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Ms Victoria Moore
Policy Manager,
Queensland Sentencing Advisory Council

By email:

25th June 2020

RE: PENALTIES FOR ASSAULTS ON PUBLIC OFFICERS: ISSUES PAPER

Dear Ms Moore,

We welcome and appreciate the opportunity to make a submission to the review being conducted by QSAC on penalties for assaults on public officers and whether the current offence, penalty and sentencing framework that exists in Queensland is adequate or in need of reform. The review particularly raises questions on who should have special protections from being assaulted by members of the public, and whether the application of higher maximum penalties is a suitable vehicle to achieve that.

Preliminary Consideration: Our background to comment

The Aboriginal and Torres Strait Islander Legal Service (Qld) Limited (ATSILS), is a community-based public benevolent organisation, established to provide professional and culturally competent legal services for Aboriginal and Torres Strait Islander people across Queensland. The founding organisation was established in 1973. We now have 26 offices strategically located across the State. Our Vision is to be the leader of innovative and professional legal services. Our Mission is to deliver quality legal assistance services, community legal education, and early intervention and prevention initiatives which uphold and advance the legal and human rights of Aboriginal and Torres Strait Islander people.

ATSILS provides legal services to Aboriginal and Torres Strait Islander peoples throughout the entirety of Queensland. Whilst our primary role is to provide criminal, civil and family law representation, we are also funded by the Commonwealth to perform a State-wide role in the key areas of Community Legal Education, and Early Intervention and Prevention initiatives (which include related law reform activities and monitoring Indigenous Australian deaths in custody). Our submission is informed by almost five decades of legal practise at the coalface of the justice arena and we therefore believe we

are well placed to provide meaningful comment. Not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences.

Should there be a separate offence under section 340 at all?

Section 340 of the Criminal Code carries a substantial amount of historical baggage with it, having been amended 15 times in 18 years. One of the most controversial changes to s 340 was derived from amending legislation in 2012 which provided for the doubling of the maximum penalty from 7 years to 14 years. Many criticisms directed against that amendment 8 years ago, including those levelled by our legal service, remain strongly valid today, namely:

(a) A seven year maximum penalty is sufficiently adequate for offences which do not result in any actual harm. Were actual harm to be caused then the more serious conduct and the associated more serious harm could then lead to the more serious charges of Assault Occasioning Bodily Harm or Grievous Bodily Harm being laid;

(b) The laws set by Parliament should contain a rational and logical approach to the objective seriousness of the conduct and the harm caused by offending. Particular regard should be paid to ensuring that penalties for comparable conduct remain broadly consistent. The penalties under section 340 fail to meet that test. While protection of police officers and other public officials is a laudable objective, it should not be done to the point that it creates incongruous results. Why an action which does not inflict any actual harm on a police officer should under section 340 carry the same maximum penalty as the offence for actual harm serious enough to require surgical intervention caused to a member of the public is seemingly incongruous. It is not supported by any evidence showing the efficacy of those measures. It is a disproportionate response by the state.

(c) The starting point in law should be that everyone is equal under the law. A fundamental criticism levelled at the amendment eight years ago is that effect of the creation of additional categories in section 340 elevated the protection of some types of official above the need to protect all other categories of persons engaged in potentially dangerous contact with members of the public. Eight years later further amendments to increase the types of people with elevated status under s 340 only seems destined to lead to further disparity and further controversy.

(d) The effect of the law will be likely to lead to the charging and conviction of those least in control of their actions - the mentally unwell and dysregulated. Those predictions we made eight years ago been proven to be true. We make more detailed comment below on how that overrepresentation of the severely disadvantaged often comes about. With respect to overincarceration, we note the comment contained in the 2016 *Queensland Parole System Review Final Report* that a massive proportion of prisoners suffer from various mental illnesses and that in many cases these illnesses are implicated in the offence that led to imprisonment.[1]

In an ideal world such considerations could even result in the abolition of a separate offence as an unnecessary addition to the existing range of offences which are already available. Such in no way

[1] W. Sofronoff, *Queensland Parole System Review Final Report* (2016) at paragraph 52. The full paragraph bears repeating: "A massive proportion of prisoners suffer from various mental illnesses. In many cases these illnesses are implicated in the offence that led to imprisonment. There is such a lack of appropriate professional staff to deal with mental illness that only a handful of the most dangerous prisoners are able to be given treatment. The rest will be released one day without these issues ever being addressed although they are critical to reoffending and risk to the community."

takes away from our admiration of the very difficult and challenging role that so many police officers undertake on a daily basis.

If the offence is to remain then the following comments listed below address section 340 as it now stands.

