Chapter 3 Current offence framework in Queensland

This chapter discusses the current offence framework in Queensland for assault, and assault-related offences.

There are a number of offences that can be charged when a public officer is assaulted by a member of the public while performing their duties. Some are located in the Queensland *Criminal Code*, while others are found in other legislation governing the operations and functions of specific agencies.

3.1 Offences and penalties under the *Criminal Code*

3.1.1 What is the *Criminal Code*?

The offence which is the primary focus of this review is section 340 of the Queensland Criminal Code ('*Criminal Code*'). However, as explained below, other offences may also be charged depending on the nature of criminal conduct involved and the harm caused.

The *Criminal Code* is a schedule to the *Criminal Code Act 1899* (Qld).[11] It contains most of Queensland's criminal offences. It also deals with legal issues such as how people are held criminally responsible and criminal and trial procedure.

Several offence provision options may be open when a public officer is assaulted. If an offender's criminal conduct means they could be charged with an offence under the *Criminal Code* and also under a different statute, either can be used — but the offender cannot be twice punished for the same offence.[12]

The *Criminal Code* was largely the work of then Queensland Chief Justice Sir Samuel Griffith. He compiled a Digest of Queensland's criminal laws, prepared a draft Code and 'recommended the repeal or amendment of approximately 250 Imperial, NSW and Queensland Acts'.[13] This means that the *Criminal Code* is designed to be the single source of Queensland's criminal laws, and any laws existing before it or materials made in drafting it, are not relevant to its use.[14] The *Queensland Legislation Handbook* advises that:

> It may not be necessary or desirable to create an offence if other legislation already covers the intended offence. In particular, 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.[15]

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11 *Criminal Code Act 1899* (Qld) sch 1.

12 *Criminal Code* (Qld) s 7.

13 R G Kenny, *An Introduction to Criminal Law in Queensland and Western Australia* (Butterworths 5th ed, 2000) 5 [1.9].

14 See *Bank of England v Vagliano Brothers* [1891] AC 107, 145 (Lord Herschell) cited in R G Kenny, *An Introduction to Criminal Law in Queensland and Western Australia* (Butterworths 5th ed, 2000) 7 [1.11], and *Mellifont v A-G for the State of Queensland* (1991) 173 CLR 289, 309 (Mason CJ, Deane, Dawson, Gaudron, McHugh JJ).

15 The Queensland Legislation Handbook Governing Queensland, The State of Queensland, Department of the Premier and Cabinet (2019, 6th ed) 10 [2.12.4] Enforcement of provisions <https://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/legislation-handbook/policy-development/matters-to-consider.aspx#> [2.12.4].

The current *Criminal Code* is not identical to the original version established over a century ago. Parliament regularly passes legislation which amends it, and this includes changing, adding and deleting different offences, elements of offences, penalties and the ways in which people can be held criminally responsible in Queensland.

3.1.2 Relevant assault-related *Criminal Code* offences

What is an assault?

The definition of 'assault'[16] is very wide and can be met in two ways. The first is where the offender strikes, touches, moves or otherwise applies force of any kind to another person. This can be direct or indirect. It must be done without the victim's consent, or where consent was obtained by fraud.

The second way is where the offender uses a bodily act or gesture to attempt or threaten to apply force of any kind to the victim without the victim's consent, in circumstances where the offender has (actually or apparently) a present ability to effect his or her purpose. Words alone are not enough.

'Applies force' includes applying heat, light, electrical force, gas, odour, or any other substance or thing, if it is applied in such a degree as to cause injury or personal discomfort.

Defences and partial excuses

An assault is unlawful and is an offence unless it is authorised, justified or excused by law.[17] Examples of this include where the other person consents,[18] the behaviour occurs by accident,[19] where force is reasonably necessary to overcome resistance to a lawful arrest,[20] where the person is provoked,[21] is acting in self-defence[22] and in the case of domestic discipline.[23]

Serious assault (s 340 *Criminal Code* (Qld))

The offence of serious assault applies much higher maximum penalties to the same conduct that would otherwise constitute another general assault charge (such as common assault or assault occasioning bodily harm), on the basis that the offence was committed against a particular class of person or for a particular reason. The intention is to 'offer greater deterrence' for such assaults.[24] It has been said they are more aggravated than ordinary common assaults, 'because of the persons involved or the intent with which they are carried out'.[25] Despite this, it has been suggested 'they may in fact not be serious in the sense that they call for a jury trial necessarily or a penalty of any great substance in a particular case'.[26]

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16 Section 245 of the *Criminal Code* defines assault, including the term 'applies force'.

17 *Criminal Code* (Qld) s 246(1).

