



**Queensland Sentencing
Advisory Council**
Inform. Engage. Advise.

Penalties for assaults on public officers

Issues Paper

April 2020

Warning to readers

This report contains subject matter that may be distressing to readers. Material describing assaults committed on police, other emergency services personnel, corrective services officers and other public officers, including case studies drawn from sentencing remarks, and descriptions of the impact these offences can have on victims are included in this report. If you need to talk to someone, support is available:

- [Lifeline Australia](#): 13 11 14
- [Victim Assist Queensland](#): 1300 546 587 (business hours) or e-mail: VictimAssist@justice.qld.gov.au

You may also be able to seek advice and support from your current employer and employee union. Visit their websites for more information.

Penalties for assaults on public officers: Issues paper

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Queensland Sentencing Advisory Council

The Queensland Sentencing Advisory Council is established by section 198 of the *Penalties and Sentences Act 1992* (Qld). The Council provides independent research and advice, seeks public views and promotes community understanding of sentencing matters. The Council's functions, detailed in section 199 of the Act, include to:

- inform the community about sentencing through research and education;
- engage with Queenslanders to understand their views on sentencing; and
- advise the Attorney-General on matters relating to sentencing, at the Attorney-General's request.

Further information

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Foreword

In December 2019, the Attorney-General Yvette D'Ath issued the Council with Terms of Reference focussing on the sentencing of assaults of police and other frontline emergency service workers, corrective services officers and other public officers.

This Reference refers Council to the importance of ensuring that everyone should be able perform their job free from physical threats and violence. The impact of being assaulted at work can be significant and ongoing, and the ripples of these incidents reach beyond individuals themselves, having impacts on family members and employers and on the broader community.

Some occupational groups – such as police and corrective services officers – are trained and prepared to manage conflict and aggression, while others – health care workers, paramedics, teachers, public transport workers – are not equipped, nor should they expect to meet violence in their role. Regardless of the work, however, violence should never be accepted as ‘part of the job’, even for those who are trained to respond.

The work of these occupational groups is considered central to the operation of public order and public service, and governments across the world have worked to ensure they are protected in their work from occupational violence. The many actions governments have taken over time to respond to and prevent occupational violence have included establishing penalties that reflect the fact that assault against these individuals is considered very serious.

On the other hand, the Council recognises that those individuals who assault a public officer are often responding in the context of personal circumstances that mean they are not thinking or behaving rationally. Many of these individuals have mental health conditions, drug or alcohol addiction, or disabilities that compound with heightened stress in a situation, leading to the offending.

With the emergence of the COVID-19 pandemic, there has never been a more important time in Queensland to consider this issue. Daily, our frontline workers are being called upon to enforce restrictions on the movement of individuals, deliver services under difficult conditions, and manage those who cannot live in the community due to their infection with the virus, or because they were already serving a sentence in prison for a criminal offence.

These workers deserve to conduct their work in safety, and their workplaces can include our streets, hospitals, public transport networks and prisons.

This Paper explores the legal framework currently in place to sentence those who are convicted of assaulting a public officer, considers the relevant literature about this offence, presents sentencing statistics and trends over time for this offence, and identifies a range of associated issues. A set of questions has been posed, and we strongly encourage input from our stakeholders.

Naturally, our consultation on this Terms of Reference has been impacted by the restrictions in place to limit social contact, and we are moving to more appropriate mechanisms to ensure we have a range of views on the questions we have raised.

I urge you to consider the issues contained in this Paper, and I look forward to the responses of our key agencies, unions and other representative groups. The feedback we receive will be critical to the Council’s deliberation on recommendations, which will be released as part of the final report sometime later in 2020.



John Robertson
Chair

Acknowledgements

The Council's inquiries are informed by the knowledge and expertise of its members, research and policy analysis undertaken by its staff, and the contribution of key criminal justice agencies, other stakeholders and community members.

The Council would like to acknowledge the contributions of all those who made preliminary submissions, attended meetings to discuss issues relating to the review, and provided information to inform the preparation of this issues paper. While not exhaustive, those who have contributed submissions to the review included the Australasian Railway Association, the Bus Industry Confederation, the Rail, Tram and Bus Union, the TrackSAFE Foundation, the Australian Lawyers Alliance, the Bar Association of Queensland, GoldlinQ Pty Ltd (Gold Coast Light Rail), the Department of Communities, Disability Services and Seniors, the Department of Education, the Department of Housing and Public Works, the Department of Justice and Attorney-General (DJAG), the Department of Youth Justice, the Dispute Resolution Branch, DJAG, Legal Aid Queensland, the Office of Industrial Relations, the Office of the Information Commissioner, the Office of the Public Guardian, the Prisoners' Legal Service, Queensland Advocacy Incorporated, Queensland Corrective Services (QCS), Queensland Health, the Queensland Human Rights Commission, Queensland Fire and Emergency Services, the Queensland Law Society, the Queensland Nurses and Midwives' Union, the Queensland Police Service (QPS), the Queensland Police Union of Employees, the Queensland Teachers' Union, the Security Providers Association of Australia Limited, Sisters Inside, Together Queensland, the Transport Workers' Union (Queensland Branch), and local and interstate criminal justice agencies and academic researchers.

The Council looked at a range of sentencing data to inform the findings in this paper, and would like to thank the following agencies for providing data for this review: the Queensland Ambulance Service, QCS, Court Services Queensland (DJAG), the Department of Education, Queensland Fire and Emergency Services, Queensland Health, the Office of Industrial Relations, DJAG, the QPS, the Public Service Commission, the Department of Transport and Main Roads, WorkCover Queensland, the Department of Youth Justice, and Victim Assist Queensland. The Council would also like to acknowledge the Griffith Institute of Criminology which was commissioned to conduct a literature review on the sentencing of assaults on public officers.

The Council also acknowledges the input and advice provided by the Council's Aboriginal and Torres Strait Islander Advisory Panel. The Council appreciates the input of the Panel on this project, and thanks the members of the Panel for their engagement and advice to date.

It is also the Council's practice to establish a Project Board for every inquiry. The Council acknowledges the contributions of Project Board members and thanks Board members for giving so generously of their time during the initial stages of the review.

Call for submissions

Submissions are being called for as part of the Council's review of penalties for assaults on public officers.

You are invited to make a submission based on the questions in this consultation paper, or any issues arising from the Terms of Reference.

Submission deadline: Thursday, 25 June 2020, 5.00pm

Preparing submissions

The issues and questions presented address key concerns under the Terms of Reference referred to the Council by the Attorney-General.

You are invited to respond to some or all of the questions and to provide your views on options presented. To assist in analysing responses, please identify the relevant question or option number/s in your submission.

Try to keep your responses succinct and focused on the question/s or issue you are responding to. If you wish to provide attachments, please indicate which question/s your attachment refers to.

How your submission will be used

All submissions to this issues paper, as well as additional consultation conducted with key stakeholders, will inform the Council's response to the Terms of Reference. A final report with recommendations will be provided to the Attorney-General by 31 August 2020 and released publicly via the Council's website: www.sentencingcouncil.qld.gov.au.

This consultation paper reflects the Council's commitment to listening to community members.

Generally, submissions will be considered public and published on the Council's website unless clearly marked 'confidential'.

Public submissions may be published on the Council's website, but with certain personal information redacted to protect the privacy of those making the submission.

Submissions marked as '**anonymous**' will have all identifying details removed (including the name or names of those making the submission) prior to publication.

The Council does not publish submissions that are received anonymously (that is, that do not include the name and contact details of the person making them).

Submissions marked '**confidential**' will not be published or referred to in publications. The Council treats confidential submissions as for the Council's information only.

Any personal information provided by individuals identified in this public consultation process will be collected only for the purpose of the review. Personal information will not be used within the final report. However, unless you explicitly request, details provided in your submission (other than personal information) may be directly or indirectly quoted in the final report, or other products associated with the final report. If you include details in your submission that you do not want publicly disclosed, please indicate this within your submission.

The *Right to Information (RTI) Act 2009* may apply to submissions provided as part of this consultation process. If subject to a RTI application, submissions (including those marked as confidential) will all be assessed as part of the RTI process.

While the Terms of Reference are restricted to reviewing penalties for assaults of a public officer, the Council understands there may be other issues submitters wish to highlight or raise.

Submissions containing offensive, derogatory, highly specific information about actual offending and/or issues beyond the scope of these Terms of Reference will not be referred to in the final report and may be excluded from the consultation process.

Making a submission

Email

To submit via email, please include in the subject line of your email 'Penalties for assaults on public officers review submission'.

Email your submission to submissions@sentencingcouncil.qld.gov.au.

Post

To make a postal submission, please include the following information on your correspondence 'Penalties for assaults on public officers review submission'. Post your submission to:

Queensland Sentencing Advisory Council
GPO Box 2360
Brisbane Qld 4001

Submission assistance

If you require any assistance to participate in this public consultation process, please contact the Council on (07) 3224 7375, or use the following services:

Translating and Interpreting Service

If you need an interpreter, contact the [Translating and Interpreting Service \(TIS\)](#) on 131 450 and tell them:

- the language you speak;
- the council's name – Queensland Sentencing Advisory Council; and
- the Council's phone number – (07) 3224 7375.

TIS will arrange an interpreter so you can talk with us. This is a free service.

National Relay Service

The National Relay Service (NRS) is a free phone service for people who are deaf or have a hearing or speech impairment. If you need help contacting us, the NRS can assist. To contact the NRS you can:

- TTY/voice call – 133 677
- Speak and Listen – 1300 555 727
- SMS relay – 0423 677 767

Table of contents

| | |
|--|-----------|
| Chapter 1 Introduction | 1 |
| 1.1 Background | 1 |
| 1.2 Terms of Reference | 1 |
| 1.3 The Council's approach | 2 |
| 1.4 Scope of the project | 4 |
| 1.5 Data used in this paper | 4 |
| 1.6 Outline of the issues paper | 5 |
| Chapter 2 A profile of assaults on public officers | 6 |
| 2.1 Literature review: executive summary | 6 |
| 2.2 Frequency of assaults on public officers | 8 |
| 2.3 Sentenced acts intended to cause injury | 10 |
| 2.4 Serious assault trends | 12 |
| 2.5 Serious assault of public officers | 15 |
| 2.6 Demographics of offenders sentenced for serious assault of a public officer | 16 |
| 2.7 Associated offences | 17 |
| 2.8 Summary | 18 |
| Chapter 3 Current offence framework in Queensland | 20 |
| 3.1 Offences and penalties under the <i>Criminal Code</i> | 20 |
| 3.2 Other offences that can be charged under other legislation | 25 |
| 3.3 History of s 340 – amendments and rationale | 26 |
| 3.4 Jurisdiction and sentencing implications | 30 |
| 3.5 Charging discretion | 31 |
| 3.6 The impact of the <i>Human Rights Act 2019</i> (Qld) | 31 |
| Chapter 4 Sentencing process and framework in Queensland | 34 |
| 4.1 <i>Penalties and Sentences Act 1992</i> (Qld): purposes, guidelines and factors | 34 |
| 4.2 Sentencing principles in case law – totality and the <i>De Simoni</i> principle | 40 |
| 4.3 The general approach to sentencing in Queensland | 42 |
| 4.4 The application of general sentencing principles and approaches to sentencing for serious assaults | 45 |
| 4.5 The orders courts can make when sentencing for assaults on public officers | 53 |
| 4.6 Differences in sentencing children | 59 |
| Chapter 5 Sentencing outcomes for assaults on public officers | 63 |
| 5.1 Sentencing outcomes for serious assaults and other 'acts intended to cause serious injury' | 63 |
| 5.2 Sentencing outcomes for section 340 <i>Criminal Code</i> | 69 |
| 5.3 Assault of police officers | 74 |
| 5.4 Assault of corrective services officers | 83 |
| 5.5 Assault of public officers | 86 |
| 5.6 Limitations and data quality issues | 93 |
| 5.7 Summary | 94 |
| Chapter 6 The approach in other jurisdictions | 96 |
| 6.1 Introduction | 96 |
| 6.2 Specific offences targeting workplace assaults | 96 |
| 6.3 Aggravated forms of offences | 98 |

| | | |
|--|--|------------|
| 6.4 | Aggravating factors for sentencing purposes | 101 |
| 6.5 | Mandatory minimum penalties, standard sentences and standard non-parole periods | 105 |
| 6.6 | Conclusion | 114 |
| Chapter 7 Aggravated assault based on victim status | | 115 |
| 7.1 | Introduction | 115 |
| 7.2 | Judging offence seriousness | 117 |
| 7.3 | Historical justifications and the approach in other jurisdictions | 123 |
| 7.4 | Stakeholder views on victim status | 125 |
| 7.5 | Issues | 126 |
| Chapter 8 Responding to the needs of victims | | 129 |
| 8.1 | Impact of assault on public officer victims | 129 |
| 8.2 | The role of the criminal justice system in responding to victim needs | 131 |
| 8.3 | Current approach | 133 |
| 8.4 | Alternative mechanisms | 140 |
| Chapter 9 Offence and sentencing framework: issues and options | | 144 |
| 9.1 | Introduction | 144 |
| 9.2 | The definition of a ‘public officer’ | 144 |
| 9.3 | Assaults by prisoners against corrective services officers | 156 |
| 9.4 | Legal framework for aggravated forms of assault and assault-related offences | 160 |
| 9.5 | Offences of assault and related conduct (resist and obstruct) involving public officers | 165 |
| 9.6 | General deterrence as a key sentencing purpose and its relationship to the setting of penalty levels | 175 |
| 9.7 | Do current penalties and sentencing practices provide an adequate response to assaults on public officers? | 198 |
| 9.8 | Reform options | 210 |
| Chapter 10 Enhancing community knowledge and understanding | | 225 |
| 10.1 | Introduction | 225 |
| 10.2 | Raising public awareness | 225 |
| 10.3 | Other issues | 234 |
| Appendix 1: Terms of Reference | | 236 |
| Appendix 2: Preliminary submissions | | 238 |
| Appendix 3: Summary of changes to section 340 of the <i>Criminal Code</i> | | 240 |
| Appendix 4: Data tables | | 241 |
| Appendix 5: Cross jurisdictional analysis: Australia and select international jurisdictions | | 244 |
| Glossary | | 260 |
| Bibliography | | 264 |

List of figures

| | |
|---|----|
| Figure 1-1: The Council's approach to the Terms of Reference | 3 |
| Figure 2-1: Rate of accepted WorkCover claims per 1,000 employees for assault of public officers, 2014–15 to 2018–19 | 10 |
| Figure 2-2: Number of sentenced cases involving an 'act intended to cause injury' | 11 |
| Figure 2-3: Number of sentenced cases involving a serious assault over time | 12 |
| Figure 2-4: Number of sentenced serious assault cases (MSO), by subsection over time | 13 |
| Figure 2-5: Rate of sentenced serious assault cases (MSO) per 1,000 frontline employees over time | 14 |
| Figure 2-6: Number of sentenced serious assault cases (MSO), by subsection | 14 |
| Figure 2-7: Proportion of serious assault of a public officer cases by offence type | 15 |
| Figure 2-8: Percentage of young offenders sentenced for serious assault (MSO) | 17 |
| Figure 2-9: Top 5 MSOs in cases where serious assault of a public officer was not the MSO | 17 |
| Figure 2-10: Top eight associated offences sentenced with the serious assault of a public officer (MSO) | 18 |
| Figure 5-1: Distribution of custodial penalties for 'acts intended to cause injury' offences carrying a 7-year maximum penalty (MSO) | 65 |
| Figure 5-2: Distribution of custodial penalties for 'acts intended to cause injury' offences carrying a 14-year maximum penalty (MSO) | 67 |
| Figure 5-3: Distribution of custodial penalties for common assault (MSO) and non-aggravated assault of public officer offences (MSO) | 68 |
| Figure 5-4: Type of penalties issued for serious assault of a public officer over time (MSO), Magistrates Courts | 69 |
| Figure 5-5: Proportion of serious assaults of public officers that resulted in a custodial penalty (MSO), Magistrates Courts, adult offenders | 70 |
| Figure 5-6: Type of penalties issued for serious assault (MSO) by assault type, Magistrates Courts, adult offenders | 71 |
| Figure 5-7: Type of penalties issued for serious assault of a public officer (MSO) over time, higher courts | 72 |
| Figure 5-8: Percentages of serious assaults of public officers that resulted in a custodial penalty (MSO) by assault type, higher courts, adult offenders | 73 |
| Figure 5-9: Type of penalties issued for serious assault (MSO) by assault type, higher courts, adult offenders | 73 |
| Figure 5-10: Type of penalties issued for serious assault (MSO), by assault type, young offenders | 74 |
| Figure 5-11: Proportion of assaults and obstructions under section 790(1) PPRA | 75 |
| Figure 5-12: Number of assaults or obstructions of police officers, by assault type, over time | 76 |
| Figure 5-13: Number of serious assaults of police officers, by aggravating circumstances, over time | 77 |
| Figure 5-14: Demographics of offenders sentenced for the assault of a police officer | 82 |
| Figure 5-15: Number of assaults or obstructions of corrective services staff, over time | 83 |
| Figure 5-16: Demographics of offenders sentenced for the assault of a corrective services officer | 85 |

| | |
|---|-----|
| Figure 5-17: Number of cases involving a serious assault of a public officer offence, over time | 86 |
| Figure 5-18: Number of serious assaults of public officers by aggravating circumstances, over time | 89 |
| Figure 5-19: Demographics of offenders sentenced for the assault of a public officer | 93 |
| Figure 8-1: Proportion of serious assault cases receiving a compensation and/or restitution order | 140 |
| Figure 8-2: Average amount of compensation and/or restitution ordered for serious assault cases | 140 |

List of tables

| | |
|--|-----|
| Table 2-1: Number of reported incidents and accepted WorkCover claims for assaults of public officers, 2014–15 to 2018–19 | 9 |
| Table 2-2: Number of serious assaults of a public officer, by type of court | 15 |
| Table 5-1: Number of sentenced assaults or obstructions of police officers by assault type | 75 |
| Table 5-2: Custodial sentences for serious assaults against police officers (MSO) before and after the introduction of aggravating circumstances, adult offenders | 78 |
| Table 5-3: Custodial sentences for serious assaults against police officers (MSO) before and after the introduction of aggravating circumstances, juvenile offenders | 79 |
| Table 5-4: Sentencing outcomes for assault of a police officer by assault type (MSO), adult offenders | 80 |
| Table 5-5: Ranking of seriousness of sentencing outcomes for assault of a police officer by assault type, adult offenders | 81 |
| Table 5-6: Number of sentenced assaults or obstructions of corrective services staff | 83 |
| Table 5-7: Sentencing outcomes for assault of a corrective services officer by assault type (MSO), adult offenders | 84 |
| Table 5-8 : Number of sentenced assaults of public officers | 87 |
| Table 5-9: Victim occupations, by type of serious assault and whether the offender was an adult | 88 |
| Table 5-10: Aggravating circumstances by victim occupation | 90 |
| Table 5-11: Custodial sentences for assault against public officers (MSO) before and after the introduction of aggravating circumstances, adult offenders | 91 |
| Table 5-12: Custodial sentencing outcomes for assaults against public officers (MSO), adult offenders | 92 |
| Table 7-1: Starting point for sentencing of three assault offences, England and Wales | 123 |
| Table 8-1: Restitution and compensation orders for serious assaults of a public officer | 139 |
| Table 9-1: Select Queensland offences involving assault, maximum penalties and classification | 166 |
| Table 9-2: Select Queensland offences involving obstruction, maximum penalties and classification | 168 |
| Table 9-3: Maximum penalties for AOBH, and equivalents, where committed against a public officer (or specific classes of officer) by jurisdiction | 204 |
| Table A4-1: Frequency of accepted WorkCover claims for assaults of public officers, by agency and occupation over time, 2014–15 to 2018–19 | 241 |
| Table A4-2: Summary of custodial penalties for 'acts intended to cause injury' offences carrying a 7-year maximum penalty (MSO) | 242 |
| Table A4-3: Summary of custodial penalties for 'acts intended to cause injury' offences carrying a 14-year maximum penalty (MSO) | 242 |
| Table A4-4: Summary of custodial penalties for common assault and non-aggravated serious assault (MSO) | 242 |
| Table A4-5: Restitution and compensation orders for serious assaults of a public officer | 243 |
| Table A5-1: Examples of specific offences involving assaults on police — Australia, Canada, England and Wales and New Zealand | 244 |

| | |
|---|-----|
| Table A5-2: Examples of specific offences involving assaults of public officers – Australia, Canada, England and Wales and New Zealand | 248 |
| Table A5-3: Examples of circumstances of aggravation that apply to assault and other offences against the person when committed against specific classes of workers – Australia | 255 |
| Table A5-4: Examples of aggravating factors for sentencing purposes for assaults and other non-fatal offences against specific categories of workers – Australia, Canada, England and Wales and New Zealand | 258 |

Abbreviations

| | |
|--------|--|
| ABS | Australian Bureau of Statistics |
| ALA | Australian Lawyers Alliance |
| ALRC | Australian Law Reform Commission |
| ANZSOC | Australian and New Zealand Standard Offence Classification |
| AOBH | Assault occasioning bodily harm |
| ARJC | Adult restorative justice conferencing |
| CCC | Crime and Corruption Commission |
| CCO | Community Corrections Officer |
| CLR | Commonwealth Law Reports |
| CLS | Court Liaison Service |
| CSA | <i>Corrective Services Act 2006 (Qld)</i> |
| DCDSS | Department of Communities, Disability Services and Seniors |
| DJAG | Department of Justice and Attorney-General |
| DPP | Director of Public Prosecutions |
| GBH | Grievous bodily harm |
| GPS | Global positioning system |
| HRA | <i>Human Rights Act 2019 (Qld)</i> |
| MHC | Mental Health Court |
| MSO | Most serious offence |
| ODPP | Office of the Director of Public Prosecutions (Queensland) |
| PLS | Prisoners' Legal Service |
| PSA | <i>Penalties and Sentences Act 1992 (Qld)</i> |
| PPRA | <i>Police Powers and Responsibilities Act 2000 (Qld)</i> |
| QAI | Queensland Advocacy Incorporated |
| QC | Queen's Counsel |
| QCA | Queensland Court of Appeal |
| QCA | Queensland Court of Appeal |
| QCS | Queensland Corrective Services |
| QGSO | Queensland Government Statisticians Office |
| QHRC | Queensland Human Rights Commission |
| QPS | Queensland Police Service |

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| QPU | Queensland Police Union of Employees |
| QSAC | Queensland Sentencing Advisory Council |
| QSI | Queensland Sentencing Information Service |
| QTU | Queensland Teachers' Union |
| QWIC | Queensland Wide Inter-Linked Courts database |
| SNPP | Standard non-parole period |
| SPAAL | Security Providers Association of Australia Limited |
| SVO | Serious Violent Offence |
| TSAC | Tasmanian Sentencing Advisory Council |
| TWU | Transport Workers' Union |
| VAQ | Victims Assist Queensland |
| VIS | Victim impact statement |
| VLRC | Victorian Law Reform Commission |
| VOCCA | <i>Victims of Crime Assistance Act 2009</i> (Qld) |
| VSAC | Victorian Sentencing Advisory Council |
| YJA | <i>Youth Justice Act 1992</i> (Qld) |

List of questions

1. Should an assault on a person while at work be treated by the law as more serious, less serious, or as equally serious as if the same act is committed against someone who is not at work, and why?
2. If an assault is committed on a public officer performing a public duty, should this be treated as more serious, less serious, or as equally serious as if the same act is committed on a person employed in a private capacity (e.g. as a private security officer, or taxi driver) and why?
3. Should the law treat assaults on particular categories of public officers as being more serious than other categories of public officer, and why?
4. Does the current sentencing process in Queensland adequately meet the needs of public officer victims?
5. Should any changes be considered to the current approach to better respond to victim needs? If so, what reforms should be considered?
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?
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. 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)?
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?
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?
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 appropriate, 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* (Qld), in accordance with section 108B of the *Penalties and Sentences Act 1992* (Qld) (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?
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?
16. What issues contribute to, or detract from, the community's understanding of penalties and sentencing for assaults on public officers?
17. How can community knowledge and understanding about penalties and sentencing for assaults on public officers be enhanced?

Chapter 1 Introduction

1.1 Background

The Queensland Sentencing Advisory Council ('the Council') was established in 2016 to inform, engage and advise the community and government about sentencing in Queensland.

The Council's six legislative functions are outlined in section 199 of the *Penalties and Sentences Act 1992* (Qld) ('PSA'), one of which is to provide advice to the Attorney-General on matters relating to sentencing, when requested. Other relevant functions of the Council are:

- to give information to the community to enhance knowledge and understanding of matters relating to sentencing;
- to publish information about sentencing;
- to research matters about sentencing and publish the outcomes of the research; and
- to obtain the community's views on sentencing and matters about sentencing.

In December 2019, the Attorney-General and Minister for Justice, the Honourable Yvette D'Ath MP, requested the Council undertake a review of penalties for assaults on police and other frontline emergency service workers, corrective services officers and other public officers (hereafter, referred to collectively as 'public officers').

In April 2020, in response to a request made by the Council, the Attorney-General granted an extension, extending the Council's reporting date from 30 June 2020 to 31 August 2020.¹ The extension was granted on the basis of the emergence of the COVID-19 pandemic, and the Council's concerns about the need for stakeholders to have additional time to respond given their necessary focus on delivering essential services to the community during this challenging period.

This issues paper has been prepared to gather and present information about sentencing for assaults of public officers to assist stakeholders and community members to provide their views to the Council on the sentencing of offences involving assaults of public officers.

1.2 Terms of Reference

The Terms of Reference issued to the Council outline matters the Council must consider in reporting to the Attorney-General. These include:

- the expectation of the community and government that public officers carrying out their duties should not be the subject of assault during the execution of their duties;
- the need for public officers to have confidence that the criminal justice system properly reflects the inherent dangers they face in the execution of their duties, and the negative impacts that such an assault can have on those workers, their colleagues and their families; and
- the importance of the penalties provided for under legislation and sentences imposed for these offences being adequate to meet the purposes of sentencing under section 9(1) of the PSA while also taking into account the individual facts and circumstances of the case, the seriousness of the offence concerned and offender culpability.

¹ Notified by the Attorney-General and Minister for Justice, Yvette D'Ath, on 29 April 2020.

The Terms of Reference then outline a series of issues that must be addressed by the Council in providing its advice. These include:

- analysis of penalties and sentencing trends for offences sentenced under section 340 (Serious assaults) of the *Criminal Code*,² including the impact of the 2012 and 2014 legislative amendments that introduced high maximum penalties, to determine whether they are in accordance with stakeholder expectations;
- advice about whether the current structure of section 340 of the *Criminal Code* should be retained as it currently stands, or whether such offending should instead be targeted in a separate provision or provisions, possibly with higher penalties, or through the introduction of a circumstance of aggravation;
- advice about whether the definition of ‘public officer’ in section 340 of the *Criminal Code* should be expanded to recognise other occupations, including public transport drivers;
- a review of related provisions in other legislation that targets the same offending to assess the suitability of retaining these separate offences, and advice about whether penalties for these other offences reflect stakeholder expectations;
- analysis of the approach in other Australian and relevant international jurisdictions to address this type of offending and presentation of any evidence of the impact of any reforms introduced in these jurisdictions;
- identify ways to enhance community knowledge and understanding of the penalties for this type of offending.

In undertaking its work, the Terms of Reference require the Council to:

- consider any relevant statistics, research, reports or publications regarding causes, frequency and seriousness of relevant offending;
- consult with stakeholders;
- advise on options for reform to the current offence, penalty and sentencing framework to ensure it provides an appropriate response to this kind of offending; and
- advise on any other matters relevant to this reference.

The Council is required to report to the Attorney-General and Minister for Justice by 31 August 2020. The Terms of Reference are provided in full at Appendix 1.

1.3 The Council’s approach

As with all Terms of Reference projects, work is governed by a project management policy which was established early in the life of the Council. The Council’s practice is to nominate several Council members to sit on a separate Project Board that meets throughout the life of the project and governs all decisions relating to the progress of the project. The Project Board for this Terms of Reference has met monthly and is responsible for ensuring a high quality response to the Terms of Reference.

The Project Board commenced work on the Terms of Reference by developing a project plan which was approved by the full Council, and inviting early submissions from stakeholders about what should be considered during the project. Preliminary submissions were initially sought by 10 January 2020, but this was later extended to 28 January to provide stakeholders with adequate time to respond.

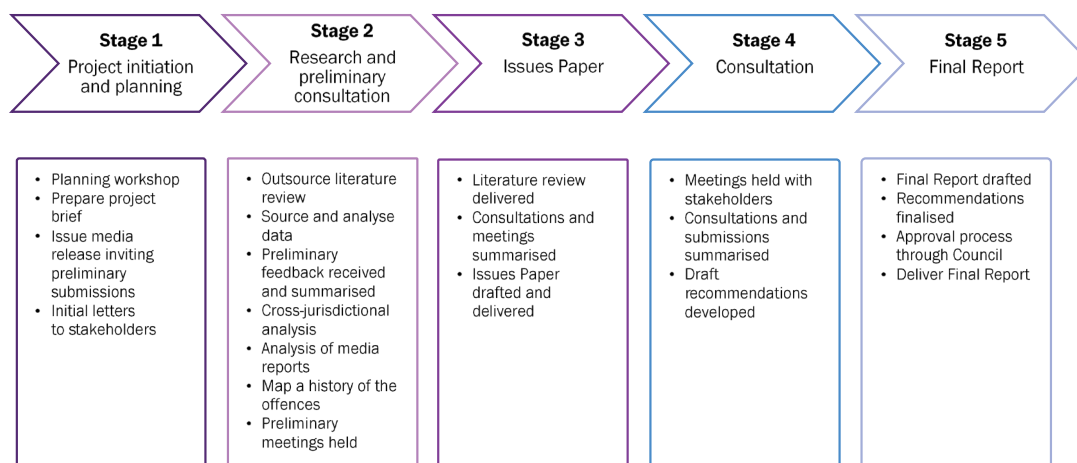
Stage 2 of the project involved the commencement of work on key aspects of the research program, including data and legislative analysis, documenting the history of the relevant legislative

² *Criminal Code Act 1899* (Qld) sch 1 (‘*Criminal Code*’).

provisions, holding preliminary meetings with data custodians and undertaking an analysis of media reports on the issue. During this phase of the project the Council published an initial high-level analysis of relevant data on serious assault as part of its *Sentencing @ a glance* series, as well as an information sheet on penalties for assaults of public officers. These two documents were placed on the Council's website and were intended to assist stakeholders in identifying areas for further investigation.

The publication of this issues paper — representing Stage 3 of the project — marks the mid-point of the reference, as shown in Figure 1 below.

Figure 1-1: The Council's approach to the Terms of Reference



Following publication of this issues paper, the Council originally envisaged a four-week consultation period for stakeholders to respond to the issues raised to meet its original reporting deadline of 30 June 2020. Stakeholder feedback on the issues raised is critical to inform the Council's deliberations and the development of its recommendations.

However, the Council is conscious that the emergence of the COVID-19 pandemic is placing increasing burdens on a number of frontline and emergency service agencies and employee unions whose staff and members are also those most likely to be directly affected by any recommendations the Council might make. Responding to the current health crisis must necessarily take priority.

The recent extension granted by the Attorney-General has allowed the Council to extend the consultation period to 8 weeks to provide stakeholders with additional time to consider and respond to the number of complex issues this paper raises.

To ensure the safety of all those involved in consultation, and in compliance with Commonwealth and State government advice about the importance of social distancing, the Council has determined that any consultation will be undertaken by phone, videoconferencing and email, with written submissions also strongly encouraged.

The Council's website is the best place to get the latest information about the review and applicable timeframes.

The final report will be drafted in Stage 5.

1.4 Scope of the project

Early in the life of the project, the Council considered whether there were any matters that should be excluded from the analysis undertaken for the project. Some of these issues have arisen as a result of the quality of data recorded and maintained in relation to sentencing for assault offences. For example, the Council was not able to determine whether there were assaults on public officers charged under general offence provisions under the *Criminal Code* such as the offences of grievous bodily harm (s 320), wounding (s 323) and assault occasioning bodily harm (s 339). This is because the identity of the victim is not recorded in a reliable way in the data. Even if the victim's occupation was reliably recorded, it would not be possible to identify whether the victim was assaulted while at work or because of a function performed in their work capacity. Consequently, only sentencing outcomes for the offence of serious assault and specific offences that, by their nature, are committed against identified classes of public officers (e.g. police and corrective services officers) could be examined for the purposes of the Council's work.

Offences that resulted in an outcome of a police caution or other diversionary option were excluded, as these are not sentences imposed under the PSA or the *Youth Justice Act 1992* (Qld).

The Council agreed that fatal assaults also would not be considered as part of this Terms of Reference, taking into account the main focus of the reference was on the offence of serious assault under section 340 of the *Criminal Code*, and other assault-related offences, and that these offences would be likely to be prosecuted as a homicide.

The Council also scoped out the *Criminal Code* offences of assault with intent to commit rape (s 351) and sexual assault (s 352) from being investigated as part of this review. Assaults with a sexual motivation may well be committed against public officers while they are working, but the Council is concerned that including this kind of offending in the Council's analysis could distort findings and distract from the main emphasis of the Terms of Reference. There was no suggestion by stakeholders in preliminary submissions that specific sexual offences should be examined.

The Council did not undertake a detailed analysis regarding the sentencing regime for juveniles in Queensland or in other jurisdictions, although it has considered these issues in the context of the specific advice the Council has been asked to provide about the appropriateness of sentencing responses more generally. Nor did the Council consider matters dealt with by the Mental Health Court, on the basis this court is not a sentencing court and the orders made are not sentencing orders.

Finally, the Council considered that the issue of what offence a person is charged with — that is, charging practices of police officers — would be a much broader issue that could not be adequately addressed as part of this reference although, in response to preliminary feedback received, the issue of whether additional guidance is required is discussed and views invited in relation to this matter. As outlined in Chapter 3, an assault of a public officer could result in a number of different charges, depending on the level of harm arising from the offence. Decisions by police officers as to which offence they decide to initially charge was regarded by the Council as a matter that precedes prosecution and sentencing, and therefore falls outside the Council's functions.

1.5 Data used in this paper

In the early stages of the project, the Council wrote to a number of public sector agencies to seek access to information about assault incidents occurring against their staff that had been reported internally during the period 2014–15 to 2018–19. Data were provided by:

- Queensland Health;
- the Queensland Police Service;
- the Queensland Ambulance Service;

- Queensland Fire and Emergency Services;
- Queensland Corrective Services;
- the Department of Justice and Attorney-General;
- the Department of Youth Justice; and
- the Department of Education.

In addition, the Council wrote to WorkCover Queensland and received unpublished claims data for the period 2015–16 to 2018–19, which documents accepted claims regarding assault of a public officer. Additional data was sought and obtained from Victim Assist Queensland on claims made by public officers that resulted from an assault in the workplace. As part of their submission to the Council, the Office of Industrial Relations provided data extracted from its incident notifications dataset, which records reported incidents of workplace violence.

The Council also wrote to the Public Service Commission and received data on numbers of officers employed in the Queensland public service. These figures were used to calculate rates and contextualise the number of assaults that occurred in the public sector.

As is usual practice for the Council when undertaking a Terms of Reference project, the Council also used sentencing data from the Queensland Government Statisticians Office (QGSO). For the purposes of this reference, it looked at all sentencing outcomes for the period 2009–10 to 2018–19 where the case involved:

- serious assault of a public officer (*Criminal Code* s 340(2AA));
- assault or obstruction of a corrective services officer (*Corrective Services Act 2006* (Qld) s 124(b));
- assault or obstruction of a watch-house officer (*Police Powers and Responsibilities Act 2000* (Qld) s 655A);
- assault or obstruction of a police officer (*Police Powers and Responsibilities Act 2000* (Qld) s 790);
- resisting a public officer (*Criminal Code* s 199);
- grievous bodily harm (*Criminal Code* s 320);
- torture (*Criminal Code* s 320A);
- assault occasioning bodily harm (*Criminal Code* s 339(1));
- wounding (*Criminal Code* s 323); and
- common assault (*Criminal Code* s 335).

Sentencing for this broader range of assault offences was sought to enable comparison between sentencing trends for different types of assault and assault-related offences.

Data is presented in Chapters 2 and 5 of this report.

1.6 Outline of the issues paper

The remaining chapters of this issues paper are set out below:

- Chapter 2 – A profile of assaults on public officers
- Chapter 3 – Current offence framework in Queensland
- Chapter 4 – Sentencing process and framework in Queensland
- Chapter 5 – Sentencing outcomes for assaults on public officers
- Chapter 6 – The approach in other jurisdictions
- Chapter 7 – Aggravated assault based on victim status
- Chapter 8 – Responding to the needs of victims
- Chapter 9 – Offence and sentencing framework – issues and options
- Chapter 10 – Enhancing community knowledge and understanding.

Chapter 2 A profile of assaults on public officers

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.

The following section of this chapter is a direct extract of the executive summary of this report,³ which can be found on the Council's website.

