Chapter 9 Offence and sentencing framework: issues and options

9.1 Introduction

In this chapter, we discuss issues and options for reform to the current offence, penalty and sentencing framework for assaults on police, other frontline emergency service workers, corrective services officers and other public officers drawing on the information presented in earlier chapters.

9.2 The definition of a 'public officer'

In Chapter 7, we discussed the basis on which assaults on certain classes of victims — in particular, public officers — should be treated as being more serious at law.

A related issue the Council has been asked to advise on under the Terms of Reference is whether the definition of 'public officer, in section 340 of the *Criminal Code*[547] should be expanded to recognise other occupations, including public transport drivers.

9.2.1 The current legal framework

The definition of 'public officer' in section 340 of the *Criminal Code* is inclusive (not exhaustive). It includes:

- a member, officer or employee of a service established for a public purpose under an Act (with the example of a service given of the Queensland Ambulance Service which is established under the *Ambulance Service Act 1991* (Qld));
- a health service employee under the *Hospital and Health Boards Act 2011* (Qld);
- an authorised officer under the *Child Protection Act 1999* (Qld);[548] and
- a transit officer under the *Transport Operations (Passenger Transport) Act 1994* (Qld).[549]

In addition to this inclusive definition, section 1 of the *Criminal Code* defines a 'public officer' to mean:

> a person other than a judicial officer, whether or not the person is remunerated—
>
> (a) discharging a duty imposed under an Act or of a public nature; or
>
> (b) holding office under or employed by the Crown;
>
> and includes, whether or not the person is remunerated—
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> (c) a person employed to execute any process of a court; and
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> (d) a public service employee; and
>
> (e) a person appointed or employed under any of the following Acts—

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547 *Criminal Code Act 1899* (Qld) sch 1 ('*Criminal Code*').

548 'Authorised officers' are appointed under the *Child Protection Act 1999* (Qld) s 149 and include an officer or employee of the Department of Child Safety, Youth and Women, but can also be a person included in a class of persons declared by regulation as eligible for appointment (they may not necessarily be public servants).

549 Transit officers are appointed by the chief executive under the *Transport Operations (Passenger Transport) Act 1994* (Qld) s 111(3) and can include public service employees, employees of railway operators and managers that are rail government entities; and an employee of the Authority established under the *Queensland Rail Transit Authority Act 2013* (Qld) who are so appointed. For the definition of 'the Authority', see *Transport Operations (Passenger Transport) Act 1994* (Qld) sch 3.

(i) the *Police Service Administration Act 1990*;

(ii) the *Transport Infrastructure Act 1994*;

(iii) the *State Buildings Protective Security Act 1983*; and

(f) a member, officer, or employee of an authority, board, corporation, commission, local government, council, committee or other similar body established for a public purpose under an Act.

A history of the *Criminal Code* definitions

The exhaustive definition of a 'public officer' was inserted by the *Criminal Law Amendment Act* (Qld) in 1997[550] — the only explanation regarding the need for the new definition being that it was 'relevant to the reforms' contained in the Bill.[551]

In particular, prior to the 1997 reforms, the offence of official corruption under section 87 of the *Criminal Code*, was restricted to a person 'employed in the public service, or being the holder of a public office', and while a number of other offences included the term 'public officer' in their section heading, they were in practice restricted in application to public servants through the wording of the offence provisions themselves.[552]

The use of the term 'public officer' in a substantive offence provision (rather than merely a section heading or a procedural provision) at the time of the 1997 amendments was limited to sections 78 (Interfering with political liberty), 199 (Resisting public officers), 399 (Concealing registers) and 469 (Malicious injuries in general — now 'Wilful damage' — 'punishment in special cases: wills and registers').

In his second reading speech explaining the need for these amendments, the then Attorney-General, Dean Wells, referred to Chapter 4 of the Bill as dealing with abuse of office by a public officer, making particular comment that: 'The offence no longer just covers officers of the public service but is extended to include all statutory office holders, from Ministers of the Crown to clerks in local authorities'.[553] The intention to broaden the application of who was captured by this new form of offence (and amendments that followed in later years) seems to have been the main driver for the introduction of the new definition.[554]

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550 *Criminal Law Amendment Act 1997* (Qld). An earlier version of this same definition appeared in the *Criminal Code 1995* (Qld) (which was never proclaimed into force, and later repealed) in much the same terms as that introduced into the Code. However this definition referred to 'holding office under or employed by the State' rather than 'the Crown', 'an officer of the public service' rather than 'a public service employee', and excluded any reference to a person appointed or employed under the *State Buildings Protective Security Act 1983* (Qld) (formerly titled the *Law Courts and State Buildings Protective Security Act 1983* (Qld)).

551 Explanatory Notes, Criminal Law Amendment Bill 1996 (Qld) 4.

552 See, for example, former wording of former sections 84 (Disclosure of secrets relating to defences by public officers — since repealed) and 97 (Personating public officers – substituted in its current form in 2008: see *Criminal Code and Other Acts Amendment Act 2008* (Qld) s 19). Other sections still remaining have retained 'public officer' in the section heading, while applying only to public servants. See, for example, sections 88 (Extortion by public officers) and 89 (Public officers interested in contracts).

553 Queensland, *Parliamentary Debates*, Legislative Assembly, 24 May 1995, 11875 (Dean Wells, Minister for Justice and Attorney-General).

554 This would seem to be supported by a Green Paper produced when a number of other related reforms were sought to be introduced: Queensland Government, Department of Justice, *A Green Paper on Potential Reforms to the Criminal Law of Queensland* (1998) Chapter 4, 103–106.

The later inclusion of the definition of a 'public officer' in section 340(3) coincided with the insertion of subsection (2AA) into section 340 by the *Criminal Code and Other Acts Amendment Act 2009 (*Qld*)*. The Explanatory Notes to the amendment Bill provided the following explanation of these changes:

> Subclause (4) inserts a new subsection (2AA) to apply to assaults on public officers performing a function of their office or employment. The term 'public officer' is defined in section 1 of the Code. That definition includes a person, other than a judicial officer, discharging a duty of a public nature or executing any process of a court. Therefore, persons protected under current 340(1)(c) and (d) will continue to fall under the provision. Subclause (5) inserts into section 340 an inclusive definition of 'public officer' to ensure assaults on emergency services personnel, health service employees and child safety officers (an authorised officer appointed under section 149 of the *Child Protection Act 1999* would not necessarily be a public service employee) are captured by the provision.[555]

The intended relationship between the exhaustive definition of 'public officer' in section 1 of the Code and the inclusive definition of the same term in section 340 — and, more specifically, the application of the section 1 definition to subsection (2AA) — was not addressed.

As a general principle of statutory interpretation in Queensland, a definition in or applying to an Act applies to the entire Act.[556] Generally, where a legislative definition is expressed in a provision to 'include' a concept, this does not displace another legislative definition, unless the included concept is inconsistent with a concept in the other definition.[557] Any displacement generally occurs only to the extent of any inconsistency.[558]

Paragraphs (c) and (d) of subsection 340(1), to which the Explanatory Notes to the amendment Bill refer, do not refer to the term 'public officer' at all. They refer to an unlawful assault committed on a person while the person is, or because the person has, performed a duty imposed on the person by law. In doing so, these paragraphs only partly reflect the language used under the section 1 definition, being a person (other than a judicial officer) 'discharging a duty imposed under an *Act*' (emphasis added), but do not import the concept of a person discharging a duty 'of a public nature'. Nor do they apply explicitly to a person 'holding office under or employed by the Crown'.

What constitutes a duty 'of a public nature' for these purposes is not further defined.

A different approach — the *Human Rights Act 2019* (Qld)

The approach under the *Criminal Code* is in contrast to that recently adopted for the purposes of the *Human Rights Act 2019* (Qld) ('HRA'). Section 10 of the HRA sets out specific criteria for determining if a function is 'of a public nature' for the purposes of the Act. In accordance with the *Acts Interpretation Act 1954* (Qld), a 'function' includes a 'duty'.[559] Relevant matters to be considered include:

> (a) whether the function is conferred on the entity under a statutory provision;
> (b) whether the function is connected to or generally identified with functions of government;
> (c) whether the function is of a regulatory nature;
> (d) whether the entity is publicly funded to perform the function; and
> (e) whether the entity is a government owned corporation.

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555 Explanatory Notes, Criminal Code and Other Acts Amendment Bill 2008 (Qld) 13.

556 *Acts Interpretation Act 1954* (Qld) s 32AA.

557 NSW Parliamentary Counsel's Office, *DP5: Legislative Definitions* (1st ed, 2017) 9 [71].

558 Ibid.

559 *Acts Interpretation Act 1954 (*Qld*)* s 36, sch 1.

Examples are also provided under section 10(3) of functions considered to be 'of a public nature' being:

> (a) the operation of a corrective services facility under the *Corrective Services Act 2006* or another place of detention;
> (b) the provision of any of the following—
> (i) emergency services;
> (ii) public health services;
> (iii) public disability services;
> (iv) public education, including public tertiary education and public vocational education;
> (v) public transport;
> (vi) a housing service by a funded provider or the State under the *Housing Act 2003*.

The phrase 'of a public nature' is applied in the context of defining what a 'public entity' is for the purposes of the HRA[560] which, in addition to other entities expressly referred to in the definition (such as public service employees, police, and local government employees), includes: 'an entity whose functions are, or include, functions of a public nature *when it is performing the functions for the State or a public entity (whether under contract or otherwise)*' (emphasis added).[561] The following (converse) example appears directly below this provision:

> *Example of an entity not performing functions of a public nature for the State—*
>
> A non-State school is not a public entity merely because it performs functions of a public nature in educating students because it is not doing so for the State.[562]

9.2.2 The approach in Western Australia and South Australia

The WA equivalent to section 340 (section 318 of the *Criminal Code* (WA)) establishes an offence of assaulting a public officer performing a function of their office or employment (or because of this),[563] but in this case:

- there is no separate definition of a 'public officer' set out in the offence provision;[564]
- the definition of a 'public officer' that appears in WA section 1 does not refer to a person 'discharging a duty … of a public nature' but rather to 'a person exercising authority under a written law'[565] [this is similar to the wording of ss 340(1)(c) and (d) of the Queensland

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560 The Act only applies to 'public entities' (as defined) to the extent they have functions set out under pt 3 div 4 of the Act: *Human Rights Act 2019* (Qld) s 5(2)(c). It also applies to: a court or tribunal, to the extent the court or tribunal has functions under pt 2 and pt 3 div 3 of the Act; and the Parliament, to the extent the Parliament has functions under pt 3 div 1-3 of the Act: ss 5(2)(a)—(b).

561 *Human Rights Act 2019* (Qld) s 9(1)(h). This applies also to a person, not otherwise mentioned in paragraphs (a)-(h) who is a staff member or executive officer of a public entity: s 9(1)(i).

562 Ibid s 9(1)(h) – example.

563 *Criminal Code* (WA) s 318(1)(d).

564 Examples of public officers, however, are set out under the definition of 'prescribed circumstances', which, where present, restrict the court's discretion in sentencing in accordance with ss 318(2), (4). 'Prescribed circumstances' include where the offence is committed against a public officer who is: (i) a police officer; or (ii) a prison officer, as defined in the *Prisons Act 1981* (WA) s 3(1); or (iii) a person appointed under the *Young Offenders Act 1994* (WA) s 11(1a)(a); or (iv) a security officer as defined in the *Public Transport Authority Act 2003* (WA) s 3; in circumstances where the officer suffers bodily harm: s 318(5).

565 'Public officer' is defined under s 1 to mean any of the following: (a) a police officer; (aa) a Minister of the Crown; (ab) a Parliamentary Secretary appointed under *Constitution Acts Amendment Act 1899* (WA) s 44A; (ac) a member of either House of Parliament; (ad) a person exercising authority under a written law; (b) a person authorised under a written law to execute or serve any process of a court or tribunal; (c) a public service officer or employee within the meaning of the *Public Sector Management Act 1994* (WA); (ca) a person who holds a permit to do high-level

Criminal Code (assault of a person while performing, or because the person has performed, 'a duty imposed on the person by law')];

- while there is a separate offence (under section 318(1)(e)) of assaulting *any person* performing a function of a public nature, or on account of this, this is limited to a person performing functions of a public nature 'conferred on [the person] by law'.

Another point of distinction with section 340 of the Queensland *Criminal Code* is that the WA offence of serious assault does not rely solely on the definition of a 'public officer', or the broad categorisation of people as performing a duty imposed by law, to establish other aggravated forms of assault committed against people in particular occupations or performing specific functions. Instead, in addition to the broad categories of conduct captured, it identifies assaults on people falling within particular occupational groups, working at particular places or delivering particular types of services as constituting forms of serious assault.

318. Serious assault

(1) Any person who—

(d) assaults a public officer who is performing a function of his office or employment or on account of his being such an officer or his performance of such a function; or

(e) assaults any person who is performing a function of a public nature conferred on him by law or on account of his performance of such a function; or

(f) assaults any person who is acting in aid of a public officer or other person referred to in paragraph (d) or (e) or on account of his having so acted; or

(g) assaults the driver or person operating or in charge of—

(i) a vehicle travelling on a railway; or

(ii) a ferry; or

(iii) a passenger transport vehicle as defined in the *Transport (Road Passenger Services) Act 2018* section 4(1);[566] or

(h) assaults—

(i) an ambulance officer; or

(ii) a member of a FES [Fire and Emergency Services] Unit, SES [State Emergency Services] Unit or VMRS [Volunteer Marine Rescue Service] Group (within the meaning given to those terms by the *Fire and Emergency Services Act 1998*); or

(iii) a member or officer of a private fire brigade or volunteer fire brigade (within the meaning given to those terms by the *Fire Brigades Act 1942*),

who is performing his or her duties as such; or

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security work as defined in the *Court Security and Custodial Services Act 1999* (WA); (cb) a person who holds a permit to do high-level security work as defined in the *Prisons Act 1981* (WA); (d) a member, officer or employee of any authority, board, corporation, commission, local government, council of a local government, council or committee or similar body established under a written law; (e) any other person holding office under, or employed by, the State of Western Australia, whether for remuneration or not.

566 Defined to mean a vehicle used or intended to be used in providing a passenger transport service. 'Passenger transport service' is defined in s 4(1) to mean: (a) an on-demand passenger transport service; (b) a regular transport service; (c) a tourism passenger transport service; or a prescribed passenger transport service.

(i) assaults a person who—

(i) is working in a hospital; or

(ii) is in the course of providing a health service to the public; or

(j) assaults a contract worker (within the meaning given to that term by the *Court Security and Custodial Services Act 1999*) who is providing court security services or custodial services under that Act; or

(k) assaults a contract worker (within the meaning given to that term by section 15A of the *Prisons Act 1981*) who is performing functions under Part IIIA of that Act,

is guilty of a crime.

The specific categories of victims named under section 318 of the WA *Criminal Code* are broader than those referred to in the section 340 Queensland definition of a 'public officer' as they include:

- a person working in a hospital (applicable both to public and private facilities, and to medical and non-medical staff), as well as those assaulted while providing a health service to the public (for example, private practitioners and those providing at-home services); and
- drivers and people operating or in charge of various forms of public transport — including trains, ferries, and other forms of passenger transport, such as taxis.

The treatment of these categories of victim, however, is different for the purposes of applying the mandatory minimum sentencing provisions discussed in Chapter 6 of this paper. These provisions are confined in their application to certain occupational groups only in circumstances where the victim has suffered bodily harm. For example, they do not apply to assaults of public transport drivers under section 318(1)(g), fire and emergency services staff under sections 318(1)h)(ii)–(iii), or those working in a hospital or providing health services to the public under section 318(1)(i) which do not meet the definition of 'prescribed circumstances' for the purposes of these subsections.[567]

As an example of an alternative approach, in South Australia, section 5AA(1) of the *Criminal Law Consolidation Act 1935* (SA), sets out circumstances of aggravation that apply across specified general criminal offences, including assault,[568] creating an aggravated form of assault. The aggravating circumstances, which result in a higher maximum penalty being applied if committed in these circumstances, apply in circumstances including that:

(c) the offender committed the offence against a police officer, prison officer, employee in a training centre (within the meaning of the *Youth Justice Administration Act 2016*) or other law enforcement officer — (i) knowing the victim to be acting in the course of his or her official duty; or (ii) in retribution for something the offender knows or believes to have been done by the victim in the course of his or her official duty;

(ca) the offender committed the offence against a community corrections officer (within the meaning of the *Correctional Services Act 1982*) or community youth justice officer (within the meaning of the *Youth Justice Administration Act 2016*) knowing the victim to be acting in the course of their official duties;

567 *Criminal Code* (WA) s 318(5).

568 *Criminal Law Consolidation Act 1935* (SA) s 20.

(ka) the victim of the offence was at the time of the offence engaged in a prescribed occupation or employment (whether on a paid or volunteer basis) and the offender committed the offence knowing the victim to be acting in the course of the victim's official duties.[569]

Occupations and employment prescribed for the purposes of these provisions are:

(a) emergency work;[570]

(b) employment as a person (whether a medical practitioner, nurse, midwife, security officer or otherwise) performing duties in a hospital (including … a person providing assistance or services to another person performing duties in a hospital);

(c) employment as a person (whether a medical practitioner, nurse, pilot or otherwise) performing duties in the course of retrieval medicine;[571]

(d) employment as a medical practitioner or other health practitioner (both within the meaning of the *Health Practitioner Regulation National Law (South Australia)*) attending an out of hours or unscheduled callout, or assessing, stabilising or treating a person at the scene of an accident or other emergency, in a rural area;

(e) passenger transport work;[572]

(f) police support work;[573]

(g) employment as a court security officer;[574]

(h) employment as a bailiff appointed under the South Australian *Civil and Administrative Tribunal Act 2013*;

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569 Ibid s 5AA(1)(ka).

570 The term 'emergency work' is defined to mean: 'work carried out (whether or not in response to an emergency) by or on behalf of an emergency service provider'. The definition of 'emergency services provider' includes the South Australian Country Fire Service and Metropolitan Fire Service, State Emergency Service, Ambulance Service, Surf Life Saving South Australia, the accident or emergency department of a hospital, and a number of other services: *Criminal Law Consolidation (General) Regulations 2006* (SA) r 3A(2).

571 'Retrieval medicine means the assessment, stabilisation and transportation to hospital of patients with severe injury or critical illness (other than by a member of SA Ambulance Service Inc)': *Criminal Law Consolidation (General) Regulations 2006* (SA) r 3A(2).

572 'Passenger transport work means—(a) work consisting of driving a public passenger vehicle for the purposes of a passenger transport service; or (b) work undertaken as an authorised officer appointed under section 53 of the *Passenger Transport Act 1994*; or (c) work undertaken as an authorised person under Part 4 Division 2 Subdivision 2 of the *Passenger Transport Regulations 2009*': *Criminal Law Consolidation (General) Regulations 2006* (SA) r 3A(2). 'Public passenger vehicle has the same meaning as in the *Passenger Transport Act 1994*': *Criminal Law Consolidation (General) Regulations 2006* (SA) r 3A(2). The definition of a 'public passenger vehicle' under *Passenger Transport Act 1994* (SA) s 4(1) is 'a vehicle used to provide a passenger transport service', with 'passenger transport service' further defined to mean: a service consisting of the carriage of passengers for a fare or other consideration (including under a hire or charter arrangement or for consideration provided by a third party)—(a) by motor vehicle; or (b) by train or tram; or (c) by means of an automated, or semi-automated, vehicular system; or (d) by a vehicle drawn by an animal along a public street or road; or (e) by any other means prescribed by the regulations for the purposes of this definition, but does not include a service of a class excluded by the regulations from the ambit of this definition [which currently are: (a) a service provided under a car pooling arrangement; and (b) a service consisting of a ride for the purposes of fun or amusement for a fare less than $5 per ride': *Passenger Transport Regulations 2009* (SA) r 5].

573 'Police support work' means work consisting of the provision of assistance or services to South Australia Police (and includes, to avoid doubt, the provision of assistance or services to a member of the public who is being assisted, or seeking to be assisted, by South Australia Police)': *Criminal Law Consolidation (General) Regulations 2006* (SA) r 3A(2).

574 'Court security officer means a sheriff, deputy sheriff, sheriff's officer or security officer within the meaning of the *Sheriff's Act 1978*': *Criminal Law Consolidation (General) Regulations 2006* (SA) r 3A(2).

(i) employment as a protective security officer within the meaning of *the Protective Security Act 2007*;

(j) employment as an inspector within the meaning of the *Animal Welfare Act 1985*.[575]

Such aggravated assaults attract a maximum penalty of 5 years[576], or 7 years if harm is caused to the victim,[577] in comparison to 2 years for a basic assault offence not involving harm,[578] or 3 years where the assault causes harm.[579]

Following legislative amendments that came into effect on 3 October 2019, a new offence was introduced under section 20AA of the *Criminal Law Consolidation Act 1935* (SA) of causing harm to, or assaulting, certain prescribed emergency workers. 'Prescribed emergency worker' for this purpose is defined as:

(a) a police officer; or

(b) a prison officer;

(c) a community corrections officer or community youth justice officer;

(d) an employee in a training centre (within the meaning of the *Youth Justice Administration Act 2016*);

(e) a person (whether a medical practitioner, nurse, security officer or otherwise) performing duties in a hospital;

(f) a person (whether a medical practitioner, nurse, pilot or otherwise) performing duties in the course of retrieval medicine;

(g) a medical practitioner or other health practitioner (both within the meaning of the *Health Practitioner Regulation National Law (South Australia)*) attending an out of hours or unscheduled callout, or assessing, stabilising or treating a person at the scene of an accident or other emergency, in a rural area;

(h) a member of the SA Ambulance Service Inc;

(i) a member of SAMFS [South Australian Metropolitan Fire Service], SACFS [South Australian Country Fire Service] or SASES [South Australian State Emergency Service];

(j) a law enforcement officer; or

(k) an inspector within the meaning of the *Animal Welfare Act 1985*; or

(l) any other person engaged in an occupation or employment prescribed by the regulations …; or

(m) any other person prescribed by the regulations for the purposes of this paragraph,

whether acting in a paid or voluntary capacity, but does not include a person, or person of a class, declared by the regulations to be excluded from the ambit of this definition.[580]

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575 *Criminal Law Consolidation (General) Regulations 2006* (SA) r 3A(2).

576 *Criminal Law Consolidation Act 1935* (SA) s 20(3)(d).

577 Ibid s 20(4)(d).

578 Ibid s 20(3)(a).

579 Ibid s 20(4)(a).

580 Ibid s 20AA(9).

As discussed in Chapter 6, the maximum penalties that apply to this offence range from 15 years imprisonment for causing harm intentionally[581] down to 5 years for an assault, where harm has not been caused either recklessly or intentionally.[582] 'Harm' is defined for the purposes of this section as including harm inflicted by causing human biological material to come into contact with the victim.[583]

9.2.3 Stakeholder views

A number of preliminary submissions received by the Council identified a need to clarify the scope of the current Queensland definition of a 'public officer', and in some cases, advocated for expanding the scope of those captured under these definitions who are at high risk of being assaulted in similar circumstances to police and other public officers.

For example, the Security Providers Association of Australia Limited (SPAAL) submitted that the role of private security guards in maintaining the safety and protection of the community justified these officers being extended the same protection as enjoyed by public officers under section 340 of the *Criminal Code*:

> Over the past 5 years the role of private security officers to protect Queenslanders from alcohol related crime, violence and anti-social behaviour, as well as deal with responsibilities related to the management and control of criminal organisations in and around licensed venues have led to increasing assaults on private security officers.
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> ...
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> Private security officers play an integral role in the community in providing protection and safety for persons. Controlling the flow of people into and out of a venue or events presents a variety of potential risks to the health, safety and welfare of those responsible for crowd control. The primary role of crowd controllers employed to manage entry into events or venues is to ensure potentially troublesome or intoxicated people don't enter and are safely managed at that point. There are various risks to crowd controllers, such as aggressive or abusive behaviour, patron illness or patron traffic management issues and crowd controllers must have the knowledge and training to deal with these situations.[584]

The Office of Industrial Relations noted that:

> Workers can be exposed to WVA (work-related violence and aggression) from a wide range of sources, including external perpetrators, clients, customers or service users. WVA is a common concern in industries where people work with the public or external clients, and is a particular risk for public officers.[585]

Queensland Health acknowledged with respect to healthcare providers, that:

> Healthcare is delivered in a broad range of settings throughout Queensland by people employed by public agencies, such as Queensland Health, private providers or as individuals. ... Queensland Health believes that the safety of all people in healthcare settings is of equal importance whether that person be in a hospital, a clinic, and aged care facility, a prison or in the community.[586]

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581 Ibid s 20AA(1).

582 Ibid s 20AA(3).

583 Ibid s 20AA(6).

584 Preliminary submission 1 (SPAAL).

585 Preliminary submission 30 (Officer of Industrial Relations) 1.

586 Preliminary submission 2 (Queensland Health) 2.

Queensland Health called on the Council to adopt as a principle of the review that 'the health and safety of all workers in all healthcare settings be treated with equal importance in any sentencing regime'.[587]

The Queensland Nurses and Midwives' Union similarly urged consideration beyond health service employees under the *Hospital and Health Boards Act 2011* (reflecting the current definition of a 'public officer' under section 340 of the *Criminal Code*) to 'include those who work within private health facilities and private aged care facilities and agency nurses and midwives'. It asked the Council to consider 'a new category of coverage for these healthcare workers other than "public officers"'.[588]

The Department of Youth Justice noted that Youth Detention Centre staff are public officers within the current definition.[589]

One example specifically raised with the Council of a type of worker unlikely to meet the current definition of a 'public officer' was contracted service providers, such as public transport providers. These workers are not employees of a service established for a public purpose under an Act, although their functions may be regulated under legislation.

In the lead up to the 2017 State election, there were calls as part of the Queensland Labor Party's State Platform to 'increase penalties for people found guilty of assaulting public transport workers'[590] suggesting there was a potential gap in current protections.

Similarly, in the same campaign, the Liberal National Party reportedly made election commitments to:

- introduce mandatory minimum sentences of seven days' physical imprisonment for people convicted of serious assault of police, ambulance officers and firefighters; and
- create a new offence under the *Ambulance Service Act 1991* (Qld) of assaulting or obstructing a paramedic or other authorised officer (similar to the existing summary offence for police officers).[591]

The Australasian Railway Association, Bus Industry Confederation, Rail, Tram and Bus Union and TrackSAFE Foundation, in a joint preliminary submission to the review, submit that the definition of a 'public officer' in section 340 of the Code 'should be expanded to recognise Queensland public transport workers'.[592] They suggest any expanded definition should 'include front-line public transport workers and all modes of transport' rather than being limited to public transport drivers only, arguing: 'It is vital that bus, train, light rail, ferry, taxi drivers as well as front-line public

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587 Ibid.

