summary reveals, the drivers of assaults against particular occupations are varied. It is not immediately apparent that a blanket approach for a range of occupations, particularly implemented through the criminal justice system, will necessarily make such workers safer. The Commission agrees with the Issues Paper conclusion:

Nevertheless, more work is needed to better identify the types of interventions that will be most successful in minimising assaults, as well as an investment in rigorous evaluations to assess the conditions of success of these interventions. We should expect that the most effective interventions may vary by location and sector.

### **Do higher penalties act as a deterrent?**

22. There is limited evidence to support the proposition that higher penalties deter objectionable behaviour. As the Griffith University research paper concludes, imprisonment, on average, does not achieve the goal of deterrence in studies of general criminal offending. This paper suggests that while amendments to sentencing frameworks can clearly communicate the unacceptability of the behaviour, prevention strategies may be a better means for reducing the incidence of assaults against public officers.
23. Research highlighted in the paper from Professor Andrew Ashworth observes that potential offenders do not always respond rationally to increased penalties and increased risk of conviction, even if they are aware of them.
24. The Queensland Productivity Commission recently considered how imprisonment affects offending in its *Inquiry into Imprisonment and Recidivism* (QPC Report).<sup>14</sup> It concluded that ‘there is no research for Queensland that quantifies how prison deters individuals from committing

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<sup>14</sup> Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism* (Report, January 2020) <<https://qpc.blob.core.windows.net/wordpress/2020/01/FINAL-REPORT-Imprisonment-Volume-I-.pdf>>



crime or prevents offending through incapacitation'. In considering the relevant Australian research, it found:

- There are diminishing returns from the use of imprisonment—that is, the additional benefit (through a reduction in crime) declines significantly as more people are imprisoned.
- Increasing policing effort has a much greater impact on crime than increasing the severity of punishment—Increases in sentence length do little to prevent crime.
- Well-designed community corrections can reduce recidivism without compromising community safety.<sup>15</sup>

### Could higher penalties increase risks for some workers?

25. Overcrowding has been identified as a particular issue in prisoner-on-staff assaults. If higher penalties lead to higher incarceration rates, such reform might inadvertently increase the risk of assault for corrections officers.
26. The Issues Paper provides a detailed snapshot of the imprisonment rates to date arising from the existing legislative provisions, together with assaults against public officers, which suggests that higher maximum penalties may not necessarily lead to an increase in the numbers of people incarcerated. The Court of Appeal has also observed that all offences committed after an increase penalty will not necessarily attract a higher penalty than they previously would have.<sup>16</sup>
27. Nonetheless, given the impetus for this review, the justification for any law reform must consider if the proposed changes may result in frontline officers being subject to greater risk of assault.

## Potential coverage

**1 Should an assault on a person while at work be treated by the law as more serious, less serious, or as equally serious as if the same act is committed against someone who is not at work, and why?**

**2 If an assault is committed on a public officer performing a public duty, should this be treated as more serious, less serious, or as equally serious as if the same act is committed on a person employed in a private capacity(e.g. as a private security officer, or taxi driver) and why?**

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<sup>15</sup> Ibid, xxii.

<sup>16</sup> As cited in the Issues Paper: *R v Murray* (2014) 245 A Crim R 37, 42 [16] (Fraser JA, Gotterson and Morrison JJA agreeing), citing *R v Samad* [2012] QCA 63 [30] (Wilson AJA)

### **3 Should the law treat assaults on particular categories of public officers as being more serious than other categories of public officer, and why?**

28. Our earlier submission explored how some other jurisdictions had approached these issues. This included the human rights implications of:
- mandatory minimum sentences – which we noted significantly limit rights, and without further evidence we would not support;
  - tailored and aggravated offences – depending on the justification provided, may represent a reasonable limitation on rights;
  - non-legislative options – should be exhausted before rights are limited through law reform.
29. While various jurisdictions have introduced increased penalties to protect particular workers, the definition of the protected worker differs. This reflects that specific local evidence about the importance of protecting a particular occupation is necessary to demonstrate human rights compliance.