2.1 Literature review: executive summary

Over the past decade or so, there has been growing concern expressed about assaults on public officers, both by workers themselves as well as the public. Although Queensland, like other Australian jurisdictions, has an aggravated offence of serious assault when victims are public officers performing their professional duties, the questions about the adequacy of these laws continues to be questioned. In response to these unresolved concerns, in December 2019, the Queensland Government tasked the Queensland Sentencing Advisory Council (QSAC) to examine and report on the penalties for assaults on police officers, other frontline emergency service workers, corrective services officers, public transport drivers and other types of public officers.

As part of this referral from the government, QSAC commissioned a literature review to identify and assess the *empirical* research evidence about:

- the incidence and context of (particularly the causes and contributing factors, as well as the frequency and seriousness) assaults on public officers;
- the impact of penalty and sentencing of assaults, sentencing frameworks and push for reforms, as well as the impact and outcome of these reforms on this type of offending.

A broad conceptualisation of “public officer” was used, including: those working at the frontline in the justice sector; those providing services in the public health sector; those working in state schools; and those providing public transit services. The literature review focuses on the state of knowledge based on available empirical research and does *not* include a jurisdictional overview of legislation and case law.

What do we know about the incidence of assaults on public officers?

Overall, estimates of the prevalence of, and trends in, assaults against public officers, are not easily made. Different data sources, different definitions of violence, and different time periods make it difficult to make comparisons between different types of public officers. Although the majority of studies focused on physical assault, there was a sufficient number of studies that defined workplace violence more broadly. In other words, more reliable studies are required to provide a robust empirical assessment of the extent of assaults against public officers.

With that limitation, the research suggests that, at least in Australia, New Zealand, the United Kingdom (UK) and Canada:

- rates of the incidence of assault may be lowest among firefighters, and highest in the health and welfare sectors;
- the most common type of assault against public officers does *not* involve weapons or result in serious injury;

³ Christine Bond et al, *Assaults on Public Officers: A Review of Research Evidence* (Griffith Criminology Institute for Queensland Sentencing Advisory Council, March 2020) iii to vi.

- assaults in the workplace are more commonly *reported* by male staff than female staff, across a range of occupational groups.

Trends in the incidence of assaults against public officers are more difficult to assess, due to possible changes in reporting and the environment (in addition to methodological limitations). More recent research suggests that, at least for those in the justice sector, assaults against public officers may have declined. However, this may not be the case for those in the healthcare and welfare sector.

Research also suggests that assaults are *more* likely in particular circumstances or conditions, such as:

- perpetrators involved in substance abuse, *at least in the healthcare sector*;
- perpetrators with poor mental health, across a number of sectors;
- perpetrators with current or past history of violent behaviour;
- officers with less experience on the job;
- operational workplace characteristics, which may vary by sector (such as understaffing in the healthcare sector, and ticketing and timetabling issues in the public transit sector).

Although conclusions about the trends and extent of assaults against public officers are made tentatively, the impact of these assaults on both victims and organisation should not be overlooked. For victims, research documents detrimental impacts such as: negative consequences for emotional and physical well-being; decreased connectedness to the organisation; lack of a desire to remain in the occupation; and reduced job performance, including increased errors. However, the extent of the organisational costs – such as lost productivity and high staff turn-over – of these assaults has been largely understudied, especially outside the health sector and the United States. A 2011 Australian study of accepted workers' compensation claims made by police officers estimated an average of 587 work hours per claim (ranging from claims for one hour to over 11, 840 hours) was lost due to injuries caused by the broader category of occupational violence.

What do we know about the sentencing of assaults on public officers?

The Griffith Criminology Institute's literature review also addresses the issue of penalty enhancements or mandatory minimum sentencing schemes for assaults against public officers in common law jurisdictions and the justifications for, and evidence regarding effectiveness of, such schemes. The findings of this review are discussed in Chapter 9 (Offence and sentencing framework: issues and options).

The conclusion reached is:

although amendments to sentencing frameworks can clearly communicate the unacceptability of the behaviour, prevention strategies may be 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.

Prevention strategies, reproduced from the Griffith University's literature review, are discussed in section 2.1.1 below.

2.1.1 Prevention strategies

The types of interventions that have been discussed in research fall into three groups:

- focusing on the *relationship of the officer with the "client"* (e.g. appropriate risk assessment tools, training in skills to de-escalate interactions, clearer instructions and policies for the public).

- focusing on the *workplace environment* (e.g. physical barriers, the organisation of the workplace, public awareness/education posters, surveillance technology).
- focusing on the *relationship of the officer with the organisation* (e.g. simpler and clearer internal reporting processes, supportive management, a culture of safety).

The under-reporting of workplace assaults by victims complicates the identification and implementation appropriate responses and strategies. The reasons for under-reporting are not dissimilar to those found in other victimisation contexts. However, from the small number of studies available, particular barriers to reporting include: confusing internal reporting process; lack of internal support after the assault; dissatisfaction with the response of managers to an incident; and minimisation of the significance of the incident due to the nature of the perpetrator (e.g. may have poor mental health).

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

2.2 Frequency of assaults on public officers

While assessing the seriousness of offending requires a complex and multifaceted approach, for the purpose of this review, only limited analysis was feasible due to time constraints and data availability. This chapter reports on the frequency of assaults against different groups of public officers.

As highlighted in the Griffith University literature review, the findings of which are summarised above, certain occupational groups are less likely to report assaults committed against them. Public officers working in care professions, including health care, education, and emergency response sectors, under-report assaults committed against them as the professional orientation of these professions inhibits reporting. For example, some professionals may view occupational violence as ‘part of their job’.⁴ The issue of under-reporting is expanded at the beginning of Chapter 8 of this paper.

The Council obtained data from a range of public sector agencies on the number of incidents reported internally which involved the assault of a public officer from 2014–15 to 2018–19. Further data was obtained from WorkCover Queensland on the number of accepted claims which involved the assault of a public officer. These figures are displayed in Table 2-1 below.

⁴ Ibid [3.2].

A conversion rate was calculated by dividing the number of accepted WorkCover claims by the number of incidents reported by each agency. Employees in the health sector had the lowest conversion rate, with only 6.1 per cent of reported incidents resulting in an accepted WorkCover claim. The Queensland Ambulance Service had a conversion rate of 12.0 per cent – twice that of Queensland Health, but comparatively low in relation to other agencies. Police officers had a higher conversion rate, with 33.7 per cent of reported incidents leading to an accepted WorkCover claim. Similarly, corrective services officers also had a higher conversion rate, with 36.0 per cent of incidents resulting in an accepted claim.

Table 2-1: Number of reported incidents and accepted WorkCover claims for assaults of public officers, 2014–15 to 2018–19

| Agency | Reported Incidents | Accepted WorkCover claims | Conversion rate |
|---|--------------------|---------------------------|-----------------|
| Queensland Health | 34,844 | 2,109 | 6.1% |
| Queensland Ambulance Service | 1,656 | 199 | 12.0% |
| Queensland Fire and Emergency Service | 19 | 3 | 15.8% |
| Queensland Police Service – Police Officers | 9,103 | 3,064 | 33.7% |
| Queensland Corrective Services – Prison staff* (2018–19 only) | 333 | 120 | 36.0% |
| Youth Justice – Detention centre staff* (2018–19 only) | 121 | 19 | 15.7% |

Source: Incident data provided by individual agencies – unpublished data, 2014–15 to 2018–19. Claims data provided by WorkCover Queensland – unpublished data, 2014–15 to 2018–19.

Note: Incident data from different agencies is sourced from different administrative systems and may not be directly comparable. Incident data from Queensland Corrective Services and Youth Justice reflects the number of incidents recorded in prison and detention facilities involving a staff member. Data from the Queensland Police Service reflects the number of assaults of on-duty police officers that were charged. Data from Queensland Health, Queensland Ambulance Service and Queensland Fire and Emergency Service reflects the number of incidents involving the assault of a staff member that were reported internally.

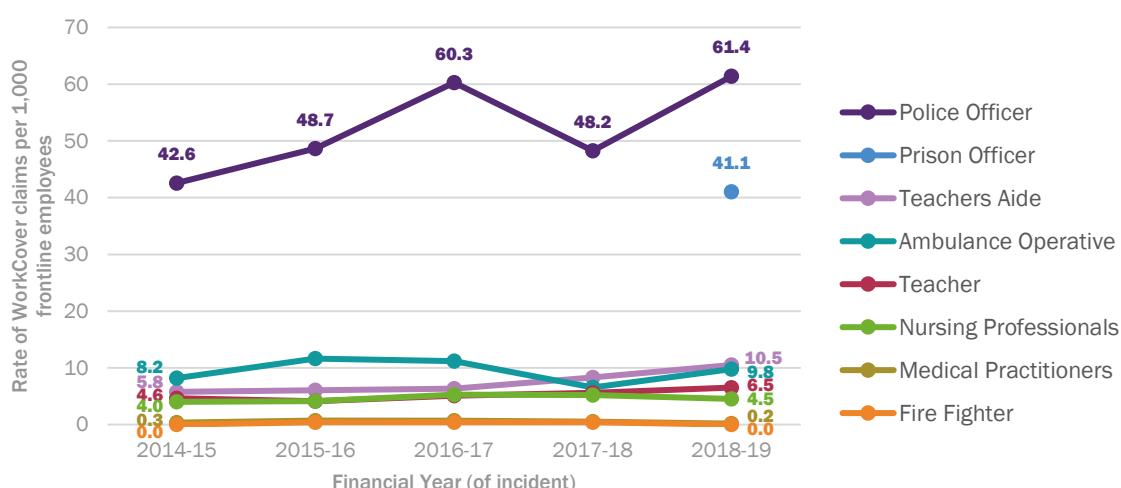
* Due to Machinery-Of-Government changes, only includes data from 2018–19.

The number of accepted WorkCover claims can provide an indication of which public sector agencies are affected by assaults. However, due to differences in reporting rates between different professions (discussed above) some occupational groups may under-report more so than others. The amount of harm caused may also affect the number of claims accepted by WorkCover; that is, assaults that result in medical costs or time off work may be more likely to result in a WorkCover claim. Table A4–1 in Appendix 4 provides a breakdown of the number of accepted WorkCover claims by agency and occupation from 2014–15 to 2018–19. It is important to note that some occupational groups have many more employees compared to other occupational groups. As such, data between agencies is not comparable. For comparable data, refer to Figure 2-1 below which reports the number of accepted WorkCover claims reported as a rate of workers employed in those roles.

In 2018–19, the Queensland Police Service (QPS), Department of Education, and Department of Health reported the highest number of accepted WorkCover claims resulting from an assault of a staff member (n=742, 634, and 368 respectively, excluding guards and security officers). Queensland Corrective Services, and the Department of Child Safety, Youth and Women also reported a large number of accepted WorkCover claims (n=137, and 120 respectively, excluding guards and security officers). Guards and security officers accounted for 61 claims, across a range of agencies. While the number of assaults in other agencies (such as the Queensland Ambulance Service) were relatively low, it is important to note there are also fewer workers employed in these agencies – see Figure 2-1 for further context.

Figure 2-1 shows the rate of accepted WorkCover claims per 1,000 employees, where the claim was the result of the assault of a public officer. Police officers had the highest rate, which has increased over the past 5 years, from 42.6 claims per 1,000 officers in 2014–15 to 61.4 claims per 1,000 officers in 2018–19. Prison officers (of both adult prison and juvenile detention centres) had the second highest rate of claims, with 41.1 accepted WorkCover claims per 1,000 officers in 2018–19. The remaining occupational groups for which data was available were relatively low in comparison. There were 9.8 accepted WorkCover claims per 1,000 ambulance operatives in 2018–19. Teachers' aides had a rate of 10.5 claims per 1,000 employees in 2018–19, which was higher than the rate of 6.5 for teachers.

Figure 2-1: Rate of accepted WorkCover claims per 1,000 employees for assault of public officers, 2014–15 to 2018–19



Source: Claims data provided by WorkCover – unpublished data, 2014–15 to 2018–19. Rates calculated from the number of frontline workers as provided by the Queensland Public Service Commission – unpublished data, 2014–15 to 2018–19.

Note: Prison officers were not identified as a discrete group prior to 2018–19.

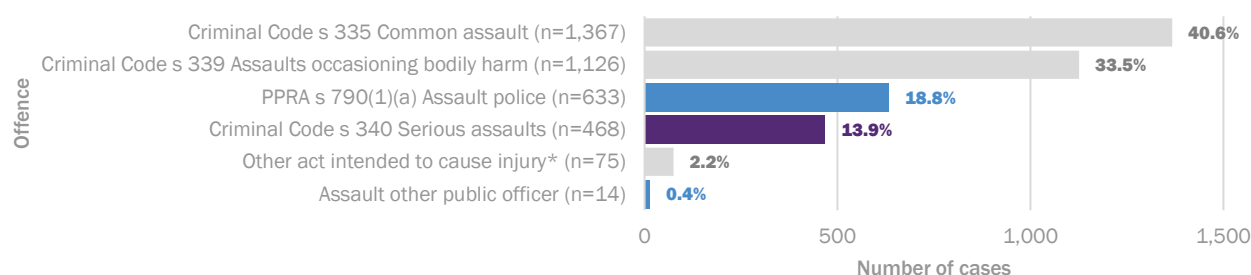
2.3 Sentenced acts intended to cause injury

As discussed above, not all cases involving the assault of a public officer are reported. Even fewer cases proceed to a WorkCover claim, or result in criminal charges. The remainder of this chapter discusses those cases which resulted in a conviction for an offence sentenced by a Queensland Court.

The Australian and New Zealand Standard Offence Classification (ANZSOC) is used to classify offences into broad categories for statistical purposes. To ascertain the prevalence of serious assaults, Figure 2-2 shows a breakdown of all offences falling within the broad offence category of ‘acts intended to cause injury’. This category includes offences which cause non-fatal injury or harm to another person where there is no sexual or acquisitive element and includes offences such as common assault and assaults occasioning bodily harm (AOBH). As the ANZSOC classification is a national classification, its broad categories may not always account for the elements of offences as they exist in individual jurisdictions. As such, it is important to note that in the Queensland context, some offences which are classified under ‘acts intended to cause injury’ do not actually require an ‘intent’ to injure, and the classification might more accurately be thought of as ‘assaults which cause harm’.

Assaults against a public officer make up a substantial proportion of all acts intended to cause injury sentenced in Queensland Courts — see Figure 2-2. Assault of a police officer under section 790 of the *Police Powers and Responsibilities Act 2000* (Qld) ('PPRA') accounted for 18.8 per cent of all acts intended to cause injury. An additional 13.9 per cent of cases involved a serious assault. A further 0.4 per cent of cases involved the assault of a public officer under a different legislative provision. Note that the data in this figure is limited to offences sentenced from 20 September 2018, as prior to this date section 790 of the PPRA did not clearly distinguish between 'assault' and 'obstruction' of a police officer.

Figure 2-2: Number of sentenced cases involving an 'act intended to cause injury'



Data includes: Higher and lower courts, adult and juvenile cases sentenced in 2018–19 where the offence was committed on or after 20 September 2018 (following the amendments to s 790 PPRA).

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

Notes: Totals will add to more than 100%, as a case will be counted multiple times if it contains multiple offences.

For the purposes of this analysis, some offences were recoded from the offence classification of 'resist or hinder government official' to 'acts intended to cause injury'. These included:

- the serious assault of a public officer (Criminal Code s 340(2AA));
- the assault or obstruction of a corrective services officer (*Corrective Services Act 2006* s 124(b));
- the assault or obstruction of a watch-house officer (*Police Power and Responsibilities Act 2000* s 655A); and
- resisting a public officer (Criminal Code s 199).

* Offences with fewer than 30 cases were grouped as 'other act intended to cause injury', these include offences such as unlawful stalking (n=27), wounding (n=21), strangulation (n=15), grievous bodily harm (n=5) and others.

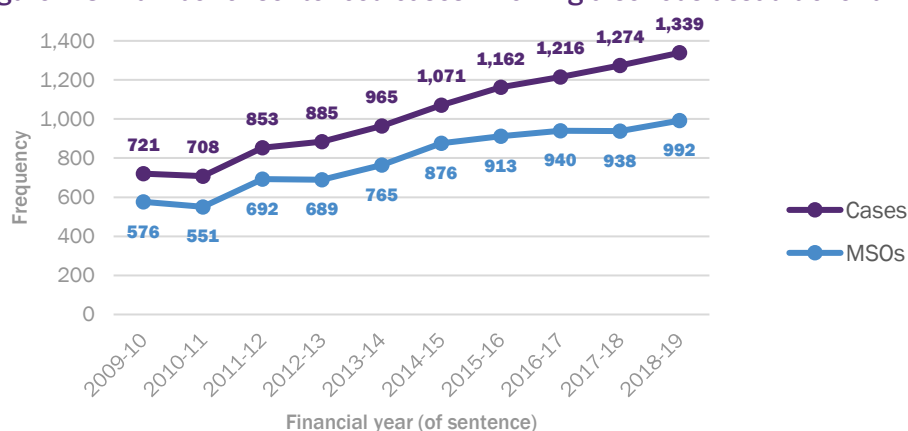
2.4 Serious assault trends

9,061 OFFENDERS SENTENCED FOR
SERIOUS ASSAULT
IN THE PAST 10 YEARS

7,932 CASES
WHERE SERIOUS ASSAULT WAS THE
MOST SERIOUS OFFENCE

Overall, the total number of sentenced cases involving a serious assault under section 340 of the *Criminal Code* has increased over the past 10 years. From 721 cases in 2009–10 to 1,339 cases in 2018–19, an increase of 85.7 per cent – see Figure 2-3. The chart below includes all cases involving a serious assault, regardless of whether the serious assault was the most serious offence (MSO).

Figure 2-3: Number of sentenced cases involving a serious assault over time



Data includes: Higher and lower courts, adult and juvenile cases sentenced between 2009–10 and 2018–19.
Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

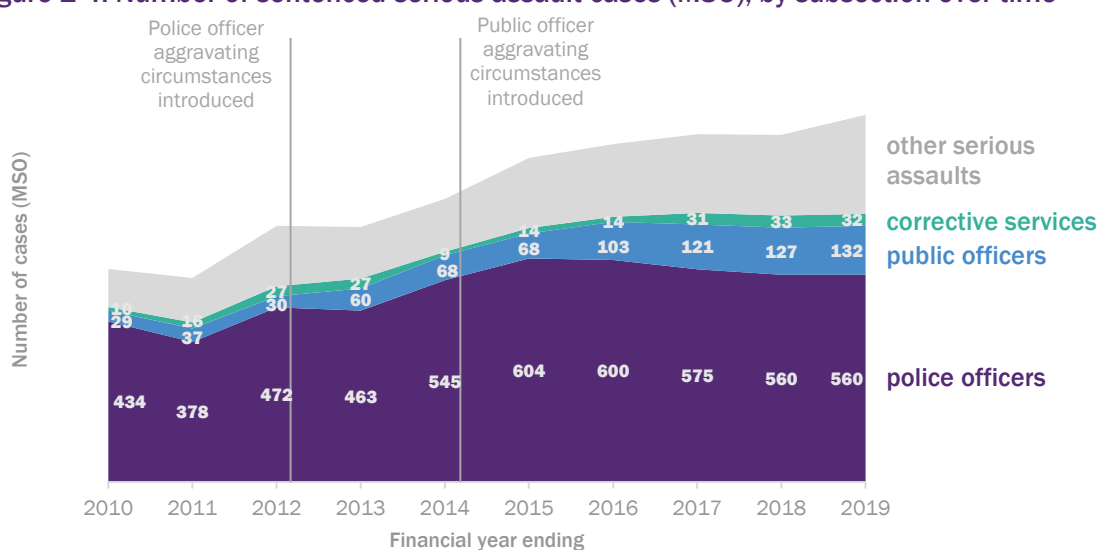
Figure 2-4 (below) provides a breakdown of the types of serious assault over time.

The number of serious assaults of a police officer increased by 39.2 per cent from 2009–10 to 2014–15; however, since 2014–15, the number of serious assaults involving a police officer as the victim has declined by 7.3 per cent.

The QPS Violent Confrontations Review, undertaken by QPS following five fatal police shootings in 2013–14, observed a 15.2 per cent reduction of all reported assaults of on-duty police officers between 2012 and 2014. The review identified the increased use of ‘accoutrements (O/C Spray, Taser and firearms) which are traditionally deployed from a greater distance between the subject and police officer’ as a possible contributing factor.⁵

The number of assaults of public officers more than quadrupled over the data period, from 29 cases (MSO) in 2009–10 to 132 in 2018–19. Over the same period, the number of employees in the public sector increased by 18.8 per cent.

Figure 2-4: Number of sentenced serious assault cases (MSO), by subsection over time



Data includes: Higher and lower courts, adult and juvenile cases (MSO) sentenced between 2009–10 and 2018–19.

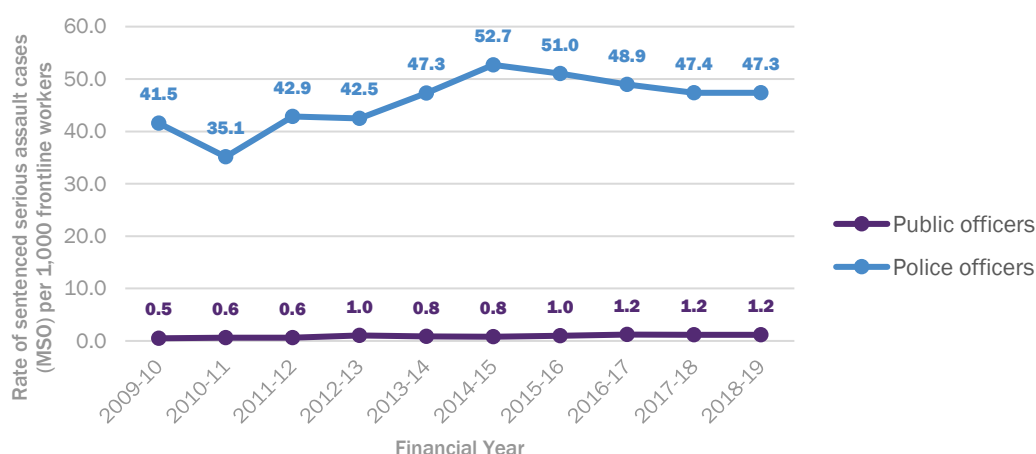
Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

Note: ‘Other’ includes offences charged under sections 340(1)(a) (assault with intent to commit a crime or to resist arrest/detention; n= 169); 340(1)(c)–(d) (assault any person who is performing, or has performed a public duty; n=220), 340(1)(f) (unlawful conspiracy in trade; n=1), 340(1)(g) (assault of a person 60 years and over; n=1,329), and 340(1)(h) (assault of a person with a disability; n=32), as well as serious assaults which are not further defined (n=2)

⁵ Queensland Police Service, Violent Confrontations Review Team, Operational Capability Command, *QPS Violent Confrontations Review* (undated) <<https://www.police.qld.gov.au/sites/default/files/2018-12/QPS%20Violent%20Confrontations%20Review.pdf>> 23.

The decrease in serious assaults against police officers in recent years is even more notable considering the number of police officers in Queensland has increased by 3.2 per cent over the same period (2014–15 to 2018–19). Figure 2-5 shows the rate of sentenced serious assault cases per 1,000 frontline employees. In 2014–15, there were 52.7 sentenced cases involving the assault of a police officer (MSO) per 1,000 officers, this rate reduced to 47.3 in 2018–19. Over the same time period, the rate of assaults of public officers increased a very small amount, from 0.8 sentenced cases per 1,000 frontline workers in 2014–15 to 1.2 in 2018–19.

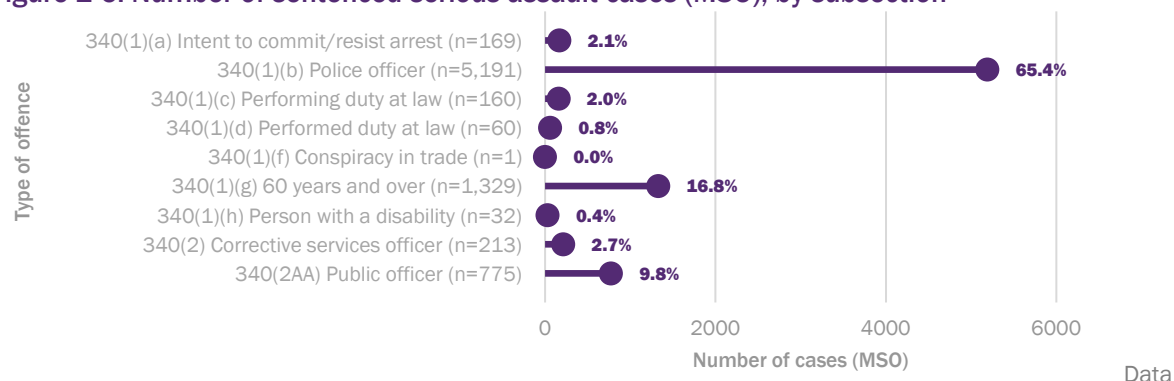
Figure 2-5: Rate of sentenced serious assault cases (MSO) per 1,000 frontline employees over time



Data includes: Higher and lower courts, adult and juvenile cases (MSO) sentenced between 2009–10 and 2018–19. Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019. Rates calculated from the number of frontline workers provided by the Queensland Public Service Commission – unpublished data, 2014–15 to 2018–19. Note: Public officers includes serious assaults of corrective services officers under s 340(2), public officers under s 340(2AA), and those performing or who performed a duty imposed at law under s 340(1)(c) and s 340(1)(d).

The serious assault of a police officer was, by far, the most common type of serious assault, accounting for 65.4 per cent of cases sentenced under section 340. The second most frequently sentenced type of serious assault involved people aged 60 years and over (16.8%). Public officers were the third largest category (9.8%). The remaining types of serious assault only account for small percentages of all serious assault cases, including cases involving a serious assault charge under sections 340(1)(c) (assault of a person performing a duty at law) and 340(1)(d) (assault of a person who has performed a duty at law), as well as 340(2) assault of a working corrective services officers at a corrective services facility.

Figure 2-6: Number of sentenced serious assault cases (MSO), by subsection



includes: Higher and lower courts, adult and juvenile cases (MSO) sentenced between 2009–10 and 2018–19. Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

2.5 Serious assault of public officers

While the offence of serious assault (s 340 of the *Criminal Code*) extends to a variety of different types of victims, including people 60 years and over and people with a disability, this section of the report focuses solely on cases involving the assault of a police officer, corrective services officer or public officer (including offences charged under ss 340(1)(c)–(d)).

The vast majority of cases involving serious assault of a public officer over the data period were sentenced in the Magistrates Courts (82.8%, n=6,847) — see Table 2-2. The remaining 17.2 per cent of cases were heard in the higher courts (District and Supreme Courts) (n=1,427).

Table 2-2: Number of serious assaults of a public officer, by type of court

| Court Level | Charges | Offenders | Cases | MSO |
|--------------|------------------------|-----------------------|-----------------------|-----------------------|
| Magistrates | 9,073 (80.1%) | 6,185 (84.1%) | 6,847 (82.8%) | 5,540 (86.6%) |
| District | 2,158 (19.1%) | 1,307 (17.8%) | 1,361 (16.4%) | 854 (13.3%) |
| Supreme | 93 (0.8%) | 65 (0.9%) | 66 (0.8%) | 5 (0.1%) |
| Total | 11,324 (100.0%) | 7,354 (100.0%) | 8,274 (100.0%) | 6,399 (100.0%) |

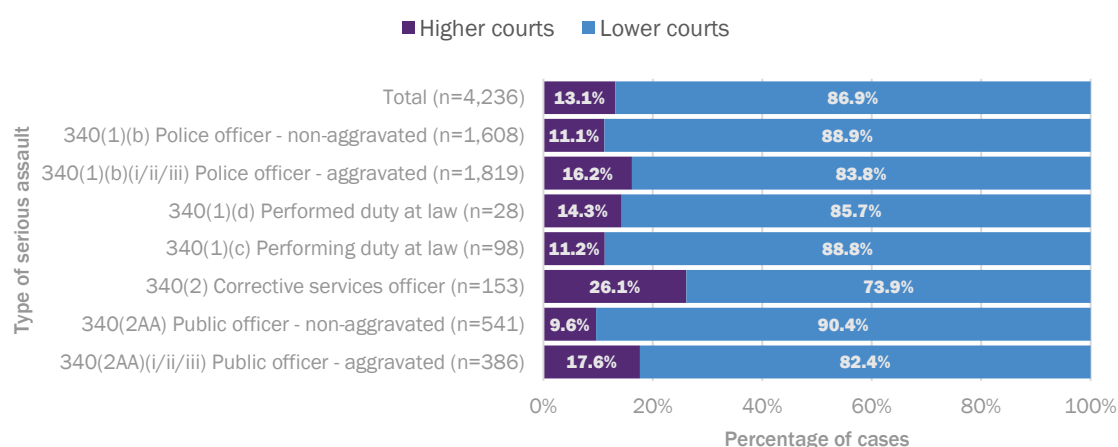
Data includes: Adult and juvenile cases sentenced between 2009–10 and 2018–19.

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

Note: Includes serious assaults that involved a public officer, including: s 340(1)(b) Police officers, s 340(1)(c) person performing a duty imposed by law, s 340(1)(d) person who performed a duty imposed by law, s 340(2) corrective services officers, s 340(2AA) public officers.

While most cases involving a serious assault are heard in the Magistrates Courts, some types of serious assault are more likely to be dealt with in the higher courts compared to others. Serious assaults of working corrective services officer by prisoners who are either in prison or on parole, are the most likely type of serious assault to be sentenced in the higher courts (26.1%). The non-aggravated assault of a public officer are the least likely type of serious assault to be dealt with by the higher courts, with 90.4 per cent of these cases sentenced in the Magistrates Courts — see Figure 2-7.

Figure 2-7: Proportion of serious assault of a public officer cases by offence type



Data includes: Adult and juvenile cases sentenced between 2014–15 and 2018–19 where the offence was committed on or after 5 September 2014.

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

2.6 Demographics of offenders sentenced for serious assault of a public officer

The majority of offenders sentenced for the serious assault of a public officer (MSO) under section 340 of the *Criminal Code* were male (69.6%), non-Indigenous (62.0%) and relatively young (median age=26.5 years).

The figures below compare the demographic profile of offenders who were sentenced for the serious assault of a public officer, compared to the demographic profile of all offenders sentenced for an act intended to cause injury. Female offenders were more likely to be sentenced for a serious assault (30.4%) compared to other acts intended to cause injury (23.7%).

Aboriginal and Torres Strait Islander offenders were also more likely to be sentenced for a serious assault (38.0%), than an act intended to cause injury offence (32.2%). The proportion of Aboriginal and Torres Strait Islander offenders sentenced for an act intended to cause injury was also much higher than the proportion of Aboriginal and Torres Strait Islander offenders sentenced for other types of offences (18.5%).

The median age of offenders who were sentenced for a serious assault was slightly younger (26.5 years) compared to other acts intended to cause injury (27.0 years), and also younger than the average age of offenders across all sentenced offences (29.2 years).

Serious assault of a public officer

30.4%

female

38.0%

Aboriginal and Torres
Strait Islander

26.5

Median age

All acts intended to cause injury

23.7%

female

32.2%

Aboriginal and Torres
Strait Islander

27.0

Median age

All sentenced offences

24.4%

female

18.5%

Aboriginal and Torres
Strait Islander

29.2

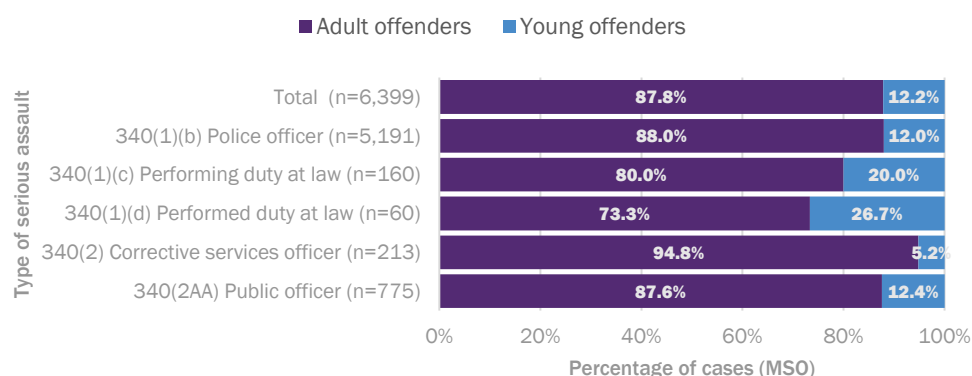
Median age

Data includes: Higher and lower courts, adult and juvenile cases (MSO), sentenced between 2009–10 and 2018–19, excludes cases where demographic data is unknown.

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

Over the period 2009–10 to 2018–19, 12.2 per cent of offenders sentenced for the serious assault of a public officer were young offenders who were sentenced under the *Youth Justice Act 1992* (Qld) (n=778). The proportion of young offenders was higher for assaults of people who performed, or were performing, a duty imposed at law (26.7% and 20.0% respectively) – see Figure 2-8.

Figure 2-8: Percentage of young offenders sentenced for serious assault (MSO)



Data includes: Higher and lower court cases (MSO), sentenced between 2009–10 and 2018–19.






Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

2.7 Associated offences

2.7.1 Cases where serious assault of a public officer was not the most serious offence

In the 2,829 cases involving the serious assault of a public officer where the serious assault was not the MSO, the MSO most commonly was AOBH (n=438, 15.5%) or burglary (n=184, 6.5%) – see Figure 2-9.

Figure 2-9: Top 5 MSOs in cases where serious assault of a public officer was not the MSO

| Offence | Cases |
|---|--------------------|
|  Assaults occasioning bodily harm <i>Criminal Code (Qld) s 339</i> | 438 (15.5%) |
|  Burglary <i>Criminal Code (Qld) s 419</i> | 184 (6.5%) |
|  Assault or obstruct police officer <i>Police Powers and Responsibilities Act 2000 s 790</i> | 123 (4.3%) |
|  Dangerous operation of a vehicle <i>Criminal Code (Qld) s 328A</i> | 113 (4.0%) |
|  Robbery <i>Criminal Code (Qld) s 411</i> | 96 (3.4%) |

Data includes: Higher and lower courts, adult and juvenile cases (MSO), sentenced between 2009–10 and 2018–19.









Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

2.7.2 Cases where serious assault of a public officer was the most serious offence

The offence most commonly sentenced alongside serious assault (MSO) was the assault or obstruction of a police officer under section 790 of the PPRA (n=2,801, 27.5% of cases). The offence of public nuisance was sentenced alongside serious assault (MSO) in 18.0 per cent of cases (n=1,832).

Wilful damage, under section 469 of the *Criminal Code*, was another offence that was often sentenced alongside the serious assault of a public officer (MSO) (n=1,143, 11.2%).

Figure 2-10: Top eight associated offences sentenced with the serious assault of a public officer (MSO)

| Offence | Cases |
|---|----------------------|
|  Assault or obstruct police officer <i>Police Powers and Responsibilities Act 2000 s 790</i> | 2,801 (27.5%) |
|  Public nuisance <i>Summary Offences Act 2005 s 6</i> | 1,832 (18.0%) |
|  Wilful damage <i>Criminal Code (Qld) s 469</i> | 1,143 (11.2%) |
|  Breach of bail – failure to appear <i>Bail Act 1980 s 33</i> | 621 (6.1%) |
|  Possessing dangerous drugs <i>Drugs Misuse Act 1986 s 9</i> | 580 (5.7%) |
|  Breach bail condition <i>Bail Act 1980 s 29</i> | 577 (5.7%) |
|  Stealing <i>Criminal Code (Qld) s 398</i> | 560 (5.5%) |
|  Contravene direction of police officer <i>Police Powers and Responsibilities Act 2000 s 791</i> | 522 (5.1%) |

Data includes: Higher and lower courts, adult and juvenile cases (MSO), sentenced between 2009–10 and 2018–19. Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

The analysis of associated offences clearly indicates that serious assaults are frequently committed in conjunction with other police officer-specific assault/obstruct offences, public order offences, offences relating to breaches of bail conditions, and drug offences.

2.8 Summary

Data from the public sector shows a variety of different types of workers that are affected by assaults in the workplace; from police officers to paramedics, teachers to health professionals. The type of assault, and circumstances of offending behaviour varies substantially between different occupational groups.⁶

Assaults against public officers have a significant impact on victims, including reduced job performance, and consequences for the organisation as a whole, such as lowered productivity and difficulties in retaining staff.⁷ These issues are explored further in Chapter 8 of this report.

Factors relating to the perpetrator, the staff member and situational factors were identified which impact on the prevalence of assaults of public officers. Perpetrators with drug or alcohol problems, mental health issues, or a history of violence were more likely to assault a public officer.⁸ Staff-centric factors such as gender and level of experience affected the likelihood of assault.⁹ Finally,

⁶ Bond et al (n 3) [2.1.2].

⁷ Ibid [3.2.1].

⁸ Ibid [2.2.1].