588 Preliminary submission 18 (Queensland Nurses and Midwives' Union) 4.

589 Preliminary submission 32 (Department of Youth Justice) 1.

590 Australian Labor Party, Queensland Branch, *Putting Queenslanders First: State Platform 2017* (2017) 80 [7.60].

591 Felicity Caldwell, 'LNP PROPOSES MANDATORY JAIL SENTENCE FOR ASSAULTS ON EMERGENCY SERVICE WORKERS' *Brisbane Times* (online, 25 May 2017) <https://www.brisbanetimes.com.au/national/queensland/lnp-proposes-mandatory-jail-sentence-for-assaults-on-emergency-services-workers-20170525-gwd753.html>.
Another report related to an unsuccessful attempt to pass a three-month mandatory minimum jail term for assaults on emergency workers from opposition in 2010, with reference to another attempt in 2008: AAP, 'MANDATORY JAIL FOR ATTACKING EMERGENCY WORKERS REJECTED' *Brisbane Times* (online, 2 September 2010) <https://www.brisbanetimes.com.au/national/queensland/mandatory-jail-for-attacking-emergency-workers-rejected-20100902-14o3l.html>.

592 Preliminary submission 5 (Australasian Railway Association and ors) 1.

transport workers who interact with customers are adequately covered'.[593] GoldlinQ Pty Ltd (Gold Coast Light Rail) supported this submission.

The Transport Workers' Union (TWU) requested that: 'the inquiry consider, where appropriate, extending similar and tougher penalties [to those introduced in South Australia] to bus drivers working in both the public and private sphere'.[594] It went on to observe: 'As our privately engaged bus drivers essentially perform the same public transport services, we believe they face the same risk of assault as bus drivers employed directly by the public service sector', calling either for the definition of 'public officer' to be expanded, or to protect such workers in separate offence provisions with higher penalties or the introduction of circumstances of aggravation. [595]

The TWU also supported extending similar protections to operators within the personalised transport industry, including taxi and rideshare drivers, noting that survey data commissioned by the Department of Transport and Main Roads had indicated that passenger and driver safety is of significant concern to relevant stakeholders.[596]

The Queensland Law Society did not hold a 'firm view as to whether "public officer" in section 340 should be expanded to recognise other occupations, including public transport drivers', and required further information about the frequency and seriousness of offending to enable a considered response to this issue.[597] However, it accepted 'some refinement may be necessary to remove ambiguity'.

Sisters Inside specifically opposed the extension of the current definition of 'public officer' in section 340 on the basis of the justification provided in the Explanatory Notes to the 2014 Bill introducing these reforms which referred to the need to protect frontline officers from the dangers inherent in their duties.[598] It submitted: 'We contend there are no 'inherent dangers' in the duties of bus drivers. For contrast, the work of taxi or Uber driver[s], while not a public role, could not be said to be less dangerous….'[599]

The TWU had a contrary view, pointing to the findings of the 2017 Queensland Bus Driver Safety Review citing 2015–16 Department of Transport and Main Roads figures which reported 392 assault-related incidents in 2015–16 involving contracted bus operators.[600] The TWU submitted: 'Notwithstanding their direct interaction with the public and working alone, evidence suggests that bus drivers have a higher predisposition, and increased vulnerability, to violence'.[601]

Members of the Council's Aboriginal and Torres Strait Islander Advisory Panel who attended a meeting on 27 February 2020, provided preliminary feedback on the Terms of Reference. Concern was expressed about overrepresentation of people with disabilities and substance abuse issues as public officer assault offenders. The Panel expressed a general opposition to mandatory sentencing, support for greater clarification of the definition of the term 'public officer' and an appreciation for the potential benefits of officer training and support with a focus on de-escalation techniques.

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593 Ibid.

594 Preliminary submission 24 (Transport Workers' Union, Queensland Branch) 1.

595 Ibid 2.

596 Ibid 1–2.

597 Preliminary submission 34 (Queensland Law Society) 2.

598 Preliminary submission 21 (Sisters Inside) 4.

599 Ibid. This submission was supported by the Prisoners' Legal Service Inc.

600 Department of Transport and Main Roads, *Queensland Bus Driver Safety Review* (2017) 6.

601 Preliminary submission 24 (Transport Workers' Union, Queensland Branch) 1.

9.2.4 Issues and options

Preliminary submissions made to this review highlight the high level of uncertainty about who meets the definition of a 'public officer', and different views about which classes of persons should fall within section 340, rather than be dealt with under general offence provisions under the *Criminal Code* — such as common assault, AOBH and GBH.

Arguably, given the current definition of a 'public officer' under section 1 of the *Criminal Code* is broad, and presuming this is not displaced by the current inclusive definition in section 340, there is existing scope to recognise other categories of workers, such as public transport workers and other contracted service providers delivering public services on the basis that in doing so, they are 'discharging a duty … of a public nature'. The scope of this statutory definition, however, is rarely tested, and the reality is that in specific cases, it may be unclear whether the definition has been satisfied — particularly to police who are initially making decisions as to the appropriate charge or charges that should be laid.

As discussed above, the rationale for setting out a separate inclusive definition under section 340 of a 'public officer', in addition to the existing definition under section 1 of the *Criminal Code,* was to ensure assaults on emergency services personnel, health service employees and child safety officers were captured within the new subsection (2AA).

If any changes to the section 340 definition of 'public officer' are contemplated, some care would need to be taken to ensure consistency with the definition that appears in section 1. Otherwise, there is a clear risk of increasing the uncertainty about who is included.

The Queensland Human Rights Commission (QHRC) has also made a case for greater specificity in determining who falls within scope of these aggravated assault provisions, cautioning:

> While various jurisdictions have introduced increased penalties to protect particular workers, the definition of a frontline worker differs. This reflects that specific local evidence about the importance of protecting that particular profession is necessary to demonstrate human rights compliance.
>
> Although all of the professions proposed in the Terms of Reference undoubtedly have inherent risks in their work, the nature of that risk may differ. There is clear evidence that frontline workers, such as police, corrective services officers and other frontline emergency service workers are subject to greater risks of assault in their work … the risk of injury is not necessarily the same for all workers categorised as 'public officers'.[602]

The QHRC recommends that:

> each occupation identified for … increased penalties must be specifically justified based on the particular risks faced by that profession, rather than a blanket approach. This may include demonstrating how differences in penalties can achieve the change in behaviour sought towards frontline workers.[603]

Queensland Advocacy Incorporated (QAI) made very similar arguments.[604]

On a related issue, a recent Bill introduced in Victoria aims to clarify the legislative intention to extend protection to emergency workers who are employed or engaged by another State or

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602 Preliminary submission 3 (Queensland Human Rights Commission) 13 [44]–[45].

603 Ibid 13 [47].

604 Preliminary submission 35 (Queensland Advocacy Incorporated) 10–11 (citations omitted).

Territory, or by the Commonwealth to perform a functions of a similar kind to an emergency worker in Victoria when these officers are on duty in Victoria.[605]

The Council invites views about whether similar amendments are necessary in Queensland to ensure interstate public officers are extended the same protections as local Queensland officers when performing functions in Queensland.

Questions: Definition of a 'public officer'

6. Who should be captured within the definition of a 'public officer' and how should this be defined? Are the current definitions under sections 1 and 340 of the *Criminal Code* sufficiently clear, or are they in need of reform? For example:
    a. Should the definition of 'public officer' in section 340 of the *Criminal Code* be expanded to expressly recognise other occupations, including public transport drivers (e.g. bus drivers and train drivers) and public transport workers?
    b. Should people employed or engaged in another state or territory or by the Commonwealth to perform functions of a similar kind to Queensland public officers who are on duty in Queensland, also be expressly protected under section 340?
7. Should assaults on people employed in other occupations in a private capacity, working in particular environments (e.g. hospitals, schools or aged care facilities) or providing specific types of services (e.g. health care providers or teachers) also be recognised as aggravated forms of assault? For example:
    a. by recognising a separate category of victim under section 340 of the *Criminal Code* — either with, or without, providing for additional aggravating circumstances (e.g. spitting, biting, throwing bodily fluids, causing bodily harm, being armed) carrying a higher maximum penalty;
    b. by stating this as a circumstance of aggravation for sentencing purposes under section 9 of the *Penalties and Sentences Act 1992* (Qld);
    c. other?

9.3 Assaults by prisoners against corrective services officers

9.3.1 The current legal framework

As discussed in Chapter 3, section 340(2) of the *Criminal Code* creates a specific form of serious assault which applies in circumstances where a prisoner unlawfully assaults a working corrective services officer. The maximum penalty for this offence is 7 years imprisonment.

The term 'prisoner' has the same meaning as under Schedule 4 of the *Corrective Services Act 2006* (Qld) ('CSA') meaning 'a person who is in the chief executive's custody, including a person who is released on parole'.

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605 Sentencing Amendment (Emergency Worker Harm) Bill 2020 (Vic) cl 4(2) amending the definition of 'emergency worker' in *Sentencing Act 1991* (Vic) s 10AA(8).

'Working corrective services officer' is defined under section 340(3) to mean 'a corrective services officer present at a corrective services facility in his or her capacity as a corrective services officer'.

Section 340(3) sets out the definitions that apply to section 340, and imports the CSA definitions of:

- 'corrective services facility': (a) a prison;[606] (b) a community corrections centre;[607] or (c) a work camp';[608]
- 'corrective services officer': a person who holds appointment as a corrective services officer under section 275 of the CSA.

Section 156A of the *Penalties and Sentences Act 1992* (Qld) ('PSA') further requires that where an offender commits an offence listed in Schedule 1 of the Act while serving a term of imprisonment or on parole, the sentence imposed must be ordered to be served cumulatively with any other term of imprisonment the offender is liable to serve. Schedule 1 offences include serious assault under section 340, as well as other offences that may be charged in circumstances where a correctional officer has been assaulted, such as acts intended to cause GBH and other malicious acts (s 317), GBH (s 320), wounding (s 323) and AOBH (s 339).

Prisoners can also be subject to breach action following an assault in custody, although the CSA is clear that a prisoner must not be punished twice for the same act or omission. [609] This means that a decision must be made to either deal with the assault by way of a criminal charge or as a breach of discipline. Consequences of a major breach of discipline can include: a reprimand without further punishment; forfeiting privileges the prisoner might have otherwise received; or a period of separate/solitary confinement[610] for not more than 7 days.[611]

In addition to these consequences, behaviour while in custody is taken into account by the Parole Board Queensland in deciding the outcome of applications for parole.

9.3.2 Issues and preliminary feedback

Corrective Services Officers: section 340(2)

The creation of a separate offence under section 340(2) of unlawful assault by a prisoner on a working corrective services officer has led to some concerns that offenders who commit aggravated forms of serious assault in this context will be subject to a lower penalty than if committed in another context. Section 340(2) provides a flat maximum penalty of 7 years and does not distinguish between different types of assaults or whether bodily harm is caused. However, a higher maximum penalty of 14 years applies to assaults by an offender involving biting or spitting on a public officer, throwing at or applying a bodily fluid or faeces at a public officer, or which caused bodily harm.

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606 A 'prison' is defined to mean a place declared to be a prison under section 149(1): *Corrective Services Act 2006* (Qld) sch 4. As provided for under *Corrective Services Regulation 2017* (Qld) s 21, places declared to be prisons are set out in sch 1, column 2.

607 A 'community corrections centre' means a place declared to be a community corrections centre under s 151(1)(a)(i): *Corrective Services Act 2006* (Qld) sch 4. These are notified by gazette notice.

608 A 'work camp' is defined to mean 'a place declared to be a work camp under section 151(1)(a)(ii)': *Corrective Services Act 2006* (Qld) sch 4. These are notified by gazette notice.

609 *Corrective Services Act 2006* (Qld) s 115. Sisters Inside in its preliminary submission has raised concerns the existing of this provision does not ensure that internal punishments are taken into account when pressing charges or sentencing: Preliminary submission 21, 6.

610 Ibid s 118(2).

611 Ibid s 121(2).

The limited nature of section 340(2) and charging practices could lead to a situation where an assault by a parolee on a corrections officer in a community setting is subject to a different maximum penalty in circumstances where there are aggravating features (14 years imprisonment under s 340(2AA)) than if it the same type of assault had occurred in a corrective services facility (7 years under s 340(2)).

It was concerns of this nature that contributed to the Together Union initiating petitions,[612] which received a combined total of 3,967 signatures and were tabled in the Legislative Assembly in October 2019. The petitions requested the House to:

> amend or omit clauses of section 340 and any other relevant legislative instruments necessary to effect consistent maximum sentencing is applied to perpetrators of unlawful assault against any member, officer or employee of a service established for a public purpose under an Act.

Assuming that corrective services officers — whether working in a correctional centre environment or in the community — already meet the definition of a 'public officer', there should be no barrier to charging a person with an offence under section 340(2AA) where it is appropriate to do so due to the presence of aggravating factors. However, in practice it seems that the overwhelming majority of prisoners who have committed offences against corrective services officers are charged and sentenced under section 340(2) — even when aggravating features may have been present.

The Council's findings support concerns raised by the Together Union that: 'There remains confusion as to whether the increased maximum sentences contained in s 340(2AA) apply to Correctional Officer[s] given the specific provisions of s 340(2)'.[613]

In 2005, when subsection (2) was inserted with the passage of the *Justice and Other Legislation Amendment Act 2005* (Qld), the only explanation for this provision given in the Explanatory Notes was that it would 'provide for a specific offence to cover assaults by prisoners committed upon corrective services officers in prisons',[614] thereby acknowledging 'the vulnerability of prison officers and the seriousness of any assault upon them in the course of their legitimate duties'.[615]

This pre-dated the introduction of subsection (2AA) and the current form of offending captured under paragraphs (c) and (d) of subsection (1). Prior to the introduction of these amendments, charges involving assaults against corrective services officers would instead have either had to be brought under:

- the former section 340(1)(e) 'assault any person on account of any act done by the person in the execution of any duty imposed on the person by law', or
- the summary offence of obstructing a corrective services officer in the performance of a function under section 95 of the former *Corrective Services Act 2000* (Qld) (which at that time carried a maximum penalty of 40 penalty units or 1 year's imprisonment (increased under the new equivalent offence provision, section 124(b) of the CSA, to 2 years imprisonment; with its coming into force on 28 August 2006).[616]

The 2005 amendments also extended the operation of what was then the offence of obstructing a corrective services officer in performing a duty under the *Corrective Services Act 2000* (Qld) to expressly refer to an assault on a corrective services officer. This amendment was said to

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612 E-petition 3187–19 and paper petition 3224–19 entitled 'Protect Our Prison Officers'.

613 Preliminary submission 14 (Together Union) 3.

614 Explanatory Notes, Justice and Other Legislation Amendment Bill 2005 (Qld) 4, 24.

615 Ibid 24.

616 *Proclamation - Corrective Services Act 2006* (SL 213 of 2006).

'complement the amendment made … to section 340 of the Criminal Code' and to provide 'a specific charge, which must be dealt with summarily, to deal with minor examples of assaults on corrective services officers'.[617]

Arguably, any issues arising from the existence of subsections (2) and (2AA) of section 340 — both of which might be applied in circumstances where a prisoner has assaulted a corrective services officer — could be avoided if subsection (2) was simply repealed. Once repealed, it is likely all prosecutions initiated under section 340 of the Code in circumstances where a prisoner has assaulted a corrective services officer would be initiated under subsection (2AA). This would put beyond doubt that where a prisoner assaults a corrective services officer with aggravating factors, the higher maximum penalty (14 years) is to be applied in setting the appropriate sentence.

In the event this is considered necessary, in addition to repealing subsection (2AA), the current definition of a 'public officer' could be amended to refer to a corrective services officer as defined under schedule 4 of the CSA to put beyond any doubt that they are captured.

However, as with any legislative reforms, repealing subsection (2) might have unforeseen and/or negative consequences. For example, it may make it more difficult for statistical and reporting purposes to identify cases falling within this particular sub-category of offending and to distinguish between assaults and other conduct falling with (2AA). It might also result in problems in interpreting criminal histories. The recent separation of the acts of 'assault' and 'obstruct' into separate paragraphs (and therefore separate offences) under section 790(1) of the PPRA was justified on this basis.[618]

This same argument, however, could equally apply to other categories of 'public officer' who unlike police and working corrective services officers, do not have their own specific offence provisions under section 340 — including paramedics, health and hospital service staff, child safety officers and transit staff.

The Government has very recently sought to resolve this issue by replicating the existing aggravating circumstances (involving biting or spitting on a public officer, throwing at or applying a bodily fluid or faeces at a public officer, or which caused bodily harm) implemented by the Liberal National Party in 2012 and again in 2014. These are discussed in Chapter 3.

On 17 March 2020, the Minister for Police and Minister for Corrective Services, Mark Ryan MP, introduced the Corrective Services and Other Legislation Amendment Bill 2020 into Parliament. It would, if passed, amend section 340 of the *Criminal Code* by copying the provisions, and maximum 14-year penalty, from the penalty provisions in sections 340(1)(a) and (2AA). In introducing the Bill, the Minister acknowledged the advocacy of the Together union, their members and all staff across correctional centres as well as members of the House in respect of the amendment and the hope the amendment `will provide a strong deterrent to this type of behaviour occurring in a closed environment and reassurance to Corrective Services officers of the importance of their health and safety'.[619]

The Bill has been referred to the Legal Affairs and Community Safety Committee, which must report to the Parliament by 29 May 2020.

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617 Explanatory Notes, Justice and Other Legislation Amendment Bill 2005 (Qld) 19.

618 Explanatory Notes, Police Powers and Responsibilities and Other Legislation Amendment Bill 2018 (Qld) 4.

619 Queensland, *Parliamentary Debates*, Legislative Assembly, 17 March 2020, `Corrective Services and Other Legislation Amendment Bill — Introduction', 622–2 (Mark Ryan, Minister for Police and Minister for Corrective Services).

The Council invites views about the benefits and disadvantage of retaining section 340(2) in its current or amended form and potential impacts should its repeal, in either form, be recommended.

Question: Assaults by prisoners on corrective services officers under s 340 *Criminal Code*

8. If section 340 of the *Criminal Code* is retained in its current or amended form, is there a need to retain subsection (2) which applies to assaults by prisoners on working corrective services officers (as defined for the purposes of that section), or can this type of conduct be captured sufficiently within subsection (2AA)? What are the benefits of retaining subsection (2)?

9.4 Legal framework for aggravated forms of assault and assault-related offences

9.4.1 The current legal framework

There is no legislated circumstance of aggravation for sentencing purposes regarding serious assault, as this is built into the structure of the offence itself through the higher maximum penalty. This includes the introduction of an aggravated form of offence in 2012 for certain categories of assault on police involving the offender: biting or spitting on the police officer or throwing at, or applying a bodily fluid or faeces to the police officer; causing bodily harm to the police officer; and being, or pretending to be, armed with a dangerous or offensive weapon or instrument. In 2014, this form of aggravated offence was extended to other public officers.

In practice this means that a higher maximum penalty (signalling to courts the more serious nature of the offending) applies to similar conduct when committed against a person falling within the scope of the offence than to other members of the community. For example:

- a 7-year maximum penalty for serious assault without bodily harm or other aggravating factors being present, versus a 3-year maximum penalty for common assault;
- a 14-year maximum penalty for serious assault causing bodily harm, versus a 7-year maximum penalty for AOBH (or 10 years if the offender is, or pretends to be armed or is in company with another person);
- a 14-year maximum penalty for serious assault involving the offender spitting on a police officer or public officer, versus a 3-year maximum penalty for common assault where the victim is not a public officer or police officer (although if the offender has an infectious disease and intends to transmit the disease in spitting on the person, they may be charged under section 317 of the *Criminal Code* which carries a maximum penalty of life imprisonment);
- a 14-year maximum penalty for serious assault involving the offender biting a police officer or public officer, versus a 7-year maximum penalty for AOBH (without a circumstance of aggravation) and wounding.

9.4.2 Issues and options

Framing circumstances of aggravation

Instead of, or in addition to, introducing a stand-alone form of assault that applies to public officers, some other jurisdictions have introduced:

- statutory circumstances of aggravation that apply to specific offences that fall under the general criminal law (e.g. common assault, AOBH, GBH, wounding); and/or

- general statutory aggravating factors that apply for sentencing purposes and can be applied across all general criminal offences without being expressly charged.

In some jurisdictions, there exists both specific offences carrying higher penalties for specific types of assaults, as well as general circumstances of aggravation for sentencing purposes. For example, in NSW there are separate offences of assaults on police,[620] assaults on law enforcement officers other than police[621] and assaults on school students or staff members[622] as well as general circumstances of aggravation for sentencing purposes, which include:

- the victim was a police officer, emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation or voluntary work;[623]
- the victim was vulnerable, for example because of the victim's occupation (such as a person working at a hospital (other than a health worker), taxi driver, bus driver or other public transport worker, bank teller or service station attendant).[624]

The NSW provisions make clear that a court is not to have additional regard to these general circumstances of aggravation if they are an element of the offence,[625] thereby avoiding potential for double counting.

The differences between the two approaches to aggravating factors is illustrated by the High Court decision in *R v De Simoni.*[626] This case concerned a person who was convicted of robbery with actual violence. Wounding was a statutorily defined aggravating factor for that offence. The Court found (by majority) that a wounding committed during the commission of the robbery, but not expressly charged in the robbery indictment, could not be relied upon to make the offender subject to the higher maximum penalty that would have applied on conviction for the aggravated form of the offence. Gibbs CJ wrote:

> …the general principle that the sentence imposed on an offender should take account of all the circumstances of the offence is subject to a more fundamental and important principle, that no one should be punished for an offence of which he has not been convicted … a judge, in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence.[627]

The most important distinction between aggravating factors that attach to a specific offence or offences, and general statutory aggravating factors applied for sentencing purposes is that under the first approach, a higher statutory maximum penalty generally applies in circumstances where

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620 *Crimes Act 1900* (NSW) ss 60(1)–(3A).

621 Ibid ss 60A(1)–(3).

622 Ibid ss 60E(1)–(2).

623 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(a).

624 Ibid s 21A(2)(l).

625 Ibid s 21A(2).

626 (1981) 147 CLR 383.

627 *R v De Simoni* (1981) 147 CLR 383, 389 (Gibbs CJ, Mason and Murphy JJ agreeing). However, see *Sentencing Act 1995* (WA) s 7(3) introduced following this decision which provides for circumstances not charged to be treated as aggravating: 'If the statutory penalty for an offence is greater if the offence is committed in certain circumstances than if it is committed without the existence of those circumstances, then (a) an offender is not liable to the greater statutory penalty unless he or she has been charged and convicted of committing the offence in those circumstances; and (b) whether or not the offender was so charged, the existence of those circumstances may be taken into account as aggravating factors'.

the aggravating factors are established, whereas under the second, the same maximum penalty applies. In the first instance, '[t]he presence of the aggravating element will ordinarily be read as converting the offence from a lesser to a graver one by creating a separate aggravated form of the crime carrying a higher penalty'.[628]

Another distinction between the two approaches, is that if an aggravated form of an offence exists, it must be expressly charged in the indictment and the aggravating circumstances proven beyond reasonable doubt by the prosecution. If the defendant does not admit guilt by pleading guilty, it is for the jury, rather than the judge, to determine if the aggravating factors have been established (in addition to the other elements of the offence).[629]

A potential advantage of introducing legislated circumstances of aggravation is that they can be applied across a number of general criminal offences (e.g. common assault, AOBH, wounding, GBH) without the need to create new specialised forms of offences. Substantive offences under the criminal law are thereby distinguished by the victim's status (as a public officer) rather than by the criminal conduct involved and resulting harm. Under this approach, while the offence charged is the same irrespective of victim status, it is more serious by virtue of the fact it was committed against a public officer performing a public role or duty.

Even more flexibility than under aggravated forms of offences is possible where statutory circumstances of aggravation are applied for sentencing purposes, as there is no requirement for the aggravating factors (or aggravated form of the offence) to be charged. Under this approach, the same maximum penalties apply irrespective of whether the victim is a public officer or not, while still directing a court to treat an offence against these categories of victims as more inherently serious, unless there are good reasons for it not to be.

Examples of approaches under 9(a) (see Question 9 below) to aggravating circumstances applied to Queensland offences

Example of different approaches to aggravating circumstances, including how these might be applied to Queensland offences, are set out below.

> *Criminal Code* s 335: Common assault
>
> (a) Common assault where committed against a police officer or other public officer and the act involves spitting, or throwing at, or applying to the officer a bodily fluid or faeces, or where offender is, or pretends to be armed: 14 year maximum penalty [current maximum penalty under s 340(1)(b) – penalty para (a) and s 340(2AA) – penalty para (a)]
>
> (b) Common assault where committed against a police officer or other public officer, not in circumstances listed in (a): 7 years [current maximum penalty under s 340(1)(b) – penalty para (b) and s 340(2AA) – penalty para (b)]
>
> (c) Common assault simpliciter in circumstances where paragraphs (a) and (b) do not apply: 3 year maximum penalty (current)
>
> *Criminal Code* s 339: Assaults occasioning bodily harm
>
> (a) AOBH simpliciter: 7 year maximum penalty (current)
>
> (b) AOBH where the offender is, or pretends to be armed or is in company, and circumstances in para (c) do not apply: 10 year maximum penalty (current)

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628 Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Lawbook Co, 3rd ed, 2014) 162 [2.145].

629 Ibid 163 [2.145].

(c) AOBH where committed against a public officer performing, or because they have performed, a function of their office (note: likely to encompass current 'biting' charges under s 340) — including where the offender is, or pretends to be, armed: 14 years [current maximum penalty under s 340(1)(b) – penalty para (a) and s 340(2AA) – penalty para (a)].

Examples of approaches under 9(b) (see Question 9 below):

(1) *Sentencing Act 2002* (NZ), s 9:

In sentencing or otherwise dealing with an offender the court must take into account the following aggravating factors to the extent that they are applicable in the case:

…

(fa) that the victim was a constable, or a prison officer, acting in the course of his or her duty:

(fb) that the victim was an emergency health or fire services provider acting in the course of his or her duty at the scene of an emergency:

(2) *Assaults on Emergency Workers (Offences) Act 2018* (UK), s 2:

(1) This section applies where—

(a) the court is considering for the purposes of sentencing the seriousness of an offence listed in subsection (3), and

(b) the offence was committed against an emergency worker acting in the exercise of functions as such a worker.

(2) The court—

(a) must treat the fact mentioned in subsection (1)(b) as an aggravating factor (that is to say, a factor that increases the seriousness of the offence), and

(b) must state in open court that the offence is so aggravated.

(3) The offences referred to in subsection (1)(a) are—

(a) an offence under any of the following provisions of the *Offences against the Person Act 1861*—

(i) section 16 (threats to kill);

(ii) section 18 (wounding with intent to cause grievous bodily harm);

(iii) section 20 (malicious wounding);

(iv) section 23 (administering poison etc);

(v) section 28 (causing bodily injury by gunpowder etc);.

(vi) section 29 (using explosive substances etc with intent to cause grievous bodily harm);

(vii) section 47 (assault occasioning actual bodily harm);

(b) an offence under section 3 of the *Sexual Offences Act 2003* (sexual assault);

(c) manslaughter;

(d) kidnapping;

(e) an ancillary offence in relation to any of the preceding offences.

…

(6) Nothing in this section prevents a court from treating the fact mentioned in subsection (1)(b) as an aggravating factor in relation to offences not listed in subsection (3).