18 However, the application of force by one person to another can be unlawful despite it being done with consent: *Criminal Code* (Qld) s 246(2). The force remains unlawful if consent is obtained by fraud. The law does not permit consent in some instances, such as sexual offences against children: Justice Ryan, Judge Rafter and Judge Devereaux, LexisNexis, *Carter's Criminal Law of Queensland* (online at 10 February 2020) [s 246.10] Consent.

19 *Criminal Code* (Qld) s 23.

20 Ibid s 254.

21 A defence: See ibid ss 268, 269.

22 Ibid ss 271, 272.

23 Ibid s 280.

24 *R v Ganeshalingham* [2018] QCA 34, 3 (Sofronoff P, Philippides JA and Boddice J agreeing).

25 Michael Murray, *The Criminal Code: A General Review* (Report, 1983) vol 1, 214.

26 Ibid.

Section 340 also covers other behaviour that may not even otherwise be an assault at law: resisting or wilfully obstructing police (or people aiding police) or a public officer (sections 340(1)(b) and (2AA)(a)).

In some instances, this provision provides a higher maximum penalty than for assaults occasioning bodily harm (AOBH) (14 years as against 10 years) and on par with grievous bodily harm (GBH) (14 years).

An assault can be charged as a serious assault if the victim:

- was performing a duty imposed on them by law (or the assault is committed because the victim had already performed that duty);
- was 60 years old or more; or
- relied on a guide, hearing or assistance dog, wheelchair or other remedial device.

Serious assault also covers assaults committed:

- with intent to commit a crime or resist or prevent lawful arrest or detention of any person; and
- in pursuance of any unlawful conspiracy respecting any manufacture, trade, business or occupation (or respecting anyone concerned or employed in those areas, or the wages of any such persons).

These forms of serious assault carry a maximum penalty of 7 years' imprisonment.

Assaults on police officers are, and have always been, specifically recognised in the section. The 7-year maximum applies where a person assaults, resists or wilfully obstructs a police officer while acting in the execution of duty (or any person acting in aid of a police officer so acting). The maximum penalty is 14 years where the victim is a police officer and when committing the offence, the offender:

- bites or spits on a police officer;
- throws at or applies to a police officer a bodily fluid or faeces;
- causes bodily harm to the police officer; or
- is, or pretends to be, armed with a dangerous or offensive weapon or instrument.

There is a similar penalty provision, which provides for the same form of aggravated offence also carrying a 14 year maximum penalty for unlawfully assaulting, resisting or wilfully obstructing a public officer performing a function of their office, or assaulting a public officer because they have performed that function (section 340(2AA)).

Sections 340(1) and 340(2AA) are drafted so that each has two sets of subparagraphs (a) and (b). The first set in each creates offences. The second set creates aggravated offences and sets out the maximum penalties applicable.[27]

Finally, subsection (2) states that a person who unlawfully assaults a 'working corrective services officer' is liable to a maximum penalty of 7 years' imprisonment. This pre-dates the insertion of subsection (2AA) regarding 'public officers' and preliminary consultation indicates there may be conflict or uncertainty about what to charge because of the existence of these two separate provisions. This issue is explored further in Chapter 9.

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[27] See *Criminal Code* (Qld) s 365A, regarding circumstances of aggravation of committing the offence in a public place while the person was adversely affected by an intoxicating substance. The term 'penalty, paragraph (a)' is the descriptor used to described the second (a) in each of sections 340(1) and (2AA).

'Public officer' has an inclusive (but not exhaustive) definition in section 340. This is distinct from a definition of the same term in section 1 (definitions) of the Code.

There are also several definitions of terms relating to the single instance of the term 'working corrective services officer' in section 340(2).

Alternative charges to serious assault – other Code offences

Because a wide range of behaviour can constitute an assault, or a different offence, one incident could result in police deciding between several different kinds of charges, or a mixture of them. The Court of Appeal has noted:

> One difficulty is that quite often offences of the type in question are associated with other, frequently more serious, offences and the penalties imposed with respect to the offences in question are affected by other sentences imposed at the same time.[28]

Common assault (section 335)

Any person who unlawfully assaults another person commits the offence of common assault and faces a maximum penalty of 3 years' imprisonment. Often the difference between common assault and serious assault is not the offender's physical actions, but rather that victim's particular characteristics (such as their age, being 60 years or older, or their status as a public officer).

Assaults occasioning bodily harm ('AOBH', section 339)

AOBH is committed when a person unlawfully assaults someone else and causes them bodily harm. 'Bodily harm' means any bodily injury which interferes with health or comfort.[29] The maximum penalty is 7 years' imprisonment, or 10 years where the offender is or pretends to be armed with any dangerous or offensive weapon or instrument, or is in company with someone else.