⁹ Ibid [2.2.2].

situational factors, such as frequent contact with clients and overcrowded environments lead to more assaults.¹⁰

The analysis of offences commonly sentenced alongside the serious assault of a public officer suggests that serious assaults commonly occur in conjunction with offences related to the obstruction of a police officer, public order offences, and/or breaches of justice procedures.

The demographic breakdown of offenders shows there is a higher proportion of female offenders sentenced for serious assaults compared to other acts intended to cause injury. Aboriginal and Torres Strait Islander people comprised a higher proportion of serious assaults, compared to other categories of offences. The age of offenders sentenced for a serious assault was somewhat younger than the age of offenders for other types of offences.

Overall, the number of accepted WorkCover claims for the assault of a public officer increased over the past five years. Police officers have the highest rate of claims, followed by corrective services officers.

Over the past 10 years, the number of sentenced cases involving a serious assault of a public officer has increased considerably. However, when expressed as a rate of cases per the number of frontline workers, the rate is a lot less significant. The majority of cases sentenced under section 340 involved the serious assault of a police officer, although the number of serious assaults of police officers has decreased slightly in recent years.

¹⁰ Ibid [2.2.3].

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

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-defence²² 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

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.

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 describe 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

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 officer³² 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.

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

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 1988³⁸ 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

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

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

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).

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 aggravation⁶³ and mandatory sentence component requiring the making of a community service order in certain circumstances⁶⁴ 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

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

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

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 Queensland⁸⁵ and the Queensland Law Society⁸⁶ 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.

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.

Chapter 4 Sentencing process and framework in Queensland

4.1 *Penalties and Sentences Act 1992 (Qld): purposes, guidelines and factors*

The *Penalties and Sentences Act 1992* (Qld) ('PSA') is the key piece of legislation that guides sentencing for offences in Queensland. The Act has its own purposes as a piece of legislation, and also lists sentencing guidelines and factors which courts must consider.

4.1.1 The purposes of the PSA

Relevant to this review, the purposes of the PSA are —

- (a) collecting into a single Act general powers of courts to sentence offenders; and
- (b) providing for a sufficient range of sentences for the appropriate punishment and rehabilitation of offenders, and, in appropriate circumstances, ensuring that protection of the Queensland community is a paramount consideration; and...
- (d) promoting consistency of approach in the sentencing of offenders; and...
- (f) providing sentencing principles that are to be applied by courts; and...
- (h) promoting public understanding of sentencing practices and procedures.

Consistency in sentencing in this context refers to the application of a consistent *approach* (i.e. using the same purposes and principles) for sentencing similar offences, rather than applying the same sentence.⁹⁴

4.1.2 Sentencing guidelines

Section 9(1) of the PSA sets out sentencing guidelines, limited to the following five (including combinations of them):

- (a) to punish the offender to an extent or in a way that is just in all the circumstances; or
- (b) to provide conditions in the court's order that the court considers will help the offender to be rehabilitated; or
- (c) to deter the offender or other persons from committing the same or a similar offence; or
- (d) to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; or
- (e) to protect the Queensland community from the offender.

The PSA does not suggest that one purpose should be more, or less, important than any other purpose, and in practice, their relative weight must be assessed taking into account the individual circumstances involved. The purposes overlap and none of them can be considered in isolation; they are guideposts to the appropriate sentence, sometimes pointing in different directions.⁹⁵

⁹⁴ Sarah Krasnostein and Arie Freiberg, 'Pursuing Consistency in an Individualistic Sentencing Framework: If You Don't Know Where You're Going, How Do You Know When You've Got There?' (2013) 76(1) *Law and Contemporary Problems* 265, 270–71.

⁹⁵ *Veen v The Queen (No. 2)* (1988) 164 CLR 465, 476 (Mason CJ, Brennan, Dawson and Toohey JJ).

The concept of ‘just punishment’ reflects the principle of proportionality — a fundamental principle of sentencing in Australia. Sentencing courts must ensure the sentence imposed: ‘should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in light of its *objective* circumstances’.⁹⁶

While a sentence must not be ‘extended beyond what is appropriate to the crime merely to protect society’, the propensity of an offender to commit future acts of violence, and the need to protect the community is a legitimate sentencing consideration.⁹⁷

The principle of proportionality is of direct relevance to sentencing courts in setting the duration and intensity of conditions ordered under a community-based sentencing disposition. Courts cannot impose a longer order or attach more onerous conditions (even those directed at the offender’s treatment or rehabilitation), ‘if the resulting order would be disproportionate to the gravity of the offending’.⁹⁸

Deterrence has a forward-looking, crime prevention focus and aims, as a consequence of the penalty imposed, to discourage the offender and other potential offenders from committing the same or a similar offence.⁹⁹

Denunciation in a sentencing context is concerned with communicating ‘society’s condemnation of the particular offender’s conduct’.¹⁰⁰ The sentence imposed represents ‘a symbolic, collective statement that the offender’s conduct should be punished for encroaching on our society’s basic code of values as enshrined within our substantive criminal law’.¹⁰¹

As discussed later in this chapter, there is a long line of authority that deterrence and denunciation are primary sentencing considerations in sentencing for assaults on public officers (although this can be ‘significantly reduced’ in appropriate, unusual circumstances).¹⁰² The need for a salutary penalty in such cases has also been identified.¹⁰³

4.1.3 Sentencing factors

Sections 9(2)–(11) of the PSA set out general and specific sentencing factors to which a court must have regard in sentencing (as they apply to the facts of each case).

⁹⁶ *Hoare v The Queen* (1989) 167 CLR 348, 354 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ) (emphasis in original).

⁹⁷ *Veen v The Queen (No. 2)* (1988) 164 CLR 465, 473, 475 (Mason CJ, Brennan, Dawson and Toohey JJ).

⁹⁸ *Boulton v The Queen* (2014) 46 VR 308, 328 [75] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA). The Court commented that this position was not displaced by the offender’s need to consent to the making of the order: ‘the willingness of the offender to consent to treatment proposed as part of a CCO does not relieve the court of the obligation to ensure that the order remains within the bounds of proportionality’: 328 [76].

⁹⁹ Arie Freiberg, *Fox and Freiberg’s Sentencing: State and Federal Law in Victoria* (Law Book Co, 3rd ed, 2014) 250–51.

¹⁰⁰ *Ryan v The Queen* (2001) 206 CLR 267, 302 [118] (Kirby J).

¹⁰¹ *Ibid* citing *R v M (CA)* [1996] 1 SCR 500, 558 (Lamer CJ).

¹⁰² *R v Ganeshalingham* [2018] QCA 34, 5, 6 (Sofronoff P, Philippides JA and Boddice J agreeing); *R v Whiting* [2009] QCA 338, 3 [15] (Keane JA, Holmes JA and McMeekin J agreeing).

¹⁰³ See, for example: *Queensland Police Service v Terare* (2014) 245 A Crim R 211, 221 [35] and 222 [40] (McMurdo P, Fraser and Gotterson JJA agreeing), *R v Ganeshalingham* [2018] QCA 34, 5–6 (Sofronoff P, Philippides JA and Boddice J agreeing), *R v King* (2008) 179 A Crim R 600, 601–2 [6] (de Jersey CJ, Keane and Holmes JJA agreeing) and 603 [16] (Holmes JA), *R v MCL* [2017] QCA 114, 6–7 [16] Fraser JA, McMurdo JA and Mullins J agreeing), *R v Reuben* [2001] QCA 322, 5 (Davies JA, Williams JA and Byrne J agreeing).

Imprisonment must generally only be imposed as a last resort and a sentence allowing an offender to stay in the community is preferable (section 9(2)(a) of the PSA). However, these two principles do not apply to offences involving the use of (or counselling or procuring the use of, or attempting or conspiring to use) violence against another person, or that resulted in physical harm to another person (section 9(2A) of the PSA).¹⁰⁴

This exception in section 9(2A), and the corresponding list of factors in section 9(3) discussed below, was introduced in 1997 alongside the serious violence offence scheme, which occupies a later part of the PSA.¹⁰⁵ Other amendments included adding ‘deter’ (replacing ‘discourage’) and ‘denounces’ (replacing ‘does not approve of’) in section 9 of the PSA, discussed above. They were stated to be the fulfilment of an election commitment by the then Liberal National Government. The commitment was that:

In determining the appropriate length of a custodial sentence for a *serious violent offender*, a court will take into account the protection of the community as a primary sentencing consideration.¹⁰⁶

The Attorney-General at the time, Denver Beanland, explained that ‘this Bill delivers that promise by amendments to the purposes section and the sentencing guidelines of the Act’.¹⁰⁷ He stated:

While the Act currently mentions protection of the community among the purposes of sentencing, section 9(1), there is nothing in section 9(2), the sentencing principles, requiring the court to actually have regard to the protection of the community as a sentencing consideration. Significantly, the sentencing criteria which might arguably be said to be paramount are those of section 9(2)(a), that prison is a last resort and that a non-custodial sentence is preferable to one of imprisonment. This logically cannot always be the case, and certainly not in the case of serious violent offenders.¹⁰⁸

However, section 9(2A) applies to any offence involving violence or physical harm, thereby reaching beyond the very serious offences to which the serious violent offence scheme applies. In section 9(2A) cases, there are a list of factors in section 9(3) which the court ‘must have regard primarily to’. These relate to:

- the risk of physical harm to any members of the community if a custodial sentence was not imposed, and the need to protect the community from that risk;
- the personal circumstances of any victim;
- the circumstances of the offence, including injury to a member of the public; any loss or damage resulting from the offence;
- the nature or extent of the violence used, or intended to be used;
- any disregard for the interests of public safety;
- the past record of the offender, including any attempted rehabilitation and the number of previous offences of any type committed;

¹⁰⁴ *Penalties and Sentences Act 1992* (Qld) ss 9(2)(a) and 9(2A). See also *R v McLean* [2011] QCA 218, 5 [15] (White JA, Fraser JA and Philippides J agreeing).

¹⁰⁵ *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld) s 6. For an explanation of the serious violent offence provisions, see Queensland Sentencing Advisory Council, *Queensland Sentencing Guide* (2019) 9 < https://www.sentencingcouncil.qld.gov.au/__data/assets/pdf_file/0004/572161/queensland-sentencing-guide.pdf>.

¹⁰⁶ Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1997, ‘Penalties and Sentences (Serious Violent Offences) Amendment Bill – Second Reading’, 595 (Denver Beanland, Attorney-General and Minister for Justice) (emphasis added).

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

- the offender's age, character and personal background/antecedents (including health issues, such as intellectual capacity, family, social, employment and vocational circumstances, and their current way of life and its interaction with the lives and welfare of others);
- any remorse or lack of remorse of the offender;
- any medical, psychiatric, prison or other relevant report in relation to the offender; and
- anything else about the safety of members of the community the court considers relevant.

The Queensland Court of Appeal recently commented on the difference between cases where imprisonment is, and is not, the sentence of last resort:

At the forefront of a sentencing judge's consideration of an offender who falls within s 9(2A) must be the risk to the community on the one hand and the interests of the victim of the offender on the other hand. No longer is the sentence to be seen, in the first instance, from the perspective of the offender who should not, except as a last resort, be sentenced to an actual term of imprisonment. Instead, a judge must place at the forefront of the sentencing process the question whether the risk to the public and to the victim, as well as the circumstances of the victim, point to the need for prison.

This is a large difference from s 9(2). It is justified by the community's abhorrence of the use of violence and the community's expectation that the courts will protect the community when necessary from the risk of further violence by incarcerating the offender. That will deter the particular offender, will deter others from offending and will satisfy a justified need for a sense of retribution.

These considerations are not at the forefront of sentencing nonviolent offenders.¹⁰⁹

There is also a list of general factors, which apply to all cases, including offences of violence:

- the maximum penalty and any minimum penalty for the offence;
- the nature of the offence and how serious the offence was, including:
 - any physical, mental or emotional harm done to a victim, including harm mentioned in a victim impact statement; and
 - the effect of the offence on any child under 16 years who may have been directly exposed to, or a witness to the offence;
- the extent to which the offender is to blame for the offence (culpability);
- any damage, injury or loss caused by the offender;
- the offender's character, age and intellectual capacity;
- the presence of any aggravating or mitigating factor concerning the offender;
- the prevalence of the offence;
- how much assistance the offender gave to law enforcement agencies in the investigation of the offence or other offences;
- time spent in custody by the offender for the offence before being sentenced;
- other sentences imposed on the offender which have an impact on the sentence being imposed (and vice versa);
- submissions made by a representative of the community justice group in the offender's community, if the offender is an Aboriginal or Torres Strait Islander; and
- any other relevant circumstance.

¹⁰⁹ *R v Oliver* [2019] 3 Qd R 221, 227 [26]–[28] (Sofronoff P, Fraser and Philippides JJA agreeing).

The application of these principles by courts in sentencing for serious assault are discussed in section 4.4 of this chapter. Chapter 8 also contains a detailed discussion of the impact of assaults on public officer victims and the relevance of this to sentencing.

4.1.4 Aggravating and mitigating circumstances

Aggravating circumstances are those factors that would increase a sentence. Mitigating circumstances are those that would reduce a sentence. Both can impact on the sentence imposed depending on their relevance and the weight placed on them by the court.

The Court of Appeal has noted that the expression ‘aggravating factors’ is useful because:

it signifies the tendency of such factors to promote a more severe punishment. However, sometimes such factors really reflect the relevance, in the sentencing process, of the interests of the community and the interests of those who have been directly affected by the offence.¹¹⁰

Previous convictions must be treated as an aggravating factor if the court considers they can reasonably be treated as such. This is determined by considering the nature of the previous conviction, its relevance to the current offence, and the time that has elapsed since the conviction.¹¹¹

The fact an offence is a domestic violence offence must be treated as an aggravating factor, unless the court considers it is not reasonable to do so because of the exceptional circumstances of the case.¹¹² This ensures that sentences reflect a specific type of aggravating criminal behaviour in every case in which such behaviour appears, irrespective of what offence is charged. This method is very different to the way that aggravating circumstances, with discrete higher maximum penalties, are grafted into the specific subsections of the actual offence provisions regarding serious assault and assaults occasioning bodily harm. These different approaches are discussed in more detail in Chapters 6 and 9 of this paper.

4.1.5 Guilty plea as a mitigating factor

A Queensland sentencing court must take the offender’s guilty plea into account and may reduce the sentence it would have otherwise imposed had the offender not pleaded guilty (taking into account the timing of the plea).¹¹³ The courts have indicated the more serious the offence, the less significance a plea of guilty will carry in terms of the ultimate sentence imposed. However, even where the offence is quite serious, some reduction in the sentence is warranted in the event of a guilty plea.¹¹⁴

There are three reasons why a guilty plea is generally accepted as justifying a lower sentence than would otherwise be imposed.

¹¹⁰ *R v Patrick (a pseudonym)* [2020] QCA 51, 7 [28] (Sofronoff P, Fraser JA and Boddice J agreeing).

¹¹¹ *Penalties and Sentences Act 1992* (Qld) s 9(10).

¹¹² *Ibid* s 9(10A). For ‘Domestic violence offence’, see *Criminal Code* (Qld) s 1.

¹¹³ *Penalties and Sentences Act 1992* (Qld) s 13.

¹¹⁴ See for example, *R v Bates*; *R v Baker* [2002] QCA 174 (17 May 2002) 11–12 [58] and [60] (Williams JA) where the Court of Appeal allowed an appeal by an offender who received a life sentence on this basis substituting a determinate sentence of 18 years’ imprisonment finding that the failure of the sentencing judge to take the guilty plea into account in mitigation represented an error in the exercise of the sentencing discretion; and *R v Duong, Nguyen, Bui and Quoc* [2002] QCA 151 (30 April 2002) where the Court of Appeal accepted the offenders must receive some benefit for their guilty pleas notwithstanding its lateness: 9 [38]; and that it involved ‘an horrendous crime calling for severe punishment’: 10 [45]. In that instance, sentences of 12 years’ imprisonment on two offenders, and 9 years’ of imprisonment on the others with a SVO declaration were not disturbed on appeal.

First, the plea can be a manifestation of remorse or contrition. The Court of Appeal has cautioned that ‘on sentencing, an offender’s remorse should not be left to inference. If it exists, it should be proved with clarity’.¹¹⁵ An example of this is the attention paid to formal expressions of apology by offenders to public officers assaulted, as identified elsewhere in this chapter.

Secondly, the plea has a utilitarian value to the efficiency of the criminal justice system. It saves public time and money.

Thirdly, in particular cases — especially sexual assault cases, crimes involving children and, often, elderly victims — there is particular value in avoiding the need to call witnesses, especially victims, to give evidence.¹¹⁶

In the absence of remorse by the offender for their actions, the focus moves to the willingness of the offender to facilitate the course of justice.¹¹⁷

As to the utilitarian value of a plea, courts have recognised that the public interest is served by an accused person who accepts guilt and pleads guilty to an offence charged,¹¹⁸ even if there is a high likelihood of conviction had the case proceeded to trial.¹¹⁹ This is because, unless there is some incentive for a defendant to plead guilty, there is always a risk they will proceed to trial if they consider there is nothing to be lost by doing so.¹²⁰

The degree of leniency may vary according to the degree of inevitability of conviction as it may appear to the sentencing judge, but it is always a factor to which a greater or lesser degree of weight must be given.¹²¹

The person’s motive for pleading guilty is not a basis for not taking the plea into account.¹²²

The extent to which a guilty plea may reduce the sentence that would otherwise have been imposed depends in part on how early or late the plea was entered,¹²³ although the circumstances of the case need to be considered. For example, if a person only pleads guilty to an offence after other charges to which he or she was not prepared to plead guilty are withdrawn, it cannot automatically be assumed the person has not pleaded guilty at the earliest opportunity.¹²⁴

¹¹⁵ *R v Randall* [2019] QCA 25, 5 [27] (Sofronoff P and Morrison JA and Burns J).

¹¹⁶ *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, 386 [3]. This principle has been cited with approval by the Queensland Court of Appeal. See, for example, *R v Bates; R v Baker* [2002] QCA 174 (17 May 2002) 14 [76] (Atkinson J).

¹¹⁷ *Cameron v The Queen* (2002) 209 CLR 339, 343 [11], [13]–[14] (Gaudron, Gummow and Callinan JJ); and *McQuire & Porter* (2000) 110 A Crim R 348, 358 (de Jersey CJ), 362 and 366 (Byrne J).

¹¹⁸ *R v Harman* [1989] 1 Qd R 414; *Cameron v The Queen* (2002) 209 CLR 339, 360–61 [66]–[68] (Kirby J).

¹¹⁹ *R v Bulger* [1990] 2 Qd R 559, 564 (Byrne J).

¹²⁰ *Ibid.*

¹²¹ *R v Ellis* (1986) 6 NSWLR 603, 604 (Street CJ).

¹²² *R v Morton* [1986] VR 863, 867 cited with approval in *R v Bates; R v Baker* [2002] QCA 174 (17 May 2002) 16 [83] (Atkinson J).

¹²³ *R v Bates; R v Baker* [2002] QCA 174 (17 May 2002) 15 [79] (Atkinson J).

¹²⁴ *Atholwood v The Queen* (1999) 109 A Crim R 465, 468 (Ipp J) cited with approval in *R v Bates; R v Baker* [2002] QCA 174 (17 May 2002) 15 [80] (Atkinson J).

4.2 Sentencing principles in case law – totality and the *De Simoni* principle

Sentencing principles established by case law are applied alongside the legislative factors and are equally important. They are referred to as the ‘common law’ and courts have a duty to follow them. The principles are often discussed in judgments issued by the Queensland Court of Appeal.

4.2.1 Proportionality

A sentence must always be proportionate to the objective seriousness of the offending.¹²⁵ Proportionality, in the form adopted by Australian courts, sets the outer limits (both upper and lower) of punishment.¹²⁶

It is only within the outer limit of what represents proportionate punishment for the actual crime that the interplay of other relevant favourable and unfavourable factors ... will point to what is the appropriate sentence in all the circumstances of the particular case.¹²⁷

In determining whether a sentence is proportionate, courts consider factors such as the maximum penalty for the offence and the circumstances of the offence, including the degree of harm caused and the offender’s culpability.¹²⁸

4.2.2 Parity

The parity principle guards against unjustifiable disparity between sentences for offenders guilty of the same criminal conduct or common criminal enterprise. Ideally, people who are parties to the same offence should receive the same sentence but matters that create differences must be taken into account. These include each offender’s ‘age, background, previous criminal history and general character ... and the part which he or she played in the commission of the offence’.¹²⁹

4.2.3 Totality

When a sentencing court is dealing with multiple offences at once (for instance, a number of assaults on different police or paramedics in one incident) or is sentencing for an offence and the person is already serving another sentence, it must look at the totality of all criminal behaviour. It must impose a sentence that ‘adequately and fairly represents the totality of criminality involved in all of the offences to which that total period is attributable’.¹³⁰ It can achieve this by making the sentences concurrent, so they run together, instead of making the sentences cumulative (i.e. to be served one after the other).¹³¹

¹²⁵ *Markarian v The Queen* (2005) 228 CLR 357, 385 [69] (McHugh J); *Veen v The Queen (No 2)* (1988) 164 CLR 465, 473–474 (Mason CJ, Brennan, Dawson, Toohey JJ). *Penalties and Sentences Act 1992* (Qld) s 9(11) expressly applies this principle to previous convictions.

¹²⁶ Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Law Book Co., 3rd ed, 2014) 237.

¹²⁷ *Veen v The Queen (No 2)* (1988) 164 CLR 465, 491 (Deane J).

¹²⁸ Commonwealth, *Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report* (2017) 280.

¹²⁹ *Lowe v The Queen* (1984) 154 CLR 606, 609 (Gibbs CJ), affirmed in *Postiglione v The Queen* (1997) 189 CLR 295, 303 (Dawson and Gaudron JJ), 325 (Gummow J).

¹³⁰ *R v Beattie; Ex parte A-G (Qld)* (2014) 244 A Crim R 177, 181 [19] (McMurdo J) cited in *R v DBQ* [2018] QCA 210, 7–8 [27] (Philipiddes JA, Boddice and Bond JJ agreeing).

¹³¹ *Mill v The Queen* (1988) 166 CLR 59, 63 (Wilson, Deane, Dawson, Toohey, Gaudron JJ). See also *R v Hill* [2017] QCA 177 (22 August 2017) 7–8 [34]–[36] (Applegarth J, Sofronoff P and Atkinson J agreeing) and *Nguyen v The Queen* (2016) 256 CLR 656, 677 [64] (Gageler, Nettle and Gordon JJ).

The totality principle applies whether the penalty takes the form of a fine or a term of imprisonment or, indeed, whatever might be the form of punishment. It will apply whether the resulting accumulation of punishments is relatively light, such as a series of fines or several cumulative short terms of imprisonment, or whether it is severe. The principle is very much concerned with the concept of proportionality that pervades so many facets of the system of law. In some of its applications it reflects the prohibition against double punishment which is a risk when several offences committed at the same time contain elements that are all proved by the same fact.¹³²

4.2.4 'Crushing' sentences

There are circumstances where cumulative terms of imprisonment are justified, but their total combined effect can be described as 'crushing'. Examples include:

when an offender is sentenced to a long term of imprisonment but then commits a further serious offence while imprisoned, or while at liberty after escaping, or, sometimes, while on bail awaiting trial for a set of offences for which he is later found guilty. If sentences in such cases were not made cumulative then the offender would effectively get a discount by a misapplication of the totality principle.¹³³

Also, sometimes the need to vindicate the rights of different victims while giving effect to the totality principle results in making sentences cumulative in whole or in part.¹³⁴

In such cases, harshness in the overall sentence (if it in fact arises in the particular case) is alleviated by the notion that a sentence should never be a 'crushing sentence'.¹³⁵ Such a sentence has been described as one so harsh as to 'provoke a feeling of helplessness in the [offender] if and when he is released or as connoting the destruction of any reasonable expectation of useful life after release'.¹³⁶ While some mandatory sentences (life imprisonment for murder, for example) must be imposed regardless of their crushing impact, where there is still discretion, a court can reduce a sentence on the basis that it is crushing:

Such mercy is not a reflection upon the applicant's subjective characteristics or his deserts. It reflects the attitude of our community¹³⁷ that, in general, and in the absence of particular circumstances, even a justly severe punishment [and factors that aggravate the severity of the offence, particularly denunciation]¹³⁸ ought not remove the last vestige of a prisoner's hope for some kind of chance of life at the end of the punishment.¹³⁹

¹³² *R v Symss* [2020] QCA 17, 6 [22] (Sofronoff P, Morrison and McMurdo JJA agreeing).

¹³³ *Ibid* 7 [25] (Sofronoff P, Morrison and McMurdo JJA agreeing) citing *R v Makary* [2019] 2 Qd R 528.

¹³⁴ *Ibid* citing *Richards v The Queen* [2006] NSWCCA 262.

¹³⁵ *Ibid* 8 [32] (Sofronoff P, Morrison and McMurdo JJA agreeing).

¹³⁶ *R v Beck* [2005] VSCA 11, [19] (Nettle JA), cited in *R v Symss* [2020] QCA 17, 7 [27] (Sofronoff P, Morrison and McMurdo JJA agreeing).

¹³⁷ 'Shared values of the community which do not countenance either cruelty in punishment or a total abandonment of hope, even for the worst kind of offender': *R v Symss* [2020] QCA 17, 8 [33] (Sofronoff P, Morrison and McMurdo JJA agreeing).

¹³⁸ *R v Symss* [2020] QCA 17, 8 [32] (Sofronoff P, Morrison and McMurdo JJA agreeing).

¹³⁹ *Ibid* 10 [40] (Sofronoff P, Morrison and McMurdo JJA agreeing).

4.2.5 The *De Simoni* principle

A sentencing judge can generally consider all of an offender's conduct, including conduct that would make the offence more or less serious — but cannot take into account circumstances of aggravation that would have warranted a conviction for a more serious offence.¹⁴⁰

The acts, omissions and matters constituting the offence (and accompanying circumstances) for sentencing purposes are determined by applying common sense and fairness. Something that might technically constitute a separate offence is not necessarily excluded from consideration for that reason.¹⁴¹ However, such things cannot be taken into account if they would establish:

- a separate offence that consisted of, or included, conduct that did not form part of the offence for which the person was convicted;
- a more serious offence; or
- a circumstance of aggravation.¹⁴²

In such a case, the act, omission, matter, or circumstance cannot be considered for any purpose either to increase the penalty or deny leniency. A person convicted of an isolated offence is entitled to be punished for that isolated offence. In restating these principles, the Queensland Court of Appeal has recognised it would be wrong to punish the person on the basis that their isolated offence formed part of a pattern of conduct for which the person has not been charged or convicted.¹⁴³

The relevance of this principle as it applies to aggravated forms of assaults based on victim status is discussed further in Chapter 9 of this paper.

4.3 The general approach to sentencing in Queensland

Sentencing is not a mechanical or mathematical exercise:¹⁴⁴

Sentences of imprisonment are necessarily calculated by reference to the number of months or years for which an offender must be imprisoned. However, strict adherence to the mathematics of sentencing can lead to injustice.¹⁴⁵

Queensland courts sentence by applying an 'instinctive synthesis' approach:

The task of the sentencer is to take account of *all* of the relevant factors and to arrive at a single result which takes due account of them all. That is what is meant by saying that the task is to

¹⁴⁰ *The Queen v De Simoni* (1981) 147 CLR 383, 389 (Gibbs CJ). See also *Nguyen v The Queen* (2016) 256 CLR 656, 667 [29] (Bell and Keane JJ), 676 [60] (Gageler, Nettle and Gordon JJ) and *R v D* [1996] 1 Qd R 363, 403. A circumstance of aggravation means 'any circumstance by reason whereof an offender is liable to a greater punishment than that to which the offender would be liable if the offence were committed without the existence of that circumstance': *Criminal Code* (Qld) s 1.

¹⁴¹ *R v D* [1996] 1 Qd R 363, 403.

¹⁴² *Ibid.* Note *R v Cooney* [2019] QCA 166, 6 [27] – 7 [35] (Henry J, Gotterson JA and Bradley J agreeing), where a defence *De Simoni* argument in a serious assault case failed on the basis that the manner in which the offender's blood ended up on a police officer's arm was inadvertent physical proximity rather than a direct application as required by the section ('applies'). This meant that the court could consider emotional harm caused to the officer as a result of the blood, because the Crown had not foregone the opportunity to charge a circumstance of aggravation.

¹⁴³ *Ibid* 403-4.

¹⁴⁴ *Markarian v The Queen* (2005) 228 CLR 357, 372–5 [30]–[39] (Gleeson CJ, Gummow, Hayne and Callinan JJ) as cited in *DPP (Vic) v Dalglish (a Pseudonym)* (2017) 262 CLR 428, 443 [45] (Kiefel CJ, Bell and Keane JJ). See also *Barbaro v The Queen* (2014) 253 CLR 58, 72 [34] (French CJ, Hayne, Kiefel and Bell JJ).

¹⁴⁵ *R v Symss* [2020] QCA 17, 6 [22] (Sofronoff P, Morrison and McMurdo JJA agreeing).

arrive at an ‘instinctive synthesis’. This expression is used, not as might be supposed, to cloak the task of the sentencer in some mystery, but to make plain that the sentencer is called on to reach a single sentence which ... balances many different and conflicting features.¹⁴⁶

The High Court, in considering the proper approach to sentencing, has recognised ‘there is no single correct sentence’ and sentencing judges are to be allowed as much flexibility in sentencing as is in keeping with consistency of approach and applicable legislation.¹⁴⁷

Unless legislation fixes a mandatory penalty (as it does for assaults of public officers in certain circumstances, see section 4.5.4 ‘Mandatory sentencing’ below), ‘the discretionary nature of the judgment required means that there is no single sentence that is just in all the circumstances’.¹⁴⁸ Sentencing courts have a wide discretion yet must take into account all (and only) relevant considerations including legislation and case law.¹⁴⁹

The discretion can ‘miscarry’ when the sentence is clearly unjust¹⁵⁰ – either being ‘manifestly excessive’ or ‘manifestly inadequate’.¹⁵¹ Such sentences, which an appeal court can set aside, fall ‘outside the range of sentences which could have been imposed if proper principles had been applied’.¹⁵²

Consistency in sentencing requires like cases to be treated alike and different cases, differently.¹⁵³ Queensland’s Court of Appeal has stated that ‘[c]ommunity confidence in the sentencing process depends ... on a wide variety of judges imposing sentences which are consistent, and which are formulated by reference to relevant discretionary factors and by having regard to the relevant legislation, comparable sentences, and the guidance of appellate court decisions’.¹⁵⁴

The administration of criminal justice works as a system, not as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, among other things, reasonable consistency.¹⁵⁵

However, if cases show a range of sentences for similar offending that is ‘demonstrably contrary to principle’, they do not have to be followed in future.¹⁵⁶

‘Consistency’ does not require exact replication. The ultimate sentencing discretion lies somewhere between a non-punishment (like an unconditional discharge) and the maximum penalty set in the legislation.¹⁵⁷ The so-called range is ‘merely a summary of the effect of a series of previous decisions’; it reflects Parliament’s recognition that ‘the range of circumstances

¹⁴⁶ *DPP (Vic) v Dalgliesh (a Pseudonym)* (2017) 262 CLR 428, 434 [5] (Kiefel CJ, Bell and Keane JJ) citing *Wong v The Queen* (2001) 207 CLR 584, 611 [75] (Gaudron, Gummow and Hayne JJ) (emphasis in original).

¹⁴⁷ *Markarian v The Queen* (2005) 228 CLR 357, 371 [27] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

¹⁴⁸ *DPP (Vic) v Dalgliesh (a Pseudonym)* (2017) 262 CLR 428, 434 [7] (Kiefel CJ, Bell and Keane JJ).

¹⁴⁹ *Markarian v The Queen* (2005) 228 CLR 357, 371 [27] (Gleeson CJ, Gummow, Hayne and Callinan JJ) and *Barbaro v The Queen* (2014) 253 CLR 58, 70 [25] (French CJ, Hayne, Kiefel and Bell JJ).

¹⁵⁰ *House v The King* (1936) 55 CLR 499, 504–5 (Dixon, Evatt and McTiernann JJ).

¹⁵¹ *DPP (Vic) v Dalgliesh (a Pseudonym)* (2017) 262 CLR 428, 434 [7] (Kiefel CJ, Bell and Keane JJ).

¹⁵² *Barbaro v The Queen* (2014) 253 CLR 58, 70 [26] (French CJ, Hayne, Kiefel and Bell JJ) (emphasis in original).

¹⁵³ *R v Pham* (2015) 256 CLR 550, 559 [28] (French CJ, Keane and Nettle JJ), citing *Wong v The Queen* (2001) 207 CLR 584, 591 [6] (Gleeson CJ), 608 [65] (Gaudron, Gummow and Hayne JJ) and *Hili v The Queen* (2010) 242 CLR 520, 535 [49] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

¹⁵⁴ *R v Jones* [2011] QCA 147, 8 [27] (Daubney J, Muir and White JJA agreeing).

¹⁵⁵ *Wong v The Queen* (2001) 207 CLR 584, 591 [6] (Gleeson CJ).

¹⁵⁶ *DPP (Vic) v Dalgliesh (a Pseudonym)* (2017) 262 CLR 428, 445 [50] (Kiefel CJ, Bell and Keane JJ).

¹⁵⁷ *R v Streatfield* (1991) 53 A Crim R 320, 325 (Thomas J, Cooper J agreeing).

surrounding each offence will also be great'.¹⁵⁸ The history of a range of sentences for similar offending does not guarantee the range, including its upper and lower limits, is correct.¹⁵⁹ Previous sentences have been described as a guide only.¹⁶⁰ It is 'consistency in the application of relevant legal principles' that is sought, 'not numerical equivalence'.¹⁶¹ Of more use are cases where the Court of Appeal has 'laid down some relevant principle, delineated the yardsticks for particular offending, or re-sentenced'.¹⁶² In the case of a serious assault upon an 81-year-old woman in her home, the Court of Appeal stated:

It is impossible not to feel anger towards the [offender] for his treatment of the complainant for our society rightly expects its elderly citizens to be nurtured and treated with respect. Every fair-minded person would inevitably feel sympathy for the elderly complainant who was entitled to enjoy the security of her own home. The emotions naturally aroused in the commission of such offences cannot, however, deflect Judges from sentencing upon established principles.¹⁶³

In another case involving the serious injury of a police officer, the Court noted:

It is true that a sentence serves to satisfy the legitimate emotional needs of the community, but it can only do so justly when the judge engages in the dispassionate application of legal rules and principles in order to serve those needs. It is therefore necessary to be rigorous in the application of the provisions of the Act that sentencing judges are bound to apply.¹⁶⁴

Recording sentences for comparison is only useful if the 'unifying principles' revealed by those sentences are explained. The reasons why the sentences were fixed as they were must be clear¹⁶⁵ and it is important to properly characterise the offending conduct.¹⁶⁶

The avoidance of 'unjustifiable discrepancy in sentencing' has been recognised by the High Court as 'a matter of abiding importance to the administration of justice and to the community', so that public confidence in the administration of justice is not eroded.¹⁶⁷

The emphasis on the particular circumstances of each case must not be lost.

In assessing serious assault sentence appeals, the Court of Appeal has commented that it can be more instructive to look at the precise circumstances of the case than the authorities cited by the parties.¹⁶⁸ The various different subsections and types of conduct covered by section 340 make

¹⁵⁸ *R v Ryan and Vosmaer; Ex parte A-G (Qld)* [1989] 1 Qd R 188, 192 (Dowsett J).

¹⁵⁹ *Hili v The Queen* (2010) 242 CLR 520, 537 [54] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) citing *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 79 NSWLR 1, 70–1 [304] (Simpson J, Matthews J agreeing).

¹⁶⁰ *R v Hoerler* (2004) 147 A Crim R 520, 532 [49] (Spigelman CJ), citing *R v Whyte* (2002) 55 NSWLR 252, 278–82 [168]–[189] and *Wong v The Queen* (2001) 207 CLR 584, 591 [6] (Gleeson CJ).

¹⁶¹ *Barbaro v The Queen* (2014) 253 CLR 58, 74 [40] (French CJ, Hayne, Kiefel and Bell JJ), citing *Hili v The Queen* (2010) 242 CLR 520, 535 [48]–[49] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

¹⁶² *R v Bush (No. 2)* [2018] QCA 46, 12 [76]–[77] (Sofronoff P, Morrison JA and Douglas J).

¹⁶³ *R v M* [2001] QCA 11, 4 (McMurdo P, Williams JA and Mackenzie J agreeing).

¹⁶⁴ *R v Patrick (a pseudonym)* [2020] QCA 51, 9 [42] (Sofronoff P, Fraser JA and Boddice J agreeing).

¹⁶⁵ *Wong v The Queen* (2001) 207 CLR 584, 606 [59] as reproduced in *Hili v The Queen* (2010) 242 CLR 520, 537 [55] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

¹⁶⁶ *R v Bush (No. 2)* [2018] QCA 46, 12 [77] (Sofronoff P, Morrison JA and Douglas J).