Categories of who should have special protections - Questions 1 and 2 and 3 and 6, 7, 9

Presently those who have the special protections of section 340 of the Criminal Code, ss 340 (1)(a)-(d) and 340(2) are public officers and working corrective service officers. A public officer includes: a member, officer or employee of a service established for a public purpose under an Act (an explicit example being a Queensland Ambulance Service established under the *Ambulance Service Act 1991*) and a health service employee under the *Hospital and Health Boards Act 2011*; and an authorised officer under the *Child Protection Act 1999*; and a transit officer under the *Transport Operations (Passenger Transport) Act 1994*. A "working corrective services officer" is defined as a corrective services officer present at a corrective services facility in his or her capacity as a corrective services officer.

Importantly for the protections of the rule of law, section 340 of the Criminal Code requires assaults to occur within the context of a lawful arrest or detention, a police officer acting in the execution of the officer's duty, or the protected person performing a duty imposed on them by law. So while any action which qualifies as an assault without it necessarily being unlawful in itself is rendered illegal by s 340(1), it must occur within the context of lawful behaviour of the public official. If the public official's behaviour is unlawful then the protection of the law extends to the victim of the public official's unlawful behaviour and the normal laws of assault and defences from assault apply.

Thus for example, when a public officer exceeds their powers, all persons are protected by the ordinary operation of the law. This is important in the sort of complex situation where behaviour of a public official may change from lawful to unlawful in a very short space of time [2]

We note the shared attribute of public officers presently protected by section 340 is that they are under the direction and control of government authorities, and therefore obliged to act in accordance with government policy and in accordance with law. They are also subject to disciplinary regimes which offer a form of recourse if they exceed their powers and/or break the law.

Further protection from the actions of public officers is provided by international human rights standards, most importantly the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* and its associated protocols. Protection from the unlawful behaviour of public officials is further supplied by the obligations derived from international law on Governments to respect, protect and fulfil human rights. This means that not only is there an obligation on governments to take action to ensure people can enjoy their human rights, it also means that governments must also refrain from action that would breach people's human rights. This obligation extends to all persons who work for government or who work for agencies that carry out outsourced governmental functions.

Consequently there is both a level of restraint and accountability on public officers and to that end there is a logic that the frontline public officers subject to direction and control of the state and also subject to obligations towards members of the public should also have a special protection under the

[2] As illustrated by the following news reports: https://www.abc.net.au/news/2020-06-16/black-lives-matter-advocates-demand-investigation-into-video/12358796, https://www.canberratimes.com.au/story/6779227/indigenous-teens-family-wants-cop-charged/

law from those members of the public. However that special protection should not extend to others who are not public officials.

We note one exception to this in the other limbs of section 340, with respect to certain categories of vulnerable persons, the assault must be an unlawful assault upon them.

We would seek that the distinction between the two types of person being afforded special protection by section 340 be preserved in any future amendments to section 340.

Prosecutorial Discretion – Question 10, and Sentencing options and alternatives – Questions 14 (a) - (e)

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)?

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 [with respect to the current form and maximum penalties for Code and summary offences.]

It is appropriate that there are a range of offences which reflect the range of circumstances in which these incidents occur. There is a very large spectrum of fact situations which involve serious assault charges but an even greater spectrum of fact situations in objectively less serious circumstances where it is not in the interests of justice to bring the more serious charges.

That great variety of circumstances in which serious assault charges can arise is both explicitly and implicitly recognised in the *The Director's Guidelines*[3] issued by the Director of Public Prosecutions. The Guidelines outline the factors to consider when exercising the prosecutorial discretion on how to charge for serious assault:

> *Care must be taken when considering whether a summary prosecution is appropriate for an assault upon a police officer who is acting in the execution of his duty. Prosecutors should note the following:-*
>
> [after discussing the more serious instances which warrant the more serious charges being laid] *In all other cases an assessment should be made as to whether the conduct could be adequately punished upon summary prosecution. Generally, a scuffle which results in no more than minor injuries should be dealt with summarily. However, in every case all of the circumstances should be taken into account, including the nature of the assault, its context, and the criminal history of the accused … and whether other criminal charges laid against the accused are proceeding on indictment.*
>
> The Director's Guidelines also go on to comment that where the prosecution has the election to proceed with the matter summarily it should do so unless the conduct could not be adequately punished other than upon indictment or else the interests of justice require that

[3] DJAG, Director's Guidelines, available at https://www.justice.qld.gov.au/__data/assets/pdf_file/0015/16701/directors-guidelines.pdf

it be dealt with upon indictment. For both these limbs, the circumstances of the case are an important consideration to be taken into account.

Changes to existing provisions – Question 11

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

We know from the history of charging assaults and serious assaults that the incidents often involve complex, fast evolving, and often escalating situations.

It is not just the simple example of an angry abusive patient or detained person just turning on the front-line worker and assaulting them. If it were, then preparing a response to the proposed changes would be a relatively simple exercise.

One example which makes this problem clearest in the context of excessive use of force, is the use of police chokeholds.

This unfortunately is illustrated by the recent death of George Floyd in the United States. While there are complexities around that situation which have not been covered by the mainstream press reporting, this much is clear:

(a) A foot on the neck for over seven minutes is almost inevitably going to kill someone;
(b) There are other lesser chokeholds that would have killed him just as quickly;
(c) Had Mr Floyd successfully struck the police officer's leg off his neck and saved his own life, and had he been in Queensland, he would have been charged with serious assault and potentially spent a lengthy period in prison.