Wounding (section 323)

Wounding carries a maximum penalty of 7 years' imprisonment. It does not rely on the legal definition of assault, even though the physical action causing the wounding will often be an assault. Case law says that wounding means the true skin is broken and penetrated (not merely the cuticle or outer skin). It does not matter how the wound was inflicted (for instance, a weapon does not have to be used).[30]

Grievous bodily harm ('GBH', section 320)

GBH has a maximum penalty of 14 years' imprisonment. It does not rely on the legal definition of assault, even though the physical action causing the GBH will often be an assault. The term 'grievous bodily harm' means the loss of a distinct part or an organ of the body, serious disfigurement, or any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health; whether or not treatment is or could have been available.[31]

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28 *R v Juric* [2003] QCA 13, 4 [9] (Williams JA, de Jersey CJ and Atkinson J agreeing).

29 *Criminal Code* (Qld) s 1.

30 Justice Ryan, Judge Rafter and Judge Devereaux, LexisNexis, *Carter's Criminal Law of Queensland* (online at 3 January 2020) [s 232.20] Unlawful wounding.

31 *Criminal Code* (Qld) s 1.

Acts intended to cause grievous bodily harm and other malicious acts ('malicious acts', section 317)

The offence of acts intended to cause GBH and other malicious acts carries a maximum penalty of life imprisonment. Like GBH, it does not rely on the legal definition of assault. The prosecution must prove one of a list of four specific intentions accompanying one of seven physical actions. The intentions are: to maim/disfigure/disable; do GBH or transmit a serious disease; resist or prevent arrest or detention; or resist or prevent a public officer from acting in accordance with lawful authority. The physical actions include: wounding; doing GBH or transmitting a serious disease; and striking with a projectile (or anything else capable of achieving the intention).

Resisting public officers (section 199)

The offence of resisting public officers has a maximum penalty of two years' imprisonment and a fine at the court's discretion. It is committed if any person obstructs or resists any public officer[32] while engaged in the discharge or attempted discharge of the duties of office under any statute, or obstructs or resists any person while engaged in the discharge or attempted discharge of any duty imposed on the person by any statute.

Torture (section 320A)

Torture is the intentional infliction of severe pain or suffering on a person by an act or series of acts done on one, or more than one, occasion. 'Pain or suffering' includes physical, mental, psychological or emotional pain or suffering, whether temporary or permanent. The maximum penalty is 14 years' imprisonment.

A recent example of a serious torture and assault of a vulnerable victim is *R v Drews* [2020] QCA 18.[33] This case also demonstrates how different *Criminal Code* charges, which carry the same maximum penalty as serious assault, are used for extremely serious offending — and can be preferred to assault charges because they are recognised, historically and because of their elements, as more serious.

The Court of Appeal refused an application to appeal against a sentence of 10 years' imprisonment (with an automatic serious violent offence declaration requiring 80 per cent of that term to be served in actual custody).[34] Other counts were common assault, GBH and breaches of domestic violence order, which received lesser concurrent penalties. Violence was used against a 39-year-old man with cerebral palsy and limited use of the right side of his body, and a 28-year-old woman.

The offender threatened to kill the woman while holding scissors open against her throat, grabbed her around the neck, spat in her face and threw the scissors at her, striking her abdomen.

The disabled male victim was subjected to a 10-hour ordeal that left him with a life-threatening injury (traumatic large left pneumothorax with partial collapse of the left lung), rib fractures, fractures to his vertebra, partial thickness burns, multiple abrasions and contusions and a nasal bone fracture.

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32 'Public officer' for this section, is defined solely in *Criminal Code* (Qld) s 1.

33 This is not a case where serious assault was a charge that could have been used. For the relevant aspects for this discussion, see *R v WBJ* [2020] QCA 32, 2 [1]–[2]. 3 [5], 5 [15]–[17], 6 [27] and 8 [38] (Sofronoff P, Fraser and Philippides JJA agreeing).

34 For an explanation of the serious violent offence provisions, see Queensland Sentencing Advisory Council, *Queensland Sentencing Guide* (December 2019) 9 <https://www.sentencingcouncil.qld.gov.au/education-and-resources/queensland-sentencing-guide>.