¹⁶⁷ *Lowe v The Queen* (1984) 154 CLR 606, 611 (Mason J).

¹⁶⁸ *R v Reuben* [2001] QCA 322, 5 (Davies JA, Williams JA and Byrne J agreeing).

this especially important. In the 2008 Queensland Court of Appeal decision of *R v Spann*, the Court observed:

Counsel for the applicant suggested 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. Although the cases cited by both counsel are of limited assistance, given the very differing factual matrix they concern, they do not suggest that in the circumstances that arose in the present case the sentence imposed under [s 340](1)(b) was manifestly excessive.¹⁶⁹

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.¹⁷⁰

4.4 The application of general sentencing principles and approaches to sentencing for serious assaults

4.4.1 General principles

As discussed in the previous chapter, there is a range of conduct that this is captured within the offence of serious assault under section 340 of the *Criminal Code*.

As the broad nature of the relevant offence definitions show, not every assault involves a high level of violence resulting in extreme injuries (or even an injury of any kind), and therefore judicial discretion to sentence on the facts is important. The Court of Appeal recently commented that:

Serious assault on police is an offence which can occur in circumstances of widely variable levels of criminality, ranging, for example, from physical acts of minor resistance to arrest through to deliberately dangerous, degrading or prolonged attacks. For these reasons the range of appropriate sentences for serious assault of police is inevitably very broad.¹⁷¹

The Court noted that ‘the absence of infliction of actual physical harm is but one feature relevant to an assessment of the inherent seriousness of this category of offending’.¹⁷²

The Council has examined Court of Appeal judgments regarding section 340 sentencing. Examples of issues relevant to assessment of offence seriousness include:

- The extent of injuries — both physical and psychological (including the anxiety arising from waiting for test results¹⁷³ regarding transmittable diseases).¹⁷⁴

¹⁶⁹ *R v Spann* [2008] QCA 279, 9 [31] (Philippides J, Muir and Fraser JJA agreeing).

¹⁷⁰ *Ibid* 9 [32] (Philippides J, Muir and Fraser JJA agreeing).

¹⁷¹ *R v Cooney* [2019] QCA 166, 9 [46] (Henry J, Gotterson JA and Bradley J agreeing).

¹⁷² *Ibid* 9 [49] (Henry J, Gotterson JA and Bradley J agreeing).

¹⁷³ In terms of the objective statistical risk of disease transmission weighed against the subjective concern in a complainant’s mind, see *R v Kalinin* [1998] QCA 261, 5 (Derrington J): ‘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’. See also the discussion of Canadian case law on this point in Chapter 9, regarding deterrence.

¹⁷⁴ *Queensland Police Service v Terare* (2014) 245 A Crim R 211, 221 [36]-[37] (McMurdo P (Fraser and Gotterson JJA agreeing); *R v Cooney* [2019] QCA 166, 9 [42] (Henry J, Gotterson JA and Bradley J agreeing); *R v Craigie* [2014]

- Any impacts on the officer's interaction with family and their professional life.¹⁷⁵
- Where an application of bodily fluids is accompanied by a statement from the offender that they carried a disease (an intentional statement to instil fear).¹⁷⁶
- No expression of regret/apology – alternatively, a positive act in addition to a plea of guilty such as a letter of apology.¹⁷⁷
- Prolonged offence episode/persistent behaviour.¹⁷⁸
- Use of a weapon (including driving a motor vehicle in a dangerous manner).¹⁷⁹

It is important to note that the weight given to each issue, if and when it arises, will differ according to the particular circumstances of each individual case. None of these issues are unique to serious assaults.

As noted above, courts must consider all relevant mitigating and aggravating circumstances, whether they are recorded in an offence provision or not.¹⁸⁰ This is a restatement of the pre-existing common law (see above) and reflects long-standing sentencing practice prior to the PSA coming into effect.

A very recent example is *R v Patrick (a pseudonym)*,¹⁸¹ in which the Attorney-General successfully appealed against a sentence on the basis that it was manifestly inadequate. The head sentence was increased significantly, from 3 years to 5 – on the basis of two key aggravating factors which the court applied weight to in the exercise of its own discretion.

A child (aged 15 and 16 when he offended) pleaded guilty to (relevantly, among others) malicious acts (section 317 – discussed in Chapter 3) against a public officer (a police officer), causing GBH with intent to resist or prevent lawful arrest. This offence carries a maximum penalty of life

QCA 1, 8 [22] (Fraser JA and McMeekin J); *R v Ganeshalingham* [2018] QCA 34, 6 (Sofronoff P, Philippides JA and Boddice J agreeing); *R v MCL* [2017] QCA 114, 4 [8] (Fraser JA, McMurdo JA and Mullins J agreeing) (the Court was willing to infer, in the absence of a victim impact statement, that an officer 'went through a period of significant distress' in the wait for medical clearance regarding infection after being bitten); *R v Mitchell* [2010] QCA 20, 5 [16] (Muir JA, McMurdo P and Fraser JA agreeing); *R v Murray* (2014) 245 A Crim R 37, 42 [15] (Fraser JA, Gotterson and Morrison JJA agreeing).

¹⁷⁵ *R v Barry* [2007] QCA 48, 5 [15] (Jerrard JA, de Jersey CJ and Holmes JA agreeing); *R v Benson* [2014] QCA 188, 7 [31] (Morrison JA, Fraser JA and Philippides J agreeing).

¹⁷⁶ *R v Barber* [1997] QCA 282, 5 (Williams JA, Davies and McPherson JJA agreeing); *R v Barry* [2007] QCA 48, 5 [15] (Jerrard JA, de Jersey CJ and Holmes JA agreeing); *R v Benson* [1994] QCA 394 3-4 (McPherson JA, Pincus JA and Mackenzie J agreeing); *R v Benson* [2014] QCA 188, 7 [31] (Morrison JA, Fraser JA and Philippides J agreeing); *R v Kalinin* [1998] QCA 261, 4 Derrington J (de Jersey CJ agreeing) ('The use by the applicant of his infection as a weapon to cause added fear and distress to the victims of his assaults in this way is a seriously aggravating feature of his conduct. Knowing of his capacity to infect others by these means, he behaved with reckless malice and if he had in fact infected anyone in this transaction, he would have been imprisoned for a long time indeed').

¹⁷⁷ *McDermott v Jones* [1992] QCA 260, 3 (Lee J, Fitzgerald P and Davies JA agreeing); *R v Barry* [2007] QCA 48, 5 [15] (Jerrard JA, de Jersey CJ and Holmes JA agreeing); *R v Hamilton* [2006] QCA 122, 3 [10] (Fryberg J, Jerrard JA and Douglas J agreeing); *R v King* (2008) 179 A Crim R 600, 602 [11] (de Jersey CJ, Keane and Holmes JJA agreeing) (also communicating the fact that the offender carried no disease); *R v Laskus* [1996] QCA 120, 4 (Macrossan CJ, Shepherdson J agreeing); *R v McCoy* [2015] QCA 48, 4 [8], 5 [11] (Margaret McMurdo P, Holmes JA and Jackson J agreeing); *R v McLean* [2011] QCA 218, 11 [31] (White JA, Fraser JA and Philippides J agreeing).

¹⁷⁸ *R v Marshall* [2001] QCA 372, 6 (Davies JA, Williams JA and Wilson J agreeing); *R v Taylor* [2004] QCA 447, 5 (Mackenzie J, McMurdo P and Williams JA agreeing); *R v Mulholland* [2001] QCA 480, 8 (Mackenzie J).

¹⁷⁹ *R v Marshall* [1993] 2 Qd R 307; *R v Marshall* [2001] QCA 372, 4 (Davies JA, Williams JA and Wilson J agreeing); *R v McCoy* [2015] QCA 48, 5 [11] (Margaret McMurdo P, Holmes JA and Jackson J agreeing); *R v Mulholland* [2001] QCA 480, 8 (de Jersey CJ, Mackenzie and Chesterman JJ agreeing); *R v Packwood* [2006] QCA 369, 9 (Atkinson JJ, Holmes JA and Jones J agreeing).

¹⁸⁰ *Penalties and Sentences Act 1992* (Qld) s 9(2)(g).

¹⁸¹ [2020] QCA 51.

imprisonment (which, subject to certain other statutory criteria, remains open to courts sentencing children for this offence, although in this case 10 years was the relevant applicable maximum).¹⁸²

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’.¹⁸³

The key to the appeal succeeding related to the police officer’s role and physical harm done to him:

The two prominent facts that aggravate the gravity of the offending in this case are, first, that grievous bodily harm was done to a police officer in order to evade arrest and, second, that the grievous bodily harm that was actually inflicted upon [the officer] was permanent and was so severe. The other objective facts are in this case also matters in aggravation of sentence. The car that Patrick drove into [the officer] was a stolen car and he was then on bail for burglary and robbery. After injuring his victim, Patrick left him on the roadway and fled, later falsely denying responsibility. However, the first two facts to which I have referred are the crucial ones.

I would accept the Attorney-General’s submission that the seriousness of the facts that the victim was a police officer and that the offence was committed to stop him doing his duty were not given due recognition so that the discretion miscarried.¹⁸⁴

The Court of Appeal has made repeated statements about general sentencing principles regarding violence against police and public officers.¹⁸⁵

In 1992, before the PSA was even enacted¹⁸⁶ and long before the 1997, 2012 and 2014 penalty amendments to section 340 of the *Criminal Code*, the Court denounced spitting on police as ‘especially an aggravating feature’ on which the Court took ‘an extremely serious view’. There was a ‘need, always, for an appropriate deterrent to uphold the authority of the legal processes and the execution of police duties’.¹⁸⁷ This was a view held by the Court of Appeal ‘and its predecessor’.¹⁸⁸

¹⁸² See *Youth Justice Act 1992* (Qld) s 176(3), noted by Sofronoff P in *R v Patrick (a pseudonym)* [2020] QCA 51, 8–9 [35]–[37] and see the discussion regarding sentencing child offenders below at 1.7).

¹⁸³ *R v Patrick (a pseudonym)* [2020] QCA 51, 8 [32] (Sofronoff P, Fraser JA and Boddice J agreeing). The rejection of that argument has parallels to the Court’s rejection of a similar argument in *R v Spann* [2008] QCA 279, 9 [31] (Philippides J, Muir and Fraser JJA agreeing), 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 (see above at 4.1).

¹⁸⁴ *Ibid* 8 [33]–[34].

¹⁸⁵ The Court of Appeal decides serious assault cases as and when such cases are presented to it; it is not a function of courts to proactively issue statements or comment.

¹⁸⁶ *Penalties and Sentences Act 1992* (Qld) s 9 commenced 27 November 1992 (SL 377 of 1992).

¹⁸⁷ *R v Mickle* [1992] QCA 250, 4 (Macrossan CJ, McPherson and Davies JJA agreeing). Judgment date: 21 July 1992.

¹⁸⁸ *R v Benson* [1994] QCA 394, 4 (McPherson JA, Pincus JA and Mackenzie J agreeing). The Court of Appeal was created as a separate division of the Supreme Court of Queensland in 1991 by the *Supreme Court of Queensland Act 1991* (Qld). ‘Until then, Queensland’s appellate courts were the Full Court of the Supreme Court in civil matters and the Court of Criminal Appeal in criminal matters, with Supreme Court judges sitting on both courts in rotation’: Justice Margaret McMurdo AC, ‘The Queensland Court of Appeal: The first 25 years’ (Lecture, Australian Academy of Law 2016 Queensland Lecture) 1. <<https://archive.sclqld.org.au/judgepub/2016/MMcmurdo241016.pdf>>.

The Court reaffirmed this in 1997, noting that maintaining social order depends on adequately protecting those charged with enforcing it to the greatest extent possible:

It is not fair to them that they should be exposed to assaults of this kind, nor is it in the best interest of the community, either the particular community in question or the broader community, that they should be so exposed ... It is also ... important that the sentence not appear to be merely a nominal one.¹⁸⁹

There follows a long line of approval for, and repeat of, such sentiments, noting the need for:

- deterrence and denunciation as primary sentencing considerations (although this can be 'significantly reduced' in appropriate, unusual circumstances);¹⁹⁰
- need for a salutary penalty (which depends on the specific facts and is not inevitably imprisonment, including where the maximum penalty is 14 years' imprisonment under section 340);¹⁹¹
- protection of police officers and their authority; and
- community support for them.¹⁹²

The Court of Appeal has also made similar comments in relation to railway guards,¹⁹³ court clerks,¹⁹⁴ corrections officers (highlighting the importance of maintaining discipline in correctional centres)¹⁹⁵ and local council officers.¹⁹⁶

It has also made similar comments in respect of persons not protected by section 340, but who are covered (as ordinary members of the community are) by the other general offence provisions of the *Criminal Code*. In the case of an attacks leading to charges of AOBH and GBH on taxi drivers,

¹⁸⁹ *R v Williams* [1997] QCA 476, 6-7 (Dowsett J, McPherson JA and Thomas J agreeing). This judgement was cited with approval the following year in *R v Kazakoff* [1998] QCA 459, 6 (Ambrose J, McPherson JA and Byrne J agreeing), which also cited *R v Howard* (1968) 2 NSW 429.

¹⁹⁰ *R v Ganeshalingham* [2018] QCA 34, 5, 6 (Sofronoff P, Philippides JA and Boddice J agreeing); *R v Whiting* [2009] QCA 338, 3 [15] (Keane JA, Holmes JA and McMeekin J agreeing).

¹⁹¹ See, for example: *Queensland Police Service v Terare* (2014) 245 A Crim R 211, 221 [35] and 222 [40] (McMurdo P, Fraser and Gotterson JJA agreeing); *R v Ganeshalingham* [2018] QCA 34, 5-6 (Sofronoff P, Philippides JA and Boddice J agreeing); *R v King* (2008) 179 A Crim R 600, 601-2 [6] (de Jersey CJ, Keane and Holmes JJA agreeing) and 603 [16] (Holmes JA); *R v MCL* [2017] QCA 114, 6-7 [16] Fraser JA, McMurdo JA and Mullins J agreeing); *R v Reuben* [2001] QCA 322, 5 (Davies JA, Williams JA and Byrne J agreeing).

¹⁹² Examples are, in chronological order: *R v Wotton & Bourne; ex parte A-G (Qld)* [1999] QCA 382 [1999] QCA 382, 4-5 (Chesterman J), citing *R v Howard* (1968) 2 NSW 429, 430; *R v Marshall* [2001] QCA 372, 5 (Davies JA, Williams JA and Wilson J agreeing); *R v Reuben* [2001] QCA 322, 7 (Davies JA, Williams JA and Byrne J agreeing); *R v Bidmade* [2003] QCA 422, 3 [9] (Muir J); *R v Braithwaite* [2004] QCA 82, 5 [19] (Jerrard JA, McMurdo P and Philippides J agreeing), *R v Nagy* [2004] 1 Qd R 63, 74-5 [47] (Williams JA, Jerrard JA agreeing) (cited in *Braithwaite and Devlyn*); *R v Conway* [2005] QCA 194, 17 [54] (McMurdo P, Atkinson and Mullins JJ agreeing) (cited in *Mathieson*); *R v Mathieson* [2005] QCA 313, 3 [9] (McPherson JA, Jerrard JA agreeing); *R v King* (2008) 179 A Crim R 600, 601-2 [6] (de Jersey CJ, Keane and Holmes JJA agreeing); *R v Devlyn* [2014] QCA 96, 8 [32] (Ann Lyons J, Holmes and Morrison JJA agreeing).

¹⁹³ *R v Nagy* [2004] 1 Qd R 63, 74-5 [47] (Williams JA, Jerrard JA agreeing): 'But the role of a guard on the railways is not all that different [to a police officer]. Part of a guard's responsibility is to ensure the safety of the travelling public and it is their duty to confront anyone who is perceived to be a threat to the safety of the travelling public. Attacks on such officials, particularly cowardly attacks by groups of drunken youths, must be severely punished. In a number of recent cases this court has indicated that stern penalties should be imposed for serious violent offences committed upon innocent people in public places. That principle applies with equal force to attacks on people such as the complainants in these cases.'

¹⁹⁴ *R v McKinnon* [2006] QCA 16, 4-5 (McMurdo P, McPherson JA and Muir J agreeing).

¹⁹⁵ *R v Hope* [1993] QCA 299, 4 (Fitzgerald P, Davies and Moynihan JJ).

¹⁹⁶ *R v Ketchup* [2003] QCA 327, 1 [3] (Williams JA).

the Court noted that drivers are members of the public performing a valuable community service which makes them vulnerable. Salutory deterrent penalties are required.¹⁹⁷

While imprisonment is not inevitable (in the absence of legislation compelling it), the Court of Appeal has noted that it is very much open (and as discussed above, is a common sentencing outcome). In one case involving spitting blood and phlegm into a police officer's face and mouth, the Court stated:

One begins with the proposition that those who treat a police officer in this way should ordinarily expect to be imprisoned, meaning actual imprisonment. Police officers carry out duties which are usually onerous and often dangerous. It is abhorrent that a police officer responsibly going about his or her business be subject to the indignity and risk of being spat upon. The risk in contemporary society relates obviously to communicable disease. Related to the indignity is the display of contempt for civil authority which will often be involved in these incidents. An appropriate level of deterrence will in such cases usually be secured only through actual imprisonment of the offender.¹⁹⁸

...Even allowing for the serious and disgusting nature of the offence, the effrontery of its being committed against a police officer and the consequent need for serious deterrence, the question arises whether in selecting [a particular period of time as a head sentence in that case], the judge started from too high a level of penalty. Reference to some previous decisions suggests that he did.¹⁹⁹

...In cases like this, it is often the fact of imprisonment rather than the particular duration of the term imposed which secures the necessary deterrence. In light of the cases to which I have referred I consider the penalty imposed on the applicant was manifestly excessive and should be reduced. The early pleas of guilty, the early written apology with the assurance of no communicable disease, the applicant's previously unblemished character, and his state of depression at the time,²⁰⁰ combine to warrant significant mitigation in this particular case.²⁰¹

In 2019, the Court of Appeal discussed how legislative amendment made by Parliament can give effect to community expectations regarding sentencing:

Public clamour about a particular case has to be ignored by a sentencing judge because it is not a reliable indicator of legitimate public expectations of the system of justice or of anything else relevant to sentencing. But community attitudes, standards and expectations are things that a sentencing judge must somehow take into account because, in general, sentences are

¹⁹⁷ See *R v Levy & Drobny; Ex parte A-G (Qld)* [2014] QCA 205, 9 [32] (Morrison JA, Holmes JA and Philip McMurdo J agreeing), discussing *R v Wilkins; ex parte A-G (Qld)* [2008] QCA 272 at 10 [37] and *R v Hamilton* [2009] QCA 391 at 15–16 [61]. See also 11 [39], 18 [75], 19 [77] and 20 [80].

¹⁹⁸ *R v King* (2008) 179 A Crim R 600, 601-2 [6] (de Jersey CJ, Keane and Holmes JJA agreeing). Note Holmes JA also stated in her judgment that imprisonment is not inevitable (603 [16]). See also *R v Reuben* [2001] QCA 322, 5–7 (Davies JA, Williams JA and Byrne J agreeing) and *R v Williams* [1997] QCA 476, 6 (Dowsett J, McPherson JA and Thomas J agreeing). *King* was more recently referred to with approval in *R v MCL* [2017] QCA 114, 6-7 [16] (Fraser JA, McMurdo JA and Mullins J agreeing): 'Consistently with that very severe maximum penalty [14 years' imprisonment], although each case involves an exercise of the sentencing discretion in light of all of the relevant evidence in the case and there is no rule that offenders who assault police officers acting in the course of their duties in a way that attracts that penalty must be sentenced to imprisonment, in the ordinary course offenders who spit upon police officers or break the skin by premeditated biting can expect to be sentenced to a term of imprisonment involving a period of actual custody'.

¹⁹⁹ *R v King* (2008) 179 A Crim R 600, 602 [7] (de Jersey CJ, Keane and Holmes JJA agreeing).

²⁰⁰ The offender was 'suffering from what the psychiatrist...terms a "pathological bereavement disorder" following a family tragedy': *R v King* (2008) 179 A Crim R 600, 601 [4]. See the discussion of mental illness in this chapter.

²⁰¹ *R v King* (2008) 179 A Crim R 600, 602 [11] (de Jersey CJ, Keane and Holmes JJA agreeing). Noted with approval in *R v Murray* (2014) 245 A Crim R 37, 45 [24] (Fraser JA, Gotterson and Morrison JJA agreeing).

supposed to reflect a community's values. That is one reason why "denunciation" is a factor in sentencing.²⁰²

...One source from which judges might discern *legitimate* community expectations is from the content of statutes that change the law governing offences and their penalties.²⁰³

The Court of Appeal has consistently noted changes in maximum penalties for serious assault as amended by Parliament over time, and commented on how this impacts sentencing:

- It is plain that the maximum penalty must be taken into account. It is one of the many factors a sentencing judge is obliged to take into account and balance with all other relevant factors.²⁰⁴
- The 14-year maximum for some section 340 offences is 'very severe'.²⁰⁵
- The legislature clearly intended that sentencing courts should impose significantly heavier penalties for serious assaults against police in those aggravated circumstances.²⁰⁶
- Increases in maximum penalty can be expected to produce a general increase in severity of sentences, rendering earlier cases of limited utility as comparable sentencing decisions. There should not necessarily be proportionate increases in sentences.²⁰⁷ Nor does it mean all offences committed after the increase should attract a higher penalty than they previously would have.²⁰⁸
- Doubling of the maximum penalty will not necessarily result in a doubling of sentences at all levels.²⁰⁹ It 'underscore[s] the seriousness' of such assaults.²¹⁰

4.4.2 The impact of offender mental illness on sentencing

It is not uncommon for assaults on public officers to be committed by offenders with entrenched and serious mental health issues. Officers may be required to engage with such people to address

²⁰² *R v O'Sullivan; Ex parte Attorney-General (Qld)* [2019] QCA 300, 29 [101] (Sofronoff P, Gotterson JA and Lyons SJA).

²⁰³ *Ibid* 29 [104] (Sofronoff P, Gotterson JA and Lyons SJA) (emphasis in original).

²⁰⁴ *R v Murray* (2014) 245 A Crim R 37, 42 [16] (Fraser JA, Gotterson and Morrison JJA agreeing) and *R v MCL* [2017] QCA 114, 6-7 [16] (Fraser JA, McMurdo JA and Mullins J agreeing), both judgments citing the High Court's judgment in *Markarian v The Queen* (2005) 228 CLR 357, [31].

²⁰⁵ *R v MCL* [2017] QCA 114, 6-7 [16] (Fraser JA, McMurdo JA and Mullins J agreeing).

²⁰⁶ *Queensland Police Service v Terare* (2014) 245 A Crim R 211, 221 [35] (McMurdo P (Fraser and Gotterson JJA agreeing); *R v Benson* [2014] QCA 188, 9 [36] (Morrison JA, Fraser JA and Philippides J agreeing).

²⁰⁷ *R v Murray* (2014) 245 A Crim R 37, 42 [16] (Fraser JA, Gotterson and Morrison JJA agreeing), citing *R v Benson* [2014] QCA 188, [36] (Morrison JA) and *R v CBI* [2013] QCA 186, 7 [19] (Fraser JA, Gotterson JA and Mullins J agreeing) (which was a case about increases in maximums for sexual offences). *Murray* was a case post the 14-year maximum introduction. See also at 45 [23], where the Court wrote: 'the applicant's sentence is so far out of kilter with the sentences in those cases, even when the fullest possible allowance is made for the increase in the maximum penalty, as to indicate that the sentencing judge must have erred ... That indication is confirmed by reference to the circumstances of this particular offence and the applicant's personal circumstances. Both the head sentence of 15 months imprisonment and the period before release on parole of five months in custody for this 19-year-old mother of a one-year old baby are manifestly excessive'. See also *R v Brown* [2013] QCA 185, 6 [18] (Holmes JA, Fraser JA and North J agreeing); *R v Holden* [2006] QCA 416, 5 (Holmes JA, McMurdo P, and Fryberg J agreeing) and *R v Kalinin* [1998] QCA 261, 9 (Derrington J).

²⁰⁸ *R v Murray* (2014) 245 A Crim R 37, 42 [16] (Fraser JA, Gotterson and Morrison JJA agreeing), citing *R v Samad* [2012] QCA 63 [30] (Wilson AJA).

²⁰⁹ *Ibid* citing *R v SAH* [2004] QCA 329, [12]-[13].

²¹⁰ *R v Roberts* [2017] QCA 256, 9 [30] (Fraser JA, Philippides JA and Douglas J agreeing).

their risk to the wider public, or to prevent such people from harming themselves (or both).²¹¹ The Court of Appeal has commented:

It is, of course, distressing to find someone who, possibly through no reason of their own, becomes involved in offences of this kind. Mental impairment or psychiatric problems have always been circumstances that are taken into account in the course of sentencing. However, they are not ordinarily such as to excuse a person entirely from the penal consequences of what they have done.²¹²

‘It is well established that an offender’s mental disorder, short of insanity, may lessen moral culpability and so lessen the claims of general or personal deterrence upon sentencing’.²¹³ In an appropriate case, this can even eliminate such claims.²¹⁴ In one example, the Court of Appeal noted that:

In cases under s 340(2AA) it can be a mitigating factor of great force, depending on the particular offender’s idiosyncratic circumstances, that an assault was prompted by an extreme state of distress or by a real psychological disturbance ... In this case, [the offender’s] history of torture, imprisonment, exposure to danger, flight, dislocation, isolation from family, friends and his native land, mental illness and his suicide attempt constitute very weighty matters for consideration. In addition, the motivation for the assault he committed is lacking in the moral blameworthiness that exists in the usual cases.²¹⁵

However, where voluntary intoxication also substantially contributes to the offending (which cannot be taken into account by way of mitigation of the sentence),²¹⁶ weight can be placed ‘upon the factors that the sentence imposed should both deter the applicant and deter others from committing the same kind of offence’.²¹⁷

4.4.3 The impact of childhood trauma and disadvantage: *Bugmy v The Queen*

*Bugmy v The Queen*²¹⁸ is an important High Court case originating from NSW (involving offences analogous to Queensland provisions) which explains how someone’s disadvantage and trauma in life is always relevant to sentence. It also serves as an example of how the same physical actions can be charged as different offences, due to the variation in the level of harm caused.

The offender in that case was a 29-year-old Aboriginal man who had an extremely traumatic and disadvantaged upbringing in a remote community. He was a remand prisoner charged with three counts of assault police, two of resisting an officer in the execution of his duty, escape from police custody, intimidate police and causing malicious damage by fire, for which he was later sentenced separately.²¹⁹ A report from a forensic psychiatrist noted that he had ‘very negative attitudes

²¹¹ For instance, in *R v MCL* [2017] QCA 114, 7 [16], police officers were assaulted when trying to stop an intoxicated and mentally ill person from climbing out of an elevated window at a drug rehabilitation centre.

²¹² *R v Benson* [1994] QCA 394, 5 (McPherson JA, Pincus JA and Mackenzie J agreeing).

²¹³ *R v Ganeshalingham* [2018] QCA 34, 7 (Sofronoff P, Philippides JA and Boddice J agreeing), referring to *Goodger* [2009] QCA 377, [21] (Keane J) and *Neumann* [2007] 1 Qd R 53.

²¹⁴ *R v MCL* [2017] QCA 114, 6 [15] (Fraser JA, McMurdo JA and Mullins J agreeing), referring to *R v Bowley* [2016] QCA 254, [34] as summarising the relevant law).

²¹⁵ *R v Ganeshalingham* [2018] QCA 34, 7 (Sofronoff P, Philippides JA and Boddice J agreeing).

²¹⁶ *Penalties and Sentences Act 1992* (Qld), s 9(9A).

²¹⁷ *R v MCL* [2017] QCA 114, 6 [15] (Fraser JA, McMurdo JA and Mullins J agreeing).

²¹⁸ (2013) CLR 247.

²¹⁹ *R v Bugmy* [2012] NSWCCA 223, 4-5 [5], 7 [15].

towards authority figures, particularly police and I suspect also prison officers. There may be some family "cultural issues" which are also relevant to his negative views'.²²⁰

While on remand, he became upset that visitors might not arrive at the correctional centre before the close of visiting hours. This led to an incident where he threw pool balls from a pool table at two correctional officers, missing them, giving rise to two charges of assaulting a correctional officer acting in the execution of duty (maximum penalty 5 years imprisonment).²²¹

He had made two verbal threats to physically harm a third officer. When that officer appeared, he made another threat and then threw two pool balls which struck his back and a third ball which struck his eye. Despite a series of surgeries, the officer was left blind in that eye, suffered great physical pain and profound psychological effects including loss of enjoyment of life and career prospects.²²² This gave rise to a much more serious charge of causing grievous bodily harm with intent (maximum penalty 25 years' imprisonment).²²³

The High Court stated that:

The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person's capacity to mature and to learn from experience. It is a feature of the person's make-up and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending.²²⁴

Because the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending, it is right to speak of giving "full weight" to an offender's deprived background in every sentencing decision ... Giving weight to the conflicting purposes of punishment is what makes the exercise of the discretion so difficult. An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender.²²⁵

The High Court noted that 'consideration of the objective seriousness of the offence must take account of the fact that this was an offence committed by a prisoner against an officer in a prison'.²²⁶ One of the issues to be balanced was whether Mr Bugmy's 'background of profound childhood deprivation allowed the weight that would ordinarily be given to personal and general deterrence to be moderated in favour of other purposes of punishment, including rehabilitation'.²²⁷

²²⁰ Ibid 9 [23].

²²¹ *Crimes Act 1900* (NSW) s 60A(1).

²²² *Bugmy v R* (2013) CLR 247, 583-4 [6]-[11].

²²³ *Crimes Act 1900* (NSW) s 33(1)(b). A similar charge in Queensland's *Criminal Code* (Qld) s 317, carries a maximum of life imprisonment.

²²⁴ *Bugmy v The Queen* (2013) CLR 247, 594-5 [43] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

²²⁵ Ibid 595 [44] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) (citations omitted).

²²⁶ Ibid 595 [46] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

²²⁷ Ibid 596 [47] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). The High Court dealt with specific legal issues on appeal, but remitted the matter to the NSW Court of Criminal Appeal to determine the sentence. Given that the sentence involved the application of NSW sentencing laws and principles (as distinct from the principles that the High Court discussed, which are relevant to Queensland), the ultimate sentence in *Bugmy* is not further discussed here.

4.5 The orders courts can make when sentencing for assaults on public officers

Except where mandatory sentencing applies, there are a wide range of sentencing options open to courts when sentencing offenders for assaults against public officers. Penalties available to Queensland courts sentencing for Queensland offences are:

- non-custodial options such as fines, good behaviour bonds and community-based orders such as community service and probation;
- various forms of custodial penalties.

The sentencing outcomes for the offences under consideration as part of this review are discussed in the following chapter of this paper. This analysis shows that, particularly in the case of aggravated serious assaults, a custodial sentence is the most common penalty type imposed by courts, with imprisonment being the most commonly used form of custodial penalty.

While the use of custodial sentences for assault offences under the *Corrective Services Act 2006* (Qld) ('CSA') is also very common, non-custodial sentences are more likely to be imposed in the case of offences charged under section 790 of the *Police Powers and Responsibilities Act 2000* (Qld) ('PPRA').

Different forms of custodial and non-custodial penalties are discussed below.

4.5.1 Custodial penalties

Custodial penalties can involve a combined prison and probation order, a term of imprisonment with parole, or a suspended sentence of imprisonment (either wholly or partially).

Imprisonment with parole

As discussed above, imprisonment is the most common custodial penalty imposed on offenders sentenced for serious assaults on public officers, as well as assaults under the CSA.

The total sentence imposed is called a 'head sentence'.

Most offenders will be released on parole, become eligible to apply for parole or be released on a suspended sentence before the entire period of their head sentence is served.

Parole is the supervised release of a prisoner to serve all or the remainder of their term of imprisonment in the community, subject to conditions and supervision. Consequences for non-compliance include return to prison.²²⁸ A prisoner released on parole is still serving their sentence.²²⁹

The sole purpose of parole is:

to reintegrate a prisoner into the community before the end of a prison sentence *to decrease the chance that the prisoner will ever reoffend*. Its only rationale is to keep the community safe from crime. If it were safer, in terms of likely reoffending, for prisoners to serve the whole sentence in prison, then there would be no parole.²³⁰

²²⁸ See <<https://www.qld.gov.au/law/sentencing-prisons-and-probation/sentencing-probation-and-parole/applying-for-parole>>.

²²⁹ *Corrective Services Act 2006* (Qld) s 214.

²³⁰ Queensland Parole System Review, *Queensland Parole System Review Final Report* (2016) 1 [3] (emphasis in original).

The ministerial guidelines that set out the criteria for the Parole Board to use when considering applications provide that the overriding consideration for the board's decision-making process is community safety.²³¹

If a court decides to sentence an offender to imprisonment with parole, one of two methods will be used.²³²

If the head sentence is 3 years or less (and not a sexual or serious violent offence or the offender otherwise ineligible, such as if a court ordered parole order has been cancelled during their period of imprisonment) the court *must* set a parole release date.²³³ The offender will be released to parole on that date and will remain under supervision until the expiration of the head sentence.

The court may fix any day of the offender's sentence as their parole release date, including the day of sentence or the last day of the sentence.²³⁴ This means offenders may be subject to immediate release on parole on the day of sentence, have to serve part of their sentence prior to release, or have to serve their full sentence in prison.

The other form of release on parole is a parole eligibility date, which the sentencing court sets. The offender will then be eligible for parole from that date but must apply to the Parole Board Queensland for release on parole. The actual date of their release is at the discretion of the Parole Board and can vary greatly depending on the circumstances of the case and of the offender. In some cases, offenders serve their full head sentence

If a person fails to comply with the conditions of their parole order, they can have their parole order amended, suspended or cancelled.²³⁵

Judicial discretion in setting such sentences requires flexibility. The Court of Appeal recently observed:

Because of the many different kinds of offences, the infinite kinds of circumstances surrounding the commission of offences and the limitless kinds of offenders, both the discretion as to length of imprisonment and as to the fixing of a parole date cannot possibly be circumscribed by judge-made rules so as to preclude consideration of whatever relevant factors might arise in a particular case. It may be common to impose a head sentence by having regard mostly to the circumstances surrounding the commission of the offence and to fix the actual period of custody by reference to an offender's personal circumstances. But there is no rule of law that requires that to be done in every case. In the absence of a statute that prescribes the way in which an offender should be punished, sentencing judges have always regarded all of the elements of a sentence to be flexible. They will continue to do so in order to arrive at a just sentence in all the circumstances.²³⁶

There is a general proposition that, where a sentence of imprisonment does not involve immediate release, a suspension or parole release or eligibility date will often be set at the one-third mark of the head sentence for an offender who enters an early guilty plea accompanied by genuine

²³¹ Mark Ryan MP, Minister for Police, Fire and Emergency Services and Minister for Corrective Services, *Ministerial Guidelines to Parole Board Queensland*, 3 July 2017, 2 [1.2]–[1.3].

²³² The relevant provisions regarding parole are in *Penalties and Sentences Act 1992* (Qld) Part 9, Division 3.

²³³ *Penalties and Sentences Act 1992* (Qld) s 160B.

²³⁴ *Ibid* s 160G.

²³⁵ *Corrective Services Act 2006* (Qld) s 205.

²³⁶ *R v Randall* [2019] QCA 25, 8 [38] (Sofronoff P and Morrison JA and Burns J).

remorse.²³⁷ For sentences involving parole eligibility, if a court makes no express order, the eligibility date is generally the day after reaching 50 per cent of the period of imprisonment.²³⁸ This is commonly applied to offenders who have been convicted after a trial.

However, in circumstances in which the court determines it appropriate for the offender to be declared convicted of a serious violent offence (SVO), an offender must serve 80 per cent of their sentence before being eligible for parole even if they have entered a guilty plea.²³⁹

Variable complexities encountered in different cases, which can include the mandated application of non-parole periods²⁴⁰ (for instance, for serious violent offences) and pleas of guilty which are not early, can mean that sentencing courts exercise their discretion to craft just sentences in a different way. The Court of Appeal recently confirmed that a head sentence can be reduced to give credit for a plea of guilty, but in some cases, this can then result in parole eligibility that is too early (even at the halfway point) and therefore inadequate:

The mitigating effect of a guilty plea can be manifested in many ways. One way is to reduce the head sentence. Another way is to reduce the non-parole period. The corollary of the latter proposition is that ... the mitigating effect of a plea might require a reduction in the head sentence and a postponement of the parole eligibility date.²⁴¹

²³⁷ Where the sentence is not mandatory, it is common for an offender who enters an early guilty plea — accompanied by genuine remorse — to have a parole eligibility date or release date set, or suspension of their sentence after serving one-third of their head sentence in custody: See *R v Crouch* [2016] QCA 81, 9 [29] (McMurdo P, Gotterson JA and Burns J agreeing); *R v Tran; Ex parte A-G (Qld)* [2018] QCA 22, 6–7 [42]–[44] (Boddice J, Philippides and McMurdo JA agreeing); *R v Rooney* [2016] QCA 48, 6 [16]–[17] (Fraser JA, Gotterson JA and McMeekin J agreeing) and *R v McDougall* [2007] 2 Qd R 87, 97 [20] (Jerrard, Keane and Holmes JJA). More recent judgments acknowledge this but stress that ‘as a matter of principle, the just and appropriate sentence including the proportion which the period to be served in prison bears to the whole term, is to be fixed with reference to all of the circumstances of the particular case, rather than by the application of some rule of thumb in a way that would unduly confine a sentencing judge’s discretion’: *R v Dinh* [2019] QCA 231, 5 (Morrison JA, McMurdo JA and Henry J agreeing). Further, ‘the discretion to fix a parole eligibility date is unfettered and the significance of a guilty plea for the exercise of that discretion will vary from case to case. Consequently, there can be no mathematical approach to fixing such a date’: *R v Randall* [2019] QCA 25, 9 [43] (Sofronoff P and Morrison JA and Burns J).