Labelling – symbolism and declarative functions

The approach of introducing the victim's status as a public officer when performing a duty imposed on them by law, or because of the exercise of such duties, as a general circumstance of aggravation to be applied across some, or all criminal offences might respond, in particular, to concerns about the equality of treatment of serious assault and other aggravated forms of offences which afford certain categories of victims greater protection at law (through the application of higher maximum penalties) than others.

On the other hand, the retention of a stand-alone offence (or offences), which names specific categories of victim or forms of behaviour, even if captured elsewhere under the general criminal law, could be argued to perform an important symbolic function.

The Tasmanian Sentencing Advisory Council (TSAC) in its report on assaults on emergency service workers, referencing an earlier issues paper produced by the Tasmania Law Reform Institute on racial vilification and racially motivated offences,[630] noted arguments in favour of this approach included that such offences 'can send a strong public statement of society's condemnation of certain behaviours and the symbolic function of a law can be "absolutely and without question sufficient justification for its introduction"'.[631] Arguments against such an approach in the context of the earlier review included that 'it was not a 'useful or necessary exercise of Parliament's power over citizens to enact criminal laws to serve a "symbolic function"' and '[f]or any additional restrictions on individual or collective freedom to be justified, their actual rather than their emotive, speculative or "symbolic" benefits must be demonstrated'.[632]

In the context of its own review, TSAC identified the symbolic nature of a separate provision for emergency service workers as 'an important argument in support of its introduction', as such an approach 'acknowledges the community's abhorrence of this type of behaviour and acts to educate members of the public about certain behaviours that are not acceptable'.[633] It consequently recommended that the offence of assault a public officer be broadened to include an emergency service worker, and that the maximum penalty be increased to 50 penalty units or to imprisonment for a term of two years (or both).[634] This recommendation was accepted by the Tasmanian Government, and reflects the current law.[635]

A similar benefit in the 'labelling' of such conduct as unacceptable has also been recognised by other commentators as performing a legitimate and important function in responding to offences against police:

> The labelling effect is important because it reflects the state's explicit message of the role and importance of the police as part of the state. What distinguishes the police officer from other risky professions is that the police represent the state, the community and the law. First, law enforcement is in the interest of the wider public, and condemnation of any interference with the implementation of law and security is therefore justified. Secondly, an attack on a constable is seen as an attack on the Crown, upon which every police officer takes their oath. This is

630 Tasmania Law Reform Institute, *Racial Vilification and Racially Motivated Offences: Issues Paper no. 16* (Tasmania Law Reform Institute, 2010) 22.

631 Sentencing Advisory Council (Tasmania), *Assaults on Emergency Service Workers* (Report No. 2, 2013) 41.

632 Ibid (references omitted).

633 Ibid.

634 Ibid 47, Recommendation 1(2).

635 *Police Offences Act 1935* (Tas) ss 34B(2)–(2A).

> especially true in political demonstrations or riots where officers are attacked just for being 'part of the system'. A strike against an individual officer is therefore of social significance, which goes beyond the individual harm caused. It is a strike against a fundamental institution.[636]

Similar arguments are also commonly made during parliamentary debates and in explanatory material[637] on the need for such provisions, although they are often applied equally to the need to establish specific statutory aggravating factors for sentencing purposes.[638]

9.4.3 Stakeholder views

Legal stakeholder and advocacy bodies generally supported the retention of the current form of section 340, without the need for separate additional offences or circumstances of aggravation to be introduced. These views are discussed below in this chapter, under 'support for the current offence and penalty framework'.

During this next stage of the review, the Council invites further feedback on this issue.

Question: Legal framework for assaults on public officers

9. Should assaults against public officers continue to be captured within a specific substantive offence provision (serious assault) or, alternatively, should consideration be given to:

- **a.** making the fact the victim was a public officer performing a function of their office, or the offence was committed against the person because the person was performing a function of their office an aggravating factor that applies to specific offences as a statutory circumstance of aggravation (meaning a higher maximum penalty would apply); and/or
- **b.** amending section 9 of the *Penalties and Sentences Act 1992* (Qld) to statutorily recognise the fact the victim was a public officer an aggravating factor for sentencing purposes (in which case it would signal the more serious nature of the offence, but would not impact the upper limit of the sentence that could be imposed)?

9.5 Offences of assault and related conduct (resist and obstruct) involving public officers

9.5.1 The current legal framework

As discussed in Chapter 3, Queensland has a number of offences that capture the same, or similar types of criminal conduct where committed against public officers that exist across different legislation.

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636 Osman Isfen and Regina E Rauzloh, 'Police Officers as Victims: Sentencing Standards and their Justifications in England and Germany' (2017) 81(1) *The Journal of Criminal Law* 33, 46–7.

637 See, for example, Australian Capital Territory, Explanatory Statement: Crimes (Protection of Police, Firefighters and Paramedics) Amendment Bill 2019 which refers to a new offence recognising 'the discrete criminality of this offending', as well as 'clear community expectation that these assaults are unacceptable': 2 and 5.

638 See, for example New Zealand, *Parliamentary Debates*, House of Representatives, 12 September 2012, Sentencing (Aggravating Factors) Amendment Bill — Third Reading, 5194 (Jacqui Dean, National Member for Waitaki).

In the case of assault, there are various options in Queensland regarding offences which can be charged (depending on who commits it, the type of victim and the context involved). Table 9-1 illustrates select assault offences targeted at public officers, applicable maximum penalties and classification.

Table 9-1: Select Queensland offences involving assault, maximum penalties and classification

Provision	Offence description	Maximum penalty	Indictable or summary
s 340(1)(a) *Criminal Code* (Serious assault)	Assault another with intent to commit a crime, or with intent to resist or prevent the lawful arrest or detention of himself or herself or any other person	7 years	Indictable offence triable summarily on prosecution election (see s 552A of the *Criminal Code*)
s 340(1)(b)	Assault (resist, or wilfully obstruct) a police officer while acting in the execution of the officer's duty, or another person acting in aid	7 years 14 years, if aggravating factors apply	Indictable offence triable summarily on prosecution election (see s 552A of the *Criminal Code)*
ss 340(1)(c)—(d)	Unlawfully assault any person while the person is performing, or because the person has performed, a duty imposed on the person by law	7 years	Indictable offence triable summarily on prosecution election (see s 552A of the *Criminal Code*)
ss 340(2)	Unlawfully assault a working corrective services officer (present at a corrective services facility in his or her work capacity) — applies only to prisoners	7 years	Indictable offence triable summarily on prosecution election (see s 552A of the *Criminal Code*)
s 340(2AA)	Assault (resist or wilfully obstruct) a public officer while performing a function of the officer's office, or because the officer has performed such a function	7 years 14 years, if aggravating factors apply	Indictable offence triable summarily on prosecution election (see s 552A of the *Criminal Code*)
s 124(b) CSA Other offences – assault, obstruct staff member)	Assault (or obstruct) a staff member who is performing a function or exercising a power under the Act or is in a corrective services facility [applies to prisoners in custody only — see CSA, sch 4]	2 years	Summary offence
s 790(1)(a) PPRA (Assault police officer)	Assault a police officer in the performance of the officer's duties	40 penalty units or 6 months or 60 penalty units or 12 months if in or near licensed premises	Summary offence
s 655A(1)(a) PPRA (Assault a watch-house officer)	Assault a watch-house officer in the performance of the officer's duties	40 penalty units or 6 months	Summary offence

Serious assault is an indictable offence, triable summarily (by a Magistrates Court) on prosecution election. The other offences listed above are all summary offences, and must be heard by a magistrate. As discussed earlier in this paper, where indictable offences are heard summarily, the maximum term of imprisonment a court can impose is 3 years.

While the form of these provisions is, in general, reasonably consistent, there are variations — particularly as to the maximum penalties that apply to these offences, ranging from a small fine,[639] to imprisonment. In addition to these offences there are also offences of obstructing public officers which define 'obstruct' as including the act of assault.

In addition to these offences (some of which are simple offences, and others which are indictable), simple offences exist across a number of different Queensland statutes based on the act of obstructing various public officers performing functions under relevant legislation, generally in the absence of the person having a reasonable excuse for their actions.

Under these offence provisions, 'obstruct' is commonly defined to include assault, hinder, resist and attempt or threaten to obstruct.[640]

In the case of obstruction of a civilian watch-house officer under the PPRA, the act of assault constitutes a separate offence under the same section,[641] mirroring the legislative approach taken under section 790 of that Act to assaults and obstruction of a police officer in the performance of their duties. The definition of 'obstruct' in this section therefore excludes reference to the act of assault.[642]

Other offences involving assault, threatening behaviour or intimidation of an inspector under the *Work Health and Safety Act 2011* (Qld)[643] and *Electrical Safety Act 2002* (Qld)[644] carry a maximum penalty of two years' imprisonment or a fine of 500 penalty units. Specific justifications have been made for these higher than usual maximum penalties. For example, at the time the introduction of the Bill establishing the new *Work Health and Safety Act 2011* (Qld), the Explanatory Notes stated that the purpose of the Bill was to provide for workplace health and safety legislation forming part of a system of nationally consistent laws. While the maximum penalties for offences contained in the Bill were 'substantially higher than penalties for comparative offences in the current WHS Act', they met the policy objective of promoting national uniformity in application and observance of such laws[645] and were said to be 'proportionate and relevant to the seriousness of the conduct, as there is a risk to personal safety and potential loss of life arising from any breaches'.[646]

Table 9-2 illustrates the type of criminal conduct captured, applicable maximum penalties and classification of select offences involving obstruction.

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639 For example: *Transport Infrastructure Act 1994* (Qld) s 475ZB(1): 20 penalty units.

640 See, for example, *Education and Care Services Act 2013* (Qld) s 187(3); *Electoral Act 1992* (Qld) s 369(3); *Fair Trading Inspectors Act 2014* (Qld) s 69(3); *Fire and Emergency Services Act 1990* (Qld) s 150C(3); *Animal Care and Protection Act 2001* (Qld) s 206(3); *Fisheries Act 1994* (Qld) s 182(2); *Transport Infrastructure Act 1994* (Qld) s 475ZB(3).

641 *Police Powers and Responsibilities Act 2000* (Qld) s 655A(1).

642 Ibid s 655A(2).

643 *Work Health and Safety Act 2011* (Qld) s 190.

644 *Electrical Safety Act 2002* (Qld) s 145B.

645 Explanatory Notes, Work Health and Safety Bill 2011 (Qld) 8.

646 Ibid.

Table 9-2: Select Queensland offences involving obstruction, maximum penalties and classification

Provision	Offence description	Maximum penalty	Indictable or summary
s 340(1)(b) *Criminal Code* (Serious assault)	Resist, or wilfully obstruct a police officer while engaging in the execution of the officer's duty, or any person acting in aid (also applies to assaults)	7 years	Indictable offence triable summarily on prosecution election (see s 552A of the *Criminal Code*)
s 340(2AA)	Resist or wilfully obstruct a public officer while performing a function of the officer's office (also applies to assaults)	7 years	Indictable offence triable summarily on prosecution election (see s 552A of the *Criminal Code*)
s 199 *Criminal Code* (Resisting public officers)	In any manner obstructs or resists any public officer while engaged in the discharge or attempted discharge of the duties of his or her office under any statute (also applies to *any person* discharging, or attempting to discharge, duty imposed by statute)	2 years	Indictable offence that must be dealt with summarily (see s 552BA *Criminal Code*)
s 124(b) CSA (Other offences — assault, obstruct staff member)	Obstruct (or assault) a staff member who is performing a function or exercising a power under the Act or is in a corrective services facility. Applies to prisoners only, but excluding prisoner on parole (see CSA, sch 4)	2 years	Summary offence
s 127 CSA (Obstructing staff member or proper officer of a court)	Obstruct a staff member or the proper officer of a court who is performing a function or exercising a power under the Act without the person [647] having a reasonable excuse. A 'person' is defined to exclude a prisoner, other than a prisoner who is released on parole or a supervised dangerous prisoner (sexual offender)	1 year	Summary offence
s 790(1)(b) PPRA (Obstruct police officer)	Obstruct a police officer in the performance of the officer's duties *obstruct* includes hinder, resist, and attempt to obstruct	40 penalty units or 6 months or 60 penalty units or 12 months if in or near licensed premises	Summary offence
s 655A(1)(b) PPRA (Obstruct a watch-house officer)	Obstruct a watch-house officer in the performance of the officer's duties *obstruct* includes hinder, resist, and attempt to obstruct	40 penalty units or 6 months	Summary offence
s 150C *Fire and Emergency Services Act 1990* (Obstruction of person performing functions)	Obstruct another person in the performance of a function (including power) under the Act without reasonable excuse *obstruct* includes abuse, assault, hinder, resist, threaten and attempt or threaten to obstruct	100 penalty units or 6 months	Summary offence

[647] A 'person' is defined for the purposes of this section to exclude a prisoner, other than a prisoner who is released on parole or a supervised dangerous prisoner (sexual offender).

Provision	Offence description	Maximum penalty	Indictable or summary
s 187 *Education and Care Services Act 2013* (Obstructing authorised officer)	Obstruct an authorised officer, or someone helping an authorised officer, exercising a power without reasonable excuse *obstruct* includes assault, hinder, resist, attempt to obstruct and threaten to obstruct	100 penalty units	Summary offence
s 187(1) *Hospital and Health Boards Act 2011* (Obstructing an authorised person or security officer)	Obstruct an authorised person or security officer in the exercise of a power without reasonable excuse *obstruct* includes assault, hinder, resist, threaten, attempt to obstruct and threaten to obstruct	100 penalty units	Summary offence
s 475ZB *Transport Infrastructure Act 1994* (Obstruction of authorised person)	Obstruct an authorised person in the exercise of a power without reasonable excuse *obstruct* includes assault, hinder, resist and attempt or threaten to obstruct	20 penalty units	Summary offence

9.5.2 Stakeholder views

The Terms of Reference ask the Council to assess the suitability of providing for separate offences in different Acts targeting the same offending, including the impact of the lesser offences on sentencing of offences under section 340 of the *Criminal Code*.

There was limited feedback on this specific aspect of the Terms of Reference in preliminary submissions.

Sisters Inside supported the current two-tiered approach as having the advantage of enabling people to be charged with a lesser offence, where appropriate:

> We contend that it is desirable to maintain this duality [of offences in both the *Criminal Code* and PPRA] so that people have the benefit of being charged with the lesser, summary offence contained in s 790 of the PPRA, when that is appropriate.[648]

However, it raised concerns that 'currently the requirements for establishing whether an action should be charged as a summary or indictable offence are not clear'.[649] Sisters Inside was further concerned:

> There is a relatively low threshold for satisfying serious assault under the Criminal Code and there is no explicit delineation between acts occasioning bodily harm and those that do not. This means that the police and prosecuting authority lack clear guidelines for determining whether to charge the person with a summary or indictable offence.[650]

It suggested that 'the legislation requires clarification to ensure that less serious assaults and obstructions are not punished disproportionately'.[651]

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[648] Preliminary submission 21 (Sisters Inside) 4.

[649] Ibid.

[650] Ibid 5.

[651] Ibid 4–5.

It raised similar issues in relation to the decision to charge an offender for assaulting a corrective services officer under section 124(b) of the CSA or section 340 of the *Criminal Code*.[652]

Sisters Inside contrasted the Queensland approach to structuring the serious assault offence with the method in NSW, the Northern Territory, Victoria, the ACT, Tasmania and South Australia, where the legislation explicitly differentiates penalties based on whether bodily harm was caused:

> For example, the New South Wales legislation specifies that where no actual bodily harm is caused to the officer (or specified person) the maximum penalty is 5 years, whereas assaults that cause bodily harm attract a maximum penalty of 7 years and assaults amounting to grievous bodily harm have a maximum penalty of 12 years.
>
> In Victoria the legislation provides that assaulting, threatening, resisting or obstructing a police officer carries a maximum penalty of 5 years…. In Victoria, if a person commits a more serious assault they are charged under the serious injury and gross violence provisions elsewhere in the Act, which apply equally to civilians and police or public officers. We submit that the Queensland Acts should incorporate greater specificity, as in other Australian jurisdictions, in order to reduce the occurrence of unwarranted criminalisation.[653]

QAI referred to the graduation of penalties in NSW under section 60 of the *Crimes Act 1900*, and in the Northern Territory under section 188A of the *Criminal Code*, noting that in the ACT, charges are brought under general offence provisions and the fact that the complainant is a police officer is taken into account as an aggravating feature.[654]

9.5.3 Issues and options

Co-existence of summary and indictable charges

As discussed in Chapter 3, the *Criminal Code* was established to codify Queensland's criminal law. The current *Queensland Legislation Handbook*'s primary purpose is to assist departmental policy or instructing officers work with the Office of the Queensland Parliamentary Counsel in drafting legislation. It provides: 'if the Criminal Code provides for an offence, it is undesirable that another Act should erode its nature as a comprehensive code by providing for the same or essentially the same offence'.[655]

In practice, there are a number of offences that have been introduced over time which essentially replicate offences in the *Criminal Code*, while existing as simple (or summary) offences — meaning they can only be dealt with by a Magistrates Court. As one example, the offence of assaulting, resisting or wilfully obstructing a police officer which exists in section 340 (and has existed) since the Code's initial commencement on 1 January 1901. The PPRA (section 790, and its precursors) deals with this same conduct. This offence also appeared in the earlier 1997 PPRA,[656] and as section 10.20A of the *Police Service Administration Act 1990* (Qld), in which it was inserted in 1993 due to the repeal of the *Police Act 1937* (Qld) in which this offence also appeared.[657]

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652 Ibid 6.

653 Ibid.

654 Preliminary submission 35 (Queensland Advocacy Incorporated) 10.

655 Queensland, Department of the Premier and Cabinet, *Queensland Legislation Handbook* (6th ed, 2019) 10 [2.12.4].

656 *Police Powers and Responsibilities Act 1997* (Qld) (repealed) s 120.

657 *Police Act 1937* (Qld) (repealed) s 59.

Even within the *Criminal Code* itself, as illustrated in the discussion above, there is some overlap between conduct which could either fall within section 340 (which is classified as a crime) and section 199 (which is classified as a misdemeanour).

A charge under section 199 must be dealt with summarily (by a Magistrates Court),[658] whereas in the case of a charge under section 340 of the Code, the prosecution has the power to elect if the charge is to be dealt with in this way.[659]

There are other practical procedural differences between offence types, such as whether a warrant is generally required for arrest,[660] and whether there is a limitation on commencing prosecutions after a defined time period.[661]

A recent example which provides some explanation of why simple offences may be introduced, even when there is an existing *Criminal Code* offence that deals with the same conduct, is the introduction of new offences of assaulting and obstructing a watch-house officer. The Explanatory Note to the Bill introducing these new offences noted:

> Currently, if a watch-house officer is assaulted or obstructed in the course of their duties, the only option for charging an offender is under the Criminal Code. This may result in the watch-house officer not making any complaint of assault, or result in a disproportionate charge against a person as there is no simple offence alternative.
>
> … the new offences will ensure that any penalty issued by the courts and any consequent criminal history is reflective of the offence being a simple offence and not indictable.[662]

The existence of a discretion by police to charge with the simple offence of assault police, rather than serious assault under section 340 — although section 340 can also be dealt with summarily — therefore could be argued to provide an important protection against more minor criminal conduct being dealt with under the more serious form of criminal offence which carries a higher maximum penalty. This might be important not only from the perspective of ensuring proportionate sentences, but that the person's criminal history reflects the fact the assault was of a more minor nature than had the person been charged under section 340.

In the case of other simple assault offences, the justification for introducing these offences has included the visibility of establishing this form of conduct as an offence under legislation targeting specific matters, and the ability for an offence to be prosecuted by an agency other than police. For example, section 190 of the *Work Health and Safety Act 2011* (Qld) establishes an offence of assaulting, threatening or intimidating an inspector or person assisting an inspector (or attempting

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658 See *Criminal Code* (Qld) s 552BA and definition therein of a 'relevant offence' which includes an offence against the Code if the maximum term of imprisonment to which the defendant is liable is not more than 3 years.

659 See *Criminal Code* (Qld) s 552A and discussion in Chapter 3 of this paper.

660 An offender may generally be arrested without a warrant for a crime, but ordinarily a warrant is required in the case of a misdemeanour. See *Criminal Code* (Qld) s 5.

661 *Justices Act 1886* (Qld) s 52 sets out time limits for proceedings provides that, unless some other time is limited for making the complaint by the law relating to the particular case, the complaint must be made within one year from the time when the matter of complaint arose. In contrast, indictable offences are not subject to a time limit for bringing prosecutions, even if they are dealt with summarily: *Criminal Code* (Qld) s 552F.

662 Explanatory Notes, Police Powers and Responsibilities and Other Legislation Amendment Bill 2018 (Qld) 24–25.

to do so). The Explanatory Notes to the Bill which introduced this new section justify this on the basis that:

> Although this is also an offence at general criminal law, the inclusion of this provision is intended to ensure greater deterrence by giving it more prominence and allowing its prosecution by the regulator.[663]

Disease test orders

In the case of the aggravated form of serious assault — involving the offender spitting on, or throwing at or applying a bodily fluid or faeces to a public officer — the arrest of an alleged offender for this offence triggers the ability of police to apply to a Magistrates or Childrens Court for a disease test order. This order allows an officer to ask a doctor or prescribed nurse to take blood and urine samples from a relevant person under Chapter 18 of the PPRA to determine if the person may have transmitted a relevant disease to the victim, or another person if a bodily fluid may have been transmitted to the person during or soon after the commission of a chapter 18 offence.[664]

The ability to seek this testing order is limited to only certain listed offences (referred to as 'chapter 18 offences') which includes a serious assault if: (i) blood, saliva or another bodily fluid has penetrated, or may have penetrated, the victim's skin' or (ii) blood, saliva or another bodily fluid has entered, or may have entered, a mucous membrane of the victim.[665] It does not apply to an assault that involves spitting saliva onto intact skin,[666] or to other less serious forms of assault, such as an assault under the PPRA. For this reason, an alleged offender may initially be charged with serious assault, even if the charges are later downgraded to an offence under the PPRA.

The purpose of chapter 18 'is to help ensure victims of particular sexual offences and serious assault offences, and certain other persons receive appropriate medical, physical and psychological treatment'.[667] In a submission to the Council, QAI suggested that 'police, correctional and emergency services personnel need more information about disease transmission' and pointed to a lack of medical evidence of disease transmission through spitting.[668] QAI was further concerned:

> These laws share the false premise that appropriate care and support to police or others can be meaningfully informed by the status of the alleged accused. The rationale for testing is to alleviate any distress police or other emergency service personnel may experience following an incident. Nevertheless, test results will likely be misleading and where a positive result is

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663 Explanatory Notes, Work Health and Safety Bill 2011 (Qld) 8.

664 *Police Powers and Responsibilities Act 2000* (Qld) ss 538(1), (2). The next chapter in that Act, chapter 18A, deals with breath, saliva, blood and urine testing of persons suspected of committing particular assault offences (grievous bodily harm, wounding and serious assaults carrying the maximum 14-year penalty). It was introduced by the *Safe Night Out Legislation Amendment Act 2014* (Qld). It is not concerned with disease testing, but with proving an offender's intoxication. It applies testing powers under the *Transport Operations (Road Use Management) Act 1995* (Qld), s 80 for this purpose. It works in conjunction with Chapter 35A of the *Criminal Code* (Qld) (proof) and *Penalties and Sentences Act 1992* (Qld), pt 5 div 2 sub-div 2 (circumstance of aggravation). It is a circumstance of aggravation for a prescribed offence that the offender committed the offence in a public place while the offender was adversely affected by an intoxicating substance. This carries a mandatory penalty of a community service order.

665 *Police Powers and Responsibilities Act 2000* (Qld) s 538(1)(g). The offences other than serious assault which constitute a chapter 18 offence are listed in s 538(1). They are all sexual offences and must be committed in the same context regarding blood, saliva or another bodily fluid

666 *Police Powers and Responsibilities Act 2000* (Qld) s 538(3)(c).

667 *Police Powers and Responsibilities Act 2000* (Qld) s 537.

668 Preliminary submission 35 (Queensland Advocacy Incorporated) 9-10.

> returned, only cause additional but baseless anxiety, given that there is no risk of transmission.[669]

In terms of weighing objective statistical risk of disease transmission against a complainant's subjective concern, note Derrington J's comment in *R v Kalinin*:[670]

> The first [alleged sentencing error was that the offender] had subjected the complainants to a "very high risk" whereas [the officer] had been advised by a doctor that the risk was low. This error, however, is not of great consequence because even after advice by the doctor, [the officer] has indicated that the possibilities of infection to himself and his family had a very serious impact on his life and his family relationships.[671]

Section 199 *Criminal Code* and summary offences involving obstruction of a public officer

A related issue is whether section 199 of the *Criminal Code* should be retained given the scope of section 340 has been extended over time to capture largely the same type of criminal conduct as that to which section 199 applies (albeit applying a much lower maximum penalty). Another option would be classifying section 199 as a summary offence under the *Summary Offences Act 2005* (Qld) or other Act to create a general offence of resistance or obstruction of a public officer in place of the number of offence provisions capturing the same conduct that exist across the Queensland statute book.

The Council's analysis shows over the data period, there were only seven instances in which a section 199 offence of resisting public officers was the most serious offence charged (all of which, due to the operation of section 552BA, were sentenced in Magistrates Courts). Examining all charges (not just those where the section 199 offence was the most serious offence sentenced), there were 25 cases involving an offender sentenced for the offence of resisting public officers — two cases in the District Court (involving co-offenders), and 23 in Magistrates Courts. Sentences ranged from good behaviour bonds of between 6 to 12 months and fines of between $250 to $1,000 up to a 6-month term of imprisonment[672]

The very small numbers of cases sentenced, and the level of penalties imposed, considered with the requirement for section 199 offences to be dealt with summarily, suggest there may little practical utility in retaining the offence in the *Criminal Code*.

If recast as a summary offence, this may provide an opportunity to consider the repeal of a number of simple offences scattered across the Queensland statute book which appear to serve the primary purpose, as for section 790 of the PPRA, of providing an alternative charge to what would otherwise need to proceed as a more serious charge under section 340 of the *Criminal Code*.

In the alternative, section 199 could be retained in its current form, either retaining the same or a higher penalty, and 340(1)(b) and 340(2AA) amended to limit the criminal conduct captured to assaults, rather than extending to acts of resistance or wilful obstruction.

This approach, however, would ignore the reality that assaults often occur in the context of other actions which, while not constituting an assault, involve the person resisting or obstructing a public officer exercising their powers or functions, and it is useful for a court to be able to consider the

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669 Ibid 10.

670 [1998] QCA 261, 5.

671 *R v Kalinin* [1998] QCA 261, 5. A more recent example of emotional harm regarding testing, without reference to statistical risks of transmission, is *R v Cooney* [2019] QCA 166 (which QAI noted). This is a concept taken up further in the discussion of Canadian case law in this chapter, regarding deterrence.