The offender knocked him to the ground, punched him repeatedly to the head and face, jumped on his chest (causing the collapsed lung), kicked him repeatedly in the ribs and hit him in the head with a glass. Boiling water was poured on his neck, face and back three times. The offender expressed an intent to blind the victim, who described smelling his skin burning. Other acts included repeated strikes to the back and neck with a power cord, hitting his legs with a metal bar stool, hitting his head with a kettle, stomping on his cheek and eye and making a small cut to his throat with a knife. The victim was verbally abused and tormented throughout. He lost consciousness but later escaped. He was found hiding in a cupboard as a result of further threats to the female victim. His head was stomped on again. He was, again, beaten repeatedly until he nearly lost consciousness and was finally abandoned in a front yard. The Court of Appeal stated:

> The offences to which the [offender] pleaded guilty involved a course of conduct over a protracted period in which [he], as the principal offender, terrorised two complainants. The torturous assault of those complainants was properly described by the sentencing Judge as "cowardly, vicious and evil". One complainant suffered serious and life-threatening injuries. He was callously left for dead. That complainant was disabled, rendering him largely defenceless. There was nothing in that complainant's conduct which provided any sensible reason for the [offender's] behaviour.
>
> Notwithstanding the [offender's] pleas of guilty and his expressed remorse and the other matters in mitigation such as his troubled childhood, drug addiction and prospects of rehabilitation, an effective head sentence of 10 years imprisonment imposed on an offender who had a relevant and significant criminal history, including previous convictions for violence and drugs, and who had committed the offences in question while on probation and when on bail for the domestic violence offence, fell well within an appropriate exercise of the sentencing discretion.[35]

3.2 Other offences that can be charged under other legislation

3.2.1 Assault or obstruct a police officer in the performance of the officer's duties: *Police Powers and Responsibilities Act 2000* (Qld), section 790

The offence of assault or obstruct a police officer in the performance of the officer's duties has a maximum penalty of a $5,338 fine (40 penalty units) or 6 months' imprisonment. This is increased to a fine of $8,007 (60 penalty units) or 12 months' imprisonment if the offence is committed within, or in the vicinity of, licensed premises. The definition of assault in the *Criminal Code* applies to this section, while 'obstruct' includes hinder, resist and attempt to obstruct.

3.2.2 Assault or obstruct watch-house officer in the performance of the officer's duties: *Police Powers and Responsibilities Act* 2000 (Qld), section 655A

The maximum penalty for the equivalent offence to section 790 of the PPRA that applies to watch-house officers is 40 penalty units or 6 months' imprisonment. The definitions regarding assaults and obstruct are the same as section 790.

3.2.3 *Corrective Services Act 2006* (Qld), sections 124(b) and 127

Section 124(b) of the *Corrective Services Act 2006* (Qld) creates the offence of a prisoner assaulting or obstructing a staff member performing a function or exercising a power under the Act, or is in a corrective services facility. It has a maximum penalty of 2 years' imprisonment. For this offence, 'prisoner' does not include a person who is released on parole.[36]

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35 *R v Drews* [2020] QCA 18, 4–5 [27]–[28] (Boddice J, Sofronoff P and McMurdo JA agreeing).

36 *Corrective Services Act 2006* (Qld) sch 4 (because s 124 is in chapter 3, part 2 and is excluded).

Under section 127, it is an offence for a person to obstruct (which includes to hinder, resist and attempt to obstruct) a staff member performing a function or exercising a power under that Act, or the proper officer of a court who is performing a function or exercising a power under that Act, without a reasonable excuse. The maximum penalty is a fine of $5,338 (40 penalty units) or one year's imprisonment. For this offence, 'person' does not include a prisoner, other than a prisoner who is released on parole.[37]

3.2.4 Other miscellaneous Acts

There are over 60 other Queensland Acts which carry offence provisions relating to persons acting in roles such as 'authorised officers'. They target assault and various acts including wilful obstruction, intimidation and attempts ('obstruct' is defined under a number of provisions as including assault). Many of these provisions state that this conduct is an offence 'unless the person has a reasonable excuse'.

3.3 History of s 340 – amendments and rationale

The main focus of the current review is on section 340 of the *Criminal Code* (Qld).

Section 340 was part of the original *Criminal Code* in 1899. Its original form classified this offence as a misdemeanour carrying a maximum penalty of 3 years.

> **Section 340 (Serious assaults) – as originally enacted**
>
> Any person who—
>
> (1) Assaults another with intent to commit a crime, or with intent to resist or prevent the lawful arrest or detention of himself or of any other person; or
>
> (2) Assaults, resists, or wilfully obstructs, a police officer while acting in the execution of his duty, or any person acting in aid of a police officer while so acting; or
>
> (3) Unlawfully assaults, resists, or obstructs, any person engaged in the lawful execution of any process against any property, or in making a lawful distress, while so engaged; or
>
> (4) Assaults, resists, or obstructs, any person engaged in such lawful execution of process, or in making a lawful distress, with intent to rescue any property lawfully taken under such process or distress; or
>
> (5) Assaults any person on account of any act done by him in the execution of any duty imposed on him by law; or
>
> (6) Assaults any person in pursuance of any unlawful conspiracy respecting any manufacture, trade, business, or occupation, or respecting any person or persons concerned or employed in any manufacture, trade, business, or occupation, or the wages of any such person or persons;
>
> is guilty of a misdemeanour, and is liable to imprisonment with hard labour for 3 years.