²³⁸ *Corrective Services Act 2006* (Qld) s 184.

²³⁹ *Penalties and Sentences Act 1992* (Qld) Part 9A. 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>>. In the case of offenders declared convicted of a serious violent offence, the person’s parole eligibility date is automatically set at the day after the person has served 80 per cent of their sentence for the offence, or 15 years (whichever is less): *Corrective Services Act 2006* (Qld) s 182. The Council has previously raised concern that head sentences under this mandatory SVO sentencing regime-head sentences are being necessarily reduced to take into account a plea of guilty and other matters in mitigation. See Queensland Sentencing Advisory Council, *Community-based Sentencing Orders, Imprisonment and Parole Options – Final Report* (2019) 89–90 [5.7.3] and Queensland Sentencing Advisory Council, *Sentencing for Criminal Offences Arising from the Death of a Child – Final Report* (2018) xxxiv, xxxix (Advice 3) and 158 [9.4.4]. The Court of Appeal has spoken of ‘the distorting effect’ of the scheme, in *R v Sprott; Ex parte A-G* [2019] QCA 116, 9 [41] (Sofronoff P, Gotterson JA and Henry J agreeing).

²⁴⁰ See *R v Randall* [2019] QCA 25, 5 [29]–[30] (Sofronoff P and Morrison JA and Burns J).

²⁴¹ *Ibid* 9 [44]–[45] (Sofronoff P and Morrison JA and Burns J) (emphasis added). That case involved the manslaughter of a baby and a late plea of guilty, where a head sentence of 10 years or more would mean the automatic application of the ‘80 per cent rule’ as part of a mandatory serious violent offence declaration. The court postponed the statutorily mandated halfway parole eligibility date by six months — the sentence was 9 years’ imprisonment with parole eligibility after 5 years. See also *R v MCW* [2019] 2 Qd R 344, 351–2 [30]–[31] (Mullins J): An offender pled guilty at an early stage. The sentencing judge declined to fix a date on which he would be eligible to apply for parole. He therefore was not eligible to apply for parole unless he had served half of the effective sentence of imprisonment. His application for leave to appeal against his sentence was refused.

Suspended sentences

A suspended sentence is a term of imprisonment which is suspended in whole or in part, for a set period of time called the 'operational period'. To avoid the possibility of being ordered to serve the suspended term of imprisonment, an offender subject to this form of order must not commit another offence punishable by imprisonment during the operational period.

In the case of serious assaults committed on public officers, around one in five cases results in either a wholly or partially suspended sentence being ordered (17.6% of cases dealt with in the higher courts, and 20.5% of those dealt with in the Magistrates Courts).

Queensland courts can order a sentence of imprisonment to be suspended only for head sentences of 5 years or less²⁴² and will generally prefer parole rather than suspension when supervision is required. For instance, in a section 340 case where a young offender spat into a police officer's face, mouth and eyes, the Court of Appeal stated:

It seems that [the sentencing judge] thought that there was "hope" for the [offender] because of his youth and relatively minor criminal record. He did not, however, explain how that rehabilitation might take place (apart from two months in prison) when there was no information about guidance which might put him on the right path. His Honour, puzzlingly, ordered the sentence to be suspended rather than fixing a parole release date ... it might be expected that his Honour would have explained why he chose that course and how it might aid the applicant's rehabilitation. Section 144(2) of the *Penalties and Sentences Act* provides that a court may order the whole or part of a term of imprisonment to be suspended but "only if the court is satisfied that it is appropriate to do so in the circumstances". There is no indication as to why his Honour could have been satisfied that it was appropriate here. An operational period of two years without any guidance at all put the applicant at risk of being returned to custody. In suspending the sentence without explanation the sentencing judge fell into error. The sentencing discretion must, then, be exercised by this court.²⁴³

Intensive correction orders

Another form of custodial penalty is an intensive correction order — a period of up to 12 months imprisonment, served in the community under supervision with a conviction recorded. The offender must comply with a number of conditions, including reporting twice weekly to an authorised corrective services officer, taking part in counselling and other programs as directed, and performing community service. The offender must agree to the order being made and to comply with the requirements under the order. If the offender does not comply with the conditions of the order, a court may revoke it and order the person to serve the remaining period of the sentence in prison.²⁴⁴

Intensive correction orders are rarely used in Queensland, and represent a very small proportion of all sentences imposed for serious assaults on public officers (see further Chapter 5).

4.5.2 Non-custodial orders

Non-custodial orders are orders that do not involve a term of imprisonment being imposed. Non-custodial options in Queensland include fines, good behaviour bonds and community-based orders such as community service and probation.

²⁴² *Penalties and Sentences Act 1992* (Qld) s 144. The limit is three years for Magistrates Courts — see *Criminal Code* (Qld) s 552H.

²⁴³ *R v McLean* [2011] QCA 218, 11 [30] (White JA, Fraser JA and Philippides J agreeing). And see *R v Farr* [2018] QCA 41, 8 (Philippides JA, Gotterson JA and Douglas J agreeing) where a suspended sentence was 'clearly undesirable' because of the offender's longstanding drug addiction. See also *R v Clark* [2016] QCA 173, 3–4 [5]–[6] (McMurdo P) and *R v Wano; Ex parte A-G (Qld)* [2018] QCA 117, 8 [44]–[45] (Henry J, Fraser JA and North J agreeing).

²⁴⁴ *Penalties and Sentences Act 1992* (Qld) Part 6.

Good behaviour bond/recognisance

A good behaviour bond is a requirement to appear before a court if called on to do so and to 'be of good behaviour' (not to break the law) for a set period (up to 3 years). It requires the offender and anyone acting as a 'surety' to pay an amount of money if the offender breaks the law or does not comply with other conditions that may be ordered, which include attending a drug assessment and education session.

Fine

A fine is an order to pay an amount of money. The maximum fine depends on the type of offence and the court hearing the matter. A fine can be ordered in addition to, or instead of, any other sentence with or without a conviction being recorded.

Probation order

A probation order is an order between 6 months and 3 years, with or without a conviction being recorded, that is served in the community with monitoring and supervision by an authorised corrective services officer. The person must agree to the order being made and to comply with the requirements under the order. When making a probation order the court must set mandatory requirements²⁴⁵ and can also make additional requirements.²⁴⁶ Mandatory requirements include:

- not committing another offence during the period of the order;
- participating in programs or counselling;
- reporting to and receiving visits from a corrective services officer as directed;
- telling a corrective services officer about any changes of address or employment within two business days; and
- not leaving Queensland without permission.

Additional conditions include submitting to medical, psychiatric or psychological treatment, or any conditions considered necessary to stop the offender committing another offence or to help the offender behave in a way that is acceptable to the community.

Community service order

A community service order is an order to do unpaid community service for between 40 and 240 hours, usually within 12 months, and to comply with reporting and other conditions, with or without a conviction being recorded.²⁴⁷ In addition to the requirement to perform community service, other mandatory requirements include:

- not committing another offence during the period of the order;
- reporting to and receiving visits from a corrective services officer as directed;
- telling a corrective services officer about any change of address or employment within two business days; and
- not leaving Queensland without permission.

The offender must agree to the order being made (unless it is a mandatory order, which applies to forms of assault against public officers committed in a public place while the offender was adversely affected by an intoxicating substance).²⁴⁸

²⁴⁵ Ibid s 93.

²⁴⁶ Ibid s 94.

²⁴⁷ Ibid ss 100–103.

²⁴⁸ Ibid s 108B.

4.5.3 Compensation and restitution

Restitution and compensation orders fall under the definition of ‘penalty’ in the PSA (which itself falls under the definition of ‘sentence’).²⁴⁹ Either order can be made in addition to any other sentence to which the offender is liable.²⁵⁰ These orders are described and explored in more detail in Chapter 8.

4.5.4 Mandatory sentencing

Mandatory sentences generally involve Parliament prescribing ‘a minimum or fixed penalty for an offence’.²⁵¹ It can ‘take various forms, the chief characteristic being that it either removes or severely restricts the exercise of judicial discretion in sentencing’.²⁵² In Queensland, this includes mandating non-parole periods, prescribing minimum penalties to be imposed, driving disqualification periods, directing that community service must be served as well as any punishment, and mandating the circumstances where a court can set only a parole release or eligibility date.

There are two circumstances of aggravation which apply mandatory sentencing to specified serious assault sentences.

The first is a mandatory community service order for a prescribed offence if committed with a circumstance of aggravation (committed in a public place while adversely affected by an intoxicating substance).²⁵³ A ‘prescribed offence’ includes common assault, wounding, AOBH, GBH, serious assault against police and public officers under sections 340(1)(b) and (2AA) and the PPRA section 790 offence.

This does not apply if the court is satisfied the offender is incapable of complying with a community service order because of any physical, intellectual or psychiatric disability.²⁵⁴

If it does apply and the person is detained on remand or imprisoned during the period of the community service order, that order is suspended until the person is released, and the period for completing the order is extended by the period of time the offender was detained or imprisoned.²⁵⁵

The second mandatory sentencing circumstance of aggravation is the ‘serious organised crime circumstance of aggravation’, applicable where the offence is committed as part of the offender’s involvement in a criminal organisation.²⁵⁶ It applies to a prescribed offence (which includes GBH, malicious acts, torture, AOBH if the applicable maximum penalty is 10 years’ imprisonment, and serious assault against police if the applicable maximum penalty is 14 years’ imprisonment). The sentence must include an extra, mandatory 7 years’ imprisonment (which must be served wholly in custody) in addition to, and cumulatively (one after the other) upon, the sentence for the prescribed offence itself.

²⁴⁹ Ibid s 4.

²⁵⁰ Ibid s 35(2).

²⁵¹ Law Council of Australia, *Mandatory Sentencing: Factsheet* (No. 1405, undated).

²⁵² Australian Law Reform Commission, *Same Crime: Same Time: Sentencing of Federal Offenders* (Report No. 103, 2006) 538–9 [21.54] (citations omitted).

²⁵³ See *Penalties and Sentences Act 1992* (Qld) Part 5, Division 2, Subdivision 2 (ss 108A–D) and *Criminal Code* (Qld) Chapter 35A (ss 365A–C).

²⁵⁴ *Penalties and Sentences Act 1992* (Qld) s 108B(2A).

²⁵⁵ Ibid s 108D.

²⁵⁶ See *Penalties and Sentences Act 1992* (Qld) Part 9D (ss 161N–S) and Schedule 1C.

A third form of mandatory sentencing applies where an offender is convicted of a listed offence (or of counselling, procuring, attempting or conspiring to commit it) while the offender was a prisoner serving a term of imprisonment, or was released on parole.²⁵⁷ Any sentence of imprisonment imposed for the offence must be served cumulatively (one after the other) with any other term of imprisonment the person is liable to serve. Relevant offences include wounding, AOBH, serious assault, GBH, torture and malicious acts.

The use of mandatory sentencing provisions for assaults on public officers in other jurisdictions is discussed in Chapter 6. Broader arguments for and against the adoption of minimum presumptive or mandatory sentencing provisions for serious assault offences as these apply to public officers are set out in Chapter 9.

4.6 Differences in sentencing children

The sentencing of children for assaults on public officers is governed by a different sentencing framework to the PSA.

A child under 10 is not criminally responsible for any act or omission. A child under 14 can only be criminally responsible if the prosecution shows the child had the capacity to know they should not do the act or make the omission at the time of doing it.²⁵⁸

The *Youth Justice Act 1992 (Qld)* ('YJA') governs the sentencing of children aged 17 or younger. The PSA only applies to children to the extent that the YJA allows it to.²⁵⁹ The YJA creates some different types of sentencing orders for children and has different foundational sentencing principles.²⁶⁰

Children may be sentenced to detention, but not imprisonment. A court cannot make a detention order unless it has considered a pre-sentence report,²⁶¹ has considered all other available sentences and the desirability of not holding a child in detention and is satisfied no other sentence is appropriate in the circumstances.²⁶²

In general terms, children sentenced to detention must spend a greater proportion of the head sentence physically in detention when compared to an adult offender serving a period of imprisonment prior to release on parole.

Unless a court makes a specific order, a child sentenced to serve a period of detention must be released from detention after serving 70 per cent of the period of detention. A court may order a child to be released from detention after serving 50 per cent or more, and less than 70 per cent, of a period of detention. It can do this if it considers there are special circumstances, for example to ensure parity of sentence with that imposed on a person involved in the same or related offence. As with the adult regime, there are exceptions (in the case of juveniles, the exceptions relate to terrorism offences).²⁶³

²⁵⁷ Ibid s 156A and Schedule 1.

²⁵⁸ *Criminal Code (Qld)* s 29.

²⁵⁹ *Penalties and Sentences Act 1992 (Qld)* s 6.

²⁶⁰ *Youth Justice Act 1992 (Qld)* s 150.

²⁶¹ Ibid s 207.

²⁶² Ibid s 208.

²⁶³ Ibid s 227.

At the end of the period of applicable physical detention, the chief executive (the Department of Youth Justice) must make a supervised release order releasing the child from detention.²⁶⁴ This maintains supervision of the child for the remainder of the head sentence and is similar to parole for adults.

The Department can impose and amend conditions. The order must require that the child not break the law, must satisfactorily attend programs as directed, comply with every reasonable direction of the chief executive and report and receive visits as directed, not leave, or stay out of, Queensland without prior approval and that the child or a parent notify of any change of address, employment or school. An order cannot require, or be subject to a condition, that the child must wear a tracking device.²⁶⁵

The YJA sets different maximum detention periods from those set in the *Criminal Code*, depending on the level of the sentencing court and seriousness of the offence.

The general sentencing powers are found in section 175 of the YJA. When a child is found guilty of an offence before a court, it may order:²⁶⁶

- a reprimand;
- good behaviour order for not longer than 1 year;
- a fine;
- probation (a magistrate can impose not longer than 1 year, a judge cannot impose longer than 2 years);
- performance of the obligations of restorative justice agreement if one was made through a pre-sentence referral;
- participation in a restorative justice process as directed by the chief executive;
- unpaid community service (if the child is at least 13 at the time of sentence). Maximum hours are 100 for children aged 13 or 14 at sentence, and 200 hours for children 15 or older;
- an intensive supervision order of not more than 6 months (if the child has not attained the age of 13 years at the time of sentence);
- detention – with or without conditional release. A magistrate can impose not more than 1 year. A judge can impose up to the shorter of half the maximum term of imprisonment that an adult convicted of the offence could be ordered to serve; or 5 years.

If an offence is a ‘relevant offence’ and if the Childrens Court of Queensland (the District Court exercising powers under the YJA, as opposed to a Magistrates Court doing the same) is sentencing the child, then that judge has wider penalty powers. This is because section 176 of the YJA (Sentence orders – life and other significant offences) applies.

A ‘relevant offence’ means a life offence,²⁶⁷ or an offence of a type that, if committed by an adult, would make the adult liable to imprisonment for 14 years or more (with the exception of some property and drug offences not relevant here).²⁶⁸ In other words, both aggravated forms of serious

²⁶⁴ Ibid s 228.

²⁶⁵ Ibid.

²⁶⁶ Some orders can only be imposed against a child if the offence in question is one that would make an adult liable to imprisonment (as the maximum penalty applicable). These are probation, community service and an intensive supervision order - *Youth Justice Act 1992* (Qld) s 175(2). All forms of assault carry a maximum of imprisonment for an adult.

²⁶⁷ An offence for which a person sentenced as an adult would be liable to life imprisonment: *Youth Justice Act 1992* (Qld) Schedule 4.

²⁶⁸ *Youth Justice Act 1992* (Qld) s 176(10).

assaults (regarding spitting etc against police and public officers), GBH, malicious acts and torture are relevant offences due to the maximum penalty that applies to these offences.

While the judge could use one of the section 175 sentencing options, he or she could instead:

- impose probation for up to 3 years; or
- Make a detention order for not more than 7 years. (It is different for malicious acts – because it is a life offence. The judge could impose detention of not more than 10 years; or a period up to and including the maximum of life, if the offence involves the commission of violence against a person and the court considers the offence to be a particularly heinous offence having regard to all the circumstances).

Mandatory minimum penalties applying to adults do not apply to children. Where a mandatory fixed penalty is set for adults, this is treated as the maximum penalty for children.²⁶⁹

As this discussion of the YJA demonstrates, ‘the purposes to be achieved when sentencing a [child] of 15 or 16 are not the same as the purposes to be achieved when sentencing a grown [adult] for the same offence’.²⁷⁰ In the case of a boy sentenced to (in the end, increased) detention for malicious acts, involving colliding a stolen car with a police officer, the Court of Appeal contrasted sentencing adults with children:

In dealing with the objective circumstances of the offending, it is crucial in this case to bear in mind that it was no part of the prosecution case that Patrick intended to drive the car into [the officer] or that he intended to injure him [the child intended to resist or prevent lawful arrest]. In almost all cases involving adult offenders, when the consequences have been as grave as they are in this case, a lack of intention to cause harm is often of only minor significance for sentencing purposes. When sentencing adult offenders, the plainly foreseeable consequences of offending are often treated as equivalent to intended consequences whether the offender foresaw them or not. However, when dealing with child offenders that simple equivalence is not available. Immaturity in thinking that hampers a child’s judgment, as well as a child’s lack of experience, means that children often commit offences without being conscious of the potential consequences. For this reason, the moral blameworthiness of a child for the consequences of offending cannot always be the same as that of an adult.²⁷¹

The *Youth Justice Act 1992* (Qld) embodies this as a fundamental premise and requires judges to sentence accordingly. Principles 8(b) and 16, which require a sentencing judge to deal with a child in a way that gives an “opportunity to develop in responsible, beneficial and socially acceptable ways” and in a way that “allows the child to be reintegrated into the community”, command a sentencing judge to do what can be done to increase the prospects of diverting the child from the potentially damaging effects of punishment towards education, the learning of self-discipline, the nurturing of an appreciation and an acceptance of social standards and, in due course, successful reintegration with the community.²⁷²

In this respect, if the aims of the Act are to be understood, it is critical to appreciate that although those aims are to some degree informed by the community’s natural tenderness towards children, that is a minor aspect and, for present purposes, it can be put to one side. The *real* reason for these legislative requirements lies in the Australian community’s belief that, until a child has matured into an autonomous adult, whatever a child’s current circumstances might be, and whatever offence a child has committed, every child holds within itself the potential for an honourable and productive life. The alternative view, that the child’s character

²⁶⁹ Ibid s 155.

²⁷⁰ *R v Patrick (a pseudonym)* [2020] QCA 51, 9 [43] (Sofronoff P, Fraser JA and Boddice J agreeing).

²⁷¹ Ibid 10 [45].

²⁷² Ibid 10 [46].

is irredeemable, or that painful punishment of children will “reform” them, is not to be adopted unless and until it is conclusively shown to be justified in an individual case. The Act builds upon this assumption by regulating the punishment of children so as to increase the prospect that the child will not reoffend, not by fear of the pain of punishment, but because successful reintegration of the child into the community has removed the risk of re-offending.²⁷³

²⁷³ Ibid 10 [47].

Chapter 5 Sentencing outcomes for assaults on public officers

In providing its advice to the Attorney-General, the Council has been asked to report on current penalties and sentencing trends for assaults against police officers, corrective services officers and all other public officers that fall within the scope of section 340 of the *Criminal Code*, and other specific legislative provisions such as section 790 of the *Police Powers and Responsibilities Act 2000* (Qld) ('PPRA') and section 124(b) of the *Corrective Services Act 2006* (Qld) ('CSA') to determine whether they are in line with stakeholder expectations and appropriately respond to this form of offending.

This chapter investigates the sentencing outcomes for cases involving the assault of a public officer, including police officers, corrective services officers, and other public officers charged under either section 340 of the *Criminal Code* and relevant summary offence provisions. Consideration of the appropriateness of these outcomes is explored in Chapter 9.

Assaults on public officers may be charged under general offence provisions contained in the *Criminal Code* rather than under section 340 (such as common assault, assault occasioning bodily harm (AOBH), wounding or grievous bodily harm (GBH)). However, based on data obtained from Court Services Queensland for the purposes of analysing sentencing outcomes, it is not possible to identify whether the victim of these offences was a public officer. For this reason, sentencing outcomes for assaults on public officers charged under these general offence provisions cannot be analysed. However, some data is presented on sentencing outcomes for these offences of general application for comparative purposes.

5.1 Sentencing outcomes for serious assaults and other 'acts intended to cause serious injury'

In this section, we examine sentencing outcomes for serious assault (both non-aggravated and aggravated forms) in comparison to penalties imposed for other 'acts intended to cause injury' offences carrying the same maximum penalties, and/or capturing the same type of conduct. The analysis is limited to assaults and other offences falling within the broad offence category of 'acts intended to cause injury' given the focus of this reference is on assaults and that similar forms of criminal conduct are involved in the commission of these offences.

A comparison between sentencing outcomes for offences sharing the same maximum penalties is used to illustrate how current sentencing practices vary between these offence categories.

Non-aggravated forms of serious assault are compared with common assault to explore how maximum penalties can influence sentencing practices, as these two offences involve similar types of conduct.

The Council intends to undertake further analysis of this kind based on sub-categories of aggravated forms of serious assault during the next stage of the review. For example, sentencing outcomes for aggravated serious assault causing bodily harm will be compared to sentencing outcomes for the offence of AOBH.

5.1.1 Relevance of maximum penalties to sentencing

Maximum penalties are an important sentencing consideration as they provide an indication of Parliament's views about the objective seriousness of an offence and the seriousness of assaults on public officers relative to other offences. As discussed in the previous chapter, legislation

requires courts in sentencing to have regard to ‘the maximum and any minimum penalty prescribed for the offence’.²⁷⁴

Unless the penalty to be imposed is prescribed (as it is for murder), a court has discretion to impose a sentence less than the maximum penalty that it considers is appropriate, taking into account other sentencing factors and the individual circumstances of the case. As a majority of the High Court observed in *Markarian v The Queen*:

careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick.²⁷⁵

Although the maximum penalty may be highly relevant, there are circumstances in which it may be found to ‘have little relevance in a given case, either because it was fixed at a very high level in the last century ... or because it has more recently been set at a high catch-all level’.²⁷⁶

Variations in sentencing trends for offences carrying the same name, and/or the same maximum penalty are also to be expected due to differences in offence seriousness based on the nature of the criminal conduct involved, the circumstances of the particular offender (for example, their criminal history), the harm caused, and the interests they infringe.²⁷⁷

The below analysis of sentencing trends should be approached with the above qualifications in mind.

5.1.2 Sentencing outcomes for non-aggravated serious assault and other ‘acts intended to cause injury’ carrying a 7-year maximum penalty

As discussed in Chapter 3, non-aggravated serious assault carries a maximum penalty of 7 years. Other offences falling within the category of ‘acts intended to cause injury’ also have a 7-year maximum penalty: AOBH where there are no circumstances of aggravation, and wounding.

The overwhelming majority of non-aggravated serious assaults (where this was the most serious offence (MSO))²⁷⁸ over the data period (95.4%; n=1,253) were sentenced in the Magistrates Courts, as were most AOBH offences (92.1%; n=8,144). Wounding must be dealt with on indictment and therefore all sentences imposed for this offence were imposed by the higher courts.

For offences sentenced in the Magistrates Courts, just over half of non-aggravated assaults (MSO) (54.5%) resulted in a custodial sentence being imposed, as did 50.3 per cent of AOBH offences (MSO). See Table A4-2 in Appendix 4. In the higher courts, 82.0 per cent of non-aggravated serious assault offences (MSO) resulted in a custodial sentence, compared to 80.0 per cent of AOBH offences (MSO) and 97.0 per cent of offences of wounding (MSO).

²⁷⁴ *Penalties and Sentences Act 1992* (Qld) s 9(2)(b).

²⁷⁵ (2005) 228 CLR 357, 372 [31] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

²⁷⁶ Ibid 372 [30] (Gleeson CJ, Gummow, Hayne and Callinan JJ) citing Stockdale and Devlin, *Sentencing* (1987) [1.16]–[1.18].

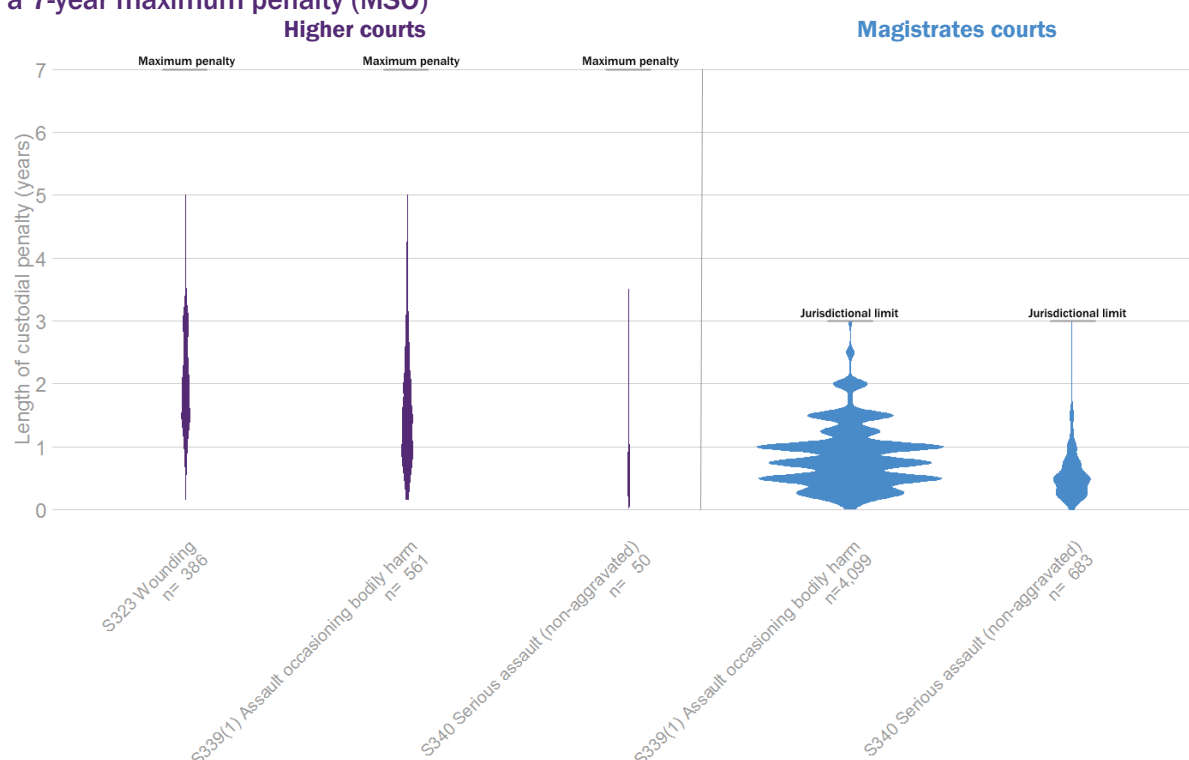
²⁷⁷ See Richard Fox, ‘Ranking Offence Seriousness in Reviewing Statutory Maximum Penalties’ (1990) 23 *Australian and New Zealand Journal of Criminology* 165, 166 making this point as it applies to variations in offence seriousness within offences bearing the same name, and the general discussion of offence seriousness in Chapter 7 of this paper.

²⁷⁸ The MSO is the offence at a court event receiving the most serious penalty, as ranked by the classification scheme used by the Australian Bureau of Statistics.

As Figure 5-1 below indicates, the distribution of custodial sentence lengths varies considerably across these different offences. For offences sentenced in the higher courts, no sentences reached the 7-year maximum penalty. The highest penalty for a non-aggravated serious assault – 3.5 years – was 1.5 years lower than that for both wounding and AOBH at 5.0 years. In the Magistrates Courts, the maximum sentence imposed for both AOBH and nonaggravated serious assault reached the 3-year jurisdictional limit.

Sentences for non-aggravated serious assault in the Magistrates Courts clustered around 6 months (with an average sentence of 0.6 years, or just over 7 months) while sentences for AOBH were more evenly spread from 6 months up to 2 years (with an average of 0.8 years, or around 9.5 months). In the higher courts, the average custodial sentence was shortest for non-aggravated serious assault at 0.9 years, followed by AOBH at 1.5 years. The average sentence for wounding was the longest at 2.1 years. Further summary statistics are set out in Table A4-2 in Appendix 4.

Figure 5-1: Distribution of custodial penalties for ‘acts intended to cause injury’ offences carrying a 7-year maximum penalty (MSO)



Data includes: adult offenders only, offences occurring on or after 5 September 2014, cases sentenced 2014–15 to 2018–19.
Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

5.1.3 Sentencing outcomes for aggravated serious assault and other 'acts intended to cause injury' offences carrying a 14-year maximum penalty

Aggravated serious assault carries a maximum penalty of 14 years, as do the offences of GBH and torture.

These three offences are quite distinct:

- aggravated serious assault involves a person assaulting, resisting or wilfully obstructing a police officer or public officer executing their duties or performing a function of their office and is so aggravated by one of a number of circumstances specified, including where bodily harm is caused to the victim (whether this outcome is intended or not);
- GBH involves a person unlawfully doing grievous bodily harm (that is, harm involving the loss of a distinct part of an organ of the body, serious disfigurement or any bodily injury that if left untreated would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health);
- 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 occasions.

Both GBH and torture must be dealt with on indictment in the higher courts. All offences of torture (n=62) and almost all GBH offences (99.1%; n=567/572) sentenced over the data period received a custodial penalty.

Aggravated serious assaults must be dealt with in the Magistrates Courts on prosecution election. The majority of aggravated serious assaults (84.9%; n=1,280/1,507) were sentenced in the Magistrates Courts with three-quarters (74.8%) resulting in a custodial sentence being imposed. Those cases dealt with in the higher courts, although smaller in number, were more likely to result in a custodial sentence (93.0%) most likely reflecting the more serious nature of the matters dealt with on indictment.

Figure 5-2 shows the distribution of the length of custodial sentences applied for these offences.

In the higher courts, the longest custodial sentence for aggravated serious assault was 5.0 years, considerably below the maximum penalty of 14 years, although 1.5 years higher than the maximum sentence imposed for non-aggravated forms of this offence. Sentences tended to cluster around 1 year, with the average sentence length being 1.1 years, with few cases longer than 2 years.

In comparison, the longest sentence for torture was 10.0 years, with a fairly even spread of cases falling between 1 and 10 years, and a slight increase in numbers around the 5-year mark. The average sentence for torture was 5.4 years. The longest sentence for GBH was 8.0 years, with the majority of sentences falling between 1 and 3 years, and an average sentence length of 3.0 years.

In the Magistrates Courts, while the longest sentence for aggravated serious assault reached the Courts' jurisdictional limit of 3 years, the majority of sentences were less than 2 years, and the most common sentence was 6 months. The average sentence length was 0.7 years – or about 8.5 months.

Further summary statistics are available in Table A4-3 in Appendix 4.

Figure 5-2: Distribution of custodial penalties for 'acts intended to cause injury' offences carrying a 14-year maximum penalty (MSO)



Data includes: adult offenders, offences occurring on or after 5 September 2014, cases sentenced 2014–15 to 2018–19. Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

5.1.4 Sentencing outcomes for non-aggravated serious assault and common assault

Common assault under section 335 of the *Criminal Code* carries a maximum penalty of 3 years. As for the offence of non-aggravated serious assault, to which a 7-year maximum penalty applies, this offence does not involve bodily harm being caused to a victim as an element of the offence.

The higher maximum penalty for serious assault under section 340 of the *Criminal Code* is reflected in the penalties imposed. Non-aggravated serious assault offences (MSO) are more likely to receive a custodial penalty than common assault, with over half (54.4%) of non-aggravated

serious assault offences (MSO) sentenced in the Magistrates Courts resulting in a custodial penalty, compared to just over one in five (21.5%) of common assault offences. For the small number of remaining offences dealt with in the higher courts, over four in five (82.0%) non-aggravated serious assault offences (MSO) resulted in a custodial penalty being imposed, compared to just two in five (41.7%) common assault offences (MSO). See Table A4-3 in Appendix 4 for further detail.

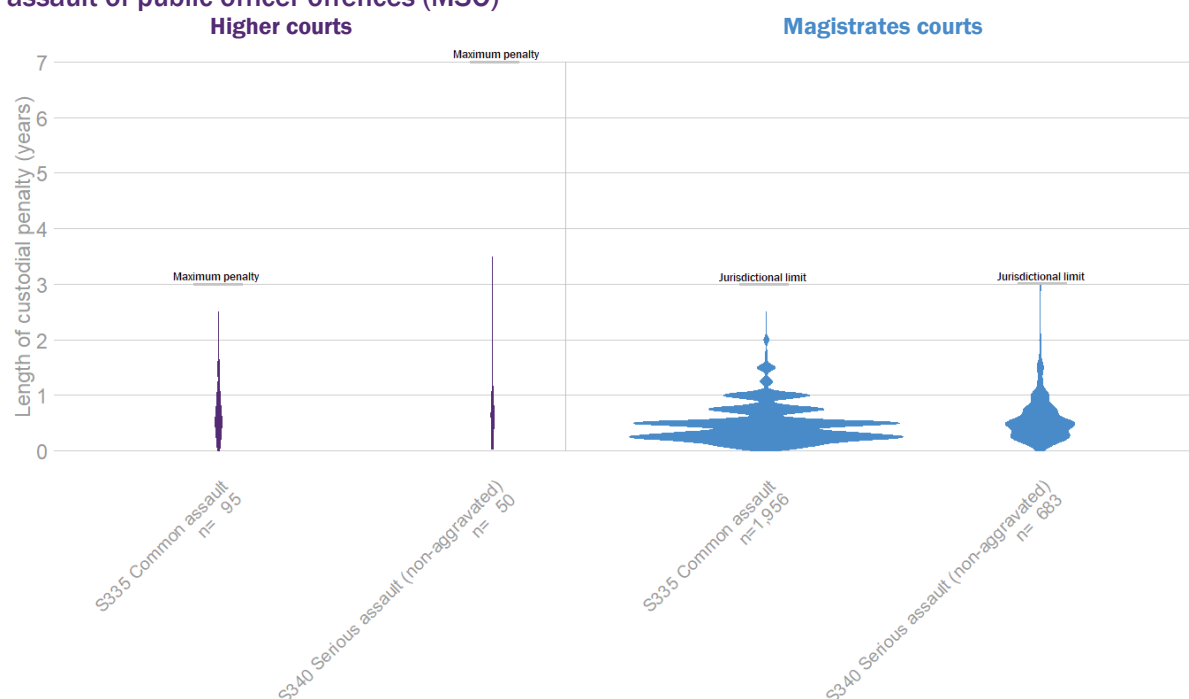
For offences resulting in a custodial sentence, Figure 5-3 below shows that the distribution of custodial sentences for non-aggravated serious assault and common assault are more similar to each other than for other ‘acts intended to cause harm’ offences analysed above.

The longest sentence imposed for common assault across both court levels was 2.5 years – just 6 months short of the maximum penalty of 3 years. The distribution of sentences, however, was quite different. For common assaults in the higher courts, the sentence lengths were distributed relatively evenly; whereas in the Magistrates Courts, which imposed 95.1 per cent of all custodial penalties for this offence, sentences were concentrated at less than 1 year.

The longest sentence imposed for non-aggravated serious assault was 3 years in the Magistrates Courts, and 3.5 years in the higher courts – both of which exceeded the highest sentence imposed for common assault. This is to be expected given the current 3-year maximum penalty that applies to common assault, and the higher maximum penalty of 7 years for serious assault.

Non-aggravated serious assault offences were not only much more likely to result in a custodial sentence, but also to attract a longer sentence. For serious assault offences sentenced in the higher courts, the average sentence length was 0.6 years, compared to the average sentence length for common assault cases which was 0.5 years. Further summary statistics are available in Table A4-3 in Appendix 4.

Figure 5-3: Distribution of custodial penalties for common assault (MSO) and non-aggravated assault of public officer offences (MSO)



Data includes: adult offenders, offences occurring on or after 5 September 2014, sentenced 2014–15 to 2018–19.
Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

5.2 Sentencing outcomes for section 340 Criminal Code

The remaining sections of this chapter explore sentencing outcomes in more detail for offences involving the assault on a public officer charged under section 340 of the *Criminal Code*, as well as for offences under the PPRA and CSA.