#### **Right to equality of victims**

30. The right to equality will be engaged if law reform seeks to treat assaults against particular workers more or less seriously than against others. For example, the right to equality of members of a certain occupation not protected as victims may be engaged if they were not afforded the protection of higher penalties. To be a reasonable limitation on rights, justification would be need to show why certain workers, or workers in the public sector compared to the private, are not given this extra protection or recognition (assuming such measures will achieve their purpose).
31. We agree with several stakeholders that, if certain offences are to carry higher penalties, the law must be clear about the definition of the workers covered.
32. The Issues Paper cites our submission, and similar submissions from QAI, that there must be a justification, based on the particular risks faced by each occupation selected for increased penalties, rather than a blanket approach. This would need to include justification for how differences in penalties can achieve the specific purpose sought.
33. Nonetheless, the frontline workers under consideration in this review have the common feature of having a legal obligation to perform duties on behalf of the state that may involve dealing with dangerous people in dangerous situations. We support any additional measures that are effective in protecting them further.

## Rights of the accused

34. The right to equality (and potentially other rights) may also be engaged for those **accused** of assault because particular members of the community may be disproportionately impacted. For example, the United Nations Committee against Torture has previously called on Australia to repeal mandatory minimum sentences, noting the disproportionate impact they have on Aboriginal peoples and Torres Strait Islander peoples.<sup>17</sup>
35. In analysing demographic data in Queensland, the Issues Paper notes:
- There is a higher proportion of **female offenders** sentenced for serious assaults, compared to other acts intended to cause injury.
  - A high proportion of **female offenders** committed a serious assault that involved biting, spitting, or bodily fluids (42.3%), much higher than the proportion of female offenders who committed the serious assault of a police officer while armed (13.8%).
  - **Aboriginal peoples and Torres Strait Islander peoples** committed a higher proportion of serious assaults, compared to other categories of offences.
  - Over a third of serious assaults of corrective services officers were committed by Aboriginal or Torres Strait Islander offenders (39.9%), which needs to be interpreted in the context of the continuing over-representation of Aboriginal and Torres Strait Islander people in prison in Queensland.
  - Perpetrators with **drug or alcohol problems, mental health issues**, or a history of violence were more likely to assault a public officer. The Griffith University research paper notes a WA Office of the Inspector of Custodial Services (2014) report that found prisoners with mental health concerns and **intellectual disability** were significantly over-represented in correctional staff assaults.
36. Further, compared to the general population, both female and male prisoners in Queensland have a higher rate of intellectual disability than the general population, and a significantly higher number of Aboriginal prisoners and Torres Strait Islander prisoners identify as having an intellectual disability.<sup>18</sup>
37. The QPC Report also found that Aboriginal and Torres Strait Islander offenders had higher rates of police contact than non-Indigenous offenders, and the average Indigenous offender also experienced a much higher rate of contact with police while under the age of 18. Aboriginal and

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<sup>17</sup> UN Committee against Torture, *Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Australia*, UN Doc CAT/C/AUS/CO/4-5 (23 December 2014), [12].

<sup>18</sup> Anti-Discrimination Commission Queensland, *Women in Prison 2019: A human rights consultation report*, 2019, 80.

Torres Strait Islander women had 14 times more frequent contact with police than non-Indigenous women.<sup>19</sup>

38. That report also found that many risk factors associated with imprisonment interact with one another and become compounded over time—for example, a cognitive disability may increase the risk of substance abuse, which in turn further inhibits executive function. These risk factors are exacerbated by socio-economic disadvantage.<sup>20</sup> The over-representation of Aboriginal peoples and Torres Strait Islander peoples in the criminal justice system is driven by entrenched economic and social disadvantage that has its roots in historic dispossession and disempowerment. These risk factors are exacerbated by the way in which the criminal justice system interacts with Aboriginal peoples and Torres Strait islander peoples.<sup>21</sup> The QPC report recommended broad structural reform to address these issues.<sup>22</sup>
39. The report also cites research showing that almost half of all Queensland prisoners are likely to have been previously hospitalised for mental health issues and/or have a history of being neglected in their childhood,<sup>23</sup> and 35 per cent of Queensland prisoners have a disability that limits activity, employment or education.<sup>24</sup>
40. Protective factors to avoid offending behaviour include employment, education, effective parenting, health and resilience, and positive influences from family, friends, and work.<sup>25</sup>
41. It does not necessarily follow that higher penalties for assaults against public officers will be an unreasonable limitation on rights. However, the above research does suggest consideration must be given as to why certain members of the community are over-represented in the criminal justice system, and if there are alternative ways of achieving the purpose of the reform without further entrenching this disadvantage. As the QPC Report put it:

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<sup>19</sup> Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism* (Report, January 2020) 76.

<sup>20</sup> *Ibid*, xviii.

<sup>21</sup> *Ibid*, 422.

<sup>22</sup> See for example recommendations 37 and 38 regarding decision-making, accountabilities, land tenure and Indigenous justice agreements.

<sup>23</sup> *Ibid*, xviii.

<sup>24</sup> *Ibid*, 64.

<sup>25</sup> *Ibid*, 441

While the decision to commit an offence ultimately rests with the individual, there is a large body of evidence to suggest that contextual factors increase or decrease the risk that an individual will make decisions leading to crime.<sup>26</sup>

42. The QPC Report recommends that the Queensland Government commit to improving the policy development process through a new 'justice impact test', which includes considering the impact of legislation and policy change on Indigenous communities in remote and regional areas. Such a test would be relevant to informing the proportionality analysis under the HRA, and appears particularly relevant to any potential change arising from this review. We suggest that the Council reiterate the need for the development and implementation of this tool in its report.
43. The QPC report, like others before it, including the Commission's *Women in Prison* report, also recommends that justice reinvestment projects that support community-led prevention and early interventions be prioritised.<sup>27</sup> Such an approach seeks to invest in protective factors to reduce offending behaviour. This is likely to result in a safer workplace for many occupations considered in this review. The *Taskforce Flaxton* report recommended a similar approach, coupled with a focus on diversion strategies:

A greater investment in initiatives that address the root causes of anti-social behaviour, while often initially costly, will reap downstream rewards by reducing offending behaviour that can lead to imprisonment. Further, making better use of effective diversion strategies and alternatives to imprisonment will deliver better crime outcomes and alleviate pressure on the Queensland prison system.<sup>28</sup>
44. The United Nations has stated that the composition of law enforcement bodies should be representative of the entire community.<sup>29</sup> Given the overrepresentation of Aboriginal and Torres Strait Islander peoples and women in many of the assaults analysed by this review, it may be that increasing the numbers of female and indigenous police may address this issue. This may also assist cultural competency within QPS. The Commission suggests that further consultation take place with police and the community about whether this would be an effective measure.
45. If the purpose of reform is to reduce assaults against public officers, the weight of recent evidence in Queensland suggests that alternative options

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<sup>26</sup> Ibid, 130.

<sup>27</sup> Recommendation 30.

<sup>28</sup> Queensland Crime and Corruption Commission, *Taskforce Flaxton: An examination of corruption risks and corruption in Queensland Prisons* (Report, December 2018) 6.

<sup>29</sup> United Nations High Commissioner for Human Rights, *Human Rights and Law Enforcement* (2002) <<https://www.un.org/ruleoflaw/files/training5Add2en.pdf>>

exist to achieve this purpose, including through justice reinvestment and related strategies, which are likely to be a more effective than increased penalties.

## Victims' needs more broadly

### 5 Should any changes be considered to the current approach to better respond to victim needs? If so, what reforms should be considered?