672 Court Services Queensland, unpublished data. There were also two instances of offenders being convicted but not further punished.

entirety of the acts involved in determining the overall criminality and seriousness of the offending. Further, the language used in section 340 is that of 'wilful' obstruction — a term not used in the context of the section 199 offence — setting potentially a higher bar than under section 199. The term 'wilful' means not only forms of obstruction which are 'intentional', but also suggests something done without lawful excuse.[673]

It may be that the presence of resisting and wilfully obstructing an officer in section 340 is a useful charge as an alternative to more serious charges. This basis of charging under section 340 might also avoid a defendant being charged as a party to a more serious offence where section 340 results in a more just sentence (whereas section 199 or a summary charge may not be sufficient).

It might be argued that the combination of sections 199, 340 and 317 of the *Criminal Code* effectively create three levels of obstruct/resist seriousness in the Code (although the language used in each differs). When elements such as intent and the vagaries of factual contexts and involvement of other co-offenders are factored in, this might seem more cogent.

Offence provisions such as sections 317 and 340 contain various different subsections and permit prosecution for the same offence, with the same maximum penalty, via broad sets of different elements designed to capture a very diverse range of factual scenarios. Two Court of Appeal cases make it clear that it should not be assumed that there is a scale of seriousness within these different sets of elements sharing the same maximum penalty, only on the basis of reading them at face value.[674] The specific facts of each individual case must still be assessed. In *R v Spann*,[675] the offender was an acquaintance of a man, Cardwell, who viciously assaulted a police officer resulting in grievous bodily harm. Spann's conduct involved kicking a can of capsicum spray away from the officer and taking hold of his baton as he used it to defend himself against Cardwell. Cardwell forcibly removed the baton from Spann after she refused to give it to him and used it to further his assault on the officer, who was then forced to shoot Cardwell. A piece of projectile lodged in Spann's leg.

Cardwell was charged with malicious acts under section 317 of the *Criminal Code*. At first, so was Spann. She was 'charged under s 317(c)(e) … with malicious act with intent (that with intent to resist the lawful arrest of Cardwell the applicant did grievous bodily harm to the complainant) as an alternate to the charge of serious assault under s 340(1)(b)'.[676] On pleading guilty to serious assault (by wilfully obstructing the officer in the execution of his duty), the prosecutor discontinued the count of malicious act with intent. She was sentenced 'only for her role in the incident and not for the very significant injuries inflicted upon the complainant'.[677] Her sentence was 3 years' imprisonment, with parole release fixed at 588 days (that period having been spent in pre-sentence custody). The Court of Appeal refused leave to appeal and rejected a submission that:

> there was ordinarily a hierarchy of seriousness as to the three examples of offences dealt with in [s 340(1)(b)] of the Criminal Code, with an assault being more serious than resisting a police officer, which in turn was more serious than obstructing a police officer. However, each of the offences [then attracted] a maximum penalty of seven years imprisonment and the severity of any particular offending will depend on its facts.[678]

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673 See Justice Ryan, Judge Rafter and Judge Devereaux, LexisNexis, *Carter's Criminal Law of Queensland* (online at September 2017) [s 340.40] Obstruction; and *Rice v Connolly* [1966] 2 QB 414.

674 Both cases are further discussed in Chapter 4.

675 [2008] QCA 279.

676 *R v Spann* [2008] QCA 279, 4 [10] (Philippides J, Muir and Fraser JJA agreeing).

677 Ibid 4 [11].

678 Ibid 9 [31].

> This case was a very serious example of obstruction of a police officer in the execution of his duty, given its context. The offending conduct cannot simply be reduced to an act divorced from the surrounding circumstances. It occurred when the [officer] was in a desperate, and potentially life threatening situation.[679]

A similar finding, in relation to section 317, was made by the Court of Appeal in *R v Patrick (a pseudonym)*,[680] where a child pleaded guilty to malicious acts against a public officer (a police officer), causing grievous bodily harm with intent to resist or prevent lawful arrest. He hit the officer in a stolen car.

The Court rejected a contention that some of the four different forms of intention to cause GBH in that section were more serious than others. Only one of those intents, the one charged in this case, specifically refer to a public officer. The section otherwise only refers to 'any person' in the context of the complainant. The Court noted that 'the section draws no distinction between any of the specified kinds of intent that motivate the doing of grievous bodily harm — although the circumstances of a particular case will affect the culpability'.[681]

In line with the Terms of Reference, the Council invites views about the benefits of retaining multiple offences that can be charged targeting the same or similar behaviour and whether any reforms to existing offence provisions should be considered.

Questions: Offences of assault and related conduct (resist and obstruct)

10. What benefits are there in retaining multiple offences that can be charged targeting the same or similar behaviour (e.g. sections 199 and 340 of the *Criminal Code* as well as sections 655A and 790 of the *Police Powers and Responsibilities Act 2000* (Qld), sections 124(b) and 127 of the *Corrective Services Act 2006* (Qld), and other summary offences)?

11. Should any reforms to existing offence provisions that apply to public officer victims be considered and if so, on what basis?

9.6 General deterrence as a key sentencing purpose and its relationship to the setting of penalty levels

9.6.1 Introduction

As discussed in Chapter 4, general deterrence, together with denunciation, is frequently raised by courts as an important purpose of sentencing for assaults on public officers — and as a justification by legislators for the introduction of harsher and/or mandatory minimum penalties for assaults on public officers.

While both sentencing legislation and Queensland case law require general deterrence to be applied to assaults against public officers as a starting point, as a practical and real principle of sentencing, it has its detractors. They point to evidence suggesting it does not work (meaning 'that the actions of the criminal justice system (here, a particular sentence order) have [not] prevented

679 Ibid 9 [32].

680 [2020] QCA 51.

681 *R v Patrick (a pseudonym)* [2020] QCA 51, 8 [32] (Sofronoff P, Fraser JA and Boddice J agreeing).

or reduced further offending').[682] This is said to be especially so in relation to impulsive criminal behaviour and with offenders who have impaired capacity to rationalise their behaviour.

Australian Law Reform Commission consideration

Deterrence can be achieved by sentences imposed by courts. It can also be achieved by legislative changes.

In 1988, an Australian Law Reform Commission (ALRC) review of Commonwealth sentencing principles recommended that 'incapacitation of the offender, and general deterrence, should not be invoked as goals or objectives by sentencers'.[683] Its reasoning was as follows:

> To impose a punishment on one person by reference to a hypothetical crime of another runs completely counter to the overriding principle that a punishment imposed on a person must be linked to the crime that he or she has committed.

However, the ALRC acknowledged that parliaments could alter 'the operation of the criminal justice system as a whole…to deter those in the community from committing offences'[684] by increasing maximum penalties for particularly prevalent offences. Consequent sentence increases are then a response by courts not to their own perceptions of a need to deter, but instead to parliament's direction that the 'offence is now to be regarded as more serious than it had been in the past. If deterrence occurs, it is not because of individual sentences, but because the system as a whole treats the offence more seriously'.[685]

In 2006, the ALRC noted that while 'general deterrence is a controversial purpose of sentencing',[686] 'Australian courts have demonstrated a 'peculiar fondness' for deterrence in sentencing jurisprudence'.[687] It concluded that 'general deterrence is an established and legitimate purpose in sentencing law'.[688]

An academic analysis

Professor Andrew Ashworth describes 'two constituent elements' to a new crime created by a legislature:

> The authoritative declaration that certain conduct is wrong and should not be done, and the attachment of a proportionate maximum penalty to that conduct. The creation of a crime involves the making of a conditional threat ("if you do x, you are liable to be convicted and punished up to a certain limit").[689]

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682 Christine Bond et al, *Assaults on Public Officers: A Review of Research Evidence* (Griffith Criminology Institute, March 2020) 19.

683 Australian Law Reform Commission, *Sentencing* (Report No 44, 1988) 18 [37] and Recommendation 9.

684 Ibid 18 [37].

685 Ibid.

686 Australian Law Reform Commission, *Same Crime, Same Time – Sentencing of Federal Offenders* (Report No 103, April 2006) 135 [4.8].

687 Ibid 135 [4.9] citing M Bagaric, 'Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals?' (2000) 24 *Criminal Law Journal* 21, 33.

688 Ibid 141 [4.29].

689 Andrew Ashworth, 'The Common Sense and Complications of General Deterrent Sentencing' (2019) *Criminal Law Review* 7, 565.

Professor Ashworth discusses a concept of 'marginal general deterrence' — enhancing the deterrent effect by 'increasing the sentence level for this particular type of crime (above the proportionate sentence)'.[690]

> This kind of hydraulic model (sentences up, crimes down) has an intuitive attraction — it appears to be squarely based on "common sense".[691]
>
> The assumption here is that marginal general deterrents work in a hydraulic fashion (sentences up, crimes down), whereas [it is argued that] they can rarely be expected to do so.[692]

He identifies a total of six complications with this. The first four are:[693]

> (1) that, because deterrence works through the mind, potential offenders must be aware of the increased penalty;
>
> (2) that if potential offenders believe the risk of detection and conviction is low, this may undermine the deterrent effect of the penalty;
>
> (3) that potential offenders do not always respond rationally to increased penalties and increased risk of conviction even if they are aware of them [with particular emphasis on 'offending that is typically impulsive (e.g. many violent offences) or that involves people whose lifestyle includes taking alcohol or drugs'];[694] and
>
> (4) that some potential offenders may not regard the legal penalty as the most important consequence.[695]

The fifth and sixth complications arise out of 'quantification' — how a legislature arrives at a number for a new, higher a maximum penalty. These take the form of two questions:

> [Is] the objective of the extra increment of punishment…to reduce the incidence of this offence to zero[?]. If not, how can one specify the level of offending that is thought "acceptable" or "tolerable", and to which the deterrent sentence should aim to reduce its incidence?
>
> What resources should be used in order to calculate the extra margin of severity that is required in order to reduce the incidence of the crime to a "tolerable" level, or whatever level is specified[?]. If it is effectiveness that is important…then that would indicate that there should be some empirical testing of different marginal increases, perhaps through research with offenders and non-offenders.[696]

The rationale for increasing maximum penalties for serious assault in Qld

The 2012 increase to the maximum penalty in section 340 of the Queensland *Criminal Code* was an election commitment arrived at by doubling the existing penalty. As discussed in Chapter 3, it was part of a wider raft of amendments aimed at strengthening sentences for certain offences against police, with reference made to the need to deter offending, protect police officers carrying out dangerous duties, and ensure the maintenance of civil authority. Similar reasons were given for the 2014 increase regarding assaults of public officers. Legal stakeholders critical of the 2012 amendments cited grounds including the strength of the existing 7-year maximum, the incongruity

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690 Ibid 567.

691 Ibid 568.

692 Ibid 577.

693 Ibid 569–73. The main four are also summarised at 577.

694 Ibid 571 (citations omitted). See also Australian Law Reform Commission, *Same Crime, Same Time – Sentencing of Federal Offenders* (Report No 103, April 2006) 135 [4.8].

695 Andrew Ashworth (n 689) 577.

696 Ibid 573.

with maximum penalties for more serious offences and equality before the law, irrespective of complainant occupation.

9.6.2 Stakeholder views

Stakeholder support for deterrence

There was both preliminary stakeholder support for, and opposition to, deterrence in the context of assaults on public officers. Support came largely from unions and organisations supporting various public official cohorts, while opposition and concern was expressed by legal stakeholders.

Support for deterrence[697] was often closely associated with calls for mandatory sentencing and/or increased maximum penalties (and in one instance, cumulative prison terms). These issues are discussed in more detail below in this chapter, at section 9.8.2. Support for deterrence was not associated with evidence showing that it works, except for a reference to the WA amendments (discussed separately below).[698]

Deterrence was justified by these stakeholders as having a declarative value; showing that the justice system supports the relevant cohorts of public officer, that such staff are valued, and that offending of this nature will not be tolerated (and that a clear message to this effect will therefore be sent to the public).

Of course, what must not be lost in the following analysis is that it is the law in Queensland that deterrence is one of the five exclusive sentencing purposes. It is enshrined in statute.[699] On 24 March 2020, the Queensland Court of Appeal acknowledged:

> the assumed propensity of punishments to deter other people from committing similar offences. A sentence is believed to have that deterrent effect if it is sufficiently severe to frighten potential offenders. A sentencing judge is obliged to take into account that purpose, *when appropriate*, when deciding upon a sentence.[700]

These emphasised words, 'when appropriate', will be seen to be a central issue in the analysis of how deterrence is applied in sentencing for offences against public officers.

Stakeholder opposition to deterrence

Opposition to a reliance on general deterrence was based on evidence that it does not work. Several stakeholders referred to a 2011 Victorian Sentencing Advisory Council (VSAC) review. It examined the current empirical studies and criminological literature regarding the effectiveness of imprisonment as a deterrent to crime:

> Deterrence theory is based upon the classical economic theory of rational choice, which assumes that people weigh up the costs and benefits of a particular course of action whenever they make a decision. Deterrence theory relies on the assumption that offenders have knowledge of the threat of a criminal sanction and then make a rational choice whether or not to offend based upon consideration of that knowledge.
>
> Rational choice theory, however, does not adequately account for a large number of offenders who may be considered 'irrational'. Examples of such irrationality can vary in severity – there

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697 Preliminary submission 5 (Australasian Railway Association and ors); Preliminary submission 14 (Together Union) 2–3; Preliminary submission 18 (Queensland Nurses & Midwives' Union) 5.

698 Preliminary submission 5 (Australasian Railway Association and ors), attachment, Letter from Australasian Railway Association and ors to The Hon Cameron Dick MP, Minister for State Development, Manufacturing Infrastructure and Planning, 22 July 2019.

699 *Penalties and Sentences Act 1992* (Qld) s 9(1)(c).

700 *R v Patrick (a pseudonym)* [2020] QCA 51, 7 [29] (Sofronoff P, Fraser JA and Boddice J agreeing).

> are those who are not criminally responsible due to mental impairment, those who are drug affected or intoxicated and those who simply act in a way that is contrary to their own best interests.[701]

Stakeholders shared concerns based on lived experience, reflecting those in the literature, regarding the counter-productive effect of deterrence on specific disadvantaged groups.

The Office of the Public Guardian (Queensland) cautioned that:

> Custodial sentences are not an effective deterrent mechanism for people with impaired capacity…[who] may be unable to control their behaviour and think through potential consequences. Custodial sentences have minimal impact, apart from detaining those with impaired capacity for an extended period in an environment not equipped to address the underlying causes of their anti-social behaviour.[702]

Similarly, the Department of Communities, Disability Services and Seniors (Queensland) noted:

> People with disability may have histories of trauma and heightened vulnerabilities, which create stressors and contribute to them exhibiting challenging behaviours to situations based on their experiences. Challenging behaviour includes for example, aggressive outburst behaviour …People with an intellectual disability, in particular, may be at a heightened risk of exhibiting challenging behaviours due to the associated issues of difficulties in expressing their needs and wants due to communication impairments.[703]

QAI noted:

> Public space policing typically involves verbal directions to take certain action, such as to move on. Persons with disability may find it difficult to comprehend directions, remember them or act in accordance with them, leading to an escalation in law enforcement interventions based on the mistaken belief that the person is wilfully disobeying a police instruction.[704]

QAI referred to the VSAC research and submitted that '[t]he statistical trends offer no compelling reason to increase penalties under section 340 of the *Criminal Code* as a way to deter potential offenders', noting that 'offender behaviour, particularly the "impulsive" behaviour usually associated with assault is driven more by offenders' immediate physical, emotional and physiological circumstances'.[705]

QAI emphasised the criminogenic effect of imprisonment goes beyond the financial costs of imprisoning people, bringing:

> likely increases in risk to the community in the medium to longer term. Longer sentences may improve community safety in the very short term, but the trade-off is institutionalisation, recidivism, wasted lives, broken families and generational cycling.[706]

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701 Donald Ritchie, Victorian Sentencing Advisory Council, *Sentencing Matters - Does Imprisonment Deter? A Review of the Evidence* (April 2011) 1.

702 Preliminary submission 7 (Office of the Public Guardian (Queensland)) 2.

703 Preliminary submission 8 (Department of Communities, Disability Services and Seniors) 3.

704 Preliminary submission 35 (Queensland Advocacy Incorporated) 7.

705 Ibid 3, 6.

706 Ibid 6.

The Queensland Teachers' Union provided material which raised the ineffectiveness of deterrence where young people are concerned because their lack of maturity:

> impedes their decision-making processes and means they are less likely to be deterred by harsher penalties. Little research exists to support the view that stricter laws and harsh punishments are effective in deterring youth crime. In addition, punishment can have negative effects, such as increased rates of recidivism.[707]

The broadest form of the argument against the effectiveness of deterrence was framed in the context of intoxicated people (often also with mental illnesses). Sisters Inside stated:

> The argument that increasing penalties will effect a change in 'culture' and increase personal responsibility is flawed. It fails to recognise that a substantial proportion of the people who behave aberrantly enough to attract the attention of the police are likely to be under the influence of drugs or alcohol, or affected by mental health conditions, or cognitive or behavioural impairments. These are people in a vulnerable position who may not be capable of understanding the consequences of their actions or controlling their behaviours.[708]

Similarly, the Bar Association of Queensland stated:

> Even assuming that sentences of imprisonment are actually effective in terms of general and specific deterrence … most people who assault public officers are either suffering from mental illness or affected by drugs or alcohol, and are frequently mentally ill and affected by drugs and alcohol. The concept of deterrence assumes a degree of rational, logical thought, something that is usually conspicuously absent in cases where public officers are assaulted.[709]

The VSAC review noted Australian research on the involvement of alcohol in assaults. Estimates varied considerably, ranging from 23 per cent to as much as 73 per cent of all assaults:[710]

> In light of those estimates and estimates of the prevalence of mental illness among prisoners…there are significant limitations on general deterrence and the number of offences and, in particular, the type of offenders, that the threat of punishment can possibly deter.[711]

9.6.3 Issues and Options

Alternative approaches in other jurisdictions — an overview

Victoria, WA and Canada have adopted different legislative sentencing approaches that are either expressly or impliedly underpinned by general deterrence. They remove or minimise the judiciary's ability to tailor the weight ascribed to deterrence on the basis of the facts of different individual cases.

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707 Preliminary submission 13 (Queensland Teachers' Union) 72 (citations omitted).

708 Preliminary submission 21 (Sisters Inside) 3.

709 Preliminary submission 29 (Bar Association of Queensland) 1.

710 Donald Ritchie, Victorian Sentencing Advisory Council (n 701) 17.

711 Ibid.

A Victorian Case Example: *DPP V Haberfield* [2019] VCC 2082

A 21-year-old offender consumed a cocktail of drugs at a music festival. On returning home, his family, worried by his behaviour, took him to hospital. He escaped and hid in a dog kennel for some hours. In a disturbed, drug affected state, he entered the house of strangers who ushered him out and called 000. An ambulance arrived and, during treatment, he became aggressive and 'recklessly caused injury' to one paramedic and assaulted another (8–9 [20]–[22]). He was under the delusional belief that his life was in acute danger (26 [71]).

He had (unknown to him) underlying, developing schizophrenia (triggered by drug use). This amounted to impaired mental functioning, causally linked to the offence, which substantially reduced his culpability, which would result in him being subject to substantially and materially greater than the ordinary burden or risks of imprisonment. Critically, expert evidence established that his illness was not caused solely by drugs (it was not a 'simple' drug induced psychosis, although drugs did play a 'sizeable' role) (28 [75]–[77], 29 [79], 31 [82]).

These were all Victorian legislative factors which, when combined, enlivened a limited discretion to consider a (Victorian) 'mandatory treatment and monitoring order' instead of imprisonment for the offence of recklessly causing injury. On appeal, this order, of 18 months' duration, was imposed (along with a community correction order for the same period) for the assault (22–3 [58]–[61], 22–3 [64], 35 [95], 41 [116], 44 [133]–[136]. This was effectively cumulative upon four months of a different order of the same type initially made by a magistrate, which the offender had been subject to (45 [137]). As discussed in Chapter 6, the Victorian legislation *requires* a court deciding whether or not there are substantial and compelling circumstances to, inter alia, *regard general deterrence and denunciation as more important than the other sentencing purposes* under the Act (just punishment, special deterrence, rehabilitation and community protection) (*Sentencing Act 1991* (Vic) s 10A(2B)).

The judge wrote:

> Some of the purposes and principles of sentencing are turned on their head in relation to the charge of [the Victorian offence of recklessly causing injury, which carries presumptive imprisonment subject to special reasons]. How am I at the very brink of sending to prison someone who ordinarily would not be despatched there? The answer lies in the prevalence of assaults upon emergency workers whilst on duty and the need to stop such attacks.
>
> Paramedics in particular but police and hospital emergency department staff as well, are randomly brought into contact with members of the public many of them mentally disturbed or affected by substances. Many of those people who commit assaults are affected by drugs or alcohol or have underlying mental health illnesses. The paramedics don't have a choice about turning up. The call goes out for help, they are summonsed, despatched and then exposed to risk. It is not some acceptable part of the job. We don't just dismiss it and say 'well it comes with the territory'. It doesn't. The law must strive to protect them.
>
> The normal weight given to the usual sentencing purposes would very often see the offender spared a term of imprisonment. Why?
>
> In the context of an emergency worker who is a paramedic, who in their right mind would attack a paramedic who is either providing care to that very offender or to a friend of the offender? Why would anyone want to intervene violently against such a person?

***DPP V Haberfield* [2019] VCC 2082 cont.**

> Surely the lion's share of such people are not behaving in the way they normally would. They are affected by alcohol or drugs or heightened emotional response to some event or mental health demons or all of the above. For of course, any one in their right mind would normally breathe a sigh of relief, as I have myself, when an ambulance with paramedics arrives on the scene. I suspect that the vast majority of such people who assault paramedics can and do, in the cold hard light of day, recognise the shameful nature of their act upon someone who was, after all, there to help. So once at Court, a common feature on most pleas would be the existence of deep remorse and shame, and the claim that the conduct was out of character with disinhibition brought about by alcohol or the drugs or the mental health issue driving the offending. So almost always, there will be an excuse or explanation proffered at Court, as there is here. A claim as to the conduct being out of character, as there is here.
>
> Courts have in the past exercised an unlimited sentencing discretion in such cases as these prior to the earlier provisions being introduced. The assaults continued. How then is the message to be sent if the Courts are not sending it? How can people be deterred? Parliament says tougher sentences are the answer. Prison. Lock up people who assault emergency workers and others will get the message soon enough and desist. To engineer that outcome, we have these amendments to the Sentencing Act deliberately and directly limiting my sentencing discretion.
>
> **I suppose one might query whether that class of person who is acting in the way I have described or the way you were, is actually able to be deterred. They are, one would think, highly unlikely, in such a state of intoxication or delusion to calmly reflect on the term of imprisonment that may be waiting in the wings. To suppose that a man who has been so delusional as to flee from his family and hide in a dog kennel, is going to reflect on the legal consequences of his actions, is perhaps not that realistic**. However, as I say, I am not here to sign off on the legislation. Parliament has no doubt considered those matters. Legislation was passed which was designed to remove from the equation very many of the usual excuses and matters raised on the plea. The remorse, the explanation for why someone was acting out of character, the fact that they may otherwise be a fine upstanding person is all well and good, but what assistance is any of that to the injured paramedic to learn several months after the assault the true context of it. The real context is that they are doing a difficult job at the best of times and that there is no excuse to turn on them. Parliament is saying that we need these assaults to stop. People must understand that an emergency worker on duty is sacrosanct. You do not touch them. (32–33, [85]–[90] (Tinney J) (emphasis added)).

Amendments currently before the Victorian Parliament in the Sentencing Amendment (Emergency Worker Harm) Bill 2020 would, if passed, further restrict the applicability of 'special reasons' to avoid imprisonment for assaults on emergency workers. The Victorian Government's statement of compatibility regarding the Bill asserted a genuine need for the reforms, 'in order to address increasing incidents of offending against this exposed victim group'. Crime Statistics Agency data were said to show 'a 23 per cent increase in recorded assaults against police, emergency services or other authorised officers' in the six years to 2018.[712]

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712 Victoria, *Parliamentary Debates*, Legislative Assembly, tabled by Jill Hennessy, Attorney-General. 4 March 2020, 680, Statement of Compatibility with the *Charter of Rights and Responsibilities Act 2006* (Vic) tabled by Jill Hennessy, Attorney-General.

The Government acknowledged that restricting 'the special reasons exception introduces a higher test of impaired mental functioning, meaning that fewer people will be able to satisfy the special reasons exception, exposing more people to a custodial sentence with a statutory minimum' but other special reasons may be found to apply and 'any further carve out from the operation of statutory minimum sentences for a wider group of offenders would prevent the amendments from fulfilling their important deterrent purpose'.[713]

Western Australia's mandatory sentencing scheme

The WA experience may demonstrate the difficulty in determining whether legislative change can be categorically shown to have reduced offending by deterrence. It may also be an example of how mandatory sentencing transfers decision making from courts to a more opaque process through prosecutorial agents (especially where there are not as many charge alternatives of lesser seriousness, as exist in Queensland).

The Council has analysed this experience at some length, because it is a recently evaluated Australian example of a relevant legislative scheme, and because it was relied on by some stakeholders as supporting an increase in penalties in Queensland.[714]

The legislation itself was discussed in Chapter 6. Amendments in 2009 introduced mandatory minimum prison sentences (including for juveniles aged 16 or 17) for assaults that cause bodily harm (section 318) or grievous bodily harm (section 297) to police, prison officers,[715] defined public transport security officers, ambulance personnel and contract workers providing certain functions relating to court security, custodial services and prisons.[716] A later amendment effective from 23 April 2013 requires 'all adult offenders convicted of assaulting a public officer in prescribed circumstances must serve the mandatory minimum sentence before being eligible for parole'.[717]

Significantly, unlike Victoria, the WA provisions have no exceptional circumstance provision, or 'ouster' whereby special mandatory sentences are not applied because of special reasons (making them 'mandatory sentences' in the truest sense). A 2011 Greens bill, which would have 'amend[ed] the Criminal Code to ensure that mandatory sentencing provisions for assault on a public officer do not apply to persons whose judgement or behaviour at the time of the offence was impaired to a significant extent by mental impairment',[718] was not passed.[719] One of the points made in the Government's response was that prosecutorial discretion would be applied, using guidelines, to determine if, and what, to charge.[720]

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713 Ibid 680–1.

714 Australasian Railway Association and ors (n 698) attachment.

715 Youth custodial officers were added to this list from 5 October 2013: Western Australia, *Parliamentary Debates*, Legislative Council, 26 June 2014, 4645 (Michael Mischin, Attorney-General).

716 Western Australian Government, *Statutory Review: Operation and Effectiveness of the 2009 Amendments to sections 297 and 318 Criminal Code* (26 June 2014) 1.

717 Western Australia, *Parliamentary Debates*, Legislative Council, 26 June 2014, 4645 (Michael Mischin, Attorney-General).

718 Western Australia, *Parliamentary Debates*, Legislative Council, 23 June 2011, 4691 (Alison Xamon, Member for North Metropolitan Region).

719 Criminal Code Amendment Bill (No. 2) 2011 (WA), introduced in the Western Australian Executive Council on 23 June 2011 and defeated on 6 September 2011.

720 Western Australia, *Parliamentary Debates*, Legislative Council, 1 September 2011, 6549 (Michael Mischin, Member for North Metropolitan Region).