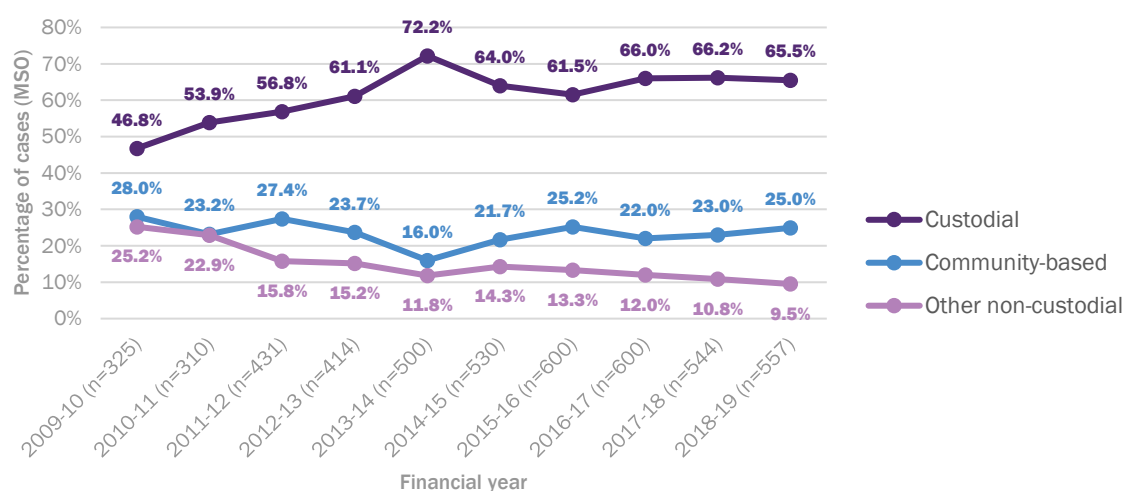
For adult offenders, the majority of cases involving the serious assault of a public officer (MSO) resulted in a custodial penalty (62.5% in the Magistrates Courts, 88.5% in the higher courts). In comparison, a custodial penalty was issued in 23.9 per cent of cases involving young offenders.

A different sentencing regime applies to young offenders sentenced in Queensland under the *Youth Justice Act 1992* (Qld) to that which applies to adults under PSA (see Chapter 4 for more information). For this reason, the penalties imposed on adult offenders and young offenders are discussed separately.

5.2.1 Adult offenders sentenced in the Magistrates Courts

As Figure 5-4 below demonstrates, custodial sentences have become more commonly imposed by Magistrates Courts for section 340 offences, representing under half (46.8%) of penalties in 2009–10, rising to 65.5 per cent in 2018–19. This may partly reflect broader sentencing trends as there was a general increase in the use of custodial penalties across all offence categories in Queensland over this same period.²⁷⁹

Figure 5-4: Type of penalties issued for serious assault of a public officer over time (MSO), Magistrates Courts



Data includes: Magistrates Courts, adult offenders, offences occurring on or after 5 September 2014, cases sentenced from 2009–10 to 2018–19

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

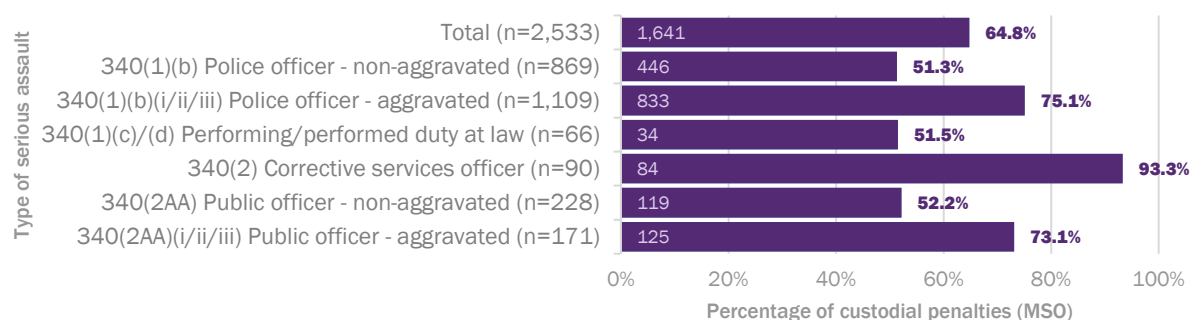
Note: ‘Custodial’ includes imprisonment, partially suspended sentences, wholly suspended sentences, and intensive correction orders. ‘Community-based’ includes community service and probation. ‘Other non-custodial’ includes monetary orders (including fines, restitution, and compensation), good behaviour bonds, and convicted not further punished.

Note: Includes serious assaults that involved a public officer, including: s 340(1)(b) police officers, s 340(1)(c) person performing a duty imposed by law, s 340(1)(d) person who performed a duty imposed by law, s 340(2) corrective services officers, s 340(2AA) public officers.

²⁷⁹ Queensland Sentencing Advisory Council, *Community-Based Sentencing Orders, Imprisonment and Parole Options – Final Report* (2019) 17.

In the Magistrates Courts, across all years examined, a custodial penalty was issued in 64.8 per cent of cases where serious assault of a public officer was the MSO (n=1,641). Almost all assaults of a working corrective services officer resulted in a custodial penalty (93.3%, n=84), which can be explained by the fact that offenders of serious assault against corrective services officers are already serving prison sentences. The proportion of custodial penalties was also high for serious assaults of police officers and public officers with circumstances of aggravation. For offences against police officers, 75.1 per cent of serious assaults with circumstances of aggravation resulted in a custodial penalty (n=833); while in the case of public officers, 73.1 per cent of aggravated serious assaults resulted in a custodial penalty (n=125).

Figure 5-5: Proportion of serious assaults of public officers that resulted in a custodial penalty (MSO), Magistrates Courts, adult offenders



Data includes: Magistrates Courts, adult offenders, offences occurring on or after 5 September 2014, cases sentenced from 2014–15 to 2018–19

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

Figure 5-6 provides a breakdown of the penalties ordered for different types of serious assault.

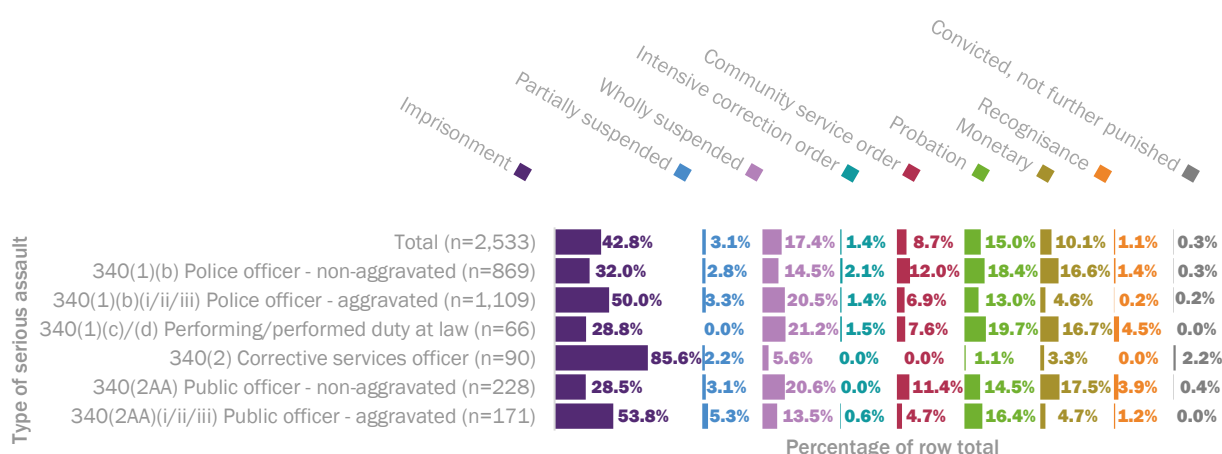
Imprisonment was the most common penalty type ordered for serious assault of a public officer, with 42.8 per cent of cases resulting in imprisonment (n=1,085). A suspended sentence of imprisonment was ordered in 521 cases (20.6%); in 79 of these cases, the suspended sentence involved a period of time actually served in custody. The Council has previously identified administrative data issues which mean that some sentences recorded as being ‘wholly suspended’ may instead be partially suspended – often where time served on remand is declared as time served and the sentence is suspended from the date of sentence. For this reason, the numbers of sentences involving actual time being served in custody may in fact be higher.

A community-based sentence was ordered in 23.7 per cent of cases in the Magistrates Courts (n=599). A probation order was made in 379 cases (15.0%), and a community service order in 220 cases (8.7%).

As discussed in Chapter 4, a community service order is mandatory for offences occurring in certain prescribed circumstances which must be ordered in addition to any other sentence imposed. However, the figures presented below relate only to the MSO sentenced. The MSO is the offence at a court event receiving the most serious penalty, as ranked by the classification scheme used by the Australian Bureau of Statistics. For this reason, if a community service order was ordered alongside a custodial sentence, the community service order will not appear as a relevant sentencing outcome. The number of community sentencing orders reported in this section therefore is likely to be an undercount. The Council will be examining the use of mandatory community sentencing orders in more detail in its final report.

In 10.1 per cent of cases, a monetary order was issued (n=257). A monetary order can include a fine, a compensation order, or a restitution order. A good behaviour bond (also known as a recognisance) was issued in 1.1 per cent of cases (n=28). In 0.3 per cent of cases, the offender was convicted, but not further punished (n=8).

Figure 5-6: Type of penalties issued for serious assault (MSO) by assault type, Magistrates Courts, adult offenders



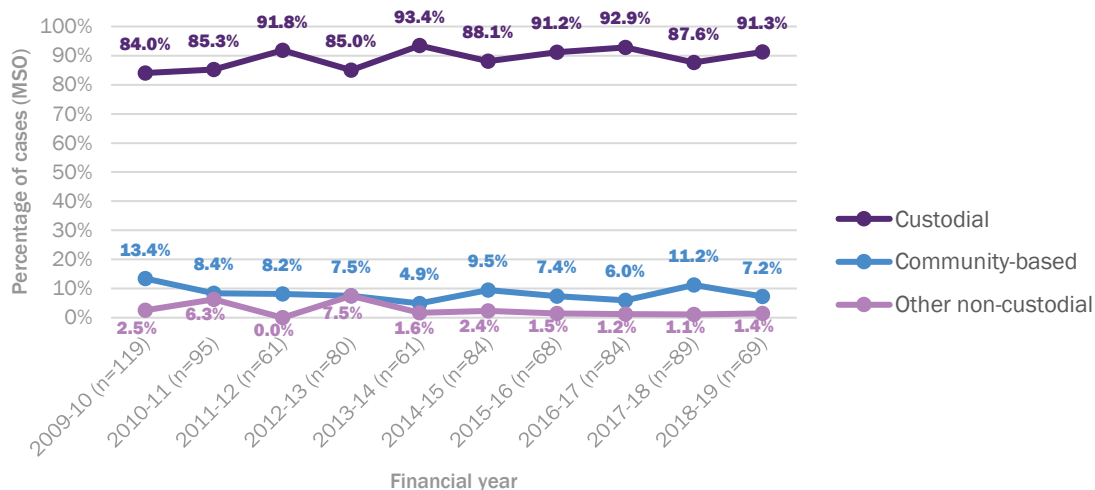
Data includes: Magistrates Courts, adult offenders, offences occurring on or after 5 September 2014, cases sentenced from 2014–15 to 2018–19

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

5.2.2 Adult offenders sentenced in the higher courts

Custodial sentences have become more common in the higher courts, having increased from 84.0 per cent in 2009–10 to 91.3 per cent in 2018–19. However, note that over the same time period, there was a general increase in the use of custodial penalties for all offences in Queensland.²⁸⁰

Figure 5-7: Type of penalties issued for serious assault of a public officer (MSO) over time, higher courts



Data includes: higher courts, adult offenders, cases sentenced from 2009–10 to 2018–19

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019

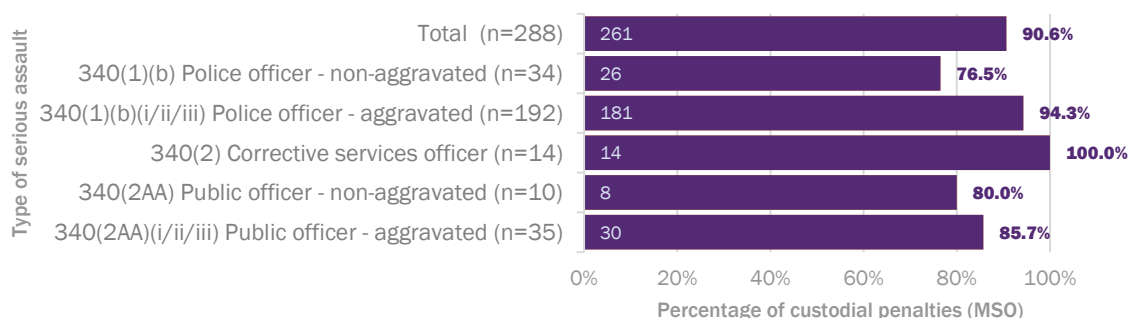
Note: ‘Custodial’ includes imprisonment, partially suspended sentences, wholly suspended sentences, and intensive correction orders. ‘Community-based’ includes community service and probation. ‘Other non-custodial’ includes monetary orders (including fines, restitution, and compensation), good behaviour bonds, and convicted not further punished.

Note: Includes serious assaults that involved a public officer, including: s 340(1)(b) Police officers, s 340(1)(c) person performing a duty imposed by law, s 340(1)(d) person who performed a duty imposed by law, s 340(2) corrective services officers, s 340(2AA) public officers.

²⁸⁰ Queensland Sentencing Advisory Council (n 279).

In the higher courts, a custodial penalty was issued in 90.6 per cent of cases where serious assault was the MSO (n=261). As expected, all serious assaults of working corrective services officers resulted in a custodial penalty (100%, n=14). For police officers, 94.3 per cent of serious assaults with circumstances of aggravation resulted in a custodial penalty (n=181); for public officers, 85.7 per cent of aggravated serious assaults resulted in a custodial penalty (n=30).

Figure 5-8: Percentages of serious assaults of public officers that resulted in a custodial penalty (MSO) by assault type, higher courts, adult offenders



Data includes: higher courts, adult offenders, offences occurring on or after 5 September 2014, cases sentenced from 2014–15 to 2018–19

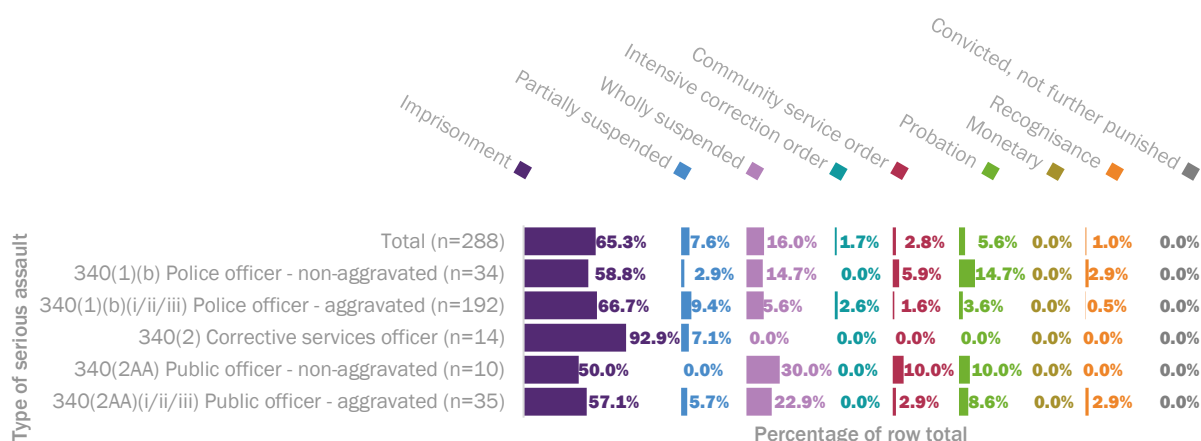
Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

Note: Assault of persons performed/performing a duty at law under s 340(1)(c)/(d) were not reported due to small numbers (n=3).

Imprisonment was the most common penalty for serious assault in the higher courts, with 65.3 per cent of cases resulting in an unsuspended term of imprisonment (n=188). A suspended sentence was imposed in 68 cases (23.6%); in 22 of these cases, the suspended sentence involved a period of time actually served in custody. As discussed above, the numbers of suspended sentences involving time spent in custody may be an undercount due to data recording issues.

A community-based sentence was ordered in 8.3 per cent of cases in the higher courts (n=24). A probation order was imposed in 16 cases (5.6%), and a community service order was imposed in 8 cases (2.8%).

Figure 5-9: Type of penalties issued for serious assault (MSO) by assault type, higher courts, adult offenders



Data includes: higher courts, adult offenders, offences occurring on or after 5 September 2014, cases sentenced from 2014–15 to 2018–19

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

Note: Assault of persons performed/performing a duty at law under s 340(1)(c)/(d) were not reported due to small numbers (n=3).

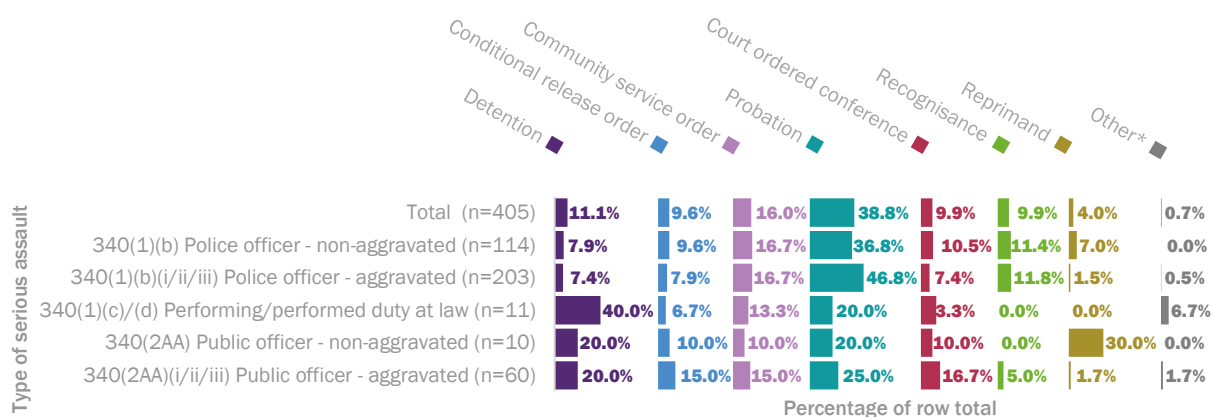
5.2.3 Young offenders

Due to the small number of young offenders sentenced in the higher courts (n=21, 5.2%), the data from the lower courts and higher courts are reported together in this section.

Overall, a custodial order was made in 21.2 per cent of cases where serious assault of a public officer was the MSO for a young offender (n=86). A detention order was imposed in 11.1 per cent of cases (n=45), and an additional 9.6 per cent of offenders were sentenced to detention but were immediately released into a structured program with strict conditions (a conditional release order, n=39).

Community-based sentences were the most common penalty imposed on young offenders. A probation order was imposed in over a third of cases (38.8%, n=157), and a community service order was imposed in 16.0 per cent of cases (n=65).

Figure 5-10: Type of penalties issued for serious assault (MSO), by assault type, young offenders



Data includes: lower and higher courts, juvenile offenders, offences occurring on or after 5 September 2014, cases sentenced from 2014–15 to 2018–19

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

Note: Assault of a corrective services officer under s 340(2) was not reported due to small numbers (n=3).

* Other includes boot camp orders, intensive supervision orders, and convicted, not further punished.

5.3 Assault of police officers

From 29 August 2012 to 30 June 2019, there were 4,959 cases sentenced for the serious assault of a police officer under section 340(1)(b) of the *Criminal Code*. In 3,612 of these cases, the serious assault of a police officer was the most serious offence sentenced.

A much larger number of cases (55,822) involved an offender being sentenced for assault or obstruction of a police officer under section 790 of the PPRA. In 15,440 of those cases, the assault or obstruction of a police officer was the most serious offence sentenced, indicating that this offence is often charged alongside more serious offences.

In contrast to serious assaults under the *Criminal Code*, the offence of assaulting or obstructing a police officer under section 790 of the PPRA is a less serious offence that can only be dealt with by a Magistrates Court, unless transmitted to a higher court to be dealt with alongside more serious charges. Under section 790, the maximum penalty is a fine of \$5,338 (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.

Table 5-1: Number of sentenced assaults or obstructions of police officers by assault type

| Section number | Offence description | Charges | Offenders | Cases | MSO |
|----------------------|------------------------------------|---------|-----------|--------|--------|
| Higher courts | | | | | |
| 340(1)(b) | Police officer (aggravated) | 380 | 288 | 290 | 74 |
| 340(1)(b)(i) | Police officer - bodily fluid | 313 | 249 | 251 | 175 |
| 340(1)(b)(ii) | Police officer - bodily harm | 180 | 146 | 146 | 98 |
| 340(1)(b)(iii) | Police officer - armed | 125 | 82 | 82 | 40 |
| 790* | Assault or obstruct police officer | 1,883 | 1,290 | 1,318 | 7 |
| Lower courts | | | | | |
| 340(1)(b) | Police officer (aggravated) | 2,437 | 1,907 | 1,974 | 1,385 |
| 340(1)(b)(i) | Police officer - bodily fluid | 1,390 | 1,144 | 1,190 | 987 |
| 340(1)(b)(ii) | Police officer - bodily harm | 647 | 583 | 597 | 509 |
| 340(1)(b)(iii) | Police officer - armed | 636 | 412 | 429 | 344 |
| 790* | Assault or obstruct police officer | 67,977 | 42,182 | 54,504 | 15,433 |

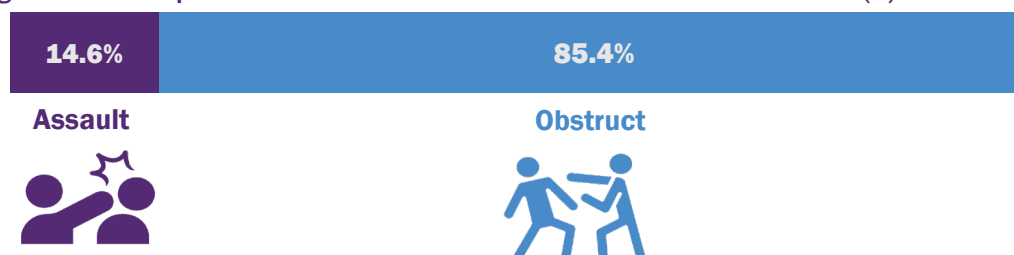
Data includes: adult and juvenile offenders, offences occurring on or 29 August 2012, sentenced from 2012–13 to 2018–19.

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

* Includes police officers who were obstructed but may not have been assaulted.

On 20 September 2018, section 790 of the PPRA was amended to separate the offence into two subsections: one dealing with the assault of police officers, and the other dealing with obstruction of police officers. Prior to this amendment, ‘assaults’ and ‘obstructions’ could not be distinguished; hence this information is not available. From 20 September 2018 to 30 June 2019, the majority of cases sentenced under section 790 involved the obstruction of a police officer (85.4%, n=3,703), the remaining 14.6 per cent of cases involved the assault of a police officer (n=633).

Figure 5-11: Proportion of assaults and obstructions under section 790(1) PPRA



Data includes: adult and juvenile offenders, lower and higher courts, cases where the offence was committed on or after 20 September 2018, and the case was sentenced in the 2018–19 financial year.

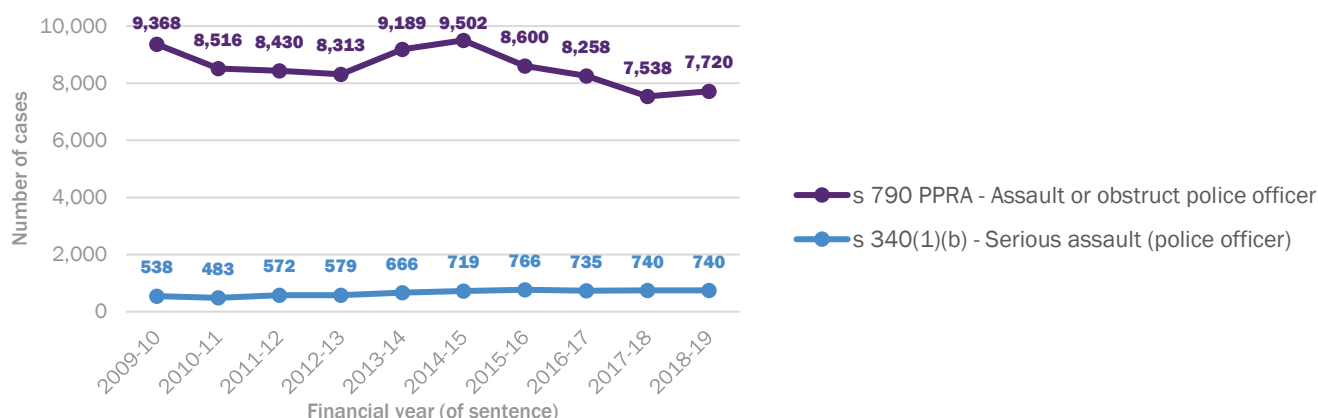
Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

Note: A small number of cases were excluded where it was unknown whether the offence was an assault or obstruct (n=36, 0.01%).

The number of cases involving the serious assault of a police officer increased from 538 cases in 2009–10 to 740 cases in 2018–19, an increase of 37.5 per cent – see Figure 5-12.

The number of assaults or obstructions of police officers sentenced under section 790 of the PPRA has decreased over the past 10 years. In 2009–10, there were 9,368 cases; this number dropped to 7,720 cases in 2018–19. This decrease is even more notable considering the number of police officers in Queensland increased by 13.2 per cent over the same period (2009–10 to 2018–19).²⁸¹ Potential reasons for this decrease will be explored by the Council during consultation.

Figure 5-12: Number of assaults or obstructions of police officers, by assault type, over time



Data includes: lower and higher courts, adult and juvenile offenders, cases sentenced from 2009–10 to 2018–19
Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

5.3.1 Impact of introduction of statutory circumstances of aggravation

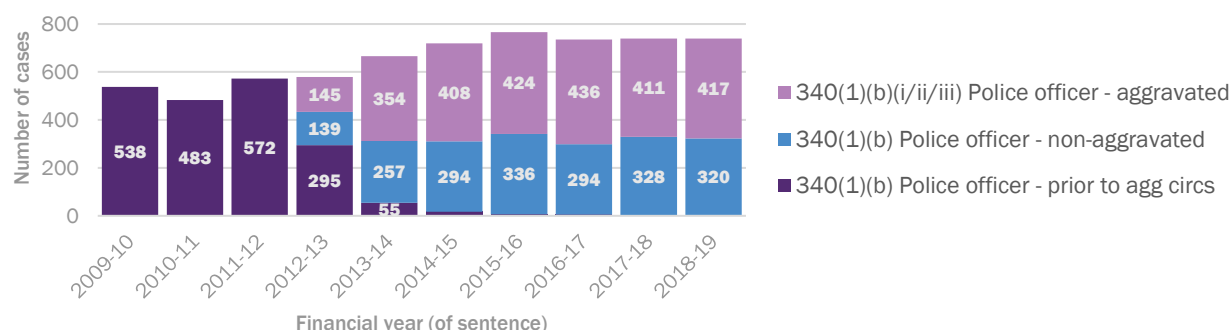
From 29 August 2012, it became a statutory circumstance of aggravation to assault a police officer by biting, spitting on, throwing at or applying bodily fluid or faeces to, or causing bodily harm to a police officer or, at the time of the assault, being or pretending to be armed, carrying a higher maximum penalty of 14 years' imprisonment. For juvenile offenders the maximum penalty for the aggravated form of the offence is instead 7 years' detention. The maximum penalty is 3.5 years' detention for a non-aggravated serious assault committed by a child (but only if the child is before a higher court). In the lower courts, a jurisdictional limit of one year's detention applies, for any offence.²⁸²

²⁸¹ Queensland Public Service Commission, Workforce Statistics — unpublished data, 2009–10 to 2018–19.

²⁸² See *Youth Justice Act 1992* (Qld) s 176 regarding the 7 year maximum penalty. This can only be imposed by a judge, not a magistrate. See s 175 regarding the 3.5 year maximum regarding serious assault simpliciter offences (if the sentence is imposed by a judge) and 1 year maximum penalty available to magistrates generally. The differences in sentencing juvenile offenders are discussed in Chapter 4.

From 2013–14 to 2018–19, over half of all cases involving the serious assault of a police officer involved at least one circumstance of aggravation (56.1%, n=2,450) – see Figure 5-13.

Figure 5-13: Number of serious assaults of police officers, by aggravating circumstances, over time



Data includes: lower and higher courts, adult and juvenile offenders, cases sentenced from 2009–10 to 2018–19

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

Note: Each case is counted once only; if a case contains multiple serious assaults of a police officer, where some assaults include aggravating circumstances and others do not, the entire case will be counted as one that contains aggravating circumstances.

Table 5-2 compares the penalties issued for the serious assault of a police officer (MSO) prior to the introduction of these statutory circumstances of aggravation, to the penalties issued following the introduction of these changes.

In the Magistrates Courts, prior to the introduction of this new aggravated form of serious assault, just over half of adult offenders (52.3%) received a custodial penalty for serious assault of a police officer, with an average sentence length of 0.5 years. When statutory aggravating circumstances were introduced, penalties for cases without aggravating circumstances remained relatively unchanged. Cases with aggravating circumstances, however, were more likely to receive a custodial penalty with over three-quarters resulting in a custodial sentence (77.9%) – representing an almost 50 per cent increase in the use of custodial penalties (48.9%) – and to attract slightly longer sentences at 0.7 months on average.

In the higher courts, prior to the introduction of the statutory aggravating circumstances, 85.7 per cent of offenders received a custodial sentence with an average penalty length of 0.8 years. Following the introduction of the aggravating circumstances, cases that did not have aggravating circumstances resulted in slightly lower penalties, with 80.0 per cent of these cases resulting in a custodial penalty, with an average length of 1.0 year. Almost all cases sentenced on the basis of there being a circumstance of aggravation resulted in a custodial sentence (95.5%), and the average penalty length was longer at 1.2 years.

Table 5-2: Custodial sentences for serious assaults against police officers (MSO) before and after the introduction of aggravating circumstances, adult offenders

| Type of serious assault of a police officer – s 340(1)(b) | 2009–10 to 2011–12 | | 2013–14 to 2015–16 | |
|---|--------------------|--------------------|--------------------|--------------------|
| | % custodial | Avg length (years) | % custodial | Avg length (years) |
| Higher courts | | | | |
| Prior to aggravating circumstances (n=252) | 85.7 | 0.8 | | |
| Non-aggravated (n=30) | | | 80.0 | 1.0 |
| Aggravated (n=132) | | | 95.5 | 1.2 |
| Magistrates Courts | | | | |
| Prior to aggravating circumstances (n=905) | 52.3 | 0.5 | | |
| Non-aggravated (n=580) | | | 55.6 | 0.5 |
| Aggravated (n=738) | | | 77.9 | 0.7 |

Data includes: adult offenders

Data excludes: 55 cases where the offence occurred prior to 29 August 2012 but was sentenced 2013–14 or later (32 cases in the Magistrates Courts and 23 cases in the higher courts)

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

While the figures above suggest that the introduction of aggravating circumstances has led to an increase in the use of custodial penalties and longer terms of imprisonment being imposed, it is not possible to identify with any certainty the extent to which sentences increased for those offences with aggravating features by comparing sentencing outcomes pre- and post- the commencement of these changes. This is because prior to these changes coming into effect, the acts of biting, spitting on or throwing or applying a bodily fluid or faeces to the victim, whether the victim suffered bodily harm, and the presence of a dangerous or offensive weapon or instrument were not separately identified under the offence provision, and therefore not recorded for statistical reporting purposes. The sentencing outcomes for cases with these aggravating features is therefore unknown.

Further, it is possible that the creation of these new statutory circumstances of aggravation carrying a higher maximum penalty may have resulted in some cases that would previously have charged as an AOBH, for example, instead resulting in charges being brought under section 340(1)(b) – thereby affecting the overall seriousness of offences sentenced. The preferring of charges of serious assault would seem to be supported by the increasing number of cases sentenced following the introduction of the new aggravated form of serious assault – 1,157 in the three years 2009–10 to 2011–12, compared with 1,480 in the three years from 2013–14, representing a 28 per cent increase.

An issue the Council hopes to explore in its final report is whether there have been other impacts of these reforms, such as on plea rates.

For juvenile offenders, the introduction of statutory circumstances of aggravation had no effect on sentencing outcomes in the lower courts, with minimal change in the proportion of offenders receiving a custodial sentence and no change in the average sentence length – see Table 5-3. The sample size for juveniles sentenced in the higher courts was too small to analyse.

Table 5-3: Custodial sentences for serious assaults against police officers (MSO) before and after the introduction of aggravating circumstances, juvenile offenders

| Type of serious assault of a police officer – s 340(1)(b) | 2009–10 to 2011–12 | | 2013–14 to 2015–16 | |
|---|--------------------|--------------------|--------------------|--------------------|
| | % custodial | Avg length (years) | % custodial | Avg length (years) |
| Higher courts | | | | |
| Prior to aggravating circumstances (n=9*) | - | - | | |
| Non-aggravated (n=2*) | | | - | - |
| Aggravated (n=10*) | | | - | - |
| Lower courts | | | | |
| Prior to aggravating circumstances (n=118) | 20.3 | 0.4 | | |
| Non-aggravated (n=72) | | | 20.8 | 0.4 |
| Aggravated (n=128) | | | 19.5 | 0.4 |

Data includes: juvenile offenders

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

* Small sample sizes

5.3.2 Sentencing outcomes for assaults against police officers

Table 5-4 shows the proportion of custodial penalties ordered for different types of assault offences committed on police officers.

Offenders sentenced under section 790 of the PPRA for the assault or obstruction of a police officer were unlikely to receive a custodial penalty, with only 6.6 per cent of cases (in the Magistrates Courts) resulting in a custodial outcome (MSO). Nearly two-thirds of offenders received a monetary penalty (65.2%), paying on average \$443.50. Of section 790 offences constituted by an act of assault (rather than obstruction, n=414), 12.3 per cent of cases (in the Magistrates Court) received a custodial outcome (MSO). Over half of offenders (52.9%) received a monetary penalty, with an average payment amount of \$651.10.

In the higher courts, almost all cases involving the aggravated serious assault of a police officer resulted in a custodial penalty (94.9%), with assaults involving bodily fluids receiving the highest proportion of custodial penalties (97.0% custodial). For non-aggravated serious assaults of police officers, four in five cases resulted in a custodial penalty (79.1%), with the average sentence being 12 months.

In the Magistrates Courts, half of all non-aggravated serious assaults of a police officer resulted in a custodial penalty (52.6%), with an average custodial length of 0.6 years. For cases involving aggravating circumstances, three-quarters of cases resulted in a custodial penalty (75.9%), with a higher average penalty length of 0.7 years.

Table 5-4: Sentencing outcomes for assault of a police officer by assault type (MSO), adult offenders

| Section number | Offence description | N (MSO) | Proportion of sentences that are custodial | Average length of custodial penalties (years) | Median length of custodial penalties (years) |
|----------------------------|------------------------------------|--------------|--|---|--|
| Higher Courts | | | | | |
| 790 | Assault or obstruct police officer | 7* | - | - | - |
| 340(1)(b) | Police officer – non-aggravated | 67 | 79.1% | 1.0 | 0.8 |
| 340(1)(b)(i/ii/iii) | Police officer – aggravated | 293 | 94.9% | 1.2 | 1.0 |
| 340(1)(b)(i) | Police officer – bodily fluid | 168 | 97.0% | 0.9 | 0.8 |
| 340(1)(b)(ii) | Police officer – bodily harm | 88 | 92.0% | 1.3 | 1.0 |
| 340(1)(b)(iii) | Police officer – armed | 37 | 91.9% | 2.1 | 2.0 |
| Magistrates Courts | | | | | |
| 790 | Assault or obstruct police officer | 14,746 | 6.6% | 0.2 | 0.2 |
| 340(1)(b) | Police officer – non-aggravated | 1,219 | 52.6% | 0.6 | 0.5 |
| 340(1)(b)(i/ii/iii) | Police officer – aggravated | 1,564 | 75.9% | 0.7 | 0.5 |
| 340(1)(b)(i) | Police officer – bodily fluid | 822 | 82.4% | 0.6 | 0.5 |
| 340(1)(b)(ii) | Police officer – bodily harm | 443 | 69.1% | 0.7 | 0.7 |
| 340(1)(b)(iii) | Police officer – armed | 299 | 68.2% | 0.7 | 0.5 |

Data includes: adult offenders, offences occurring on or after 29 August 2012, cases sentenced from 2012–13 to 2018–19

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

* Caution: small sample sizes.