There have been a total of 15 amending Acts making substantive amendments to this section passed from 1988[38] to 2016. The most important of these are discussed below. Changes affecting the Council's analysis of data from 2005 onwards are set out in Appendix 3. Even without these, a reprint changing paragraph identifiers from numbers to letters in 1994 led the Court of Appeal to

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37 Ibid s 125.

38 Removal of hard labour as part of a sentence of imprisonment: *Corrective Services (Consequential Amendments) Act 1988* (Qld).

comment that, even though there had not, at that early stage, been any change in the wording except to adopt inclusive language: 'checking to ensure that people are correctly charged has become very time consuming'.[39] At that time, the provision otherwise largely reflected the original section.

In **1997**, the maximum penalty was raised from 3 years imprisonment to 7 years and the offence was changed from a misdemeanour to a crime.[40] Section 340 had always recognised police officers, but only referred to other people by virtue of their actions (e.g. executing a duty imposed by law) as opposed to their occupation, age or disability.

The Labor Opposition, with the support of an independent Member of Parliament, passed amendments adding persons aged over 60 and persons relying on a guide dog, wheelchair or other remedial device as distinct classes of victim. In opposing this, the then Attorney-General, Mr Denver Beanland, made comments which show the inherent tension in having an offence that increases penalties for distinct classes of people to the exclusion of the rest of the community. He told Parliament that in his view:

- The current provisions (with 7-year maximum) had appropriate penalties. If the prosecution was doing its work, those provisions should be adequate to achieve tougher penalties where appropriate 'for offenders assaulting people with disabilities, people who are aged, frail or whatever the situation might be'.[41]
- A range of penalties was available, at the courts' discretion, and should stay at the courts' discretion: 'We cannot provide for all circumstances, otherwise we would be forever trying to keep up with them. Circumstances vary with each particular case.'
- The Opposition's amendment sought to set out some particular class of victim, but would 'introduce more irregularities and create more problems'. [42] It was further criticised on the basis it could lead to confusion.[43]

In **2005,** subsection (2) was added, to expressly recognise working corrective services officers assaulted by prisoners.[44] This acknowledged 'the vulnerability of prison officers and the seriousness of any assault upon them in the course of their legitimate duties'.[45] A summary offence covering the same conduct for the same people was also created at the same time, to provide a specific charge to deal with 'minor examples of assaults on corrective services officers'.[46]

In **2006**, a new subsection was included (which was itself replaced in 2012) which stated that circumstances in which a person assaults a police officer included biting, spitting on or throwing a bodily fluid or faeces at them.[47] This recognition of specific factual circumstances made no change to the penalty or existing definition of 'assault', which always covered such conduct.[48] The second

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39 *Sweet v Armstrong* [1995] QCA 406, 5–6 (Demack J**,** Pincus JA and Shepherdson J agreeing).

40 *Criminal Law Amendment Act 1997* (Qld) s 60, commenced 1 July 1997 (SL 152 of 1997).

41 Queensland, *Parliamentary Debates*, Legislative Assembly, 20 March 1997, 'Criminal Law Amendment Bill – Second Reading' (Denver Beanland, Attorney-General and Minister for Justice) 712.

42 Ibid 736.

43 Ibid.

44 *Justice and Other Legislation Amendment Act 2005* (Qld) s 59, commenced on assent: 8 December 2005.

45 Explanatory Notes, Justice and Other Legislation Amendment Bill 2005 (Qld) 24. The summary offence was s 51 of the then *Corrective Services Act 2000* (Qld).

46 Ibid.

47 *Police Powers and Responsibilities and Other Acts Amendment Act 2006* (Qld) s 89, commenced 21 July 2006 (SL 185 of 2006).

48 Explanatory Notes, Police Powers and Responsibilities and Other Acts Amendment Bill 2006 (Qld) 67.

reading speech was highly critical of this form of behaviour and encouraged Parliament's condemnation through:

> Strong legislation … that will send a clear message that it is the will of Parliament that persons who perpetrate, and are found guilty of these acts should be dealt with severely by the courts and that these acts regardless of the circumstances, should at all times be treated as a serious assault.[49]

2008 amendments included changes to subsections 340(1)(c) and (d), which relate to 'any person'.[50] The term 'engaged in the lawful duty execution of process' was replaced with 'performed/ing a duty imposed on the person by law'. This was said to extend the deleted (e) which related to acts done in execution of a duty imposed. References in these subsections to 'resisting' or 'obstructing' were also removed.