46. The Issues Paper notes that the *Human Rights Act* does not specifically recognise the human rights of victims of crime. However, victims do enjoy rights that could be relevant to their treatment by public entities. For example, freedom of expression includes the right to hold and express an opinion, as well as the right to seek out and receive information.<sup>30</sup> Consistent with this right, a victim should be kept informed about such things as: progress of a police investigation, decisions about the prosecution of the accused person, warrants that have been issued, court processes and hearing dates, details of the sentence, outcomes of bail application, and arrangements for release of the accused person. The extent of the public entity's obligations may be informed by the Queensland *Charter of Victims' Rights*.
47. The Commission deals with complaints about whether acts or decisions of public entities comply with the *Human Rights Act*. In certain circumstances, a victim may be able to make a complaint to the Commission against criminal justice entities, such as police and the Director of Public Prosecutions, to the Commission. The Commission generally does not consider complaints involving matters currently before (or previously considered by) courts and tribunals.
48. It is arguable that victims' rights could be better recognised in the HRA. For example, the right to fair hearing in the *Human Rights Act 2019* (Qld) applies to 'a person charged with a criminal offence'. The corresponding right under the *Human Rights Act 2004* (ACT) states that 'everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing'. Adopting the broader protection in the ACT legislation would provide further protection for victims in Queensland under the *Human Rights Act*. Victims can be adversely impacted if there are failures to provide a fair hearing, for example if there are unreasonable delays. Lengthy delays may be harmful to victims and can have an impact on the ability to give credible evidence.

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<sup>30</sup> HRA, s 21.

49. The Victorian Law Reform Commission in its report on *The Role of Victims of Crime in the Criminal Trial Process*, recommended more comprehensive recognition of victims' rights in Victoria's human rights legislation. This protection acknowledges that a victim of a criminal offence has the following minimum guarantees:
- to be acknowledged as a participant (but not a party) with an interest in the proceedings;
  - to be treated with respect at all times;
  - to be protected from unnecessary trauma, intimidation and distress when giving evidence.<sup>31</sup>
50. This addition to the Queensland *Human Rights Act* would further protect victims' needs.

## Sentencing principles

**12. What sentencing purpose/s are most important in sentencing people who commit assaults against police and other frontline emergency service workers, corrective services officers and other public officers? Does this vary by the type of officer or context in which the assault occurs, and in what way?**

**13. Does your answer to Question 12 change when applied specifically to children/young offenders?**

51. The current sentencing principles acknowledge the vulnerability and specific protections required for children, as reflected in their rights under the HRA.<sup>32</sup> This includes principles under the *Youth Justice Act 1992* (Qld), in particular, that a detention order should be imposed only as a last resort and for the shortest appropriate period. The Commission strongly supports the retention of these principles.
52. The Issues Paper also discusses that a child under 10 is not criminally responsible for any act or omission, and that a child under 14 can only be criminally responsible if the prosecution shows the child had the capacity to know they should not do the act or make the omission at the time of doing it.
53. In recent years, the United Nations Committee on the Rights of the Child has called for the minimum age of criminal responsibility (MACR) to be raised to 14 years of age.<sup>33</sup> It also recommends that 'no child be deprived of liberty, unless there are genuine public safety or public health concerns'

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<sup>31</sup> Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report, August 2016) xxi

<sup>32</sup> HRA, s 26 and s 33

<sup>33</sup> United Nations Committee on the Rights of the Child, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia*, 82nd Sess, UN Doc CRC/C/AUS/CO/5-6 (30 September 2019) para 48.

and that countries increase the minimum age of detention to 16.<sup>34</sup> The Northern Territory Royal Commission recommended that the MACR be increased and the Australia and New Zealand Children's Commissioners and Guardians issued a joint statement calling for the MACR to be moved to 14 years of age in November 2019. Several recent reports examining the Queensland justice system have recommended an increase in the MACR to 12 years of age, reflecting the United Nations standard at the time. Since these reports were published, the United Nations has changed its approach to MACR.<sup>35</sup>

54. The Commission submits that the government should change MACR in Queensland to 14 years, and consider a prohibition on children under 16 years being detained as recommended by the United Nations committee.

## Community understanding

### 17. How can community knowledge and understanding about penalties and sentencing for assaults on public officers be enhanced?