The Council notes that the QPU supports mandatory sentencing for assaults on police and emergency services officers, but:

> it also recognises the need to maintain the courts' sentencing discretions and that "one size does not necessarily fit all". In this regard the QPU believes a general provision should be enacted which allows a court to impose an alternate sentence instead of a mandatory sentence where there are exceptional circumstances and imposing the mandatory sentence would cause an actual injustice.[721]

WA Government characterisation of effectiveness (2010-2016)

The former WA government repeatedly cited statistics to announce that the mandatory sentencing laws introduced in 2009 have resulted in a significant drop in assaults against police and public officers.

A 2010 press release indicated that 'reported assaults against police officers had decreased by 28 per cent since the Liberal–National Government introduced the legislation. They asserted that this decrease in assaults was directly attributable to the mandatory sentencing that came into force in 2009'.[722]

A 2014 press release, accompanying the statutory report discussed below, stated:[723]

- A 33 per cent reduction in 'the number of assaults against police officers' (from 1,346 to 892) since the introduction of the mandatory sentencing laws in 2009.
- A 27 per cent reduction 'in the number of charges of' assaulting a public officer prescribed under the legislation and causing bodily harm (numbers not stated).
- A 30 per cent reduction 'in the number of charges' of obstructing a public officer, 'which may indicate that members of the public are more cautious in their dealings with police and other public officers' (numbers not stated).

A 2016 press release (which post-dates the evaluations discussed below) stated a 34 per cent reduction in 'incidents' of police assaults in 2015 compared with 2009 (800 incidents, down from 1,227). It also stated a 26 per cent reduction in assaults against public officers (1,185 incidents, down from 1,613). Incidents of obstructing public officers had also reduced by 35 per cent (1,758, down from 2,718).[724]

Instead, statistics regarding various forms of assault rates were generally rising from 2013 to 2019 (discussed below). These were attributed in part, on an apparently anecdotal presumption, to a change in community attitudes (this time in the negative).

WA analysis — Tasmanian Sentencing Advisory Council (2013)

A 2013 TSAC report examined the evidence regarding the WA position at that time, and noted that, in respect of the 2010 media release, 'whether this decrease was, in fact, the result of mandatory

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721 Preliminary submission 23 (Queensland Police Union of Employees) 1–2.

722 Sentencing Advisory Council (Tasmania), *Assaults on Emergency Service Workers — Final Report No. 2* (March 2013) 29, citing Rob Johnson and Christian Porter, 'Assaults against Police Plummet under Mandatory Sentencing Laws' (Media Release, 22 September 2010) and noting an apparent further release: Rob Johnson and Christian Porter, 'Reported Assaults against Police Continue to Decline' (Media Release, 23 June 2011). Government media releases are also discussed in Western Australian Police Union of Workers, *Mandatory Sentencing Report* (April 2013) 22–3.

723 Liza Harvey and Michael Mischin, Government of Western Australia, 'Assaults on WA Police officers cut by 33 per cent' (Media Release, 26 June 2014).

724 Liza Harvey and Michael Mischin, Government of Western Australia, 'Tough laws see drop in assaults against police' (Media Release, 19 August 2016).

minimum legislation has not been substantiated'.[725] TSAC obtained records from the Business Intelligence Office, WA Police:

- Annualised number of reported assaults on police officers from June 2006 to December 2010 showed a trend in offences that appears to indicate a substantial decline in the number of assaults since the introduction of mandatory sentencing in September 2009.
- Additional records from the same office indicate the monthly number of reported assaults on police officers from July 2005 to January 2011 … indicate that the decline in reported assaults began prior to the introduction of mandatory sentencing in September of 2009.[726]

TSAC recounted a WA Police explanation that this pre-amendment decline may be due to community behaviour being influence by 'the introduction of the mandatory sentencing bill and the public protest in March 2009 in support of the legislation and subsequent debate in Parliament'.[727]

TSAC noted two other factors that could explain the decline in assaults on police officers. The first was 'a substantial decline in public place assaults that matches the pattern of assaults on police officers for the same period' with the financial years 2009–2010 to 2010–2011 'showing the largest decline relative to previous years'.[728]

The second was an April 2008 Commissioner's instruction, just prior to the implementation of the mandatory sentencing legislation, 'that members of the police service were not to be "rostered, directed or encouraged" to patrol alone'.[729] A WA Police publication separately described that policy change as 'a significant part of Union history regarding protection of our Members and was achieved after 24 years of constant lobbying'.[730] TSAC noted that it was 'a factor that could have contributed to this recent decline, apart from the introduction of the mandatory minimum penalty legislation in September 2009'.[731]

Single officer patrols literature review (2012)

A 2012 Australian Institute of Criminology literature review found that there was 'no Australian research available that has evaluated single person patrol strategies to determine the effects — either positive or negative — were the same after its widespread implementation'.[732] Most research was from the 1980s in the United States and 1990s in Australia.[733] The little research available 'found no statistical difference in safety between the single and two person patrols' and 'officers were assaulted at the same rate regardless of their assignment to single or two person patrols'.

However, 'the likelihood of sustaining injury during an assault [the threshold for the WA mandatory sentencing regime] was statistically more likely for those patrolling alone compared with those

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725 Sentencing Advisory Council (Tasmania), (n 723) 29. The analysis therein was noted in Western Australian Police Union of Workers, *Mandatory Sentencing Report* (April 2013) (n 723) 39–40.

726 Sentencing Advisory Council (Tasmania) (n 722) 29.

727 Ibid.

728 Ibid.

729 Ibid.

730 Dave Lampard, '10 years of OSH', *WA Police News* (October 2013) 24 <http://www.rotary7610.org/documents/POLICE%20NEWS%20OCT2013-%20(A)%20Members.pdf>.

731 Sentencing Advisory Council (Tasmania) (n 722) 29. For a more detailed discussion of this change in police policy, see Jessica Anderson and Kym Dossetor, 'First-Response Police Officers Working in Single Person Patrols: A Literature Review' (AIC Reports, Technical and Background Paper No 49, 2012) 27–9.

732 Anderson and Dossetor (n 731) x and see further 45.

733 Ibid 41 and see further vii, 3, 47.

patrolling in pairs [and] this might indicate that although the rates of assault may appear similar, the severity of injury could be greater for those officers working alone'.[734] Use of force incidents had been found to have occurred for more two person patrols than single person patrols.[735]

WA Police Union report (April 2013)

A WA Police Union report questioned the WA Government's statements that the assaults on police officers causing bodily harm would see the offender inevitably incarcerated, finding an apparent 'disconnect between what was promised by politicians and what is the reality of the legislation'.[736]

The Union expressed concern about data and evaluation. Data that it obtained 'from WA Police … and other agencies not only demonstrated fluctuations in the numbers of assaults since the introduction of the legislation but also highlighted some inherent concerns about the inter-agency recording of the specific data'.[737] A 'different picture' to the reduction acknowledged in Ministerial media statements and media reports was painted by 'reviewing the statistics since the amendments to the *Criminal Code* were enshrined':[738]

> There is undoubtedly a drop in the number of assaults in 2011 when compared to 2010, and also when compared to the year before the legislation was enacted. However, if one refers solely to the 2010–2012 percentage change, the number of assaults on public officers have increased since the inception of the mandatory sentencing legislation [number of incidents of assaults on public officers up 5.4 per cent; number of offences up 8.6 per cent].[739]
>
> When analysing the data obtained from the DPP, [WA Police] and the Minister's Office, the number of imprisonments resulting from the Assault Public Officer (Prescribed Circumstances) charge has increased from the legislation's enactment. However, this increase in imprisonments…has moved in tandem with the increase in assaults on public officers in general…most notably in the year 2012.[740]

The Union noted the matters raised in the TSAC review and queried: 'is the data the Government includes in its media statements about declines in assaults from the inception of the legislation skewed?'[741]

It had concerns about a lack of publicity (as at 2013) driving the deterrent effect of the new scheme:

> Could the increase in the number of assaults on public officers mean that the wider community's interest in protecting the safety and wellbeing of public officers, and more specifically Police Officers, has waned? Since the year beyond the introduction of the legislation and the Government's 'Assault a Police Officer, go straight to jail' catch-cry, there have been no advertising or continued awareness campaigns run by the Government….Given mandatory sentencing is considered to be a deterrent for both offenders and would-be offenders, and it is

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734 Ibid viii and see further 16, 17.

735 Ibid ix.

736 Western Australian Police Union of Workers, *Mandatory Sentencing Report* (April 2013) 3.

737 Ibid 3.

738 Ibid 41.

739 Ibid 20-1, Tables 5 and 6 – WA Police data obtained by the Union. The WA DPP would later note 'that there has however been an overall 33% reduction in the number of assaults on public officers (not limited to police officers) over a four year period (from 1392 per annum to 892) and submitted that on this basis it was incorrect to state that the initial decrease had been 'reversed' ': Western Australian Government (n 717) 9.

740 Western Australian Police Union of Workers (n 736) 41.

741 Ibid 42.

> acknowledged that debate in 2009 had the community baying for reform, has the deterrent effect worn off because this topical issue has been left to fall by the wayside?[742]

The Union urged the DPP, WA Police and the Minister's Office to produce regular, public reports regarding trends, patterns, fluctuations in assaults, specific data about categories of public officers assaulted and how charges progress:[743]

> Consistency in the data reporting is pivotal. Given the differences in the data the Union obtained from the various agencies, it appears there is no consistency in how assaults and the Assault Public Officer (Prescribed Circumstances) charges are recorded. In order to accurately indicate how the legislation is being applied and its efficacy, it is vital that all the data is recorded appropriately, consistently, in a timely fashion and perhaps within a centralised database.[744]

While the Union unreservedly supported the 2009 amendments,[745] it raised strong concerns about too narrow a filter being applied to internal police guidelines (Laying of Charges — Assault Public Officer (Prescribed Circumstances)). The concern was with how the gatekeeping prosecutors applied the guidelines (with charges being downgraded or discontinued),[746] not the guidelines themselves.[747] Separate from DPP guidelines, they were developed in response to the mandatory sentencing regime with the purpose of ameliorating 'the harsh effects of the operation of this law on assaults at the lower end of the scale of assaults'.[748] Requirements included approval prior to charging (often, it would appear, by a DPP representative).

The guidelines required satisfaction not only of statutory bodily harm, but bodily harm that is 'fairly and medically assessed as reaching a level of significance which would exclude any reasonable description of the injury as being insignificant or trivial or minor or transient'.[749]

The report also discussed concerns raised by some in Parliament that the intention of the legislation might be frustrated by (the executive) prosecutorial application of guidelines regarding whether to charge a mandatory sentence offence or an alternative charge that retained 'full discretion'.[750]

WA Government department statutory review (26 June 2014)

The 2009 amending legislation required a review 'of the operation and effectiveness of the amendments' as soon as practicable after the third anniversary of commencement (September 2012)'.[751] The report was tabled in Parliament on 26 June 2014.[752] It relied on lower court data,[753] and did not mention the change in patrol policy.

The review examined only charges involving bodily harm. No charges involving GBH with the relevant 'prescribed circumstances' had been lodged since the amendment: 'This may reflect the fact that assaults on public officers which result in grievous bodily harm are rarer than the less

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742 Ibid.

743 Ibid 48.

744 Ibid 49.

745 Ibid 53.

746 Ibid 42–3.

747 Ibid 44.

748 Ibid 10. See also Western Australian Government (n 717) 4.

749 Western Australian Police Union of Workers (n 736) 10–11 and 14–15.

750 Ibid 12–14.

751 *Criminal Code Act Compilation Act 1913* (WA), Schedule — The Criminal Code ('*Criminal Code* (WA)') s 740A.

752 Western Australian Government (n 717).

753 Ibid 4: 'For the most part these matters are heard before magistrates rather than in the higher courts'.

serious assaults encompassed by section 318 [bodily harm]'.[754] The 2013 and 2014 amendments were not required to be reviewed.

The review resolved apparent confusion about whether the DPP or police determined whether a charge with the mandatory sentence was prosecuted [it would appear, in the Magistrates Court]. Due to a 30 June 2013 change, 'decisions regarding summary prosecutions under the mandatory sentencing provisions of section 318 are made within WA Police'.[755] This discretion was being exercised by a three-person panel from the Prosecuting Services Division (Assistant Divisional Officer, Prosecuting Regional Coordinator and Senior Solicitor). Police prosecutors had no authority to 'downgrade' charges by remove prescribed circumstances without the Panel's consent.[756]

About half of the surviving charges leading to conviction in the Magistrates Court were downgraded so that the mandatory sentencing scheme did not apply (45 of 84).

The numbers of charges in lower courts, for the three-year period since commencement, were as follows.[757]

- 106 section 318 charges with a specified mandatory component were lodged in lower courts (89 in the Magistrates Court, 17 in the Children's Court).
- 20 of those 106 charges were later dismissed or withdrawn and three were yet to be finalised.

Of the remaining 86 charges that were finalised and resulted in a conviction:

- 39 had the mandatory component of the legislation enforced, with a mandatory period of imprisonment or detention.
- 45 charges finalised were 'downgraded' to remove the 'prescribed circumstances' component of the charge [and so mandatory sentences did not apply].
- 'Two outcomes [were] still under investigation'.

The review compared information about charges lodged for both the bodily harm and GBH sections for the periods three years before and three years after commencement of the amendments. Lower court case management system information showed that during the first three years following the 2009 amendments, there was a:

- 27 per cent decrease in section 318 charges, and
- even though the number of total charges lodged decreased, charges for offences related to section 297 remained constant.[758]

754 Ibid 1.

755 Ibid 2.

756 Ibid 2–3.

757 Ibid 3.

758 Ibid 3.

The review report noted that:

> These figures suggest that either the rate, the reporting or the prosecution of these assaults has decreased. It is notable that charges for obstructing a public officer have also decreased [by 30 per cent]; this may suggest that members of the public are exercising more caution in their interactions with public officers. One must however be cautious about attributing these statistics to the impact of the 2009 amendments. In particular, it should be noted that crime rates overall decreased during this period, even as the Western Australian population increased – all charges for criminal offences (including traffic offences) decreased by 14% over the same period.[759]

The 2014 and 2016 press releases did not mention this need for caution and the general reduction. The 2014 release stated that the 'legislation [was] shown to be working as intended' and 'the laws had prompted a cultural shift in the way WA police officers were treated in the community'.[760] The 2016 release stated 'the continuing reduction in assaults indicates [the legislation] has been successful…the mandatory sentencing legislation has proven to be an effective deterrent against violence'.[761]

Stakeholder feedback to the 2014 statutory review regarding the effectiveness of the new scheme was more muted and did not draw conclusions as the media releases did. The WA Police Commissioner advised: 'To determine if the legislation is achieving its intended objectives and meeting community expectations, it is likely that a formal longer term study and evaluation will be required'. He advised information provided by the WA Police Prosecuting Services Division indicated that in real terms there has been an overall 33% reduction in the number of assaults on police from 1346 to 892 over a four year period, although it was **unclear whether this reduction can be attributed to the amendments as it is not known what other factors may have contributed**.[762]

The WA DPP noted:

> 'a slight increase in the total number of assaults (892) in the third year following the passage of the mandatory sentencing amendments when compared to the second year (850). He noted that there has however been an overall 33% reduction in the number of assaults on public officers (not limited to police officers) over a four-year period (from 1392 per annum to 892)'.[763]

The DPP 'noted that the existence of the PSD [WA Police Prosecuting Service Division] Guidelines reflects the fact that 'where judicial discretion is removed it does not remove discretion so much as redistribute it to other parts of the criminal process'.[764]

So did the Chief Judge of the District Court (the operation of the amendments 'has a tendency to transfer sentencing discretion from courts to police and prosecution authorities')[765] and the Mental Health Law Centre ('by the choosing of a particular offence provision, individual officers … decide, in effect, whether or not the accused will go to jail if found guilty').[766] The Chief Judge explained:

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759 Ibid 4.

760 Harvey and Mischin, Government of Western Australia (n 723).

761 Liza Harvey and Michael Mischin, Government of Western Australia, 'Tough Laws See Drop in Assaults Against Police' (Media Release, 19 August 2016).

762 WA Government (n 752) 5 (emphasis added).

763 Ibid 9.

764 Ibid 6.

765 Ibid 7.

766 Ibid 8.

> Where an offence has been committed for which a mandatory sentence of imprisonment is required …- but the facts of the offence or the personal circumstances of the offender may make it unjust for a term of imprisonment to be imposed, there is a prospect that the prosecution will not be for the offence committed but for a lesser offence…it is highly undesirable for police or prosecuting authorities to need to consider charging a person with an offence which is less serious than the offence which has been committed by reason of mandatory sentencing provisions. Unlike sentencing decisions, prosecution decisions are not public decisions and the reasons for the decisions are not always disclosed. Further, the decisions are not subject to review upon appeal.
>
> …It would be far preferable for prosecutions to be for offences that have been committed and for judicial officers to have an unfettered sentencing discretion. Judicial officers would express all the factors they have taken into account in imposing a sentence and their decisions would be subject to appeal in the ordinary way.[767]

The WA Chief Magistrate advised that people charged under section 318 with a mandatory-penalty offence:

- pleaded not guilty at much higher rates than the general rate of not guilty pleas in the Magistrates Court;
- the 'consequence of a mandatory term of imprisonment would appear to have clearly influenced the decision to plead not guilty to the matters';
- a high rate of not guilty pleas 'would indicate an increase in the workload of the Magistrates Court';
- it 'would also appear likely that there were greater delays and more appearances…whilst matters were negotiated resulting in either the withdrawal or downgrading of charges'; and
- 'the overall impact of the higher rate of not guilty pleas in respect of these charges was not significant in the context of the volume of work in the Magistrates Court'. Given 'the relatively small number of charges under section 318 in prescribed circumstances'.[768]

The St John Ambulance Service 'did not provide any figures but advised that the service "continued to see assaults on ambulance officers and believed the legislation is not acting as a suitable deterrent" and rates of assaults on ambulance officers seemed to have remained the same since the amendments'. The point was also made that: 'Alcohol affected or drug-affected people and psychiatric patients who are moved to assault an officer are unlikely to be inclined to think about the existence of legislation'.[769]

The WA Department of Corrective Services advised in 2013 'there had been no assaults on prison officers resulting in a conviction under section 297 or 318…it was not considered appropriate to prosecute under these provisions for the assaults that had occurred (including a serious assault on a prison officer in 2012)'.[770]

The WA Department of Transport 'advised that since 2009 there had been three prosecutions for assaults on Transit Officers under section 318, all relating to an incident on 20 November 2011' resulting in imprisonment and considerable media attention. It presumed 'that the profile of the incident and the significant penalties imposed have acted as a deterrent' and noted no further instances of serious assaults on transit officers occurred since that time.[771]

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767 Ibid 7.

768 Ibid 8.

769 Ibid 7.

770 Ibid 6.

771 Ibid.

The statutory review concluded:

> One problem identified in stakeholder consultation was what is seen as a lack of transparency in the process of determining whether to charge an alleged offender with assault in prescribed circumstances…Unlike judges' sentencing decisions, prosecuting decisions are not made public, and it seems the process adopted has engendered confusion and resentment among some of the public officers sought to be protected as well as concern on the part of advocates for the mentally impaired.
>
> **It is difficult to express any conclusion on the practical operation of these amendments** from an investigative or prosecutorial viewpoint given the recent change in the process for determining when a person is to be charged with the summary offence in section 318 in 'prescribed circumstances'. The alleged problems set out in, for instance, the Police Union report, may no longer be relevant but it is too early to assess whether this will be the case.
>
> …**The statistics gathered by the Department would tend to support the proposition that assaults on public officers have decreased as a result of the 2009 amendments, yet they do not prove that this is the case**.[772]

It recommended 'that a further review of the operation and effectiveness of the amendments made by the *Criminal Code Amendment Act 2009* be conducted in five years' time' [June 2019].[773] This was also announced by the government in Parliament[774] and in a press release.[775] The Council is not aware of any further review taking place.

Accepting a second recommendation, the Government undertook to 'investigate the feasibility of a narrowly focused exemption in respect of people with mental illness, cognitive impairment or relevant disabilities, which would permit a judicial decision-maker to consider any mental impairment an accused may have when imposing a sentence'.[776] The Council is uncertain what progress has been made on the implementation of this recommendation.

Office of the Inspector of Custodial Services report - Assaults on Staff in Western Australian Prisons (20 July 2014)

A 2014 report covered a five-year period but concluded that 'as the Department does not maintain a register of when a prisoner is given a mandatory sentence, it is impossible to determine the effect of the new [2009 mandatory sentencing] law on people in custody'.[777] It also noted that:

> Given the broad definition afforded to 'bodily harm', the mandatory penalties for 'serious assaults' under the criminal law are of potentially broad scope. However, the Department's policy documents use very different and much narrower definitions. Whilst Parliament considers that assaults occasioning bodily harm to prison officers deserve a minimum of six months' imprisonment, very few of these would meet Departmental definitions of a 'serious assault'.[778]

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772 Ibid 11 (emphasis added).

773 Ibid.

774 Western Australia, *Parliamentary Debates,* Legislative Council, 26 June 2014, 4645 (Michael Mischin, Attorney-General).

775 Harvey and Mischin, Government of Western Australia (n 723).

776 Western Australia (n 776) and Harvey and Mischin, Government of Western Australia (n 723).

777 Neil Morgan, Office of the Inspector of Custodial Services, Government of Western Australia, *Assaults on Staff in Western Australian Prisons* (July 2014) 35 [8.5].

778 Ibid 4 [3.16].

The report came 'at a time when assaults on staff have been widely reported in the media', with a spike of assaults on prison staff in September 2013:[779]

> The rate of assault was 0.46 assaults per 100 prisoners, the highest monthly rate since November 2004. However, very little detail surrounding these assaults was furnished in media reports. For example, little distinction was made between assaults requiring hospitalisation and assaults where the victim received no physical or psychological injuries.[780]

The report also noted that 'generalised counts and records do not reflect the particular circumstances in which assaults occur or the type of behaviour involved', illustrating this point by the following example:

> The figures also need to be placed in the context of what is being recorded, a point well-illustrated by data from September 2013. That month, there was a distinct spike in assaults, with 24 recorded cases, three times more than the average. However, almost a third of these assaults were committed by the same woman, in three incidents, over two days…Two mornings in a row, she threw her breakfast at a staff member, each incident constituting an assault. The third incident occurred later on the second day. She was under escort after a visit to a mental health nurse and lashed out at staff, punching, scratching and kicking them. Five staff members sustained scratches and bruises and because there were five victims, five assaults were recorded. This illustrates how quickly the assault rate can rise based on the behaviour of certain individuals or the presence of multiple staff in a single incident.[781]

Further developments in WA

There have been a number of Questions on Notice in the WA Parliament in recent years regarding assaults on police. All relate to high-level figures provided by the WA Police Force. None of them are at a level of specificity that would allow analysis of the application of the mandatory sentencing provisions. While the numbers vary (as they relate to different questions or incidents versus charges, and often carried a caveat that they were subject to revision), two points to note are that:

- assault rates appear to be rising; and
- blame has been attributed to negative changes in community attitudes and methylamphetamine.

A March 2018 media story[782] reported an almost 9 per cent increase in people charged with assaulting a public officer in 2017 (1,094 in 2017, 1,004 in 2016) (note however that this does not specifically identify bodily harm offences triggering the mandatory sentencing provisions).

The WA Police Minister was quoted as 'suspecting' that 'a proportion of the increase could be connected with the meth problem'. The Shadow police minister (the Opposition was in Government when the mandatory sentencing provisions were introduced) was quoted as saying that 'in 2009 there were more than 1,300 assaults against police officers, so mandatory sentencing continues to have an impact, despite the significant increase in our population and the scourge of meth'.

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779 Ibid 2 [3.9].

780 Ibid 2 [3.9].

781 Ibid i.

782 Dylan Caporn 'Three Public Officers Assaulted Each Day on Average Due to WA's Meth Crisis', *The West Australian* (online, 19 March 2018) < https://thewest.com.au/news/wa/three-public-officer-assaulted-each-day-on-average-due-to-was-meth-crisis-ng-b88775293z>. This is likely derived from Police Force figures provided in Parliament (save for the twelfth month of the second year). One question was 'how many people have been charged with assaulting a police officer, with the officer suffering bodily injury, that attracts a mandatory minimum sentence?'. The response was 'data on sentencing and court outcomes should be sought from the Department of Justice as the agency responsible': Western Australia, *Parliamentary Debates*, Legislative Council, 13 March 2018, 565–6 (Stephen Dawson, Minister for the Environment and Disability Services).

The article stated that a count of 962 offences of assaulting a police officer in 2017 was 'the highest in almost 10 years' and 'assaults on police officers have been increasing each year for the past four years, rising from 800 cases in 2014'.

The article reproduced a statement made to other media by the outgoing police commissioner the previous year: '[Mandatory sentencing is] a very easy thing to implement, it's expensive in the long run, but it doesn't really solve the problems, and I would like to have seen more money spent on the other end of the spectrum than on the mandatory sentencing end'.

On 13 June 2019, the Minister for Police provided three separate sets of figures. All showed increases. Firstly, the number of unique police officers assaulted in each calendar year from 2013 to 2019 to date (in response to the question 'How many police officers were seriously assaulted'):[783]

2013	2014	2015	2016	2017	2018	2019
652	669	684	781	759	761	257 (to 8 April)

Second, the number of people charged with 'Assault of Public Officer' under section 318(1)(d) of the *Criminal Code* (this includes occupations other than police):[784]

2013	2014	2015	2016	2017	2018	2019
816	792	848	926	969	994	293 (to 8 April)

Third, the number of charges under section 318(1)(d) in each of the following years (again, this includes occupations other than police):[785]

2013	2014	2015	2016	2017	2018	2019
1,040	1,074	1,098	1,273	1,421	1,392	392 (to 8 April)

On 20 August 2019, it was stated that 'as of 25 July 2019, there were 975 reports of assaults on police officers during the financial year 2018–19'.[786]

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783 Western Australia, *Parliamentary Debates*, Legislative Assembly, 13 June 2019, 4259–60 (Michelle Roberts, Minister for Police; Road Safety). The Western Australian Police Force provided this information.

784 Ibid 4260–1 (Michelle Roberts, Minister for Police). The Western Australian Police Force provided this information. 'Persons charged per year is a count of unique persons charged under s. 318(1)(d). … As such a person charged multiple times within a year would be counted once. A person charged in different years would be counted against each relevant year. Charges per year is a count of unique charges under 'Assault Public Officer' as defined in s. 318(1)(d) … where an associated brief has been created from 01 January 2013 to 08 April 2019 inclusive'.

785 Ibid.

786 Western Australia, *Parliamentary Debates*, Legislative Council, 20 August 2019, 5744–5 (Stephen Dawson, minister representing the Minister for Police). The Western Australia Police Force provided this information.