Importantly, subsection (2AA) was also inserted by the same amending Act in 2008, regarding assaulting, or resisting or wilfully obstructing, a new cohort of complainant for section 340 — a public officer. In so doing, a non-exhaustive definition of 'public officer' was added to section 340, although that term was already (and remains) defined in the definitions in section 1. The term 'public officer' is used elsewhere in the *Criminal Code*.[51] The definition in section 340 contained specific inclusions to the definition: Queensland Ambulance, Health Service and Child Protection employees. It did not (and does not) expressly recognise corrective services officers, present in subsection (2) since 2005.

The second reading speech noted that some persons (emergency services personnel) likely already fell within the ambit of section 340 by virtue of discharging a duty of a public nature, but this amendment would 'put the issue beyond doubt'.[52] The following year, in 2009, transit officers were added to the inclusions regarding 'public officer' in section 340(3).[53]

In **2012**, a major amendment was made with the insertion of new penalty paragraph (a) in subsection (1). It was a Liberal National Party pre-election commitment, part of a wider raft of amendments aimed at strengthening sentences for certain offences against police.[54] This replaced the 2006 descriptive amendment and doubled the maximum penalty to 14 years for serious assaults against police involving biting, spitting on, throwing at or applying bodily fluids or faeces, causing bodily harm or being or pretending to be armed. The explanatory notes stated:

> Police perform an essential and unique role in maintaining civil authority. Their duties are frequently dangerous … the increase can be justified given the need to: deter this form of concerning conduct; protect police officers carrying out their duties; and ensure the maintenance of civil authority.[55]

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49 Queensland, *Parliamentary Debates*, Legislative Assembly, 21 April 2006, 'Police Powers and Responsibilities and Other Acts Amendment Bill – Second Reading', 1368 (Judy Spence, Minister for Police and Corrective Services).

50 *Criminal Code and Other Acts Amendment Act* 2008 (Qld) s 61, commenced 1 December 2008 (SL 386 of 2008).

51 For instance in Chapter 13 regarding Corruption and abuse of office, and in section 199 (Resisting public officers).

52 Queensland, *Parliamentary Debates*, Legislative Assembly, 1 May 2008, 'Criminal Code and Other Acts Amendment Bill – Second Reading' 1425 (Kerry Shine, Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland).

53 *Transport and Other Legislation Amendment Act 2008* (Qld) s 233, commenced 1 November 2009 (SL 225 of 2009).

54 Explanatory Notes, Criminal Law Amendment Bill 2012 (Qld) 2.

55 Ibid 4.

Legal stakeholders criticised the amendment on multiple grounds:

- The strength of the existing 7-year maximum, described as 'adequate'[56] and 'substantial'.[57]
- A 14-year section 340 maximum would be incongruous with the same penalty in place for more serious offences (e.g. GBH, a more serious offence requiring greater harm). Regard should be had, in particular, to penalties for comparable conduct.[58]
- All lives, irrespective of occupation, should be valued equally under the law.[59]
- Many section 340 offenders were seriously disadvantaged, mentally ill, suffering from substance abuse and acting in desperation and were unlikely to comprehend deterrent penalty increases.[60]

The Government rejected a Parliamentary Legal Affairs and Community Safety Committee recommendation that the Attorney-General monitor and review the consequences of the proposed amendments on the courts and other criminal justice agencies, and report to Parliament within two years from commencement.[61]

In **2014**, this 2012 police penalty provision (with 14 year maximum) was copied over to the public officer offence provision in s 340(2AA), for much the same reasons as the increase regarding police.[62]

The same Act introduced mandatory community service orders for serious assaults committed with a circumstance of aggravation (committed in a public place while adversely affected by an intoxicating substance).

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56 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.

57 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.

58 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).

59 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.

60 Ibid 5.

61 Legal Affairs and Community Safety Committee, Parliament of Queensland, *Criminal Law Amendment Bill 2012* (Report No 3, July 2012) 25 (recommendation 2); Queensland Government, *Queensland Government Response to Legal Affairs and Community Safety Committee Report No 3 on the Criminal Law Amendment Bill 2012* (2012) 1–2.

62 *Safe Night Out Legislation Amendment Act 2014 (Qld)* s 16, commencement of substantive offence amendments – 5 September 2014, circumstance of aggravation re public intoxication/public place amendments – 1 December 2014: s 2.

In **2016**, the serious organised crime circumstance of aggravation[63] and mandatory sentence component requiring the making of a community service order in certain circumstances[64] were added.[65]

3.4 Jurisdiction and sentencing implications

There are three courts with criminal jurisdiction in Queensland — the Magistrates, District and Supreme Courts.