Table 5-5 below ranks the penalty outcomes for the different types of aggravated and non-aggravated serious assault of a police officer, and the penalty outcomes for the assault or obstruction of a police officer under section 790 of the PPRA. Each offence is ranked based on the seriousness of sentencing outcomes, with 1 indicating the offence typically receives more serious sentences (shaded in a dark blue in the table below), and 5 indicating the offence typically receives less serious sentences (shaded in a lighter blue).

Unsurprisingly, sentences for the assault or obstruction of a police officer under the PPRA received the least serious sentencing outcomes, compared to the offence of serious assault. Also unsurprisingly, the non-aggravated serious assault of a police officer resulted in less serious sentencing outcomes compared to aggravated serious assaults.

When comparing the different types of aggravating circumstances, serious assaults of a police officer that involved bodily fluid were the most likely to receive a custodial penalty across all court levels. However, the length of the custodial sentence was lower for bodily fluids compared to other statutory aggravating circumstances.

Of all the aggravating circumstances, being armed was the least likely to result in a custodial penalty. However, when a custodial penalty was issued, offenders who were armed received the longest sentences.

Table 5-5: Ranking of seriousness of sentencing outcomes for assault of a police officer by assault type, adult offenders

| Section number | Offence description | Custodial penalties | Average custodial length | Median custodial length |
|---------------------------|------------------------------------|---------------------|--------------------------|-------------------------|
| Higher Courts | | | | |
| 340(1)(b) | Police officer – non-aggravated | 4 | 3 | 4 |
| 340(1)(b)(i) | Police officer – bodily fluid | 1 | 4 | 3 |
| 340(1)(b)(ii) | Police officer – bodily harm | 2 | 2 | 2 |
| 340(1)(b)(iii) | Police officer – armed | 3 | 1 | 1 |
| 790 | Assault or obstruct police officer | 5 | 5 | 5 |
| Magistrates Courts | | | | |
| 340(1)(b) | Police officer – non-aggravated | 4 | 4 | 2 |
| 340(1)(b)(i) | Police officer – bodily fluid | 1 | 3 | 2 |
| 340(1)(b)(ii) | Police officer – bodily harm | 2 | 1 | 1 |
| 340(1)(b)(iii) | Police officer – armed | 3 | 2 | 2 |
| 790 | Assault or obstruct police officer | 5 | 5 | 3 |

Data includes: adult offenders, offences occurring on or after 29 August 2012, cases sentenced from 2012–13 to 2018–19
Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

5.3.3 Demographics of offenders of serious assault of police officers

Figure 5-14 shows the demographics of offenders who were sentenced for the assault of a police officer. A high proportion of female offenders committed a serious assault that involved biting, spitting or bodily fluids (42.3%), much higher than the proportion of female offenders who committed the serious assault of a police officer while armed (13.8%).

The proportion of Aboriginal and Torres Strait islander offenders who were sentenced for the serious assault of a police officer with circumstances of aggravation was relatively high. Nearly half (47.4%) of offenders who were armed were Aboriginal or Torres Strait Islanders. Cases involving bodily fluids or bodily harm also had a high proportion of Aboriginal or Torres Strait Islander offenders (40.1% and 37.7% respectively).

Offenders who were armed while committing the serious assault of a police officer were older (33.1 years on average), compared to other types of assaults of a police officer.

Figure 5-14: Demographics of offenders sentenced for the assault of a police officer

| | Female | Aboriginal and Torres Strait Islander | Average Age |
|---|--------------|---|-------------|
| s 340(1)(b) Serious assault of a police officer | | | |
| non-aggravated | 25.9% | 33.4% | 30.1 |
| (i) bodily fluid | 42.3% | 40.1% | 30.2 |
| (ii) bodily harm | 26.9% | 37.7% | 29.5 |
| (iii) armed | 13.8% | 47.4% | 33.1 |
| s 790 Assault or obstruct police officer | 28.4% | 23.9% | 30.7 |

Data includes: lower and higher courts, adult and juvenile offenders, offences occurring on or after 29 August 2012, cases sentenced from 2012–13 to 2018–19

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

5.4 Assault of corrective services officers

This section analyses the number of offenders who were sentenced for the assault of a corrective services officer, either under section 340 of the *Criminal Code* for a serious assault, or under section 124(b) of the CSA for the less serious offence of assaulting or obstructing a corrective services officer.

As shown in Table 5-6, the serious assault of a corrective services officer under section 340(2) is more commonly sentenced than the less serious offence of assaulting or obstructing under section 124(b) CSA.

Table 5-6: Number of sentenced assaults or obstructions of corrective services staff

| Section Number | Offence Description | Charges | Offenders | Cases | MSO |
|----------------------|---|---------|-----------|-------|-----|
| Higher courts | | | | | |
| 124(b) | Assault or obstruct corrective services staff | 22 | 19 | 19 | 1 |
| 340(2) | Corrective services officer | 161 | 79 | 88 | 35 |
| Lower courts | | | | | |
| 124(b) | Assault or obstruct corrective services staff | 143 | 120 | 128 | 80 |
| 340(2) | Corrective services officer | 261 | 178 | 204 | 178 |

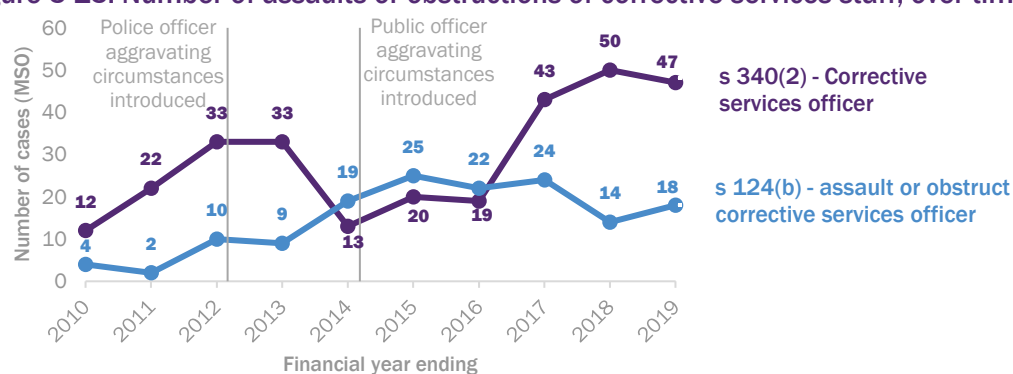
Data includes: adult and juvenile offenders, cases sentenced from 2009–10 to 2018–19

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

Figure 5-15 shows that the number of assaults against corrective services officers has generally increased over time. Serious assaults increased from 12 cases in 2009–10 to 47 cases in 2018–19, and assaults or obstructions increased from 4 cases to 18 cases over the same time period. To put these increases in context, the number of adult prisoners in Queensland increased by 56.2 per cent over the same period, from 5,616 at 30 June 2010 to 8,771 at 30 June 2019.²⁸³

From 2013–14 to 2015–16, there was an unexplained drop in the number of serious assaults sentenced under section 340(2). It is unclear whether this drop was the result of an actual reduction in assaults of corrective services officers, or whether a change in charging practices means that these cases were prosecuted under a different offence.

Figure 5-15: Number of assaults or obstructions of corrective services staff, over time



Data includes: higher and lower court, adult and juvenile offenders, cases sentenced from 2009–10 to 2018–19

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

²⁸³ Australian Bureau of Statistics, *Prisoners in Australia, 2019* (Catalogue No 4517.0, 5 December 2019) Table 15.

5.4.1 Sentencing outcomes for assaults against corrective services

Table 5-7 shows the sentencing outcomes for offenders who assaulted a corrective services officer. Where an offender is convicted of a listed offence (or of counselling, procuring, attempting or conspiring to commit it) while the offender was a prisoner serving a term of imprisonment, or was released on parole, any sentence of imprisonment imposed for the offence must be served cumulatively (one after the other) with any other term of imprisonment that person is liable to serve. Relevant offences include wounding, AOBH, serious assault, GBH, torture and acts intended to cause GBH and other malicious acts.²⁸⁴

In the higher courts, all offenders (n=35; 100.0%) sentenced for the serious assault of a corrective services officer under section 340(2) of the *Criminal Code* (MSO) received a custodial penalty, with an average length of 0.9 years. In the Magistrates Courts, almost all offenders sentenced for serious assault received a custodial penalty (n=167; 94.0%), and in this case the average sentence length was lower than the higher courts at 0.7 years.

Almost all cases involving the assault or obstruction of a corrective services officer under section 124(b) were sentenced in the Magistrates Courts. Of these, 83.8 per cent received a custodial penalty with an average length of 0.2 years.

Table 5-7: Sentencing outcomes for assault of a corrective services officer by assault type (MSO), adult offenders

| Section number | Offence description | N (MSO) | Proportion of sentences that are custodial | Average length of custodial penalties (years) | Median length of custodial penalties (years) |
|---------------------------|---|---------|--|---|--|
| Higher Courts | | | | | |
| 124(b) | Assault or obstruct corrective services staff | 1* | - | - | - |
| 340(2) | Corrective services officer | 35 | 100.0% | 0.9 | 0.8 |
| Magistrates Courts | | | | | |
| 124(b) | Assault or obstruct corrective services staff | 80 | 83.8% | 0.2 | 0.3 |
| 340(2) | Corrective services officer | 167 | 94.0% | 0.7 | 0.5 |

Data includes: adult offenders, cases sentenced from 2009–10 to 2018–19

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

* Small sample sizes

²⁸⁴ *Penalties and Sentences Act 1992* (Qld) s 156A and Schedule 1.

5.4.2 Demographics of offenders of serious assault of a corrective services officer

Female offenders accounted for 16.0 per cent of the serious assaults of a corrective services officer. This is lower than the percentage of female offenders who were sentenced for the assault of a police officer (25.9%, compare Figure 5-14 above). This may be impacted by the composition of the Queensland prison population, as female offenders comprised only 9.7 per cent of the Queensland prison population at 30 June 2019.²⁸⁵

Over a third of serious assaults of corrective services officers were committed by Aboriginal or Torres Strait Islander offenders (39.9%), which needs to be interpreted in the context of the continuing over-representation of Aboriginal and Torres Strait Islander people in prison in Queensland. At 30 June 2019, 32.8 per cent of the adult prisoner population in Queensland was Aboriginal and Torres Strait Islander.²⁸⁶

Figure 5-16: Demographics of offenders sentenced for the assault of a corrective services officer

| | Female | Aboriginal and Torres Strait Islander | Average Age |
|---|--------------|---|----------------|
| s 340(2) Serious assault of a corrective services officer | 16.0% | 39.9% | 28.6 |
| 124(b) Assault or obstruct corrective services staff | 21.0% | 39.5% | 27.8 |

Data includes: lower and higher courts, adult and juvenile offenders, cases sentenced from 2009–10 to 2018–19
Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

²⁸⁵ Australian Bureau of Statistics (n 283).

²⁸⁶ Ibid.

5.5 Assault of public officers

From 2009–10 to 2018–19, the number of sentenced cases involving serious assault of a public officer has more than quadrupled, from 46 cases in 2009–10 to 244 cases in 2018–19, an increase of 430.4 per cent – with the increase being particularly apparent after the introduction of an aggravated form of offence in September 2014. Over the same period the number of employees in the public sector only increased by 18.8 per cent.²⁸⁷ The number of assaults involving a person who had performed or was performing a duty at law remained stable, with both offences peaking in 2012–13.

Figure 5-17: Number of cases involving a serious assault of a public officer offence, over time



Data includes: lower and higher courts, adult and juvenile offenders, cases sentenced from 2009–10 to 2018–19
Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

²⁸⁷ Queensland Public Service Commission, Workforce Statistics – unpublished data, 2014–15 to 2018–19.

Table 5-8 shows the number of cases involving the assault of a public officer. In the higher courts, serious assault involving bodily fluid or faeces being thrown at or applied to a public officer was the most common offence as the MSO; whereas in the lower courts, non-aggravated serious assault was the most common MSO.

The less serious offence of resisting a public officer under section 199 of the *Criminal Code* was only sentenced as the MSO in 6 cases. Serious assault of a person who performed, or is performing, a duty at law had 84 sentenced cases. Serious assault of a public officer under section 340(2AA) had 49 cases sentenced in the higher courts, and 465 cases in the lower courts.

Table 5-8 : Number of sentenced assaults of public officers

| Section Number | Offence Description | Charges | Offenders | Cases | MSO |
|----------------------|----------------------------------|---------|-----------|-------|-----|
| Higher courts | | | | | |
| 199 | Resisting public officers | 4 | 2 | 2 | 0 |
| 340(1)(c) & (1)(d) | Performing/performed duty at law | 26 | 14 | 15 | 3 |
| 340(2AA) | Public officer (non-aggravated) | 83 | 52 | 52 | 10 |
| 340(2AA)(i) | Public officer – bodily fluid | 69 | 48 | 48 | 29 |
| 340(2AA)(ii) | Public officer – bodily harm | 21 | 19 | 19 | 9 |
| 340(2AA)(iii) | Public officer – armed | 11 | 4 | 4 | 1 |
| Lower courts | | | | | |
| 199 | Resisting public officers | 24 | 20 | 20 | 6 |
| 340(1)(c) & (1)(d) | Performing/performed duty at law | 137 | 110 | 111 | 81 |
| 340(2AA) | Public officer (non-aggravated) | 618 | 473 | 489 | 238 |
| 340(2AA)(i) | Public officer – bodily fluid | 248 | 188 | 198 | 135 |
| 340(2AA)(ii) | Public officer – bodily harm | 106 | 96 | 96 | 69 |
| 340(2AA)(iii) | Public officer – armed | 56 | 34 | 35 | 23 |

Data includes: adult and juvenile offenders, offences occurring on or after 5 September 2014, cases sentenced from 2014–15 to 2018–19

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

5.5.1 Occupation of victims of assault against public officers

Methodology and limitations

The Council was provided with additional data on the occupation of victims from Court Services Queensland, which was extracted from the administrative system used by courts – Queensland-Wide Interlinked Courts (QWIC).

Victim occupation data is recorded as a free-text field in QWIC, which was coded by the Council's Research and Statistics team into broad occupational categories. Where the free-text field did not provide enough information to determine an appropriate category, such as 'manager' or 'officer', the occupation was coded as 'other'. There were 163 cases (7.5%) in this category.

Victim occupation is not a mandatory field within QWIC and data was not available for all cases. For cases that were missing victim occupation data and were sentenced in the higher courts, sentencing remarks were accessed from the Queensland Sentencing Information Service (QSIS) to determine the victim's occupation. Cases for which victim occupation data was unobtainable were coded as 'Unknown'; there were 481 cases (22.2%) in this category.

Due to the high proportion of offences where victim occupation data was coded as either 'other' or 'unknown', it is important to note that this analysis should be treated with caution. It is possible that, if the missing victim occupation data were to be classified, different findings might result.

Findings

Paramedics are the most common victims of serious assault of a public officer under section 340(2AA); the second most common victim occupation is a medical worker – see Table 5-9. The serious assault of a person who performed, or is performing a duty at law, under section 340(1)(c)/(d) has somewhat different victims, with security guards, youth workers and police officers among the most frequent occupations.

The occupation of victims who were assaulted by young offenders was markedly different to the victims who were assaulted by adults. Unsurprisingly, young offenders most commonly assaulted youth workers and youth detention workers. Education workers were also assaulted at a higher frequency by young offenders compared to adult offenders. Adult offenders most commonly assaulted paramedics, medical staff and security guards.

Table 5-9: Victim occupations, by type of serious assault and whether the offender was an adult

| Victim type | TOTAL | 340(2AA) Public officer | 340(1)(c)/(d) Duty at law | Adult offenders | Young offenders |
|-----------------------------|--------------|----------------------------|------------------------------|--------------------|--------------------|
| Victim occupation | N | % | % | % | % |
| Paramedic | 476 | 95.0 | 5.0 | 90.1 | 9.9 |
| Medical worker | 301 | 94.4 | 5.6 | 91.0 | 9.0 |
| Security guard | 181 | 66.9 | 33.1 | 88.4 | 11.6 |
| Youth worker | 159 | 75.5 | 24.5 | 5.0 | 95.0 |
| Youth detention worker | 115 | 94.8 | 5.2 | 4.3 | 95.7 |
| Police officer | 86 | 55.8 | 44.2 | 89.5 | 10.5 |
| Watch-house officer | 74 | 73.0 | 27.0 | 90.5 | 9.5 |
| Transport officer | 36 | 83.3 | 16.7 | 69.4 | 30.6 |
| Child safety officer | 26 | 96.2 | 3.8 | 76.9 | 23.1 |
| Education worker | 25 | 68.0 | 32.0 | 20.0 | 80.0 |
| Correctional officer | 22 | 59.1 | 40.9 | 63.6 | 36.4 |
| Compliance officer | 15 | 60.0 | 40.0 | 100.0 | 0.0 |
| Fire fighter/ investigation | 4 | 100.0 | 0.0 | 100.0 | 0.0 |
| Other | 163 | 64.4 | 39.3 | 43.6 | 56.4 |
| Unknown | 481 | 77.3 | 22.7 | 75.7 | 24.3 |
| TOTAL | 2,166 | 81.2 | 18.8 | 71.1 | 28.9 |

Data includes: lower and higher courts, adult and juvenile offenders, cases sentenced from 2009–10 to 2018–19

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

Note: count is by charge (i.e. victim) therefore the victim is not necessarily unique; victims entered as 'prison officer' or 'correctional officer' where the offender was sentenced as a child have been coded as 'youth detention worker'.

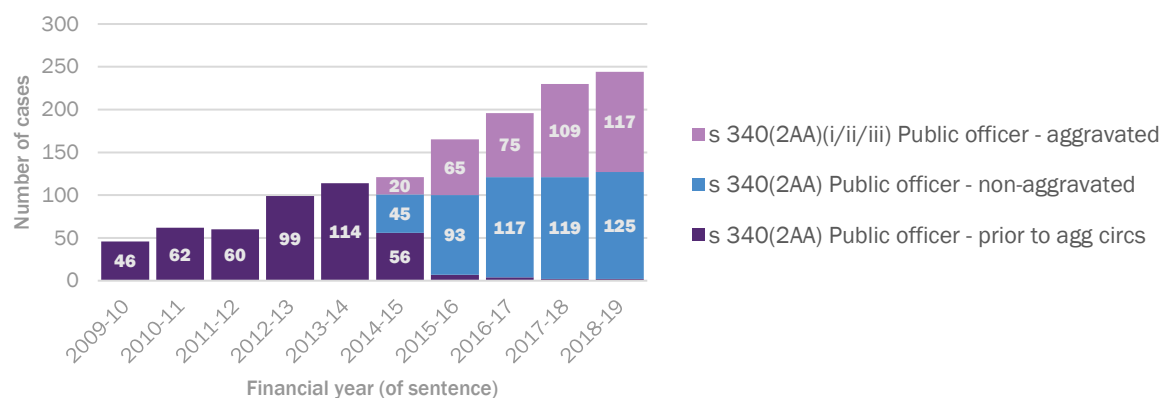
5.5.2 Impact of the introduction of aggravating circumstances

From 5 September 2014, it became an aggravating circumstance to assault a public officer by biting, spitting, throwing or applying bodily fluid or faeces to, causing bodily harm to a public officer, or at the time of the assault, being or pretending to be armed, carrying a higher maximum penalty of 14 years for adult offenders. For juvenile offenders the maximum penalty for the aggravated form of the offence is instead 7 years' detention. The maximum penalty is 3.5 years' detention for a non-aggravated serious assault committed by a child (but only if the child is before a higher court). In the lower courts, a jurisdictional limit of one year's detention applies, for any offence.²⁸⁸

²⁸⁸ See *Youth Justice Act 1992* (Qld) s 176 regarding the 7 year maximum penalty – this can only be imposed by a judge, not a magistrate. See s 175 regarding the 3.5 year maximum regarding serious assault simpliciter offences (if the sentence is imposed by a judge) and 1 year maximum penalty available to magistrates generally. The differences in sentencing juvenile offenders are discussed in Chapter 4.

Figure 5-18 shows the effect of the introduction of aggravating circumstances, with an increase in the number of serious assaults of public officer offences being sentenced in the years following the introduction.

Figure 5-18: Number of serious assaults of public officers by aggravating circumstances, over time



Data includes: lower and higher courts, adult and juvenile offenders, cases sentenced from 2009–10 to 2018–19

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

Note: Each case is counted once only; if a case contains multiple serious assaults of a public officer, where some assaults include aggravating circumstances and others do not, the entire case will be counted as one that contains aggravating circumstances. If a case involves offences in occurring both prior to and after the introduction of aggravating circumstances, the entire case will be counted in the applicable post-introduction category.

There are differences in the occupation of victims based on the type of aggravating circumstance – see Table 5-10.

Over half of serious assaults involving a youth detention officer involved bodily fluid (55.2%). Similarly, 43.8 per cent of serious assaults of a security guard involved bodily fluids. While the sample size is small (n=17), over three-quarters of serious assaults involving transport officers involved bodily fluid (82.4%), and only 5.9 per cent of serious assaults of transport officers did not involve any aggravating circumstances.

Being armed was most common where the victim was a police officer, with nearly 1 in 10 (9.7%) assaults of a police officer involving a weapon (where the case was sentenced as a public officer under section 340(2AA)). Medical workers were the most likely to receive bodily harm, at a rate of nearly 1 in 5 (17.5%).

Table 5-10: Aggravating circumstances by victim occupation

| | TOTAL | Bodily fluid | Bodily harm | Armed | No aggravating circumstances |
|------------------------|--------------|--------------|-------------|------------|------------------------------|
| Victim occupation | N | % | % | % | % |
| Paramedic | 294 | 18.4 | 9.9 | 3.4 | 69.1 |
| Medical worker | 200 | 27.5 | 17.5 | 2.5 | 54.5 |
| Youth worker | 99 | 26.3 | 3.0 | 4.0 | 66.7 |
| Security guard | 73 | 43.8 | 16.4 | 8.2 | 32.9 |
| Youth detention worker | 58 | 55.2 | 1.7 | 4.0 | 32.9 |
| Watch-house officer | 34 | 29.4 | 5.9 | 0.0 | 64.7 |
| Police officer | 31 | 9.7 | 12.9 | 9.7 | 67.7 |
| Correctional officer | 26* | 30.8 | 11.5 | 0.0 | 61.5 |
| Transport officer | 17* | 82.4 | 5.9 | 5.9 | 5.9 |
| Other | 105 | 25.7 | 10.5 | 10.5 | 55.2 |
| Unknown | 273 | 20.5 | 15.0 | 8.8 | 59.0 |
| TOTAL | 1,210 | 26.2 | 11.7 | 5.9 | 57.8 |

Data includes: lower and higher courts, adult and juvenile offenders, offences occurring on or after 5 September 2014, cases sentenced from 2014–15 to 2018–19

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

Note: count is by charge (i.e. victim) therefore the victim is not necessarily unique; victims entered as 'prison officer' or 'correctional officer' where the offender was sentenced as a child have been coded as 'youth detention worker'; small categories have been combined into 'other' due to sample size.

* Small sample size

Table 5-11 compares the penalties issued for the serious assault of a public officer (MSO) prior to the introduction of aggravating circumstances, to the penalties issued following the introduction of aggravating circumstances.

In the Magistrates Courts, prior to the introduction of aggravating circumstances, a custodial sentence was issued to over half (58.5%) of adults sentenced for the serious assault of a public officer under section 340(2AA). Following the introduction of aggravating circumstances, cases that did not have any aggravating circumstances had a lower rate of custodial penalties (49.4%), and cases that had aggravating circumstances had a higher rate (75.2%). There was little difference in the average length of custodial sentences before and after the introduction of aggravating circumstances; however, cases with aggravating circumstances had slightly longer custodial sentences on average (0.5 years where non-aggravated, compared to 0.6 years where aggravated).

For the same reasons discussed above in section 5.3.1, it is difficult to identify what the true impacts of these changes have been, although it seems clear that courts are more likely to impose custodial penalties for serious assault with aggravating circumstances, and to impose slightly longer sentences.

In the higher courts, there were not enough sentenced cases under section 340(2AA) to perform reliable analysis. Similarly, there were not enough cases involving young offenders to perform reliable analysis.

Table 5-11: Custodial sentences for assault against public officers (MSO) before and after the introduction of aggravating circumstances, adult offenders

| Type of serious assault of a public officer – section 340(2AA) | 2011–12 to 2013 | | 2015-16 to 2017-18 | |
|--|-----------------|--------------------|--------------------|--------------------|
| | % custodial | Avg length (years) | % custodial | Avg length (years) |
| Higher courts | | | | |
| Prior to aggravating circumstances (n=14*) | - | - | - | - |
| Non-aggravated (n=7*) | | | - | - |
| Aggravated (n=27*) | | | - | - |
| Magistrates Courts | | | | |
| Prior to aggravating circumstances (n=130) | 58.5 | 0.5 | | |
| Non-aggravated (n=154) | | | 49.4 | 0.5 |
| Aggravated (n=113) | | | 75.2 | 0.6 |

Data includes: adult offenders

Data excludes: 8 cases where the offence occurred prior to 5 September 2014 but was sentenced 2015-16 or later (6 in the Magistrates Courts and 2 in the higher courts)

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

* Small sample sizes

5.5.3 Sentencing outcomes for assaults against public officers

Table 5-12 shows the sentencing outcomes for different offences involving the assault of a public officer.

In the higher courts, due to the small number of cases sentenced, there are few offences that can be analysed. Custodial penalties were issued for most offenders who were sentenced for aggravated serious assault of a public officer (85.7%), with an average sentence length of 0.7 years.

In the Magistrates Courts, 73.1 per cent of offenders sentenced for the aggravated serious assault of a public officer received a custodial penalty, with an average length of 0.6 years. Non-aggravated serious assault and the serious assault of a person who performed, or was performing, a duty at law had similar percentages of custodial orders (52.2% and 51.5% respectively), with an average length of 0.7 years.

Table 5-12: Custodial sentencing outcomes for assaults against public officers (MSO), adult offenders

| Section number | Offence description | N | Proportion of sentences that are custodial | Average length of custodial penalties (years) | Median length of custodial penalties (years) |
|---------------------------|------------------------------------|------------|--|---|--|
| Higher Courts | | | | | |
| 199 | Resisting public officers | 0 | | | |
| 340(1)(c)/(d) | Performing/performed duty at law | 3* | - | - | - |
| 340(2AA) | Public officer – non-aggravated | 10* | - | - | - |
| 340(2AA)(i/ii/iii) | Public officer - aggravated | 35 | 85.7% | 0.7 | 0.8 |
| 340(2AA)(i) | Public officer - bodily fluid | 26 | 88.5% | 0.7 | 0.8 |
| 340(2AA)(ii) | Public officer - bodily harm | 8* | - | - | - |
| 340(2AA)(iii) | Public officer - armed | 1* | - | - | - |
| Magistrates Courts | | | | | |
| 199 | Resisting public officers | 6* | - | - | - |
| 340(1)(c)/(d) | Performing/performed duty at law | 66 | 51.5% | 0.5 | 0.5 |
| 340(2AA) | Public officer – non-aggravated | 228 | 52.2% | 0.4 | 0.4 |
| 340(2AA)(i/ii/iii) | Public officer - aggravated | 171 | 73.1% | 0.6 | 0.5 |
| 340(2AA)(i) | Public officer - bodily fluid | 99 | 78.8% | 0.6 | 0.5 |
| 340(2AA)(ii) | Public officer - bodily harm | 56 | 62.5% | 0.6 | 0.5 |
| 340(2AA)(iii) | Public officer - armed | 16* | - | - | - |

Data includes: adult offenders, offences occurring on or after 5 September 2014, cases sentenced from 2014–15 to 2018–19

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

* Small sample size

5.5.4 Demographics of offenders of serious assault of public officers

The majority of offenders sentenced for the assault of a public officer were male. This was highest for those sentenced for performing or having performed a duty at law where over two-thirds of offenders were male (70.2%). Female offender numbers were highest for the non-aggravated serious assault of a public officer at 35.1 per cent.

Over one-third (33.9%) of those sentenced for the non-aggravated serious assault of a public officer were Aboriginal or Torres Strait Islander offenders. This was higher in cases where aggravating circumstances were involved, with 62.5 per cent of cases where the offender was armed, and 43.6 per cent where bodily harm was caused.

Figure 5-19: Demographics of offenders sentenced for the assault of a public officer

| | Female | Aboriginal and Torres Strait Islander | Average Age |
|---|--------------|---|-------------|
| s 340(2AA) Serious assault of a public officer | | | |
| non-aggravated | 35.1% | 33.9% | 33.3 |
| (i) bodily fluid | 32.9% | 40.2% | 26.3 |
| (ii) bodily harm | 34.6% | 43.6% | 29.5 |
| (iii) armed | 29.2% | 62.5% | 31.8 |
| s 340(1)(c)/(d) Performing/performed duty at law | 29.8% | 33.3% | 27.6 |

Data includes: MSO, adult and juvenile offenders, offences occurring on or after 5 September 2014, cases sentenced from 2014–15 to 2018–19

Data excludes: cases where demographic data is unknown. Due to a small number of sentenced cases (n=6), s 199 resisting a public officer was excluded.

* Small sample size

5.6 Limitations and data quality issues

In conducting its review, the Council has identified a number of issues in working with administrative data in the criminal justice sector. A summary of some of the issues which have affected the research and analysis during this review are discussed below.

Data on circumstances of offending

No agency in the criminal justice sector collects quantitative data on the circumstances of a person's offending in a way that can be analysed. For example, in conducting analysis of serious assault of a public officer, there was no data available on the type or extent of injury that may have been caused, the type of weapon that may have been used, or the type of bodily fluid that was used (e.g. blood, saliva, faeces, etc.).

Where a public officer is the victim of a serious assault charged under section 340(2AA), there is little data available on the victim's occupation. As discussed in section 5.5.1 above, the occupation of 29.7 per cent of public officers was either unknown or unable to be classified. To reduce the number of cases with missing data for its final report, the Council has requested information from the QPS on victim occupation as recorded in court briefs (QP9s). This process will involve an officer manually reviewing case files and extracting relevant information on the occupation of the victim in each case.

There is also limited data recorded on whether a victim has been assaulted during the course of their work, which means it is not clear how many public officers are victims of offences other than serious assault, such as common assault, AOBH, GBH, or wounding. To provide some insight into this matter, the Council has requested offender-level data from the Department of Youth Justice and QCS for all assaults of staff members that have occurred within corrective or detention facilities. Similar data has also been requested from the QPS on assaults of on-duty police officers. Data provided by these agencies will be matched to Queensland courts data to assist the Council to better understand the range of offences charged involving public officer victims and associated sentencing outcomes.

Data sharing

The Council encountered difficulties in assessing identifiable data from agencies outside the criminal justice sector due to the absence of clear data-sharing protocols. As these agencies were unable to provide details of their staff members who were the victims of assaults in the workplace, it was not possible to match data on workplace assaults to courts data to determine the sentencing outcomes for these offences.

Within the criminal justice sector, each agency maintains separate administrative data systems. Although many agencies are using a shared person identifier to recognise unique offenders, these fields were sometimes missing or had not been updated to reflect changes made by other agencies. As such, data held by different criminal justice agencies is not linked, and a considerable amount of work has to be undertaken by researchers to create a cohesive dataset to get the full picture of the wider criminal justice sector.

5.7 Summary

The length of custodial penalties for cases involving a serious assault is substantially lower compared to other assault-related offences with a similar maximum penalty. The sentencing outcomes for serious assault cases more closely resemble the sentencing outcomes for common assault, which has a maximum penalty of 3 years.

Over the past 10 years, the proportion of custodial penalties for serious assault has increased in both the lower and higher courts. However, over the same period there has been a general increase in the use of custodial penalties across all offence categories in Queensland.²⁸⁹

There have been 6,538 cases sentenced for the serious assault of a police officer, and 85,434 cases sentenced for the assault or obstruction of a police officer over the past 10 years. The majority of cases sentenced under section 790 involved the obstruction rather than the assault of a police officer. There were more custodial penalties issued for serious assaults that involved biting, spitting, or bodily fluids compared to cases with other aggravating circumstances. Cases where the offender was armed received the longest sentences.

There were 292 cases sentenced for the serious assault of a corrective services officer, and 147 cases sentenced for the assault or obstruction of a corrective services officer over the past 10 years. As expected, the majority of offenders were sentenced to a custodial penalty. The average custodial sentence length was slightly lower compared to sentences for the serious assault of a police officer. There was a higher proportion of Aboriginal and Torres Strait Islander offenders, and a higher proportion of male offenders, compared to those committing serious assault of a police officer — this is reflective of the composition of the prison population.

There were 1,337 cases sentenced for the serious assault of a public officer under section 340(2AA) over the past 10 years, and 321 cases involving the serious assault of a person

²⁸⁹ Queensland Sentencing Advisory Council (n 279).

who performed, or is performing, a duty at law. These public officers consisted of people from a range of different occupations, the most common being paramedics, medical workers, security guards, youth workers and youth detention workers. However, due to the large number of cases where the occupation of the victim was missing, this finding has limited reliability.

Following the introduction of aggravating circumstances, there was an increase in custodial penalties for cases that involved aggravating factors; however, there are several intervening factors that have not been taken into account.

Chapter 6 The approach in other jurisdictions

6.1 Introduction

There are differences between jurisdictions as to:

- what offences that can be charged for assaults against police and other public officers;
- whether aggravated forms of offences exist for assaults against police and public officers carrying higher maximum penalties;
- whether specific provision is made in sentencing legislation for the treatment of assaults against public officers or other categories of workers as public officers.

In this chapter we explore the offence and sentencing frameworks that exist in other Australian jurisdictions, and select international jurisdictions (Canada, New Zealand and England and Wales).

6.2 Specific offences targeting workplace assaults

Offences committed against police and other public officers are one example of a category of aggravated assault committed on a particular class of victim. Other forms of aggravated assaults have been described as falling within three classes:

- assaults accompanied by an intention of a specific kind (for example, to resist or prevent arrest);
- assaults resulting in harm of a particular kind; and
- assaults aggravated by the means or circumstances by which they are committed.²⁹⁰

6.2.1 Offences against police

Most Australian jurisdictions have specific offences of assault of a police officer in the execution of their duties. The maximum penalty that applies to these offences varies by jurisdiction. Examples of these assault offences (excluding circumstances where serious harm or death has resulted) and applicable maximum and (where applicable) minimum penalties are summarised in Appendix 5, Table A5-1.

Penalties for assault range from a fine or 6 months' imprisonment for summary offences of assault or obstruct police,²⁹¹ to 15 years' imprisonment in South Australia for the offence of causing harm to, or assaulting, certain emergency workers (including police) in circumstances where the harm caused was intentional.²⁹² 'Harm' in the context of the South Australian provision is defined to mean 'physical or mental harm (whether temporary or permanent)'.²⁹³

The Commonwealth offence that applies in these circumstances is the offence under section 147.1 of the Commonwealth *Criminal Code* of causing harm intentionally to a public officer and the person engaged in the conduct which caused harm because the victim was a public official or their actions as a public official. Where committed against a Commonwealth law enforcement

²⁹⁰ Jennifer Wheeler, '130 — Criminal Law — II Assault and Related Offences — (1) Assault', *Halsbury's Laws of Australia* (Last updated 4 December 2017) [130-1030].

²⁹¹ See, for example, *Police Administration Act 1978* (NT) s 158; *Police Powers and Responsibilities Act 2000* (Qld) s 790(1)(a) (where no circumstance of aggravation); *Summary Offences Act 1966* (Vic) s 51(2) (which applies to assaults on emergency workers (including police) on duty or custodial officers on duty); *Police Act 1996* (UK); and *Summary Offences Act 1981* (NZ) s 10 (which applies also to assaults on prison officers and traffic officers).

²⁹² *Criminal Law Consolidation Act 1935* (SA) s 20AA(1).

²⁹³ *Ibid* ss 20AA(9) applying the definition in Div 7A of the Act (s 21).

officer (the definition of which includes a member or special member of the Australian Federal Police, as well as public servants employed in the Australian Border Force and members of the Board of the Australian Crime Commission and its staff),²⁹⁴ the maximum penalty is 13 years' imprisonment.²⁹⁵ The introduction of mandatory minimum sentences, and minimum non-parole periods in some jurisdictions which apply to assaults on police and other emergency service workers is discussed below in section 6.5 of this chapter.

6.2.2 Offences against other public officers and occupational groups

As discussed in Chapter 3, the current scope of the offence of serious assault under section 340 of the Queensland *Criminal Code* goes beyond police officers, and includes:

- any person, where the offender assaulted that person with the intent to commit a crime, or to resist or prevent the lawful arrest or detention of himself or herself or another person;²⁹⁶
- a person acting in aid of a police officer acting in the execution of the officer's duty;²⁹⁷
- any person because the person has performed a duty imposed on the person by law;²⁹⁸
- any person who is 60 years or older;²⁹⁹
- any person who relies on a guide, hearing or assistance dog, wheelchair or other remedial device;³⁰⁰
- a working corrective services officer present at a correctional services facility;³⁰¹ and
- a public officer while the officer is performing a function of the officer's office.³⁰²

The current reference is concerned with offences committed against public officers, rather than other categories of victims falling within section 340. The definition of 'public officer', and the need to clarify its scope, is discussed in Chapter 9 of this paper.