On 15 October 2019, the following statistics were provided.[787] The number of charges under section 318(1)(d) was:

2012–13	2013–14	2014–15	2015–16	2016–17	2017–18	2018–19
1,137	1,059	1,025	1,178	1,426	1,360	1,409

Most recently, on 17 March 2020, the following was provided in response to the question 'how many police officers were assaulted…?'. These statistics cover all assault offences against police officers (including both 'serious' and 'common' assaults): [788]

2017	2018	2019	2020
759	764	787	122 (to 16 Feb)

On 3 September 2019, statistics regarding 'the number of assault incidents reported' on paramedics in WA, as of 22 August 2019, from St John Ambulance, was:[789]

2015–16	2016–17	2017–18	2018–19
98	140	142	115 (to 22 August)

On 22 August 2019, the Minister for Regional Development stated that:

> The government accepts that there has been a change of behaviour in the community. General standards and the level of respect for authority in the community has been driven in part, but not exclusively, by a massive meth problem. It provides real challenges for the community, police officers, and … firefighters. We also acknowledge that it provides challenges, of course, for people in the medical profession.[790]

The Deputy Leader of the Opposition (in Government when the mandatory sentencing provisions were introduced) noted an increase in assaults on police to 975 in 2018–19, up from 911 in 2017–18:

> Most of those assaults were due either to people being liquored up, or to the meth crisis—people who are in a highly agitated state and not fully responsible for their actions, and engage in assaulting police officers. However, it is also indicative of the mindset of our society. That needs to be corrected. Instead of looking at how we can change the laws to ensure that people who assault police officers, or other public officers, and cause them bodily harm are punished and put away for longer, in order to act as a deterrent, we have resorted to police wearing body armour. Our police officers could drive around in armoured cars. That is hardly protecting police

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787 Western Australia, *Parliamentary Debates*, Legislative Council, 15 October 2019, 7617–8 (Stephen Dawson, minister representing the Minister for Police).

788 Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 March 2020, 1494 (Michelle Roberts). The Western Australia Police Force provided this information.

789 Western Australia, *Parliamentary Debates*, Legislative Council, 3 September 2019, 6180 (Alanna Clohesy, parliamentary secretary representing the Minister for Health).

790 Western Australia, *Parliamentary Debates*, Legislative Council, 22 August 2019, 5859 (Alannah MacTiernan, Minister for Regional Development).

officers. That is isolating them from society. That is doing nothing to address the societal issue.[791]

On 29 October 2019, a possible decline in methamphetamine use was canvassed: 'Meth consumption in metropolitan Perth has decreased 25 per cent since October 2016 … That is what the wastewater testing shows. Meth consumption in regional Western Australia has decreased 25 per cent since the peak in August 2016'.[792]

Canada – legislating deterrence for serious assaults

Section 718.02 of the Canadian *Criminal Code*, introduced in 2009,[793] requires that a court imposing a sentence for any of the following offences 'shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence':

- disarming a peace officer[794] [takes or attempts to take weapon].[795]
- assaulting peace officer with weapon or causing bodily harm.[796]
- aggravated assault of peace officer [commits an assault and wounds, maims, disfigures or endangers the life of the complainant].[797]
- intimidation of a justice system participant [in order to impede him or her in the performance of his or her duties].[798]

This section is housed in Part XXIII of that Code, which deals with purposes and principles of sentencing. The same mandatory requirement has also been added for offences regarding abuse of a person aged under 18 years,[799] killing or injuring a law enforcement or military animal while it is aiding a relevant officer[800] and abuse of a person who is vulnerable because of personal circumstances.[801]

A fundamental principle remains that the 'sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender'.[802]

It may be said that these statutory provisions are merely legislative restatements of what appeal courts, including the Queensland Court of Appeal, have expressly stated for decades. An analysis of Canadian cases involving spitting into officers' faces, where those officers were subsequently

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791 Ibid 5861 (Michael Mischin, Deputy Leader of the Opposition).

792 Western Australia, *Parliamentary Debates*, Legislative Assembly, 29 October 2019, 8459 (Mark McGowan, Premier). See also 8458.

793 *Criminal Code*, RSC 1985, c C-46, s 718.02. Introduced by Bill C-14, *An Act to amend the Criminal Code (organized crime and protection of justice system participants*, 2nd Sess, 40th Parl, 2009, c. 22, Cl 18 (in force 2 October 2009; see < https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=en&Mode=1&billId=3686623&View=6>.

794 A 'peace officer' includes a wide range of occupational groups, including: police or other person employed for the preservation and maintenance of public peace or for the service or execution of civil process, a mayor, warden, reeve, sheriff or deputy sheriff, sheriff's officer and justice of the peace, a member of the Correctional Service of Canada, customs and immigration officers, fishery guardians, pilots in command of an aircraft while the aircraft is in flight and officers and non-commissioned members of the Canadian Forces employed on duties that mean they have the powers of a peace officer: *Criminal Code*, RSC 1985, c C-46, s 2.

795 *Criminal Code*, RSC 1985, c C-46, s 270.1.

796 Ibid s 270.01.

797 Ibid s 270.02.

798 Ibid s 423.1(1)(b).

799 Ibid s 718.01.

800 Ibid s 718.03 (offence in s 445.01 (1)).

801 Ibid s 718.04.

802 Ibid s 718.1.

anxious about disease transmission, demonstrates that the individual circumstances of each case still loom large in the application of deterrence.

R v Charlette[803] - 2010

The offender told police she had a contagious disease, gave an oblique answer when asked again, agreed to provide medical records but then refused, then later released them after the officer's testing began. She had no disease. The officer had an unhealed wound to his face. He and his family were deeply troubled about the possibility of transmission. The Court of Appeal for Saskatchewan wrote that:

> Spitting on someone…is almost always accompanied by the veiled or express threat of transmitting a communicable disease. The possibility of contracting a disease is real, and the fear of developing a disease preys on the victim's mind for some time to come.[804]
>
> A sentence of probation, with the terms that were imposed, constitutes no sentence at all, in the circumstances presented in this case.[805]

A sentence of sixty days' imprisonment, plus six months' probation, was substituted.

R v Ratt - 2012

This single-judge decision was stated to be 'primarily about the risk of transmitting disease through spitting, and whether that should be considered an aggravating factor'.[806] The offender volunteered a blood sample to assist in determining the risk of infection and wrote a letter of apology. The Crown relied on general deterrence and section 718.02.[807] The court noted the use of the word 'primary' and not 'sole' consideration in the section.[808] Both parties submitted material regarding transmission risk and the Crown conceded that 'the risk of transmitting HIV or Hepatitis C is negligible to zero through saliva'.[809] The Court stated:

> In Ms. Ratt's case, I find there is no need for any further specific deterrence. Given her remorse and the steps she has taken…I am confident that she will never do anything like this again.
>
> Sentencing is an individualized process, and what deters one from committing crimes may not deter another. Certainly a jail sentence has no guaranteed deterrent effect, either on any particular offender or on the general public. Many studies have shown that the harshness of the penalty has little to no deterrent effect on the general public.
>
> …Those who get arrested on a regular basis know the police are terrified of getting spit on. That's why they do it…these spitting incidents are increasing *because* of the fear. If we want to deter suspects from spitting on police officers, we need to educate these officers about the real risks involved, and not perpetuate their anxiety by repeating urban myths.[810]

The Court found that 'the Court of Appeal imposed a sentence of 60 days on Ms. Charlette because of her attitude. Ms Ratt's attitude could not be more different'.[811] Denunciation and deterrence

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803 *R v Charlette* 2010 SKCA 78 (Jackson JA, Gerwing and Lane JJA agreeing) (Court of Appeal for Saskatchewan).

804 Ibid 3 [9].

805 Ibid 3 [10].

806 *R v Ratt* [2012] SKPC 154, SJ No 590 2012, 1 [1] (FM Daunt Prov Ct J) (Saskatchewan Provincial Court).

807 Ibid 4 [26].

808 Ibid 7-8 [39].

809 Ibid 4 [26].

810 Ibid 8 [42], [43], [44] (emphasis in original).

811 Ibid 10 [55].

mere met by the five days Ms Ratt had already spent in custody. She was sentenced to the five days plus 6 months' probation.

R v Custer - 2013

In this single-judge decision, the offender was sentenced to 4 months' imprisonment. She did not state that she had a communicable disease.[812] The Court referred to section 718.02 and wrote:

> Over the past eight years or so, I have seen more and more cases of assaulting a police officer by spitting with no apparent let up. I believe that both specific and general deterrence are critical in this case. The public has to know that this Court will simply not tolerate this vile and disgusting act. This is general deterrence.[813]

R v Natomagen - 2016

The same judge from Custer (RJ Lane J, who was also prosecutor in *R v Ratt*) decided this case.[814] The offender, who had no criminal record, threw his blood-soaked shirt over an officer's face. The court cited another case which stated that 'bodily fluids can transfer deadly diseases'[815] as well as the relevant comment to the same effect in *R v Charlette.* The judge disagreed with the analysis in *Ratt* which 'seemed to be based primarily on the conclusion…that there was virtually no risk of diseases being transmitted by sputum or by blood. It appeared that the court in *R v Charlette* would not agree either.[816]

The sentence imposed was 60 days' in custody followed by 12 months' probation: 'To do otherwise would, in my view, ignore specific and general deterrence. It would specifically cause me to ignore s. 718.02'.[817]

R v Maier - 2015

The Court of Appeal of Alberta dealt with a common assault by spitting onto the face and chest of a homeless shelter volunteer employee.[818] The Court noted that 'the relative importance of denunciation and deterrence is attenuated when sentencing mentally ill offenders'.[819]

Themes from the analysis of other jurisdictions regarding deterrence

The analysis of the Victorian, WA and Canadian systems above demonstrates different ways in which general deterrence can be legislatively prioritised. However, mandating the same weight for general deterrence in a blanket way for all offenders will not necessarily achieve the outcome desired. While such moves can appear to be simple common sense, critical analysis reveals undesirable consequences:

- A lack of valid evidence that general deterrence achieves its purpose (with the key consequence that there is no guarantee or likelihood that it in fact increases or protects officer safety on a global level commensurate with its global application).
- Imprisoning vulnerable people, who have different personal circumstances to the general public, when they would otherwise receive a different penalty (which could in fact make them less likely to reoffend in the long term) without addressing underlying causes which can remain latent in a particular person's life.

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812 *R v Custer* 2013 SKPC 66, 4 [7] (RJ Lane J) (Saskatchewan Provincial Court).

813 Ibid 6 [15].

814 *R v Natomagen* 2016 SKPC 108 (RJ Lane J) (Saskatchewan Provincial Court).

815 *R v McLeod*, 2009 SKPC 085 [4] Provincial Court Judge Gerry Morin.

816 *R v Natomagen* 2016 SKPC 108, 5–6 [17] (RJ Lane J).

817 Ibid 7–8 [25] (RJ Lane J).

818 *R v Maier* 2015 ABCA 59 (McDonald and Veldhuis JJA) (Court of Appeal of Alberta).

819 Ibid 9 [54], repeated at 12 [59].

- A reliance on other charges which do not carry a mandatory penalty, in order to avoid unjust outcomes and stress on the system – this further undermines judicial discretion and possibly public and victim confidence. It is a particular challenge regarding charges that cover a very wide range of offending behaviour such as assault.
- Lack of certainty around how other important sentencing purposes are given effect to (if they can be). The Council notes that the other purposes include community protection and rehabilitation.
- Statistical justification that does not acknowledge other relevant factors or vagaries, which risks producing misleading results.
- An increase in not guilty pleas. This can increase burden on the system and mean that victims must engage with the trial process as witnesses in court and wait longer for resolution of their case.

Questions: Purpose of sentencing for assault on public officers

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?

9.7 Do current penalties and sentencing practices provide an adequate response to assaults on public officers?

9.7.1 Introduction

The Terms of Reference ask the Council to determine whether penalties and sentencing trends for assaults on police officers, corrective service officers and other public officers who fall within the scope of section 340 of the *Criminal Code* in the execution of their duties (including following the 2012 and 2014 amendments introducing higher maximum penalties), as well as those charged under lesser offences (such as under the PPRA) are in accordance with stakeholder expectations.

The Council's analysis (detailed in Chapter 5) broke sentencing outcomes down by offence categories and by sentencing court level.

'Acts intended to cause injury' carrying a 7-year maximum penalty (by MSO)

In the higher courts, outcomes of note were:

- Offences most likely to result in a custodial penalty: wounding (97.0%), followed by non-aggravated forms of serious assault (82.0%), then AOBH (80.0%).
- Highest custodial penalty: wounding and AOBH (5.0 years), then non-aggravated serious assault (3.5 years).
- Average sentence: wounding (2.1 years), followed by AOBH (1.5 years), then non-aggravated serious assault (0.9 years).

In the Magistrates Courts (which cannot sentence above 3 years and cannot sentence for wounding):

- Highest proportion of cases receiving a custodial penalty was for non-aggravated serious assault (54.5%) followed by AOBH (50.3%).

- Highest sentence imposed for both offences was 3 years.
- Use of custodial penalties was less frequent, with about half of cases attracting custodial penalties.
- Custodial penalty lengths clustered differently for the two offences: About 6 months for non-aggravated serious assault and a more even spread from 6 months up to 2 years for AOBH.

This analysis tends to show (based on the use of custodial sentences and distribution of sentence lengths):

- Higher courts treat wounding and AOBH as more serious than non-aggravated serious assault (which, unlike wounding and AOBH, does not involve bodily harm), although serious assault was slightly more likely to attract a custodial sentence compared to AOBH.
- Magistrates Courts exhibit the same general patterns for non-aggravated serious assault and AOBH. AOBH was slightly less likely to attract a custodial sentence, but when a prison sentence was imposed, AOBH attracted on average slightly longer sentences than non-aggravated serious assault (0.8 years for AOBH; 0.6 years for serious assault).

'Acts intended to cause injury' offences carrying a 14-year maximum penalty (MS0)
In the higher courts, outcomes of note were:

- Custodial penalties were overwhelmingly the most common penalty imposed across all offences: torture (100.0%), followed by GBH (99.1%), then aggravated serious assault (93.0%).
- Highest custodial penalty: torture (10.0 years), followed by GBH (8.0 years), then aggravated serious assault (5.0 years).
- Average sentence: torture (5.4 years); followed by GBH (3.0 years), then aggravated serious assault (1.1 years).
- Distribution of custodial penalties: aggravated serious assault tended to cluster around 1 year, with a lower proportion of cases over 2 years compared to torture and GBH. Sentences for torture were fairly even spread between 1 and 10 years, with a slight increase around the 5-year mark. The majority of sentences for GBH fell between 1 and 3 years.

In the Magistrates Courts, custodial sentences were imposed in 74.8 per cent of cases of aggravated serious assault. The highest custodial penalty was 3 years. The majority of sentences were under 2 years (6 months was most common). The average sentence was 0.7 years (compared to 1.1 years in the higher courts). It can be assumed that aggravated forms of serious assault dealt with summarily are at the less serious end of the spectrum.

The main finding from the Council's analysis

The main finding regarding higher courts is that they treat both torture and GBH, in general, as more serious than aggravated serious assault — even though all three offences share the same 14-year maximum penalty. Over two in five (41.9%) torture sentences imposed were for a period at or over 40 per cent of the maximum penalty[820] of 14 years, as were 5.6 per cent of sentences for GBH. None of the sentences for aggravated serious assault met this threshold.

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[820] The use of 40 per cent of the maximum penalty as a meaningful point of assessment is based on the Victorian Sentencing Advisory Council's consideration of how 'standard sentence' levels might be set under a standard sentence scheme. This scheme is discussed in Chapter 6 of this paper. Under the Victorian Council's recommendations, 40 per cent was chosen to represent mid-range of objective seriousness, before subjective factors (those personal to the offender) are accounted for. See Sentencing Advisory Council (Victoria), *Sentencing*

In the higher courts, custodial penalties were ordered in 211 cases in which aggravated serious assault was the MSO (93.0%), in 567 cases where GBH was the MSO (99.1%), and 62 cases where torture was the MSO (100.0%). In the Magistrates Courts, there were 958 cases resulting in a custodial penalty where aggravated serious assault was the MSO (74.8%). The offences of GBH and torture cannot be sentenced in the Magistrates Courts.

It is arguable that once offending has a sufficiently serious gravamen, serious assault is no longer the most suitable or appropriate charge — other *Criminal Code* charges may be better suited to a particular case and result in a higher head sentence and non-parole period.[821] This may even be the case with offences of wounding and AOBH which carry a lower maximum penalty than aggravated serious assault.[822]

This is often because of the type of injury caused, how it is caused, and/or the intention of the offender in committing the offence which can be proven to the criminal standard. The elements of the other offence may better reflect the criminality involved and harm caused.

Criminal Code offences which can be used instead of serious assault were examined in Chapters 3 and 5. A recent Court of Appeal judgment regarding torture discussed in Chapter 3 reflects the data analysis — that offending of an extremely high level, with the intentional infliction of harm and serious injury, will not necessarily result in a head sentence above 10 years (this is compounded by the serious violent offence scheme and its mandatory application to sentences of 10 years or more).

This may also explain why the data shows that the highest head sentences for serious assault remain well below the maximum legislated figure of 14 years. It may be that a head sentence ceiling for section 340 offences is not a reflection of a problem with the section or associated sentencing practices, but that the other offences in the *Criminal Code* (namely AOBH, wounding and GBH) remain preferable alternatives for more serious offending which straddles different offences.

The fact that these other offences do not explicitly mention a particular victim's profession or other characteristic does not prevent or discourage courts from continuing to treat assaults on public officers as a circumstance of aggravation. Courts do not need statutory recognition of a particular victim's status to treat it as an aggravating factor.

The way in which the offence sits within the hierarchy of *Criminal Code* offences may better meet the purposes of sentencing. An unintended consequence of a precise amendment to the maximum penalty for one offence in a Code may be that this does not take into account the relationship which that offence bears to other offences in the same Code, which have co-existed since its creation, and the way in which this is borne out in sentencing and charging practice. This reflects stakeholder concerns raised with the relevant Parliamentary Committee when considering the first doubling of maximum penalty in section 340 in 2012, that a 14-year maximum would be incongruous with the same penalty in place for more serious offences (e.g. GBH, a more serious

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Guidance in Victoria: Report (2016) xxxi, 186–7. A lower sentence for a mid-range offence might be appropriate once subjective factors are factored in including, for example, the lack of a relevant prior criminal history, remorse and an early guilty plea.

821 On this point, see Office of the Director of Public Prosecutions (Queensland), *Director's Guidelines* (30 June 2019) which state where serious injuries to police have resulted: 'Serious injuries which fall short of a grievous bodily harm or wounding should be charged as assault occasioning bodily harm under section 339(3) or serious assault under section 340(b) of the Code': 17. This makes clear that GBH or wounding are to be preferred in circumstances where serious injuries have been caused to the victim.

822 See (n 821) above.

offence requiring greater harm) and that regard should in particular be had to penalties for comparable conduct.[823] Such amendments, irrespective of the jurisdiction, are often election commitments. It would be rare for such amendments to be considered in the context of Professor Ashworth's sixth complication discussed above in this chapter, regarding 'quantification' of numbers for increases in maximum penalties and the suggestion that 'there should be some empirical testing of different marginal increases, perhaps through research with offenders and non-offenders'.[824]

Sentencing outcomes: Non-aggravated serious assault and common assault

Analysis of sentencing outcomes for non-aggravated forms of serious assault (which carries a 7-year maximum penalty) and common assault (which has a 3-year maximum penalty) shows:

- Non-aggravated serious assault offences are much more likely to attract a custodial sentence. In the higher courts, 82.0 per cent attracted a custodial penalty, compared to 41.7 per cent for common assault. In the Magistrates Courts the difference was even greater, (54.5% compared to 21.5% respectively).
- Non-aggravated serious assault offences resulted in longer (on average) sentences than common assault across all courts (0.9 years compared to 0.7 years for offences sentenced in the higher courts, and 0.6 years compared to 0.5 years for offences sentenced in the Magistrates Courts).

Relevance of stakeholder views

The perceived adequacy of penalties imposed is of direct relevance to this review as, together with other evidence used to identify if there are problems with current sentencing practices:

- If sentencing levels are found to be generally consistent with stakeholder expectations, it would tend to suggest there are no major problems with the current penalties, offence and sentencing framework from the perspective of those consulted and who made submissions to the review;
- If sentencing levels are found to be generally inconsistent with stakeholder expectations, it would tend to suggest there are potential problems with the current penalties, offence and/or sentencing framework and reforms may need to be considered. It might also mean that information about the wider range of charges used for such offending could be better communicated outside of legal stakeholder groups.

9.7.2 Stakeholder views

The Together Union submitted the review 'should consider whether the sentencing of prisoners who assault Custodial Corrections Officers is having adequate deterrent effect in accordance with the sentencing guidelines contained in the *Penalties and Sentences Act 1992*'.[825] It pointed to the increases in prisoner assaults on staff based on QCS data which show the number of assault

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823 Queensland Advocacy Incorporated Shane Duffy, Submission No 5 to the Legal Affairs and Community Safety Committee, *Inquiry into the Criminal Law Amendment Bill 2012* (28 June 2012) 2; Roger N Traves SC, Submission No 9 to the Legal Affairs and Community Safety Committee, *Inquiry into the Criminal Law Amendment Bill 2012* (28 June 2012) 4. See the comment by the Court of Appeal in a s 340 case two years later, in rejecting prosecution arguments that sentences for the aggravated form of serious assault should be comparable to those for grievous bodily harm because they shared the same maximum penalty (in the context of the particular facts of that case, which did not involve actual physical injury, nor psychological injury or trauma: *Queensland Police Service v Terare* (2014) 245 A Crim R 211, 221 [36]–[37] (McMurdo P, Fraser and Gotterson JJA agreeing).

824 Andrew Ashworth (n 689) 573.

825 Preliminary submission 14 (Together Union) 2.

incidents reported by prisoners on staff from 2005 to 2018 increased by 360 per cent, far exceeding the growth in prisoner numbers over the same period (170%).[826]

The Bar Association of Queensland cautioned against 'any approach that is not based on evidence that demonstrates an increase in penalties or some other change in the statutory regime will actually serve to reduce the incidence of these offences'.[827]

QAI similarly referenced a review by the Victorian Sentencing Advisory Council in submitting: 'Higher penalties and longer sentences are unlikely to reduce the risk of assault for emergency personnel.'[828]

The QHRC noted that: 'Based on the experience of other jurisdictions, higher penalties imposed for assaults against [public officers], including how such workers are defined, will give rise to human rights limitations'.[829] In considering options for change, and with reference to circumstances in which limitations on human rights might be demonstrably justified, the Commission suggested the Council might find it beneficial to have regard to:

- data on the effectiveness of increased penalties;
- how maximum penalties are applied currently;
- how increased penalties will address risks to the specific frontline workers identified (considered particularly critical if mandatory custodial penalties are considered, which are 'a significant limitation on rights'); and
- whether non-legislative change will achieve, or assist in achieving, the same purpose.[830]

It recommended 'that each occupation identified for such increased penalties must be specifically justified based on the particular risks faced by that profession, rather than a blanket approach. This may include demonstrating how differences in penalties can achieve the change in behaviour sought towards frontline workers'.[831]

9.7.3 Issues and options

Adequacy of penalties

The 'adequacy' of penalties is a difficult concept to measure in an evidence-based way.

In the Council's report on penalties imposed on sentence for criminal offences arising from the death of a child, we discussed the concept of 'adequacy' in some detail.

We noted, as discussed in Chapter 4 of this report, that unless legislation fixes a mandatory penalty, 'the discretionary nature of the judgment required means that there is no single sentence that is just in all the circumstances',[832] or an 'objectively correct sentence'.[833]

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826 Ibid.

827 Preliminary submission 29 (Bar Association of Queensland) 2.

828 Preliminary submission 35 (Queensland Advocacy Incorporated) 3.

829 Preliminary submission 3 (Queensland Human Rights Commission) 2.

830 Ibid.

831 Ibid 13 [47].

832 *DPP v Dalgliesh (a Pseudonym)* (2017) 349 ALR 37, 40 [7] (Kiefel CJ, Bell and Keane JJ). See also *Wong v The Queen* [2001] HCA 64; (2001) 207 CLR 584 at 611–612 [74]–[76] (Gaudron, Gummow and Hayne JJ).

833 *Markarian v The Queen* (2005) 228 CLR 357, 384 [66].

Courts in exercising discretionary judgment in setting the sentence do not approach the task in an overly structured or mathematical way:

> At best, experienced judges will agree on a range of sentences that reasonably fit all the circumstances of the case. There is no magic number for any particular crime when a discretionary sentence has to be imposed.[834]

Even an agreement to accept a plea to a lesser charge (e.g. in this case, to an offence under section 790 of the PPRA, rather than to serious assault) 'cannot affect the duty of either the sentencing judge or a court of criminal appeal to impose a sentence which appears to the court, acting solely in the public interest, to be just in all of the circumstances'.[835]

Sentencing courts have a wide discretion, yet 'must take into account all relevant considerations (and only relevant considerations)'[836] including legislation and case law.

It can be inferred that the sentencing discretion has 'miscarried' when the sentence is clearly unjust, being 'manifestly excessive' or 'manifestly inadequate'.[837] Such sentences, which an appeal court can set aside, are those falling 'outside the *range* of sentences which could have been imposed if proper principles had been applied'.[838]

However, as with the earlier child homicide reference, it is evident the intention of the Attorney-General in referring this matter to the Council is that the Council should look beyond the issue of legal adequacy and consider the question of community and, in particular, stakeholder expectations.

In responding to this reference, the Council therefore will be looking to identify:

(1) Any evidence of a lack of community confidence in sentencing for assaults on public officers, including any disparities between current sentencing practices and stakeholders' and Parliament's views of offence seriousness.
(2) Any evidence of inconsistency in approach of courts to sentencing for these offences — including whether aggravated forms of serious assault which carry a higher maximum penalty than serious assault simpliciter are treated by courts, in general, as more serious, and that the distribution of sentences is what could be expected based on the maximum penalties that apply.
(3) Any inconsistencies between the approach in Queensland and that in other Australian and select overseas jurisdictions.

It will also be considering whether the current penalty and sentencing framework provides an appropriate response to this form of offending with respect to meeting the primary purposes of sentencing.

The importance of stakeholder views

The consultation process will inform the Council's response to the first issue — whether there is any evidence of a lack of confidence in sentencing for assaults on public officers — in this case, based on stakeholders' and Parliament's views of offence seriousness, taking into account that

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834 *Markarian v The Queen* (2005) 228 CLR 357, 383 [65] (McHugh J).

835 *DPP v Dalgliesh (a pseudonym)* (2017) 349 ALR 37, 51 [66] (Kiefel CJ, Bell and Keane JJ) citing *Malvaso v The Queen* (1989) 168 CLR 227, 233; *Barbaro v The Queen* (2014) 253 CLR 58, 72-74 [34]–[39] (French CJ, Hayne, Kiefel and Bell JJ).

836 *Markarian v The Queen* (2005) 228 CLR 357, 371 [27] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

837 *DPP v Dalgliesh (a pseudonym)* (2017) 349 ALR 37, 40 [7] (Kiefel CJ, Bell and Keane JJ).

838 *Barbaro v The Queen* (2014) 253 CLR 58, 70 [26] (French CJ, Hayne, Kiefel and Bell JJ) (emphasis in original).

within the timeframe for the review, it is not possible for the Council to test community views on this issue in a way that is methodologically sound.