55. It is likely that any non-legislative response to the issues identified in the terms of reference will be a less restrictive limitation on rights than law reform measures. This is particularly so if the primary purpose of such change is to denounce assaults against public officers. As the Issues Paper notes, even when courts may seek to 'send a message' to the community through the sentencing process, the achievement of this objective 'assumes that the sentences, or reports of them in the media, will be known and understood'.
56. The Commission is supportive of the options in the Issues Paper to achieve behavioural change through measures such as information campaigns, more precise statistical collection, and reporting (including from courts), and the Council continuing its role in promoting greater understanding about sentencing in Queensland.
57. 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

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<sup>34</sup> United Nations Committee on the Rights of the Child, *General comment No. 24 on children's rights in the child justice system*, UN Doc CRC/C/GC/24 (18 September 2019), 14. Noting that the Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) currently maintains 12 as the absolute minimum for MACR.

<sup>35</sup> Youth Justice Taskforce (Department of Child Safety, Youth and Women, Queensland Government), *Report on Youth Justice Version 2*, (Report, June 2018) 105. The State of Queensland (Queensland Family and Child Commission) *The age of criminal responsibility in Queensland* (Report, 2017). Independent Review of Youth Detention, *Confidential Report*, (Report, December 2016) 171.



include more training for staff on de-escalation and managing vulnerable clients.

58. The Council has previously promoted discussion in Queensland about *Gladue* reports.<sup>36</sup> The Commission suggests these reports are worthy of further consideration as a way of promoting understanding within the justice system (and wider community) about the impacts of intergenerational poverty and trauma on Indigenous peoples. *Gladue* reports, prepared in some Canadian provinces, are specialist Aboriginal sentencing reports to complement pre-sentence reports. They seek to promote a better understanding of the underlying causes of offending, including the historic and cultural context of an offender. The introduction of a similar report in Queensland may be one means of addressing the over-representation of Aboriginal peoples and Torres Strait Islander peoples in prison. As the Australian Law Reform Commission (ALRC) has observed:

This context may include an examination of complex issues of an historical and cultural nature that are unique to, and prevalent in, Canadian Aboriginal communities, including intergenerational trauma, alcohol and drug addictions, family violence and abuse, and institutionalisation.<sup>37</sup>

59. In considering *Gladue* reports, the ALRC recommended that state and territory governments, in partnership with relevant Aboriginal and Torres Strait Islander organisations, should develop and implement schemes that facilitate the preparation of 'Indigenous Experience Reports' for Aboriginal and Torres Strait Islander offenders appearing for sentence in superior courts.<sup>38</sup> We understand the ACT Government is the first Australian jurisdiction to trial their use.<sup>39</sup>

## Conclusion

60. It is likely that any increase in penalties for assaults upon frontline workers will limit rights, and must be justified as the least restrictive way of achieving an important purpose. If increased safety of frontline workers is the ultimate objective, there may be alternative strategies that contribute to achieving this purpose. The Commission suggests that all options must be exhausted before a significant limitation on rights through the introduction

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<sup>36</sup> 'Indigenous welfare: How poverty is leading to longer sentences' *Sentencing Matters Podcast* (Queensland Sentencing Advisory Council, May 2018)

<sup>37</sup> Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report 133, December 2017) 203.

<sup>38</sup> *Ibid*, Recommendation 6-2.

<sup>39</sup> Michael Inman, 'ACT set to trial sentencing reports for indigenous offenders, like Canada's Gladue reports' *The Canberra Times*, (online, 6 August 2017) <<https://www.canberratimes.com.au/story/6029810/act-set-to-trial-sentencing-reports-for-indigenous-offenders-like-canadas-gladue-reports/#gsc.tab=0>>

of further criminal law, such as mandatory minimum custodial sentences, is considered.

61. The Commission commends the Council on its Issues Paper and related research, and its commitment to consider human rights in undertaking this inquiry. With this in mind, we make three recommendations for consideration in its final report:

- Human rights proportionality must be considered in the formation and justification for any changes arising from this review.
- This consideration, and the policy development process more broadly, would be assisted by the introduction of a Justice Impact Test, 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*.