There have been plenty of examples of pile-ons where someone has been choking and gasping from the effects of chokeholds. Often in the struggle to turn and regain breath, foaming spittle which results from choking has flicked into the people who are holding them down. This situation is radically different from and should be distinguished from a deliberate spit.

In the context of sentencing for serious assault, we would argue that more serious penalties should expressly not be available when a chokehold has been applied to a person.

Context of assaults and sentencing – Questions 12-13

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?

When looking at the most relevant sentencing purposes to take into account, including rehabilitation, deterrence, denunciation, and protection of the community, the desire for retribution and denunciation should not overshadow what should be the primary aim of any amendments which is to protect the community and obviously within the context the need to protect the frontline responders. If the evidence does not support the imposition of harsher penalties leading to any objective change then it should not be pursued because it fails in its primary objective which should be to protect the frontline workers. It also draws attention, focus and effort away from other options that may be much more effective. Increased penalties are no deterrent when dealing with intoxicated or mentally unstable or youthful individuals (or the plain stupid for that matter).

Sentencing options and alternatives – Questions 14 (f) - (h)

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:

(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?

The group of people most over-represented in the criminal justice system and in custody are those suffering intellectual disability, cognitive development issues, mental health issues and behavioural issues. There is a significant proportion who suffer from the effects of trauma, including intergenerational trauma. The recent Royal Commission into Institutional Responses to Child Sexual Abuse helped identify the very large number of people whose lives have been permanently damaged from the trauma inflicted upon them. Inevitably in times of severe distress, including attempted suicide, they are going to have increased interactions with police and medical frontline services, often disastrously. For those who are charged for assault or serious assault, their sentencing options are limited.

The situation of those who have been sexually or physically abused in the past is especially acute. Frequently they are left with long lasting consequences which affects every interaction they have with others for the rest of their lives. Many victims develop hypervigilance and cannot bear to be touched or hugged for example or develop unmanageable reactions if confined in a small space. The survival instincts of a victim of abuse or sexual assault, coming out of a spell of unconsciousness and being held down will lead to behaviours to escape the "aggressors" at all costs. Being tied down or held to the ground will only make the situation worse.

A primary answer as to why so many people suffering intellectual disability, cognitive development issues, mental health issues and behavioural issues end up in jail it is the lack of suitable sentencing alternatives because they are almost inevitable regarded as unsuitable for the present community based sentencing options. For those who are sentenced to actual terms of imprisonment, many leave jail more damaged than they arrived. For those who are sentenced to parole release dates or suspended sentences, their inability to self-regulate can see those jail sentences triggered for even low level behaviour. Jail should not end up being a default option when some sort of community based intervention would be cheaper and more effective and provide a greater long term contribution to frontline safety.

Anecdotally, we have also heard of instances where mediation has proved not only to be a very powerful short term intervention but also provided a long term benefit. The option of mediation is often refused and discounted especially from front-line police officers however it is an option that

deserves to be explored in more detail. We note that in personal injury cases and other areas of law, mediation is a compulsory first step and has proved its worth in improved outcomes. In our view, unless there are plain grounds to skip mediation, countenancing a compulsory mediation process would be a powerful contributor to improved frontline safety.

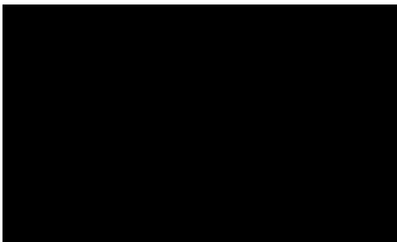
As to question 14 (h) – there is always an internal inconsistency where the aggravating factor which triggers the imposition of here, a community services order, is that the offender was adversely affected by an intoxicating substance at the material time. If such an order is specifically designed to assist the offender address his or her challenges relating to 'intoxicating substances' – then such should be made clear in the legislation itself. Failing which, it can in effect result in an additional penalty where logically one could argue that an offender who commits the same act, but whilst sober and rational – is actually more culpable for their actions.

General Comment – Question 15

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?

Any changes to the law should be evidence based. There are already a wide range of charges and a wide range of penalties available which more than adequately cover the field. We understand the existing studies do not support evidence of improvement of safety for frontline officials arising from increased penalties. That is unsurprising as sentencing is a measure which is necessarily after-the-fact. In our view, changes in laws, policies and procedures to support greater use of de-escalation (for the majority of cases) and containment (for the minority of cases) would be the greatest source of improvement for frontline safety. No one wants to see a frontline officer injured in the course of their duties – and if increased penalties would lead to same, we would support same - but they clearly do not. Without a level of innovation and lateral thinking such workers will continue to be exposed to unnecessary harm.

Yours faithfully,



Shane Duffy
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