Evidence of consistency in approach of courts – by the data

The data presented in Chapter 5 of this report, in part, responds to the second issue.[839] The Council found that, on average, aggravated forms of serious assault attract higher penalties (1.1 years for sentences imposed in the higher courts, and 0.7 years in the Magistrates Courts) than non-aggravated forms of serious assault (0.9 years for sentences imposed in the higher courts, and 0.6 years in the Magistrates Courts). The proportion of offences attracting a custodial sentence are also much higher for aggravated forms of serious assault (93.0% of offences dealt with in the higher courts, and 74.8% in the Magistrates Courts) than for non-aggravated forms of serious assault (82.0% of offences dealt with in the higher courts, versus 54.5% in the Magistrates Courts). There was also a high level of consistency in the length of custodial sentences imposed when examined by court level.

Evidence of inconsistencies with the sentencing approach in other jurisdictions

The third issue regarding any evidence of inconsistencies with the approach in other jurisdictions is explored throughout this Chapter as it applies to specific options for reform.

As one example, looking at maximum penalties that apply to behaviour that would otherwise be captured within the general criminal offence of AOBH where committed against public officers (or a sub-set of these), it is apparent that the maximum penalties in Queensland are already comparatively high — particularly taking into consideration that the Queensland offence of serious assault does not require the offender to have intended to cause harm through their actions.

The highest penalties for an equivalent offence of causing harm to a public officer in the absence of a specific intention to cause harm is 12 years in NSW where a law enforcement officer is wounded (or GBH caused) in circumstances where the offender is reckless as to causing actual bodily harm, and 10 years in South Australia (which applies where the offender was reckless as to whether harm would result, or if harm is caused in the process of hindering or resisting police), and in Canada.

Where such harm is intentional, higher penalties can apply (for example, 13 years under the Commonwealth *Criminal Code* if the official is a Commonwealth judicial officer or law enforcement officer, or 10 years otherwise), 15 years in South Australia for causing harm intentionally to prescribed emergency workers and 10 years for intentionally causing injury to any person (not just a public officer) in Victoria.

Further, from the cross-jurisdictional analysis undertaken to date, it seems that assaults resulting in bodily harm (other than wounding of law enforcement officers in NSW) are not treated for the purposes of setting the maximum penalty, as has been the case in Queensland, as equivalent in seriousness to the offence of causing GBH, or its equivalents.

Table 9-3: Maximum penalties for AOBH, and equivalents, where committed against a public officer (or specific classes of officer) by jurisdiction

Jurisdiction	Provision	Nature of act/s constituting offence	Maximum penalty
Commonwealth	*Criminal Code* (Cth) s 147.1	Engaging in conduct causing harm to a Commonwealth public official etc with the intention of causing harm without consent	10 years, or 13 years if official is judicial officer or law enforcement officer

839 See also Appendix 4, Table A4-3 and Table A4-4.

Jurisdiction	Provision	Nature of act/s constituting offence	Maximum penalty
New South Wales	*Crimes Act 1900* (NSW) ss 60(2) & (2A) (police), 60A(2) (law enforcement officers other than police), 60E (school staff)	Assault occasioning actual bodily harm Wounding where reckless as to causing actual bodily harm	AOBH: 7 years, 9 years (police only) if during public disorder Wounding: 12 years, 14 years (police only) if during public disorder
Northern Territory	*Criminal Code* (NT) ss 155A (person providing rescue services etc), 189A (emergency workers)	Assault causing harm: - person providing rescue, resuscitation, medical treatment, first aid etc to a third person (not specific to 'public officers') - emergency workers	7 years
Queensland	*Criminal Code* (Qld) ss 340(1)(b) and (2AA)	Assault causing bodily harm to: - police - public officer	14 years
South Australia	*Criminal Law Consolidation Act 1935* (SA) s 20AA (prescribed emergency workers)	(1) cause harm intending to cause harm (2) cause harm recklessly (3) assault (not otherwise falling within (1) or (2)) (4) hinder or resist police causing harm	(1) 15 years (2) 10 years (3) 5 years (4) 10 years
Victoria	*Crimes Act 1958* (Vic) s 18 (Note: Not specific to public officers)	Cause injury: (1) intentionally; or (2) recklessly	(1) 10 years (2) 5 years
	Common law offence	Common assault	5 years
	Crimes Act 1958 (Vic) s 320A	Common assault where the person is a police officer on duty or protective services officer on duty (and offender knows or is reckless as to this): (1) offender has an offensive weapon (2) offender has a firearm or imitation firearm, so as to cause fear	(1) 10 years (2) 15 years
Western Australia	*Criminal Code* (WA) s 318(1)	Assault of: - public officer/person performing function of public nature conferred by law/due to performance of such function/acting in aid of such person - driver or person operating or in charge of train, ferry, passenger transport vehicle - an ambulance officer - fire and emergency services - hospital worker providing health service etc - contract worker court security/prisons	7 years 10 years (aggravated) Aggravated if offender: (i) is armed with dangerous or offensive weapon or instrument; or (ii) is in company with another person or persons. Also, aggravated (in force for 12 months only from 4 April 2020) if: (i) at the commission of the offence the offender

Jurisdiction	Provision	Nature of act/s constituting offence	Maximum penalty
			knows he/she has COVID-19; or (ii) at or immediately before or immediately after the commission of the offence the offender makes a statement or does any other act that creates a belief, suspicion or fear that the offender has COVID-19.
Canada	*Criminal Code* (R.S.C., 1985, c. C-46) s 270.01	Assault a public officer or peace officer where offender: (a) carried, used/threatened to use a weapon or imitation weapon; or (b) caused bodily harm to the officer.	10 years
New Zealand	*Crimes Act 1961* (NZ) s 191 (applies to any person)	Cause injury to any person where committed with intent to facilitate the commission of, or avoid detection of an imprisonable offence, or to avoid arrest etc	7 years

Forms of mandatory sentences that apply to section 340 offences in Queensland in some circumstances are discussed in Chapter 3. Some jurisdictions have introduced mandatory, or presumptive minimum terms of imprisonment, but these only apply in certain circumstances, or if the offence involves bodily harm. The Victorian and WA regimes are discussed above, and in Chapter 6.

The potential deterrent effect of such sentences is discussed above in this Chapter, as are general objections to the use of these forms of mandatory or presumptive provisions.

Sentencing purposes

As discussed in section 9.6 above, the primary purposes referred to by courts are typically general deterrence and denunciation.

Leaving the issue of whether penalties deter this form of offending aside, the question becomes whether a particular type or quantum of punishment (e.g. 6 months' imprisonment) in an individual case is sufficient to meet other sentencing purposes set out in section 9(1) of the PSA including, through the sentence imposed:

- making clear, that the community, acting through the court, denounces the sort of conduct in which the offender was involved;
- punishing the offender to an extent and in a way that is just in all the circumstances; and
- providing conditions that the court considers will help the offender to be rehabilitated.

The concept of **proportionality** is central to the first two listed purposes (denunciation and just punishment). 'Ordinal proportionality' has been said by legal theorists to consist of three 'sub-requirements':

- Parity: 'when offenders have been convicted of criminal conduct of similar seriousness, they deserve penalties of comparable severity'.
- Rank-ordering: 'Punishing crime Y more than crime X expresses more disapproval of crime Y, which is warranted only if it is more serious. Punishments thus should be ordered on the

scale of penalties so that their relative severity reflects the seriousness-ranking of the crimes involved'.

- The spacing of penalties: 'Suppose crimes X, Y and Z are of ascending order of seriousness; but that Y is considerably more serious than X but only slightly less so than Z. Then, to reflect the conduct's gravity, there should be larger space between penalties for X and Y than those for Y and Z'.[840]

Maximum penalties typically provide a rough guide in most jurisdictions as to Parliament's (and, by extension, the community's) view of the perceived relative seriousness of various offences. However, the challenges of identifying a widely accepted and comprehensive scale of what makes one crime more serious than another, are well documented.[841]

Where changes to maximum penalties occur on a more ad hoc basis (for example, in response to an outcry about the sentence in a particular high-profile case), the problem becomes whether the maximum penalties remain an effective measure of relative seriousness. While increasing maximum penalties is one lever typically used by Parliament to lift penalty levels, as discussed in Chapter 4, there is no one-to-one correspondence between changes to the maximum penalty and shifts in sentencing practices. For example, a doubling in the maximum penalty does not necessarily mean average sentence lengths will double, although it will communicate to courts the increased seriousness with which such offences are viewed.

While it is possible for the Council to test in a rudimentary way whether current sentencing practices demonstrate a level of ordinal proportionality (e.g. as discussed above, by testing whether, based on the maximum penalties set for assault and related offences, including with and without circumstances of aggravation, offences with a higher level of objective seriousness receive higher sentences), it is not possible for the Council to determine with any degree of certainty or specificity what level or type of sentence, or range of sentences, is 'adequate' or 'appropriate' given there is no one 'correct' sentence or widely accepted 'deserved' penalty.[842]

Looking at **rehabilitation** as another relevant sentencing purpose, other types of sentencing orders that are reasonably equivalent to other forms of penalties that might have been imposed (e.g. imprisonment) might be considered to address underlying factors associated with this offending (for example drug and alcohol use and mental health issues).[843] Notably, in Victoria which introduced a form of mandatory minimum sentence, alternative orders may be made where special circumstances exist. These include forms of treatment orders.

The complexity of the issues means it will be necessary for the Council to draw on a range of evidence and information, including views expressed in submissions and during the consultation phase, to assess whether current penalties and the sentencing framework provide 'an appropriate response to this form of offending' as required under the Terms of Reference.

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840 Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press, 2005) 140 [9.3.2].

841 See, for example, Michael Tonry, 'Proportionality Theory in Punishment Philosophy: Fated for the Dustbin of Otiosity' in Michael Tonry (ed), *Of One-eyed and Toothless Miscreants: Making the Punishment Fit the Crime* (Oxford University Press, 2019) 13–16.

842 On the related issues of the appropriate 'anchoring' of penalties by fixing actual (rather than comparative) severity levels for crimes see von Hirsch and Ashworth (n 840) 141–143 [9.4] and Tonry (n 841).

843 On the problems associated with identifying penal equivalency of different sentencing orders see Tonry (n 841) 23–26.

Ability to deal with aggravated forms of serious assault summarily

Another decision that may impact on sentencing outcomes is whether a charge of serious assault — particularly one with aggravating circumstances present — is dealt with summarily by a Magistrates Court (in which case a 3-year maximum penalty ceiling applies) or on indictment.

As discussed in Chapter 3, a charge of serious assault must be dealt with summarily if the prosecution elects for it to be dealt with in this way.[844] During the data period analysed by the Council (2009–10 to 2018–19), the vast majority of cases involving serious assault of a public officer were sentenced in the Magistrates Courts (82.8%, n=6,847).[845]

As a protection against inadequate sentencing where an election is made, section 552D of the *Criminal Code* provides that a Magistrates Court must not deal with the charge if satisfied at any stage, and after hearing any submissions by the prosecution and defence, that because of the nature or seriousness of the offence, or any other relevant consideration, the defendant, if convicted, may not be adequately punished if sentenced in that court.

Legislation has been introduced in Victoria that, if passed, will require offences under section 18 of the *Crimes Act 1958* (Vic) of causing injury intentionally or recklessly where committed against an emergency worker, custodial worker or youth justice custodial officer on duty (carrying a presumptive minimum penalty of 6 months' imprisonment) to be prosecuted by the Office of Public Prosecutions in the higher courts.[846] The maximum penalty for section 18 offences is 10 years if the injury was caused intentionally, or 5 years if committed recklessly.

The Victorian Attorney-General has justified the removal of summary disposition of these offences on the basis of 'the complexity of the laws and the gravity of the offences', with the stated benefit it 'will also facilitate the development of specialisation in the prosecution of these complex cases'.[847]

The NSW inquiry into violence against emergency services personnel undertaken by the Legislative Assembly Committee on Law and Safety, which reported in August 2017, recommended that the NSW Government consider asking the NSW Sentencing Council to conduct a further review of the sentencing power of the NSW Local Court.[848] The review was recommended in the context of the Local Court's current jurisdictional limit of 2 years for a single offence, or up to 5 years if imposing a new sentence of imprisonment to be served wholly or partly consecutively with an existing sentence of imprisonment.[849] There are some exceptions to this.[850]

The NSW Government has indicated further consideration of the recommendation is required as while 'further examination of the sentencing powers of the NSW Local Court would be beneficial', any increase in the sentencing jurisdiction of the NSW Local Court may have broader impacts.[851]

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844 *Criminal Code* (Qld) s 552A. But see s 552D(2A) which provides a Magistrate Court must abstain from dealing summarily with a charge of a 'prescribed offence' if the defendant is alleged to have committed the offence with a serious crime circumstances of aggravation under s 161Q of the *Penalties and Sentences Act 1992* (Qld). A 'prescribed offence' includes s 340(1)(b) where a circumstance of aggravation exists and the offender is liable to imprisonment for 14 years: *Penalties and Sentences Act 1992* (Qld) s 161N (Definitions) and sch 1C.

845 See Table 1-3 in Chapter 2 of this Issues Paper.

846 Sentencing Amendment (Emergency Worker Harm) Bill 2020 (Vic) cl 7 amending sch 2 to the *Criminal Procedure Act 2009* (Vic).

847 Attorney-General (Victoria), 'Protecting Emergency Workers from Harm' (Media Release 3 March 2020).

848 Committee on Law and Safety, Parliament of NSW, *Violence Against Emergency Services Personnel* (Report 1/56, 2017) Recommendation 44.

849 *Criminal Procedure Act 1986* (NSW), ss 267-8 and *Crimes (Sentencing Procedure) Act 1999* (NSW), s 58.

850 See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 58.

851 NSW Government, *NSW Government Response to Recommendations from the Legislative Assembly's Inquiry into Violence Against Emergency Services Personnel* (Tabled 8 February 2018) 13.

Questions: Current penalties and sentencing practices in Qld

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? In particular:

- **a.** Is the current form of section 340 of the Criminal Code as it applies to public officers supported, or should changes be made to the structure of this section?
- **b.** Are the current maximum penalties for serious assault (7 years, or 14 years with aggravating circumstances) appropriate in the context of penalties that apply to other assault-based offences such as:
  - **i.** common assault (3 years);
  - **ii.** assault occasioning bodily harm (7 years, or 10 years with aggravating circumstances);
  - **iii.** wounding (7 years);
  - **iv.** grievous bodily harm (14 years)?
- **c.** Should any changes be made to the ability of section 340 charges to be dealt with summarily on prosecution election? For example, to exclude charges that include a circumstance of aggravation?
- **d.** Are the 2012 and 2014 reforms to section 340 (introduction of aggravating circumstances which carry a higher 14 year maximum penalty) achieving their objectives?
- **e.** Are the current penalties that apply to summary offences that can be charged in circumstances where a public officer has been assaulted, or should any changes be considered?
- **f.** Do the current range of sentencing options (e.g. imprisonment, suspended sentences, intensive correction orders, community service orders, probation, fines, good behaviour bonds) provide an appropriate response to offenders who commit assaults against public officers, or should any alternative forms of orders be considered?
- **g.** Similarly, do the current range of sentencing options for children provide an appropriate response to child offenders who commit assaults against public officers, or should any alternative forms of orders be considered?
- **h.** Should the requirement to make a community service order for offences against section 340(1)(b) and (2AA) of the *Criminal Code* and section 790 of the *Police Powers and Responsibilities Act 2000*, in accordance with section 108B of the *Penalties and Sentences Act 1992* (unless the court is satisfied that, because of any physical, intellectual or psychiatric disability of the offender, they are not capable of complying) be retained and if so, on what basis?

9.8 Reform options

9.8.1 Introduction

In the discussion above, we have highlighted a number of potential areas that are the subject of further investigation as part of this review.

Should it be concluded that current offences, penalties and sentencing practices are not appropriate or adequate to respond to assaults on public officers, a number of reform models could be considered.

Some of these options, such as changes to specific offences, or the introduction of statutory aggravating factors that apply to the sentencing of criminal offences, or to introduce aggravated forms of these offences, are discussed above.

Another option commonly proposed when reforms targeting assaults on public officers have been introduced in other jurisdictions is the introduction of mandatory minimum or presumptive penalties. Forms of mandatory sentencing provisions that exist in Queensland are discussed in Chapter 4. In Chapter 6 we also reviewed some of the approaches adopted in other Australian jurisdictions. Evaluation of the WA provisions is discussed above at section 9.6.3 in this chapter.

9.8.2 Stakeholder views

A range of views were expressed as to whether penalties or sentences should be increased for assaults on public officers, or the current offence and sentencing framework was appropriate.

Support for increased penalties and/or minimum sentences

SPAAL supported an increase in penalties for assaults on police and other frontline emergency service workers, corrective service officers and other public officers, but without providing any additional detail of what options would be supported.[852]

A joint submission from the Australasian Railway Association, Bus Industry Confederation, the Rail, Tram and Bus Union and TrackSAFE Foundation supported 'an elevation of penalties for anyone [who] assaults a public transport staff member so that the penalties are equal to the assault of emergency personnel'.[853] In this case, the current scope of section 340 and definition of a 'public officer' were identified as a particular area for further investigation.

This submission also referred to reforms in WA, South Australia and the Northern Territory which in the latter case was noted to involve increasing penalties for assaults on 'non-emergency workers engaged in the course of their duties'.[854]

The Transport Workers' Union (Queensland Branch) requested the Council to consider 'where appropriate, extending similar and tougher penalties to [assaults on] bus drivers' to those introduced in South Australia, but considered these should be extended to drivers working in both the public and private spheres.[855] In the context of extending protections to private bus drivers and

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852 Preliminary submission 1 (SPAAL) 1.

853 Preliminary submission 5 (Australasian Railway Association and ors) 1.

854 Ibid 1.

855 Preliminary submission 24 (Transport Workers' Union (Queensland Branch)) 1.

operators within the personalised transport industry (including taxi and rideshare drivers), it submitted:

> We believe the introduction of tougher penalties combined with strategies to enhance community knowledge and understanding of such penalties would assist in the reduction of instances of violence for both bus drivers within the private sector and personalised transport operators.[856]

The QPU suggested that the only way to achieve 'adequate legislative protection' for police and emergency workers is 'through a minimum sentencing range being imposed by statute'.[857] However, in advocating for the introduction of such a provision, the QPU supported the introduction of a general provision in the PSA allowing for an alternate sentence provided 'exceptional circumstances' could be established, recognising that 'there will be cases where the imposition of a mandatory sentence would create a real injustice'.[858]

While the minimum sentence might be a term of imprisonment in the case of the offence of serious assault (or home detention in the alternative, with recommended conditions, including GPS tracking), reflecting the less serious nature of this charge, the QPU suggested a community based order 'could be appropriate' as a minimum sentence for assault of police under section 790 of the PPRA.

The QPU identified potential benefits of a community service order being made in the case of offenders convicted of assault, in particular, as being that it 'would act as a visible and ongoing deterrent' to offenders and 'would require the offender to pay back to the community'.[859] Other benefits of the use of probation and community service orders were seen as being that it 'allows the courts to impose a form of structure on an offender, while also giving them access to services and treatment which may address the underlying causes of their offending, and hence prevent repeat offending'.[860] In the case of repeat offenders and young offenders, the QPU suggested such orders should be able to be made without the consent of the offender.[861] The Council has made recommendations regarding the need for consent for the making of community-based orders and conditions in the context of its review of community-based sentencing order, imprisonment and parole options.[862]

A member of the public supported mandatory minimum prison sentences (expressed as 'jail time') of 6 months or longer. They submitted:

> No options to reduce sentences should apply to those who assault public officers. A stern severe sentence not degraded over time needs to be sent as a warning and reminder to those in society who have little or no regard for the law. The current laws and penalties are an utter joke and have no deterrent [effect].[863]

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856 Ibid 2.

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

858 Ibid 1–2. It submitted that this provision be one of general application that would apply to all mandatory sentencing provisions, other than sentences which cannot be mitigated, such as murder.

859 Preliminary submission 23 (Queensland Police Union of Employees) 2.

860 Ibid.

861 Ibid.

862 Queensland Sentencing Advisory Council, *Community-based Sentencing Orders, Imprisonment and Parole Options: Final Report* (2019) 180–1, Recommendations 13 and 16.

863 Preliminary submission 15 (Anonymous).

Concerns about mandatory sentencing

A number of legal associations and professional bodies which made preliminary submissions, including the Australian Lawyers Alliance (ALA), the Bar Association of Queensland and Queensland Law Society, expressed concern about potential for mandatory minimum sentences to be recommended as an outcome of the review based on the experience in other jurisdictions.

Reflecting views held by others, the ALA indicated its strong opposition to mandatory minimum sentences on the basis 'they are inconsistent with the rule of law, breach international human rights standards and undermine the separation of powers as [they] detract from the independence of the judiciary'.[864] Objections included that mandatory sentences:

- remove courts' ability to consider relevant factors such the offender's criminal history, individual circumstances, or whether there are any mitigating factors which 'can result in sentencing outcomes that are disproportionately harsh, unjust and anomalous';
- 'tend to transfer decision-making powers in relation to the sentence from the judiciary to the prosecution and the police given the choice of charge will determine the sentencing outcome';
- are contrary to Australia's international human rights obligations, as set out in the International Covenant on Civil and Political Rights including the right to be free from arbitrary detention, the right to a fair trial, and the right to have one's sentence reviewed by a higher court given a court on review cannot reduce a mandatory minimum sentence that is imposed;
- 'remove the incentives for offenders to assist authorities with investigations … and for defendants to plead guilty, thereby earning the right to a sentencing discount', in turn resulting in more contested hearings, with associated resourcing impacts;
- result in the increased use of imprisonment, and impact the length of sentence served, thereby increasing the costs to the State;
- fail to provide a general deterrent to relevant offences, and in their aim of 'sending a strong message to the community', being based on 'flawed assumptions about the nature of human decision-making: that a more severe sanction will deter more effectively and that imprisoning offenders will necessarily lead to a lower crime rate'.[865]

The Office of the Public Guardian was concerned about the potential effect of mandatory sentencing laws on adults with impaired capacity being that 'the legal framework designed to take into account the mental illness or impairment and culpability of accused persons is removed or reduced', and would 'further isolate adults with impaired capacity from the opportunity to lead positive and productive lives'.[866] It recommended that 'mandatory sentencing not be included as a sentencing option in the terms of reference'.[867]

Similar issues were raised by QAI, which further identified the high proportion of Aboriginal and Torres Strait Islander offenders who have mental health issues and/or a cognitive or intellectual impairment.[868]

The deterrent potential of mandatory minimum sentences was questioned by a number of those opposed to their introduction. As discussed earlier in this chapter, the effectiveness of deterrence

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864 Preliminary submission 4 (Australian Lawyers Alliance) 5.

865 Ibid 5–7.

866 Preliminary submission 7 (Office of the Public Guardian) 3.

867 Ibid.

868 Preliminary submission 35 (Queensland Advocacy Incorporated) 4–5.

taking into account the common context in which these assaults occur has been previously questioned.

One academic summarises the ineffectiveness of mandatory penalties generally as follows:

> …Mandatory penalties do not operate as a general deterrent. They do not work as a tool for selective incapacitation. They do not promote 'just deserts'. They do work to undermine justice, to discriminate against minority groups and to encourage the subversion of open and accountable legal processes.[869]

Analysis of mandatory sentencing effectiveness: Literature review

The Council commissioned the Griffith Criminology Institute, Griffith University to undertake a literature review focusing on the causes, frequency, and seriousness of assaults on public officers, as well as the impact of sentencing reforms aimed at addressing these types of assaults. Below is a direct extract of the executive summary of this report,[870] which can be found on the Council's website. The remainder of the executive summary is reproduced in Chapter 2 of this paper.

> **What do we know about the sentencing of assaults on public officers?**
>
> Penalty enhancements or mandatory minimum sentencing schemes for assaults against public officers are not unusual in common law jurisdictions. These types of sentencing frameworks generally mean that perpetrators convicted of assaults against public officers will be sentenced more harshly than those convicted of similar assaults against other individuals. The justification for treating public officers differently is based on arguments that their willingness to provide a service to others, often at risk to themselves, aggravates the seriousness of the offence.
>
> The effectiveness of these penalty enhancements or mandatory minimum sentences depends on the outcome that these sentences are designed to achieve. In general, there are two purposes that are expressed in debate around legislation proposing these sentencing regimes: deterrence, and condemnation and denunciation.
>
> Do penalty enhancements or mandatory minimum sentencing schemes deter future assaults against public officers? There is almost no evidence of the impact of these types of sentences on future assaults on public officers. Since 2009, there have been declines in recorded assaults against police in Western Australia. With the introduction of an amendment to provide mandatory sentences for assaults against police, this trend suggests that such sentencing enhancements may have a deterrent effect. However, there were other significant changes over the same period which could equally explain the reduction in assaults against police, such as the change in policy away from single officer patrols, and a general decline in assaults overall.
>
> Further, if we look at the broader field of sentencing, there is no reliable evidence that these types of offences have a deterrent effect. For example:
>
> - imprisonment, on average, does not achieve the goal of deterrence in studies of general criminal offending. We would not anticipate that this would be different for this type of offending.
> - mandatory sentencing has not been found to have a deterrent effect. Harsher penalties have not shown any significant impact on future offending.
>
> Thus, although amendments to sentencing frameworks can clearly communicate the unacceptability of the behaviour, prevention strategies may be a better strategy for reducing

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869 Neil Morgan, 'Capturing Crime or Capturing Votes? The Aims and Effects of Mandatories' (1999) 52 *University of New South Wales Law Journal* 278. See also Christine Bond et al (n 682) 20-1.

870 Christine Bond et al (n 682) iv to v.

> 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.

The literature review also found that, 'based on the evidence to date, mandatory minimum sentences are unlikely to reduce future incidents of assault against public officers. The problem lies, in part, with the issue that sentencing itself does not address the causes of the assaults'.[871]

Looking to the broader field of sentencing, regardless of offence type, revealed the following:

- More severe penalties, compared to less severe penalties, have not been shown to produce a greater deterrent impact on further offending.[872]
- Shorter terms of imprisonment are associated with higher re-offending rates…although this might be explained by the lack of programs and support generally available to offenders serving short prison terms.[873]
- It is not clear whether penalty enhancements substantially shift sentencing practice.[874]

The literature review acknowledged that sentencing framework amendments can clearly communicate the unacceptability of the targeted behaviour. However, prevention strategies were suggested as 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'.[875]

Support for the current offence and penalty framework

Legal stakeholder and advocacy bodies generally supported the retention of the current form of section 340, without the need for separate additional offences or circumstances of aggravation to be introduced.

The Bar Association of Queensland, which was of this view, noted the available maximum penalty for serious assault simpliciter is 7 years' imprisonment, and 14 years where aggravating factors are present, and that: 'the definition of a "public officer" is very wide'.[876] It questioned whether: 'it should seriously be thought that an offence of serious assault of a public officer that does not involve the doing of grievous bodily harm ought to attract sentences in excess of the currently prescribed maximum, that is in circumstances where sentences for grievous bodily harm simpliciter rarely exceed six years'.[877]

QAI similarly considered current maximum penalties 'provide adequate scope for courts to impose sentences of appropriate length', while submitting the current maximum penalty of 14 years for some forms of aggravated serious assault involving the offender biting, spitting on, throwing at or applying a bodily fluid or faeces to a police officer is disproportionate to the offending given the 'negligible' risk of disease transmission.[878] With reference to penalties existing elsewhere, QAI noted that: 'Queensland provisions for serious assault already stand at the severe end of Australian penalties for equivalent offences'.[879]

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871 Ibid v and see 21.