The Magistrates Courts have power to impose a prison sentence of up to, and including, three years imprisonment, even if the legislated maximum penalty for the offence is greater.[66]

The *Criminal Code* offences of common assault and resisting public officers, as well as the non-Code offences (which do not have maximum penalties exceeding three years' imprisonment) must be finalised (by trial or sentence, or both) in Magistrates Courts.[67] These charges can be joined with more serious charges for sentence in either of the higher courts for sentence, in certain circumstances.[68]

For two key offences discussed in this paper, the defendant or prosecution can choose between the Magistrates or District Courts as the court of trial and/or sentence:

- serious assault: must be dealt with in the Magistrates Courts if the prosecution so chooses.[69]
- AOBH without a circumstance of aggravation must be dealt with in the Magistrates Courts unless the defendant elects for jury trial.[70] AOBH with a circumstance of aggravation can be dealt with summarily if the defendant so elects.[71]

One of several reasons that this discretion is important is that there is likely to be a large volume of non-aggravated, and possibly aggravated, section 340 offences dealt with in the Magistrates Courts — where the actual maximum penalty which can be imposed is capped at three years and therefore is the same for common assault and serious assault. However, this does not mean that the higher 7- and 14-year maximum penalties are ignored by sentencing magistrates. A sentencing court, including a Magistrates Court, must have regard to the maximum penalty prescribed for the offence.[72]

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63 *Criminal Code* (Qld) s 340(1C).

64 Ibid ss 340(1C) and (2B). This applies if the offender committed the offence in a public place while adversely affected by an intoxicating substance, unless the court is satisfied that, because of any physical, intellectual or psychiatric disability of the offender, the offender is not capable of complying with a community service order: *Penalties and Sentences Act 1992* (Qld) s 108B

65 *Serious and Organised Crime Legislation Amendment Act 2016* (Qld) s 116, commenced 9 December 2016: s 61.

66 *Criminal Code* s 552H; although a sentence of up to 4 years' imprisonment can be imposed by a Magistrates Court sitting as the Drug and Alcohol Court, and Magistrates Courts can suspend the 'operational periods' of sentences of imprisonment up to general legal maximum of five years.

67 *Criminal Code* (Qld) s 552BA for the Criminal Code offences; *Justices Act 1886* (Qld) s 139 for the remainder.

68 See *Criminal Code* ss 651 and 652.

69 Ibid s 552A(1)(a).

70 Ibid s 552B(1)(b).

71 See *Fullard v Vera* [2007] QSC 050.

72 *Penalties and Sentences Act 1992* (Qld) s 9(2)(b).

These options are subject to the overriding rule that a Magistrates Court must not deal with such charges if satisfied that the defendant, if convicted, may not be adequately punished in that court, given its three-year imprisonment ceiling.[73]

The District Court of Queensland deals with the remainder of the offences discussed in this paper.[74]

The Supreme Court would only deal with the offences discussed in this paper if they were joined to more serious charges already before it (or the Court of Appeal, being a division of the Supreme Court, was dealing with an appeal against conviction or sentence).[75]

3.5 Charging discretion

It is the decision of independent prosecution agencies (generally the Queensland Police Service (QPS) or the Office of the Director of Public Prosecutions, Queensland (ODPP)), using their discretion and assessment of the evidence, as to whether a person is charged, and what charge or charges are used.

As the seriousness of the injury increases, so too does the pool of different *Criminal Code* charges from which police and prosecutors can select (see above).

The ODPP publishes the *Director's Guidelines*, 'designed to assist the exercise of prosecutorial decisions to achieve consistency and efficiency, effectiveness and transparency'. They are issued to ODPP staff, others acting on the ODPP's behalf, and to police.[76]

If a summary charge (dealt with in the Magistrates Court) is an option, the *Director's Guidelines* state it should be preferred when choosing what to charge or which court to sentence in; unless this would not provide adequate punishment, or there is some relevant connection with an offence that must be dealt with in a higher court.[77] Further guidance on jurisdictional decisions mentions the gravity of the injury, whether spitting, biting or a needle stick injury and the risk of contracting an infectious disease is a factor, and the importance in every case of considering all circumstances, including the nature of the assault, its context, and the accused's criminal history.[78]

3.6 The impact of the *Human Rights Act 2019* (Qld)

The *Human Rights Act 2019* (Qld) ('HRA') commenced on 1 January 2020. It applies new requirements regarding existing laws. While it does not entrench rights as a constitution might, nor create a new cause of action for contravening them, it does introduce 'a principle of statutory interpretation, requiring that statutes are interpreted compatibly, or as compatibly as possible, with human rights'.[79]

The Act also requires that when a Member of Parliament proposes a new law, they need to accompany it with a statement that explains whether or not the law is compatible with the human

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73 *Criminal Code* s 552D(1). Section 552D also contains other reasons, such as exceptional circumstances, which can include that the charge in question is sufficiently connected to others which are being dealt with in a higher court, and they should all be tried together.