872 Ibid 20.

873 Ibid 19.

874 Ibid 22.

875 Ibid v and see 22.

876 Ibid.

877 Ibid.

878 Preliminary submission 35 (Queensland Advocacy Incorporated) 3.

879 Ibid 10.

Legal Aid Queensland was concerned that any 'new provisions would only seek to further complicate the criminal law',[880] while the Queensland Law Society suggested that given the existence of section 340, '[t]he creation of a new offence provision or circumstance of aggravation would be entirely redundant'.[881]

Legal Aid noted, based on the experience of lawyers in its criminal practice who deal regularly with people charged under section 340 of the *Criminal Code* and section 790 of the PPRA, and submitted 'courts are already dealing with people that are guilty of them, seriously' and 'it is common to expect that actual imprisonment will be the outcome'.[882] The Queensland Law Society commented: 'it is common to expect that imprisonment will be the outcome in offences of this nature where the facts suggest serious misconduct'.[883]

Sisters Inside noted that the 2012 and 2014 amendments to section 340 had already introduced aggravating circumstances:

> firstly by prescribing that certain types of assault (biting, spitting, throwing bodily fluids, causing bodily harm, threatening with a weapon, or pretending to do so) attract a higher maximum penalty and, secondly, by introducing mandatory sentencing provisions for offences occurring while the person was intoxicated and in a public place.[884]

It considered increasing penalties or introducing further circumstances of aggravation 'unwarranted' in light of these amendments.

Sisters Inside, however, submitted it was: 'desirable to specify different maximum penalties depending on whether or not bodily harm was caused and the seriousness of that harm', and supported reconsidering the aggravating circumstances contained in section 340(1)(b)(i)–(iii) and section 340(2AA) of the *Criminal Code*.[885] In particular, it noted 'no other Australian jurisdiction specifies spitting as an aggravating feature of an assault on a police or public officer'.[886] This Council notes, however, that this comment was made prior to the emergence of the COVID-19 pandemic and the introduction of the Western Australian legislative reforms summarised in Table 9-3 above. Further, in some jurisdictions, such as in South Australia, spitting is recognised as a way a person can cause harm to an emergency worker, which attracts higher penalties.

Separately, the Department of Transport and Main Roads commissioned a 2017 report on the outcomes of the Queensland Bus Driver Safety Review from Deloitte Risk Advisory Pty Ltd. It recommended against adopting reforms to penalties in the short term, finding 'there appears to be sufficient penalties under current legislation in Qld'.[887] In adopting this position, the report's authors voiced their concerns that there was insufficient evidence to suggest penalty changes would have the desired impact of deterring violence, and would not directly address the key triggers of violence identified by the review.[888]

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880 Preliminary submission 22 (Legal Aid Queensland) 1.

881 Preliminary submission 34 (Queensland Law Society) 2.

882 Preliminary submission 22 (Legal Aid Queensland) 1.

883 Preliminary submission 34 (Queensland Law Society) 2.

884 Preliminary submission 21 (Sisters Inside) 4.

885 Ibid 7.

886 Ibid.

887 Deloitte Risk Advisory, *Department of Transport and Main Roads Queensland Bus Driver Safety Review* (20 April 2017) 123.

888 Ibid.

Improving system responses

The Bar Association, Sisters Inside and QAI were among those stakeholders which supported an emphasis on prevention, rather than deterrence. They shared similar answers in terms of an alternative that would work, summarised as:

- Training and support for public officers in interacting with people with disabilities.
- Investing in treatment and preventative strategies addressing root cases of offending, such as mental health and substance abuse.

The Bar Association stated that 'consideration should be given to whether public money that might be expended on imprisoning offenders might be better spent on programs that address the root causes of the offending, including mental health and substance abuse'.[889]

QAI also viewed these options as more productive in maximising public officer safety:

> De-escalation training for police is more effective than increasing penalties: Preventing offending by changing police procedures on the targeting of people with mental illness, people with cognitive disabilities and Aboriginal and Torres Strait Islander people is likely to be a more effective tactic to reduce police assaults than increasing the severity and scope of serious assault provisions.[890]

This view was also voiced by the Council's Aboriginal and Torres Strait Islander Advisory Panel. The Panel suggested that, instead of mandatory or high maximum penalties, timely warnings from a public officer in the midst of an incident might be more valuable as a deterrent, coupled with de-escalation techniques and taking extra time to communicate with agitated individuals.

With specific reference to assaults by prisoners on corrective services staff, and citing the prevalence of mental health issues experienced by prisoners reported in the latest Australian Institute of Health and Welfare's report on the health of Australia's prisoners,[891] Sisters Inside submitted:

> it is often more reasonable to treat assaults on prison staff as a by-product of the person's health conditions. If someone is 'acting out' because of their mental health conditions they should not be charged with an offence, they should be supported with health services. We should not criminalise people's behaviour if it is related to their mental health or cognitive characteristics, i.e. impulsiveness and the lack of ability to self-regulate.[892]

Sisters Inside stated that 'increasing access to affordable mental health and substance abuse rehabilitation programs is a proactive, rather than reactive method of reducing drug and alcohol related violence'; these were 'practical, bottom-up measures' which would empower frontline workers 'to reduce conflict by learning to identify symptoms of mental ill health, how to de-escalate conflict and the importance of a trauma-informed approach to working with vulnerable people'. This would 'increase frontline workers' safety and job satisfaction and also improve the quality of service they provide to the public'.[893]

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889 Preliminary submission 29 (Bar Association of Queensland) 2.

890 Preliminary submission 35 (Queensland Advocacy Incorporated) 6.

891 Australian Institute of Health and Welfare, *The Health of Australia's Prisoners* (2018) 27–8.

892 Preliminary submission 21 (Sisters Inside) 6.

893 Ibid 7.

The Information Commissioner raised concerns about the need to ensure the framework for managing the impacts of other unreasonable behaviour on public officer was effective and efficient, noting the 'substantial adverse impacts' of this behaviour on public officers, as well as on 'fair access to services for other Queenslanders, and the efficient use of resources, including the broader public sector and judicial system'.[894]

The Office of the Public Guardian recommended:

> Developing strategies and diversionary options in the Criminal Code that would address the reasons why people are committing these offences in the first place. The prevalence of such incidences amongst adults with impaired capacity indicates the need for appropriate mental health services and funding of 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.[895]

It recommended that consideration should always be given to the circumstances surrounding the offence for a person with impaired capacity, and that:

> It be a legislative requirement that information on a person's capacity, trauma history and any previous engagement with therapeutic and rehabilitative programs be presented to the court prior to sentencing. This is particularly critical for children and adults in disability housing and mental health facilities and for children in child protection services and youth detention. It is important that the capacity of these cohorts be formally reported on before sentencing occurs as many of these alleged offenders do not have capacity to be charged, let alone sentenced.[896]

In a similar vein, the Prisoners' Legal Service (PLS) submitted:

> It is the experience of PLS that prisoners with disability are disproportionately charged with the offence of Serious Assault of a Police Officer. PLS believes this is linked to the well-recognised problem associated with lack of diagnosis and recognition of disability in prison.[897]

9.8.3 Mental health issues - the defence of insanity

Insanity is a complete defence to a criminal charge. An accused person is presumed to be of sound mind[898] and must raise the defence of insanity,[899] which will absolve him or her of all criminal responsibility if successful. This will usually involve psychiatrists assessing the person and their medical history, and then giving evidence.

The Mental Health Court (MHC) will usually determine whether a person was of unsound mind ('insanity') at the time of the offence.[900] The MHC is a court with special powers regarding making findings of insanity. It consists of judges of the Supreme Court of Queensland appointed to it by the Governor in Council, by commission.[901]

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894 Preliminary submission 19 (Office of the Information Commissioner) 1.

895 Preliminary submission 7 (Office of the Public Guardian (Queensland)) 2.

896 Ibid.

897 Preliminary submission 26 (Prisoners' Legal Service Inc) 1 referencing Eileen Baldry, 'Disability at the Margins: Limits of the Law' (2014) 24(3) *Griffith Law Review* 370.

898 *Criminal Code* (Qld) s 26. Insanity is covered by *Criminal Code* (Qld) ss 26, 27, 28(1).

899 On the less stringent civil standard test — was it more probable than not that the person was insane?

900 'Unsound mind' (*Mental Health Act 2016* (Qld) s 109) matches the definition of 'insanity' (*Criminal Code* (Qld) ss 27(1), 28(1)).

901 See *Mental Health Act 2000* (Qld) ss 381–4 and *Mental Health Act 2016* (Qld) ss 637–41 and s 21.

While the application of the defence of insanity to assaults on public officers is beyond the scope of the Council's Terms of Reference, the way that the mental health system interacts with the criminal justice system, in terms of how this affects court processes, is relevant to how matters proceed after charging.

9.8.4 The *Mental Health Act 2016* (Qld) and its potential impact on assault proceedings and defendants

Queensland's *Mental Health Act 2016* (Qld) (MHA), which commenced in March 2017 and replaced the *Mental Health Act 2000* (Qld), connects criminal and MHC proceedings. As well as the issue of whether or not a person has a defence of insanity, the Act creates other types of orders regarding mental health treatment. These processes can (necessarily) interfere with criminal court prosecutions (often by suspending them). The discussion here is limited to the powers available under the Act to criminal courts, and suspensions which impact on criminal proceedings.

The repealed Act

The repealed 2000 Act is relevant because it was in effect for part of this review's data period. Criminal proceedings were suspended if 'Chapter 7, Part 2' applied — if a person was charged with a simple or indictable offence (which did not include Commonwealth charges)[902] and an involuntary treatment or forensic order was made for the person. This meant delay for all parties.

The patient would be examined by a psychiatrist with regard to, inter alia, mental condition and fitness for trial.[903] Then, the patient's mental condition would be referred to the MHC (if the offence was an indictable offence) or Director of Public Prosecutions (DPP).[904] The proceedings for the offence were suspended until:

- the DPP decided, on a reference under that part, that the proceedings continue or be discontinued;
- the MHC made a decision on a reference under that part (for an indictable offence); or
- the Director of Mental Health gave notice to the chief executive for justice that the part no longer applied to the patient (for instance, the involuntary treatment or forensic order was revoked).[905]

A court was still permitted to grant bail, remand the patient in custody, and adjourn proceedings. The prosecution could discontinue proceedings.[906]

Proceedings were also suspended by the Act if the person became a classified patient,[907] or the person's mental condition relating to the offence was referred to the MHC by another means under the Act.[908]

Changes in the 2016 Act and evaluation – more powers for Magistrates Courts

The 2016 Act 'rectifie[d] a deficiency…by expressly enabling magistrates to discharge persons who appear to have been of unsound mind at the time of an alleged offence or are unfit for trial. This

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902 *Mental Health Act 2000* (Qld) s 235.

903 Ibid s 238.

904 Ibid s 240.

905 Ibid s 243 and see s 245.

906 Ibid s 244.

907 Ibid s 75.

908 Ibid ss 257, 9.

only applies to proceedings that magistrates may determine'.[909] A Queensland Health review noted the Act introduced explicit powers for magistrates to dismiss or adjourn a simple offence due to specified mental capacity reasons, and allowed a request to be made for a psychiatrist report at no cost to an involuntary patient on a treatment authority, forensic order or treatment support order if that person is charged with a serious offence[910] (an indictable offence other than one that must be heard by a Magistrate).[911]

Magistrates Court powers relating to 'simple offences'

Relevant to the Council's review, 'simple' offences[912] for the purposes of the MHA include common assault, resisting public officers and all non-*Criminal Code* offences, and can include serious assault and AOBH, depending on applicable circumstances of aggravation/maximum penalties and the choices made by the relevant parties regarding jurisdiction.

Magistrates Courts (which include the Childrens Court regarding a person being dealt with under the *Youth Justice Act 1992* (Qld))[913] now have power, in respect of simple offences, to:

- Dismiss a complaint if the court is reasonably satisfied, on the balance of probabilities, that the accused was, or appears to have been, of unsound mind when the offence was allegedly committed, or is unfit for trial (section 172).
- Adjourn the hearing of a complaint if the court is reasonably satisfied, on the balance of probabilities, that the accused is unfit for trial but is likely to become fit for trial within six months. If the court determines that the person remains unfit for trial six months after the adjournment, the court can dismiss the charge (section 173).

A 2019 Queensland Health evaluation report (the evaluation) obtained data regarding all criminal charges. In 2017-18, Magistrates Courts dealt with 413 'simple offence matters' under these two powers. Of those, '128 were dismissed under section 172, and 285 were adjourned under section 173'. These powers were considered in a further 288 matters where it was 'determined the provisions did not apply'.[914]

If a Magistrates Court that has used either of these two powers, it can also do two further things.

It can refer the person on for appropriate treatment and/or care if it is reasonably satisfied the person charged does not (currently) appear to have a mental illness (section 174).[915] The evaluation found that as at 30 June 2018, Magistrates Courts had not made such a referral to

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909 Explanatory Notes, Mental Health Bill 2015 (Qld) 4–5.

910 'Serious offence' includes serious assault, assault occasioning bodily harm, wounding, grievous bodily harm, malicious acts and torture. It does not include not common assault, resisting public officers or any of the non-*Criminal Code* offences: 'An indictable offence, other than an offence that is a relevant offence under the Criminal Code, section 552BA(4)': *Mental Health Act 2016* (Qld) sch 3).

911 Clinical Excellence Queensland, Queensland Health, *Evaluation of the Mental Health Act 2016 Implementation Evaluation Report* (April 2019) 52 [7.8].

912 *Mental Health Act 2016* (Qld) s 171: 'Simple offence' bears the same definition as *Justices Act 1886* (Qld) s 4: 'Any offence (indictable or not) punishable, on summary conviction before a Magistrates Court, by fine, imprisonment, or otherwise'.

913 *Mental Health Act 2016* (Qld) s 170.

914 Clinical Excellence Queensland (n 911) 53 [7.8.1.1].

915 'Mental illness' is defined in *Mental Health Act 2016* (Qld) s 10. It is 'a condition characterised by a clinically significant disturbance of thought, mood, perception or memory'. However, included amongst a list of things that alone cannot found a finding of mental illness is 'the person has an intellectual disability' and 'the person has previously been treated for a mental illness or been subject to involuntary assessment or treatment'.

either Queensland Health or the Department of Communities, Disability Services and Seniors (DCDSS).[916]

Second, the court can make an examination order, which authorises examination (but not involuntary treatment and care) without the person's consent (section 177). The court must be reasonably satisfied the person has a mental illness, or must be unable to decide whether the person has a mental illness or another mental health condition.

It can also make this order if it has *not* exercised the dismissal or adjournment powers but is reasonably satisfied that a person charged with a simple offence would benefit from an examination by an authorised doctor. It can then also adjourn the hearing of the complaint.[917]

The evaluation indicated that the 97 examination order outcomes in 2017–18 resulted in 25 treatment authorities, 18 changes to existing authorities or orders, 11 recommendations for treatment and care and 43 instances where treatment and care were not required.[918]

Magistrates Courts' powers relating to 'indictable offences'

A Magistrates Court can refer to the MHC the matter of the person's mental state relating to an indictable offence and an associated offence,[919] in a proceeding before it (other than a Commonwealth offence) (section 175). Relevant to the Council's review, 'indictable offences' include all *Criminal Code* (Qld) offences: common assault, resisting public officers, serious assault, AOBH, wounding, GBH, malicious acts and torture.[920]

The test required to be met is that of the dismissal power for a summary complaint in section 172, above. However, two further criteria must both be met. First, the nature and circumstances of the offence must create an exceptional circumstance in relation to the protection of the community. Second, it must be the case that the making of a forensic order or treatment support order for the person may be justified.

The evaluation found that in 2017–18, the MHC received 24 references (plus one amended reference) from magistrates. However, Magistrates Courts data put the number of references made at 67. The difference 'may be due to data entry issues in the Queensland Wide Interlinked Court (QWIC) system or a discrepancy between an intention to file a reference in the MHC and an actual reference being made'.[921]

The 2019 evaluation discussed the Queensland Health Court Liaison Service (CLS). Its primary purpose is providing clinical assessments and supporting diversionary processes into treatment 'where required for persons detained in court watchhouses or appearing before the Magistrates Court[s]'.[922]

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916 Clinical Excellence Queensland (n 911) 53 [7.8.1.2].

917 *Mental Health Act 2000* (Qld) ss 177-180B.

918 Clinical Excellence Queensland (n 911) 55 [7.8.1.5]. See Figure 20.

919 An associated offence is 'an offence, other than an offence against a law of the Commonwealth, that the person is alleged to have committed at or about the same time as the indictable offence': *Mental Health Act 2016* (Qld) s 107.

920 See *Criminal Code* (Qld) s 3(3). No other definition of 'indictable offence' is proffered in the *Mental Health Act 2016* (Qld). There will therefore be some offences, such as common assault, that could be termed either a summary or indictable offence for the purposes of the *Mental Health Act 2016* (Qld), depending on applicable jurisdictional elections (see *Criminal Code* (Qld) Chapter 58A). When required, the *Mental Health Act 2016* (Qld) makes a clear distinction between the two with its use of the term 'serious offence' in sch 3.

921 Clinical Excellence Queensland (n 911) 54 [7.8.1.3].

922 Ibid 57 [7.8.1.6].

The CLS had 'received 9,164 referrals (including paper-based triage processes) for mental health assessments of adults (n 8,351) and children and youth (n 813)' in 2017–18.[923]

The *Mental Health Act 2016* and higher courts

There are different provisions relating to the District and Supreme Courts. There are two linked powers to order a plea of not guilty, and to make reference to the MHC. Similar powers existed under the 2000 Act.[924]

This is what must first be shown. The defendant must appear before either court in a relevant proceeding — a trial if the person pleads guilty at that trial; or the person's sentence, if they have pleaded guilty before a court and been committed for sentence. The charge must be an indictable offence, but not a Commonwealth one. The court must be reasonably satisfied, on the balance of probabilities, that the person was, or appears to have been, of unsound mind when the offence was allegedly committed — or is unfit for trial.[925]

Despite the person having pleaded guilty, the court may order that a plea of not guilty be entered for the indictable offence, and a summary charge joined to it.[926] While this would ordinarily necessitate a trial, the court must adjourn the trial and must refer to the MHC the matter of the person's mental state relating to the indictable offence and any associated joined summary charge.[927] The evaluation found that 'in 2017–18, less than five matters were referred to the MHC'.[928]

Suspensions of criminal proceedings under the *Mental Health Act 2016*

Like the 2000 Act, the 2016 Act suspends criminal proceedings in certain circumstances, being where:[929]

- A person charged with an offence (other than a Commonwealth one) becomes a classified patient.[930]
- The chief psychiatrist directs preparation of a psychiatric report about a person relating to a serious[931] or associated[932] offence (this can be done on the request of or for a defendant subject to some mental health orders or authority, or the chief psychiatrist alone if certain criteria are met).[933]

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923 Ibid 3.

924 *Mental Health Act 2000* (Qld) ss 60-62.

925 *Mental Health Act 2016* (Qld) s 181.

926 Ibid s 182. The joining of summary charges is achieved by an application under s 651 of the *Criminal Code* (Qld), a process which requires the person to indicate a guilty plea.

927 Ibid s 183.

928 Clinical Excellence Queensland (n 911) 54 [7.8.1.4].

929 *Mental Health Act 2016* (Qld) s 616.

930 'A person becomes a classified patient if the person is transported to, or remains in, an inpatient unit of an authorised mental health service under chapter 3, part 2 or 3': *Mental Health Act 2016* (Qld) s 616(1)(a).

931 'Serious offence' includes serious assault, assault occasioning bodily harm, wounding, grievous bodily harm, malicious acts and torture. It does not include not common assault, resisting public officers or any of the non-*Criminal Code* (Qld) offences: 'An indictable offence, other than an offence that is a relevant offence under the Criminal Code, section 552BA(4)': *Mental Health Act 2016* (Qld) sch 3.

932 'An offence, other than an offence against a law of the Commonwealth, that the person is alleged to have committed at or about the same time as the indictable offence': *Mental Health Act 2016* (Qld) s 107.

933 See *Mental Health Act 2016* (Qld) ss 86–94.

- A reference is made to the MHC regarding the person's mental state by the chief psychiatrist, the person, their lawyer, the DPP, a Magistrates Court or the District or Supreme Courts.[934]

Impact of any proposed changes on children and young people

A number of preliminary submissions encouraged consideration of the impact any changes would have on children and young people engaging with the criminal justice system should they be charged with such an offence.[935]

Two specific issues were raised by the Office of the Public Guardian:

- Taking into account concerns raised in previous reports in Queensland concerning the current age of criminal responsibility, whether it is appropriate for children as young as 10 to be made subject to any increased penalties, and the impact this could have on a child.
- The risks of the 'continued criminalisation of children and young people in the child protection system', with the suggestion made:

> This is particularly the case for those young people who are charged with residential-based offences and those with significant mental health needs and behaviours, which are resulting in a police response rather than a therapeutic mental health response … In reviewing the penalties and sentence regime for assaults on frontline officers, the best interests of these children must be accounted for.[936]

As discussed in Chapter 4, different sentencing principles and options apply to the sentencing of young people in Queensland under the *Youth Justice Act 1992* (Qld). Further, in this case, mandatory sentencing provisions do not apply.[937]

Although Victoria has introduced mandatory and presumptive sentencing provisions, these do not apply to children sentenced under the equivalent of Queensland's *Youth Justice Act 1992* (Qld), or to a young offender aged 16 years or more but under 18 years at the time of the commission of an indictable offence, who is being sentenced before they turn 21.[938] In this case, the Supreme Court or the County Court is still required to have regard to any requirement in this Act that a specified minimum non-parole period of imprisonment be fixed or a specified minimum term of imprisonment be imposed, had the offence been committed by an adult.[939]

Further, while the requirement to impose a minimum custodial term for certain offences against emergency workers, custodial officers and youth justice custodial workers on duty still applies to young offenders, Victorian courts have greater flexibility in sentencing. In particular, even where a special circumstance is not established, which provides the sentencing court with a broader sentencing discretion, if a court has received a pre-sentence report and believes either there are reasonable prospects for the rehabilitation of the young person, or that the young person is particularly impressionable, immature or likely to be subjected to undesirable influences in an adult prison, the court has the option to make a youth justice centre order for the equivalent minimum period to that which would have been ordered had a prison sentence been required to be imposed.[940] This provision, however, is less flexible in its current form than was originally the

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934 See ibid ss 101, 110, 175, 183.

935 Preliminary submission 7 (Office of the Public Guardian) 3.

936 Ibid 4.

937 *Youth Justice Act 1992* (Qld) s 155.

938 *Sentencing Act 1991* (Vic) s 3(1) (definition of 'young offender').

939 Ibid s 5(2J).

940 Ibid ss 10AA(2)–(3).

case as a separate 'special reason' for departing from the mandatory provisions previously applied to an offender of or over the age of 18 years, but under 21 years at the time of the offence who was able to establish, on the balance of probabilities, that he or she had a particular psychosocial immaturity that has resulted in a substantially diminished ability to regulate his or her behaviour in comparison with the norm for people of that age.[941] This no longer applies.

9.8.5 Issues and options

In summary, options for reform of the current offence, penalties and sentencing framework for the sentencing of assaults on public officers are:

(1) Option 1: To retain the status quo with no changes required.

Under this approach, the current distinction would remain between serious assault and existing summary offences that apply to the same forms of criminal conduct, but which carry different maximum penalties. No changes would be made to maximum penalties for existing offences, or to the current definitions of a 'public officer' under section 340 of the *Criminal Code*.

(2) Option 2: To retain the current offence, penalties and sentencing framework, with some changes.

Changes that could be considered under this option might include, for example:

(a) better defining who falls within scope of the definition of a 'public officer' in section 340 of the *Criminal Code*;

(b) amendments to ensure that assaults on all public officers (including working corrective services officers assaulted by prisoners) attract the same maximum penalties; and

(c) possible extension of the section 340 protections to other occupational groups.

(3) Option 3: To reform the offence, penalties and/or sentencing framework to respond to any concerns that the current approach needs significant reform.

As discussed in this Options Paper, these reforms might include:

(a) changing the scope of section 340 (e.g. extending it to other occupation groups) and/or the type of conduct captured (e.g. limiting its application to assaults, rather than extending to 'wilful obstruction');

(b) introducing a statutory circumstance of aggravation that applies to general offences under the criminal law, or specifically listed assault-related offences where the victim of the offence is a public officer (or other agreed victim category) who is performing a duty imposed by law, or the offence is committed on that person because of a duty they performed which was imposed by law, with a higher maximum penalty specified for these offences;

(c) introducing a statutory aggravating factor for sentencing purposes which would apply across all criminal offences, where relevant, but without increasing the maximum penalty for the offences to which it applies;

(d) introducing presumptive minimum penalties (e.g. a form of mandatory penalty that can be departed from where certain criteria are met) that apply, for example, to aggravated forms of serious assault or some categories of these (e.g. where bodily harm has been caused);

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941 These amendments were made by *Justice Legislation Miscellaneous Amendments Act 2018* (Vic) ss 78–9.

(e) considering the introduction of alternative sentencing options—such as tailored forms of probation or community service orders—or programs to be delivered as part of these orders to address the underlying causes of offending.

They might also include reforms to better respond to the experiences and needs of victims of these offences. This is discussed in Chapter 8 of this paper.

As in jurisdictions which have introduced sentencing reforms targeting offending of this nature, separate consideration will be required to be given to whether any sentencing reforms should apply also to children sentenced under the *Youth Justice Act 1992* (Qld), as well as whether there should be any minimum age to which specific provisions apply.

Question: Reform options

15. If the Government was to introduce sentencing reforms targeting assaults on public officers in general, or specific categories of public officers, on the basis that current sentencing practices are not considered adequate or appropriate, what changes would you support or not support?

Examples might include:

- The development of more detailed advice to prosecutors as to the appropriate charge or charges based on the alleged criminal conduct involved, and whether an election to deal with a section 340 charge summarily should be made.
- Providing additional forms of legislative or non-legislative guidance to courts in sentencing for offences against public officers.
- Introducing special forms of tailored rehabilitation and treatment orders (e.g. the mandatory treatment and monitoring order in Victoria which includes judicial monitoring, and either a treatment and rehabilitation condition (which can include assessment and treatment for alcohol and other drug use, inpatient withdrawal services, medical and mental health assessment and treatment and program conditions) or a justice plan condition (for offenders with an intellectual disability)
- Introducing mandatory minimum sentences (e.g. minimum terms of imprisonment or mandatory minimum fines) or presumptive minimum penalties for section 340 offences or other assault-based offences to be applied to offenders who assault public officers, or for certain types of assaults (e.g. those causing bodily harm and/or grievous bodily harm).