74 See *District Court of Queensland Act 1967* (Qld) ss 60 and 61.

75 See ibid s 64.

76 Office of the Director of Public Prosecutions (Queensland), *Director's Guidelines* (30 June 2019) 1.

77 Ibid 15, 17–18 ('13. Summary Charges').

78 Ibid 17–18 ('13. Summary Charges').

79 Justice James Henry, '*Human Rights Act 2019* (Qld) – What work will it bring us?' (Speech, Cairns Judiciary 2019/20 CPD Series, 20 November 2019) 1-2. The statutory interpretation rule is found in *Human Rights Act 2019* (Qld) s 48.

rights set out in the Act. Further, it must communicate reasons as to how a Bill is compatible or incompatible, as well as the nature and extent of any incompatibility. What this means practically is that any suggested legislative reforms must be mindful of the new process of parliamentary scrutiny of human rights.

A HRA will not prevent governments from making laws that impede human rights, and the government may declare that a law has effect despite a possible conflict with human rights. A HRA will, however, ensure that the impact is identified and open for public debate.

The Act recognises that there are often competing human rights and interests. Section 13(1) of the HRA prescribes that 'A human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.'

Human rights do have limits, but such limits must be able to be '"demonstrably justified in a free and democratic society based on human dignity, equality and freedom'". In deciding whether a limit is '"reasonable and justifiable'", a range of factors are relevant:

(a) The nature of the human right;

(b) The nature of the purpose of the limitation;

(c) The relationship between the limitation and its purpose;

(d) Whether there are any less restrictive ways to achieve the purpose;

(e) The importance of the limitation;

(f) The importance of preserving the human right; and

(g) The balance between the matters mentioned in paragraphs (e) and (f).

Therefore, the rights set out in the Act are not absolute – they can sometimes be limited or balanced with competing rights and public interests. However, any limit on rights must have a clear legal basis and must be reasonable and proportionate in the circumstances. In developing this paper, the Council has been mindful of the competing rights and interests that exist under the Terms of Reference.

The Queensland Human Rights Commission (QHRC) provided a submission to the Council for this review. It noted that any 'imposition of higher penalties based on the type of victim of an offence will likely engage several human rights protected by the Act, including the rights to:[80]

- recognition and equality before the law (including equal protection of the law without discrimination, and equal and effective protection against discrimination);[81]
- protection from torture and cruel, inhuman or degrading treatment;[82]
- liberty and security of person;[83] and
- fair hearing.[84]

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80 Preliminary Submission 3 (Queensland Human Rights Commission) 3 [9].

81 *Human Rights Act 2019* (Qld) s 15. See also Preliminary Submission 3 (Queensland Human Rights Commission) 14, 'Disproportionate impact on certain members of the community'.

82 *Human Rights Act 2019* (Qld) s 17.

83 Ibid s 29.

84 Ibid s 31.

Legal Aid Queensland[85] and the Queensland Law Society[86] also noted these, and added protection of families and children,[87] and cultural rights.[88]

The QHRC detailed the HRA's criteria for deciding whether a limit on a right is reasonable and justified, in the context of the Council's Terms of Reference for this review.[89] Among its conclusions was the warning that 'any increase in penalties for assaults upon frontline workers will limit rights and must be demonstrably proportionate and justified based on evidence'.[90]

The QHRC also noted, conversely, the rights of public officers. The HRA draws on international rights, which have been interpreted to include an obligation on states to ensure that:[91]

> Individuals are protected not only by the State, but against violations of their rights by private persons. This includes taking appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.[92]

In this context, the QHRC noted that 'imposing higher penalties that are demonstrated to protect frontline workers will uphold the rights of those workers', including their rights to life, quality, liberty and security.[93]

The implications of this for potential reform options are discussed further in Chapters 7 and 9 of this paper.

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85 Preliminary Submission 22 (Legal Aid Queensland).

86 Preliminary Submission 34 (Queensland Law Society) 2.

87 *Human Rights Act 2019* (Qld) s 26.

88 Ibid ss 27 (generally) and 28 (Aboriginal peoples and Torres Strait and Islander peoples).

89 Preliminary Submission 3 (Queensland Human Rights Commission) 4 [12]–[14]. See *Human Rights Act 2019* (Qld) s 13.

90 Preliminary Submission 3 (Queensland Human Rights Commission) 15.

91 Ibid 3 [10]. This paraphrases the Commission's submission regarding the application of the International Covenant on Civil and Political Rights (ICCPR), Article two and the United Nations Human Rights Committee's commentary on the obligation raised by that article.

92 Ibid 3–4 [10].

93 Ibid 4 [11]. See *Human Rights Act 2019* (Qld) ss 16, 15, 29.