In addition to offences that may be charged under the *Criminal Code*, there are a number of summary offences that may be charged in circumstances where an assault has been committed against specific categories of public officer. The relevant offences often apply to actions other than assault, such as hindering or obstructing, threatening, abusing or intimidating officers performing public functions, or a failure to comply with lawful instructions or directions. The maximum penalties for these offences vary – from 10 penalty units³⁰³ to 500 penalty units or 2 years' imprisonment.³⁰⁴

²⁹⁴ *Criminal Code* (Cth) s 146.1 (definition of a 'law enforcement officer').

²⁹⁵ *Ibid* s 147.1(1)(f).

²⁹⁶ *Criminal Code* (Qld) s 340(1)(a).

²⁹⁷ *Ibid* s 340(1)(b).

²⁹⁸ *Ibid* s 340(1)(c).

²⁹⁹ *Ibid* s 340(1)(g).

³⁰⁰ *Ibid* s 340 (1)(h).

³⁰¹ *Ibid* s 340(2).

³⁰² *Ibid* s 340(2AA).

³⁰³ *Pastoral Workers' Accommodation Act 1980* (Qld) s 26(1).

³⁰⁴ *Electrical Safety Act 2002* (Qld) s 145B; *Mineral Resources Act 1989* (Qld) s 397B(1); *Work Health and Safety Act 2011* (Qld) s 190; *Racing Integrity Act 2016* (Qld) s 208(1). An assault against an inspector, or person acting in aid of an inspector who is exercising powers or performing functions under the *Gaming Machine Act 1991* (Qld), or who is attempting to exercise such powers, also carries a maximum penalty of 2 years, but the maximum fine that can be ordered for this offence is 400 penalty units: s 330.

The position in other jurisdictions varies, although a number have introduced specific offence provisions that apply both to assaults of police officers and other public officers. Examples of some of these provisions (excluding circumstances where serious harm or death has resulted) are listed in Appendix 5, Table A5-2.

The NT appears to be unique in introducing a separate stand-alone criminal offence which applies to assaults committed on *any* worker who is working in the performance of his or her duties, without the need to establish any specific intention.³⁰⁵ The same maximum penalties apply as for assaults against police and emergency workers (5 years if no harm suffered, or 7 years in circumstances where the assault has resulted in the victim being harmed).³⁰⁶ The definition of 'worker' under the NT offence includes employees, contractors and subcontractors, apprentices and trainees, work experience students, volunteers and self-employed people, as well as a person appointed by law to carry out functions or to hold an office, excluding police officers and emergency workers who are covered in a separate offence provision.³⁰⁷

In introducing the Bill inserting this new section into the NT *Criminal Code*, the Attorney-General and Minister for Justice explained that the definition of worker 'extends further than people who provide a service to the public, such as taxi drivers, paramedics and hospital workers' and that it 'extends protection to all types of lawful workers, recognising that many workers are faced with situations where they are at the mercy of violent people'.³⁰⁸ The creation of such an offence was considered justified on the basis that: 'Work is a fundamental cornerstone of many people's lives, and all Territorians should be assured when they go to work they will be protected by the law'.³⁰⁹

The question of what categories of worker (including public officers) should be afforded special protection at law against being assaulted at work and on what basis is discussed in Chapter 7 of this paper.

6.3 Aggravated forms of offences

Yet another approach to the special treatment of some categories of assault has been to create specific circumstances of aggravation for offences of general application that carry higher maximum penalties, or mandatory minimum penalties when committed against certain classes of victim, including police and other public officers. These are also sometimes called 'penalty enhancement' provisions.

³⁰⁵ *Criminal Code Act 1983* (NT) sch 1 ('*Criminal Code* (NT)') s 188A, inserted by *Criminal Code Amendment (Assaults on Workers) Act 2013* (NT). An offence exists under the Queensland *Criminal Code* of assault in interference with freedom or trade or work (s 346), which is constituted by the act of hindering or preventing a person from working at or exercising their lawful trade, business or occupation, or from buying, selling or otherwise dealing with any property intended for sale, but in this case it must be proven the accused person acted with the requisite intention. The closest equivalent to the NT offence may therefore be the categories of serious assault that fall within sections 340(1)(b) and 340(1)(c) of the *Criminal Code* which are constituted by an unlawful assault on 'any person while the person is performing a duty imposed on the person by law' or 'because the person has performed a duty imposed on the person by law'. The definition of a 'public officer', who are also expressly protected under section 340(2AA), further extends the provisions of section 340 to a person 'discharging a duty ... of a public nature'. To the extent the duties imposed on a worker are 'imposed by law' and/or 'of a public nature', the same protections that apply to police, corrections officers and other named categories of 'public officer' apply to other workers.

³⁰⁶ *Ibid.*

³⁰⁷ *Ibid* s 189A (Assaults on emergency workers).

³⁰⁸ Northern Territory, *Parliamentary Debates*, Legislative Assembly, 4 December 2012, Criminal Code Amendment (Assaults on Workers) Bill 2012 (NT), Second Reading Speech, 696 (John Elferink, Attorney-General and Minister for Justice).

³⁰⁹ *Ibid.*

Section 1 of the Queensland *Criminal Code* defines a ‘circumstance of aggravation’ as: ‘any circumstance by reason whereof an offender is liable to a greater punishment than that to which the offender would be liable if the offence were committed without the existence of that circumstance’.

If the prosecution intends to seek a higher penalty based on there being circumstances of aggravation, these generally must be contained in the charge, with the prosecution carrying the burden of proof of establishing such circumstances existed.³¹⁰

A Queensland example of a circumstance of aggravation is section 161Q of the *Penalties and Sentence Act 1992* (‘PSA’), which creates a ‘serious organised crime circumstance of aggravation’ for certain prescribed offences if, at the time the offence was committed, or any time during the commission of the offence, the offender:

- (1) Was a participant in a criminal organisation; and
- (2) Knew, or ought to reasonably to have known, the offence was being committed—
 - (i) at the direction of a criminal organisation or a participant in a criminal organisation; or
 - (ii) in association with 1 or more persons who were, at the time the offence was committed, or at any time during the course of the commission of the offence, participants in a criminal organisation; or
 - (iii) for the benefit of a criminal organisation.

In the case of offenders convicted of prescribed offences with this circumstance of aggravation, the court *must* impose a term of imprisonment comprised of the sentence of imprisonment for the offence that would, apart from the application of this law, have been imposed (called ‘the ‘base component’), and then an additional ‘mandatory component’ for the lesser of 7 years, or the maximum penalty for the offence (unless a life sentence is imposed) which must be ordered to be served cumulatively with the base component and be served wholly in a corrective services facility.³¹¹ The mandatory nature of the sentence can only be avoided if the offender provides significant cooperation to a law enforcement agency.³¹²

A number of jurisdictions have introduced circumstances of aggravation that apply in circumstances where police and other public officers have been assaulted or exposed to the risk of harm including the NT, South Australia, Victoria and WA.³¹³ England and Wales has also introduced an aggravated form of offence where committed against an emergency worker (defined widely to include police, prison officers, people providing fire and rescue services and health services, among others) that applies solely to common assault and battery.³¹⁴

As an example, section 5AA of the South Australian *Criminal Law Consolidation Act 1935* provides for aggravated forms of specified general criminal offences where committed against:

- a police officer, prison officer, employee in a (youth justice) training centre or other law enforcement officer knowing the victim to be acting in the course of his or her official duty,

³¹⁰ See, for example, *Criminal Code* (NT) s 174H (Procedure for proving aggravated offence); *Criminal Law Consolidation Act 1935* (SA) s 5AA(3).

³¹¹ *Penalties and Sentences Act 1992* (Qld) s 161R.

³¹² *Ibid* s 161S.

³¹³ See Appendix 5, Table A5-4 for further information.

³¹⁴ *Assaults on Emergency Workers (Offences) Act 2018* (UK) ss 1 (Common assault and battery) and 3 (Meaning of “emergency worker”).

or in retribution for something the offender knows or believes to have been done in the course of his or her official duty (s 5AA(1)(c));

- a community corrections officer or community youth justice officer knowing the victim to be acting in the course of their official duties (s 5AA(1)(ca));
- in the case of an offence against the person, the victim was engaged in a prescribed occupation or employment (includes work carried out by or on behalf of an emergency service provider (such as by the Country or Metropolitan Fire Service, State Emergency Service, Ambulance Service, Surf Life Saving organisation, Volunteer Coast Guard and the accident or emergency department of a hospital), the employment of a person performing duties in a hospital or in the course of retrieval medicine,³¹⁵ passenger transport work, court security officer and animal welfare inspector)³¹⁶ whether paid or volunteer, knowing the victim to be acting in the course of their official duties (s5AA(1)(ka)).

The section also captures, in the case of an offence against the person that the victim was, to the knowledge of the offender, in a position of particular vulnerability at the time of the offence because of the nature of his or her occupation or employment.³¹⁷ This might apply, for example, to a shop attendant working at a 24-hour convenience store or service station.

Other circumstances which can result in an aggravated form of an offence being charged include that:

- the offender committed the offence in the course of deliberately and systematically inflicting severe pain on the victim (s 5AA(1)(a));
- the offender used or threatened to use an offensive weapon to commit, or when committing the offence (s 5AA(1)(b));
- the offender committed the offence knowing the victim of the offence was at the time under the age of 12 years (or in the case of certain categories of offending, including child exploitation material offences, was under 14 years) (s 5AA(1)(e));
- the offender committed the offence knowing that the victim was, at the time of the offence, over the age of 60 years (s 5AA(1)(f));
- the offender committed the offence knowing the victim was a person with whom the offender was, or was formerly, in a relationship (s 5AA(1)(g));
- the offender committed the offence in company with one or more other people (excluding offences relating to public order – which are generally committed in this context) (s 5AA(1)(h));
- the offender abused a position of authority, or a position of trust, in committing the offence (s 5AA(1)(i)); and
- the offender committed the offence knowing that the victim was, at the time of the offence, in a position of particular vulnerability because of physical disability or cognitive impairment (s 5AA(1)(j)).

³¹⁵ '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).

³¹⁶ *Criminal Law Consolidation (General) Regulations 2006* (SA) s 3A (Prescribed occupations and employment—aggravated offences).

³¹⁷ *Criminal Law Consolidation Act 1935* (SA) s 5AA(1)(k)(i).

Increased penalties apply to aggravated forms of offences, which vary depending on the nature of the substantive offence charged. For example, in the case of assault, the following maximum penalties apply:

- For an assault where no harm has been caused to another person:
 - (a) for a non-aggravated offence (called a ‘basic offence’): 2 years’ imprisonment;
 - (b) for an aggravated offence (except one to which (c) or (d) applies): 3 years’ imprisonment;
 - (c) for an offence aggravated by the use of, or threatened use of, an offensive weapon: 4 years’ imprisonment;
 - (d) for an offence aggravated by the circumstances referred to in section 5AA(1)(c), (ca) or (ka) (discussed above, which includes where the victim falls into one of a broad range of occupations): 5 years’ imprisonment.³¹⁸
- For an assault causing harm to another person (an offence which replaced the South Australian offence of assault occasioning actual bodily harm):
 - (a) for a non-aggravated offence: 3 years’ imprisonment;
 - (b) for an aggravated offence (except one to which paragraph (c) or (d) applies): 4 years’ imprisonment;
 - (c) for an offence aggravated by the use of, or a threat to use, an offensive weapon: 5 years’ imprisonment;
 - (d) for an offence aggravated by the circumstances referred to in section 5AA(1)(c), (ca) or (ka) (committed against victims in particular occupations): 7 years’ imprisonment.³¹⁹

6.4 Aggravating factors for sentencing purposes

Instead of, or in addition to aggravated forms of offences, some jurisdictions have introduced statutory circumstances of aggravation that apply for sentencing purposes when an offence is committed against a particular class of person — but without providing for a higher maximum penalty to be imposed and/or mandatory or presumptive minimum penalty to be applied.

The inclusion of aggravating factors in sentencing legislation is typically more flexible than one which establishes aggravated forms of offences as there is generally no need for the aggravating circumstances to be expressly charged — thereby avoiding what has been described by a Justice of the Supreme Court of South Australia as having the effect, in the context of assaults on police officers, of: ‘adding a trial of “assault a police officer in the execution of his duty” to be heard by a jury in tandem with the trial of the substantive offence’.³²⁰

The presence of an aggravating factor is intended to signal the increased overall seriousness of an offence sharing these characteristics, which in turn may justify a more significant penalty that might otherwise have been considered appropriate. In contrast to aggravated forms of offences, this form of penalty enhancement occurs within the confines of the existing maximum penalties that apply to the relevant offences being sentenced, and often reflects factors already taken into account by courts as being aggravating under the existing common law. It also maintains the

³¹⁸ Ibid s 20(3).

³¹⁹ Ibid s 20(4).

³²⁰ *R v Tipping* [2019] SASCF 41 [106] (Peek J).

discretion of the court to take into account the individual circumstances involved when setting the sentence.

The discretionary nature of these types of provisions was confirmed by a 2018 decision of the Queensland Court of Appeal which found that a new circumstance of aggravation inserted into section 9 of the PSA (that an offence being sentenced is a domestic violence offence) is a procedural rather than substantive provision, affecting the 'approach to the exercise of the [sentencing] discretion ... rather than a mandated outcome by following that approach'.³²¹ As a consequence, it was found this new statutory aggravating factor 'applies to all sentencing from its commencement, whether or not the offending was committed before or after the commencement'.³²²

The legislative recognition of a victim's occupation as an aggravating factor for sentencing purposes has occurred to a greater or lesser extent in each of the three international jurisdictions examined (Canada, England and Wales and New Zealand) as well as in NSW. These provisions are summarised in Appendix 5, Table A5-4.

In NSW, section 21A(2)(a) of the *Crimes (Sentencing Procedure) Act 1999* provides that the fact 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 is an aggravating factor. A further separately listed aggravating factor is that:

the victim was vulnerable, for example, because the victim was very young or very old or had a disability, because of the geographical isolation of the victim or 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).³²³

The section expressly provides: 'The fact that any such aggravating or mitigating factor is relevant and known to the court does not require the court to increase or reduce the sentence for the offence'.³²⁴

Reforms in England and Wales were introduced under the *Assaults on Emergency Workers (Offences) Act 2018* (UK) ('*Assaults on Emergency Workers Act*') which provides as an aggravating factor that an offence was committed against an 'emergency worker' acting in the exercise of functions as such a worker.³²⁵ The definition of 'emergency worker' includes police, prison officers, custody officers, and people employed or engaged to provide fire services or fire and rescue services, search and/or rescue services and health services.³²⁶ The application of this provision is limited to specific listed offences, including assault occasioning actual bodily harm, malicious wounding, sexual assault and manslaughter. There is a requirement to state in open court that the offence is so aggravated.³²⁷

The justification for the introduction of these reforms put forward at the time of introduction was that by placing this aggravating factor on a statutory footing, and requiring the court to state this as an aggravating element of the offence, it would give victims of these offences 'a sense that

³²¹ *R v Hutchinson* [2018] QCA 29, [39] (Mullins J, Fraser and Morrison JJA agreeing).

³²² *Ibid* [43].

³²³ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(i).

³²⁴ *Ibid* s 21A(5).

³²⁵ *Assaults on Emergency Workers (Offences) Act 2018* (UK) s 2.

³²⁶ *Ibid* s 3.

³²⁷ *Ibid* s 2(2)(b).

justice is being done'.³²⁸ In the Second Reading speech, the sponsoring Member of Parliament submitted: 'Part of the fury that 999 [emergency services] workers feel is caused by the fact that element is never stated in open court, but now it will be'.³²⁹

Sentencing guidelines, which pre-dated the reforms under the *Assaults on Emergency Workers Act*, further identify the fact an offence has been committed against those working in the public sector or providing a service to the public (whether as a public or private employee or acting in a voluntary capacity) as a general aggravating factor that applies to all offences,³³⁰ which is also reflected in specific sentencing guidelines, such as those issued for common assault³³¹ and assault occasioning actual bodily harm.³³² Unlike the legislative reforms, the guidelines are not limited to emergency workers and the general guideline applies to all offences.

The stated rationale for including the fact the offence is committed against those working in the public sector or providing a public service in the guidelines is:

- the fact that people in public-facing roles are more exposed to the possibility of harm and consequently more vulnerable; and/or
- the fact that someone is working in the public interest merits the additional protection of the courts.³³³

Sentencing guidelines are issued by the Sentencing Council for England and Wales³³⁴ and when issued as definitive guidelines, courts are required to follow them unless satisfied that to do so would be contrary to the interest of justice.³³⁵

In New Zealand, the inclusion of the victim's status as a police or prison officer as a statutory aggravating factor was based on concerns that: 'attacks on police and corrections officers, who are upholders of the law and protectors of the public, should be explicitly denounced in legislation'.³³⁶ In introducing the amendment Bill, the Minister for Police remarked that such reforms: 'will ensure that the courts take the status of police officers and corrections officers into account as an aggravating factor at sentencing for crimes committed against them while acting in

³²⁸ United Kingdom, *Parliamentary Debates*, House of Commons, 20 October 2017, 1113 (Chris Bryant, Member for Rhondda). This was a Private Members' Bill sponsored by Chris Bryant and Baroness Donaghy, Labour members of Parliament.

³²⁹ Ibid.

³³⁰ Sentencing Council for England and Wales, General Guideline: Overarching Principles (effective from 1 October 2019) under 'other aggravating factors', <<https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/general-guideline-overarching-principles/>>. While the current guideline came into effect from October 2019, this factor also appeared in an earlier issued guideline on offence seriousness which this guideline superseded: Overarching Principles – Seriousness: Definitive Guideline, [1.23] 'Factors indicating a more than unusually serious degree of harm' (issued on 16 December 2004).

³³¹ Sentencing Council for England and Wales, Common Assault/Racially or Religiously Aggravated Common Assault: Definitive Guideline (effective from 13 June 2011) under 'other aggravating factors', <<https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/common-assault-racially-religiously-aggravated-common-assault/>>.

³³² Sentencing Council for England and Wales, Assault Occasioning Bodily Harm/Racially or Religiously Aggravated ABH: Definitive Guideline (effective from 13 June 2011) under 'other aggravating factors', <<https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/assault-occasioning-actual-bodily-harm-racially-religiously-aggravated-abh/>>.

³³³ Ibid, text under 'Offence committed against those working in the public sector or providing a service to the public'.

³³⁴ *Coroners and Justice Act 2009* (UK) s 120.

³³⁵ Ibid s 125(1).

³³⁶ New Zealand, *Parliamentary Debates*, House of Representatives, Sentencing (Aggravating Factors) Amendment Bill – First Reading, 12 April 2011, 17, 951 (Judith Collins, Minister for Police).

the course of their duties',³³⁷ with such attacks described as representing 'an attack on the community and on the rule of law'.³³⁸

The Minister identified the unique position of police and corrective services officers as justifying differential treatment:

Police and corrections officers have a legal obligation to deal with dangerous people in dangerous situations. This obligation is unlike that applicable to any other occupation. Where staff in other occupations can walk away, police and corrections officers must move forward to deal with dangerous situations on behalf of the community, as our front line of defence. Our police and corrections officers are responsible for keeping our communities safe from the most dangerous people in society, so it is important that the Government reciprocates by taking a firm stance on assaults against our front-line officers and that the Government expressly denounces this abhorrent behaviour.

This bill demonstrates this firm stance. This bill shows that the Government is taking assaults against our police and corrections officers seriously, by requiring the courts to specifically consider this as an aggravating factor in sentencing offenders.³³⁹

The Government supported an amendment extending the same aggravating factor to emergency service providers on the basis that these frontline emergency workers attending emergency situations 'deserve special protection in a similar way to police and corrections officers acting in the course of their duties'.³⁴⁰ In contrast to other workers and members of the public, it was submitted:

These front-line officers and emergency workers cannot leave when a situation gets too dangerous or risky, because their jobs require them to protect and to save the lives of others. These workers are the first and last port of call, and for that reason we are making sure that the law recognises the importance of the contribution they make to society.³⁴¹

During the debate of the Bill, questions were raised by the Labour member who had proposed the extension of the amendment to other workers about whether sentencing has much of a deterrent effect on offending.³⁴² The introduction of the proposed measure, however, was supported on other grounds including 'that, it sends a signal that the New Zealand Parliament supports the work, values the work, and recognises the work that these people do on all our behalf in New Zealand'.³⁴³

There are current examples in Queensland of circumstances set out in legislation that a court must treat as aggravating, but these do not currently extend to the fact the victim of the offence was a public officer. These aggravating factors include:

- in the case of domestic violence offences,³⁴⁴ the fact that the offence is a domestic violence offence, unless the court considers this is not reasonable because of the

³³⁷ Ibid.

³³⁸ Ibid.

³³⁹ New Zealand, *Parliamentary Debates*, House of Representatives, Sentencing (Aggravating Factors) Amendment Bill – Third Reading, 12 September 2012, 5193 (Judith Collins, Minister for Justice).

³⁴⁰ Ibid.

³⁴¹ Ibid.

³⁴² Ibid (Charles Chauvel, Labour Member for Ohariu and Spokesperson, Justice). See also comments by the Labour Member for Christchurch East, Lianne Dalziel, who was also Associate Spokesperson, Justice, referred to with approval by the Julie Anne Gentner, a Member of the Greens Party.

³⁴³ Ibid (Jacqui Dean, National Member for Waitaki).

³⁴⁴ Defined in s 1 of the *Criminal Code* (Qld) to mean: 'an offence against an Act, other than the *Domestic and Family Violence Protection Act 2012* (Qld), committed by a person where the act done, or omission made, which

exceptional circumstances of the case (for example, the victim has previously committed an act of serious domestic violence, or several acts of domestic violence, against the offender);³⁴⁵

- in the case of manslaughter of a child under 12 years, the child's defencelessness and vulnerability, having regard to the child's age;³⁴⁶
- for an offender with one or more previous convictions, each previous conviction if the court considers it can reasonably be treated as aggravating having regard to: (a) the nature of the previous conviction and its relevance to the offence for which the person is being sentenced; and (b) the time that has passed since the conviction for the earlier offence.³⁴⁷

6.5 Mandatory minimum penalties, standard sentences and standard non-parole periods

A number of jurisdictions have introduced mandatory minimum penalties or presumptive penalties that apply to assault offences committed against specific types of public officers in specific circumstances.

As discussed in Chapter 4, mandatory sentences generally involve Parliament prescribing 'a minimum or fixed penalty for an offence'.³⁴⁸ The Australian Law Reform Commission (ALRC) has identified, '[m]andatory sentencing can take various forms, the chief characteristic being that it either removes or severely restricts the exercise of judicial discretion in sentencing'.³⁴⁹

Presumptive sentences are slightly different in that they retain judicial discretion in sentencing, but generally by reference to specific criteria — 'which may be broadly or narrowly defined'.³⁵⁰

An example of a presumptive sentencing scheme is the standard non-parole period (SNPP) scheme which has been operating in NSW since February 2003. The SNPP in its current legislative form 'represents the non-parole period for an offence [as listed in the relevant Table to Division setting these out] that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness'.³⁵¹ The relevant legislation provides the SNPP for an offence is a matter to be taken into account by a court in determining the appropriate sentence for an offender, but without limiting the matters that are otherwise required or permitted to be taken into account in determining the appropriate sentence for an offender.³⁵² While the court must make a record of its reasons for setting a non-parole period that is longer or shorter than the non-parole period and each factor it took into account,³⁵³ it is not required to identify the

constitutes the offence is also—(a) domestic violence or associated domestic violence, under the *Domestic and Family Violence Protection Act 2012* (Qld), committed by the person; or (b) a contravention of the *Domestic and Family Violence Protection Act 2012* (Qld), section 177 (2)' (contravention of a domestic violence order).

³⁴⁵ *Penalties and Sentences Act 1992* (Qld) s 9(10A).

³⁴⁶ *Ibid* s 9(9B).

³⁴⁷ *Ibid* s 9(10).

³⁴⁸ Law Council of Australia, *Mandatory Sentencing: Factsheet* (No. 1405, undated).

³⁴⁹ Australian Law Reform Commission, *Same Crime: Same Time: Sentencing of Federal Offenders* (Report No. 103, 2006) 538–9 [21.54] (citations omitted).

³⁵⁰ NSW Parliamentary Research Service, *Mandatory Sentencing Laws* (2014) 2 cited in Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Final Report* (Report No. 133, 2017) 274 [8.5].

³⁵¹ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54A(2).

³⁵² *Ibid* s 54B(2).

³⁵³ *Ibid* 54B(3). This also applies to aggregate sentences in which case, a court must first indicate and make a written record of the offences to which a SNPP applies and the non-parole period that it would have set for each offence

extent to which the seriousness of the offence for which the non-parole period is set differs from an offence to which the SNPP is referable.³⁵⁴

The current SNPP scheme in NSW operates consistently with the High Court's determination in *Muldrock v The Queen*.³⁵⁵ In this case, the High Court considered the nature of SNPPs and found that the court is obliged to take into account the full range of factors in determining the appropriate sentence for the offence, with the SNPP, together with the maximum sentence, operating as 'legislative guideposts'.³⁵⁶

A Victorian form of this type of scheme, introduced in 2017 and which came into operation on 1 February 2018, operates as a 'standard sentence scheme' and prescribes standard sentences for 12 serious crimes being: murder, rape, culpable driving causing death, trafficking in a large commercial quantity of a drug of dependence, and eight sexual offences involving children.³⁵⁷

Similar to NSW, the standard sentence in Victoria represents 'the sentence for an offence that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness'³⁵⁸ – calculated in the case of the Victorian scheme, other than for offences carrying a life sentence, at 40 per cent of the maximum penalty.³⁵⁹ The Victorian legislation expressly states that it 'is not intended to affect the approach to sentencing known as instinctive synthesis'³⁶⁰ and, as under the NSW scheme, that consideration of the standard sentence 'does not limit the matters that a court is otherwise required or permitted to take into account in determining the appropriate sentence for a standard sentence offence'.³⁶¹ A court must refer to the standard sentence as part of its reasons and 'explain how the sentence imposed by it relates to that standard sentence'.³⁶² The Victorian Court of Appeal has acknowledged that the Victorian provisions explicitly preserve the instinctive synthesis approach, and do not allow for 'two-stage sentencing'.³⁶³ A court does not determine a starting point and then adjust it up and down with reference to the specific features of the case.³⁶⁴

The NSW and Victorian schemes do not apply to the sentencing of offenders under the age of 18 years at the time of the commission of the offence,³⁶⁵ or to matters heard and determined summarily.³⁶⁶

to which the aggregate sentence relates had it set a separate sentence of imprisonment for that offence, and then record the reasons why it would have set a non-parole period that is longer or shorter than the non-parole period for each offence to which a SNPP applies: ss 54B(4)–(5).

³⁵⁴ Ibid s 54B(6).

³⁵⁵ (2011) 244 CLR 120.

³⁵⁶ Ibid 132 [27].

³⁵⁷ Sentencing Advisory Council (Victoria), *Standard Sentences* (Web Page) <<https://www.sentencingcouncil.vic.gov.au/about-sentencing/standard-sentences>>.

³⁵⁸ *Sentencing Act 1991* (Vic) s 5A(1)(b).

³⁵⁹ Victoria, *Parliamentary Debates*, Legislative Assembly, 25 May 2017, 1509 (Martin Pakula, Attorney-General).

³⁶⁰ *Sentencing Act 1991* (Vic) s 5B(3)(b).

³⁶¹ Ibid s 5B(3)(a).

³⁶² Ibid s 5B(5).

³⁶³ *Brown v The Queen* [2019] VSCA 286, 15 [44].

³⁶⁴ Ibid 6 [17] citing *Markarian v The Queen* (2005) 228 CLR 357, 373–4 [37] (Gleeson CJ, Gummow, Hayne and Callinan JJ), itself quoting *Wong v The Queen* (2001) 207 CLR 584, 611 [75] (Gaudron, Gummow and Hayne JJ).

³⁶⁵ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D(3); *Sentencing Act 1991* (Vic) s 5B(1)(a)

³⁶⁶ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D(2); *Sentencing Act 1991* (Vic) s 5B(1)(b).

6.5.1 Mandatory minimum sentences and non-parole periods

The NT and WA have introduced mandatory minimum terms of imprisonment that apply to assaults on police and some other occupational categories in circumstances where the victim has suffered physical or bodily harm as a result of the assault. The mandatory minimum penalties that apply range from a minimum of 3 months' actual imprisonment (NT)³⁶⁷ to 6 months' actual imprisonment (WA)³⁶⁸ or 9 months if committed while armed or in company (WA).³⁶⁹ A mandatory minimum 3 month sentence also applies to young offenders in WA who committed the offence when aged 16 or 17 years to be served by way of imprisonment or in youth detention.³⁷⁰

In WA, a mandatory minimum penalty of 12 months (or 3 months for young offenders) also applies to offenders convicted of grievous bodily harm (GBH) committed in 'prescribed circumstances' which includes where the victim of the offence is a police officer.³⁷¹

In the NT, an 'exceptional circumstances' exemption applies to mandatory minimum sentences, which when met, requires the court to impose a term of actual imprisonment, but allows the court to order that part be suspended or served by way of home detention.³⁷² The relevant section providing for this exception states that the following do not constitute exceptional circumstances:

- (a) that the offender was voluntarily intoxicated by alcohol, drugs or a combination of alcohol and drugs at the time the offender committed the offence;
- (b) that another person:
 - (i) was involved in the commission of the offence; or
 - (ii) coerced the person to commit the offence.³⁷³

The mandatory minimum sentencing reforms in the NT as they apply to assaults on police (s 189A of the *Criminal Code* (NT)) were introduced by the *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013* (NT). Section 189A was subsequently amended, in 2019, to apply to other frontline emergency workers. As a result of these changes, the current mandatory minimum sentences which apply to assaults on police where the victim suffered physical harm now apply to assaults against other frontline workers workers.³⁷⁴

In 2014, Victoria introduced a mandatory (or presumptive) minimum term of imprisonment of 6 months which applies in circumstances where a person, without lawful excuse, has intentionally or recklessly caused injury to an emergency worker on duty, a custodial officer on duty or a youth justice custodial officer on duty in circumstances where the offender knew or was reckless as to

³⁶⁷ *Criminal Code* (NT) s 189A; and *Sentencing Act 1995* (NT) ss 78CA(2) (offence is a level 4 offence if the victim suffers physical harm, and the offence is not a level 5 offence), 78DB (mandatory penalty for a Level 4 offence), 78CA(1)(b), 78D.

³⁶⁸ *Criminal Code* (WA) ss 318(1)(d)–(e), (1)(h)(i), (j) and (k), 318(4)(b) and 318(5) (definition of 'prescribed circumstances, which includes where the offence is committed against a police officer and the officer suffers bodily harm).

³⁶⁹ *Ibid* ss 318(1)(l) and 318(4)(a) and 318(5) regarding offences committed in 'prescribed circumstances'.

³⁷⁰ *Ibid* s 318(2). This applies to offences committed in 'prescribed circumstances' (defined in s 318(5)) which includes where the offence is committed against a police officer and the officer suffers bodily harm.

³⁷¹ *Criminal Code* (WA) ss 297(4)(a)–(b), (d)(i), (f) and (g), 297(5)(b) (adults) and 297(6)(b) (juveniles) and 297(8) (prescribed circumstances).

³⁷² *Criminal Code* (NT) s 78DI (exceptional circumstances exemption). This requires a court to comply with s 78DG where the court is satisfied the circumstances of the case are exceptional.

³⁷³ *Ibid* s 78DI(4).

³⁷⁴ *Criminal Code Amendment Act 2019* (NT) s 7.

whether the victim was such a person.³⁷⁵ 'Injury' is defined for this purpose to mean any physical injury, or harm to mental health, whether of a temporary or permanent nature.³⁷⁶

A youth justice centre order for a term not less than six months may be made if the person is 18 years or over, but under 21 in circumstances where the court has received a pre-sentence report and believes there are reasonable prospects for rehabilitation; or that the young person is particularly impressionable, immature or likely to be subjected to undesirable influences in an adult prison.³⁷⁷

Minimum non-parole periods also apply when sentencing an offender for the following offences under the *Crimes Act 1958* (Vic) in circumstances where the offence is committed against an emergency worker on duty, a custodial officer on duty, or a youth justice custodial officer on duty:

- causing injury intentionally or recklessly in circumstances of gross violence³⁷⁸ (not less than 5 years);
- causing serious injury recklessly under section 17 of the *Crimes Act 1958* (Vic) (not less than 2 years);
- causing serious injury intentionally under section 16 of the *Crimes Act 1958* (Vic) (not less than 3 years).³⁷⁹

As for the offence of causing injury intentionally or recklessly, there are special provisions that apply to young offenders (18 years or over, but under 21) which, in this instance, enable the court to make a youth justice centre order for the same minimum term as the minimum non-parole period that would have applied had a prison sentence been imposed.³⁸⁰

In the second reading speech introducing these reforms, the then Attorney-General, Robert Clark described the reforms as recognising 'the very special role played by Victoria's emergency workers, and the need to ensure they receive the full protection of the law when treating, caring for and protecting Victorians at times of emergency'.³⁸¹ Longer sentences were said to 'reflect the

³⁷⁵ *Crimes Act 1958* (Vic) s 18; *Sentencing Act 1991* (Vic) ss 3 (definition of 'category 1 offence' – which includes an offence against s 18 of the *Crimes Act 1958* (Vic) if the victim falls into one of the identified categories of worker and the offender knew or was reckless as to this fact (para (cc)); 5(2G) (requirement to impose a custodial order for a category 1 offence); and 10AA(4) (requirement to impose a term of imprisonment of not less than 6 months unless the court finds a special reason exists).

³⁷⁶ *Crimes Act 1958* (Vic) s 15 – definition of 'injury'. 'Physical injury' is defined to include unconsciousness, disfigurement, substantial pain, infection with a disease and an impairment of bodily function, while 'harm to mental health' is defined to include psychological harm, but not an emotional reaction such as distress, grief, fear or anger unless it results in psychological harm.

³⁷⁷ *Sentencing Act 1991* (Vic) ss 10AA(2)–(3). This does not apply if the court makes a finding under section 10A, in which case the court has full sentencing discretion.

³⁷⁸ *Crimes Act 1958* (Vic) ss 15A (Causing serious injury intentionally in circumstances of gross violence) and 15B (Causing serious injury recklessly in circumstances of gross violence). Circumstances of gross violence are constituted by any one of the following: (a) the offender planned in advance to engage in conduct and at the time of planning intended the conduct would cause a serious injury, was reckless as to whether the conduct would cause a serious injury, or a reasonable person would have foreseen the conduct would be likely to result in a serious injury; (b) the offender was in company with 2 or more other persons; (c) the offender entered into an agreement, arrangement or understanding with 2 or more other persons to cause a serious injury; (d) the offender planned in advance to have with him or her and to use an offensive weapon, firearm or imitation firearm and used one of these to cause the serious injury; (e) the offender continued to cause injury to the other person after the other person was incapacitated; (f) the offender caused the serious injury to the other person while the other person was incapacitated: *Crimes Act 1958* (Vic) ss 15A(2) and 15B(2).

³⁷⁹ *Sentencing Act 1991* (Vic) ss 10AA(1)–(2).

³⁸⁰ *Sentencing Act 1991* (Vic) s 10AA(2).

³⁸¹ Victoria, *Parliamentary Debates*, Legislative Assembly, 26 June 2014, 2397 (Robert Clark, Attorney-General).

opprobrium that the community attaches to acts of violence against emergency workers who put themselves on the line in emergency situations on behalf of the community' and to send 'a clear message to perpetrators of these acts that violence against emergency workers will not be tolerated and will be met with strong penalties'.³⁸²

In 2018, the offences of causing serious injury intentionally or recklessly, and causing injury intentionally or recklessly if the victim was an emergency worker on duty, a custodial officer on duty or a youth justice custodial worker on duty, and the offender knew or was reckless as to this, were categorised as 'category 1 offences' for the purposes of the *Sentencing Act 1991* (Vic). This means that in sentencing an offender for one of these offences committed in these circumstances, a court must make a custodial order (but excluding a sentence of imprisonment imposed with a community correction order).³⁸³

Importantly, the requirements under the Victorian sentencing provisions discussed above do not apply if a court makes a finding under section 10A of the *Sentencing Act 1991* (Vic) that a special reason exists. This legislative exemption has led some to question whether these provisions should be characterised as mandatory sentencing provisions.³⁸⁴

If a court makes a finding that a special reason exists justifying departure from the mandatory sentencing provisions, it must state in writing the special reasons and cause this to be entered in the records of the court.³⁸⁵

Section 10A(2) sets out specific guidance about the circumstances in which a court may make a finding that a special reason exists, being that:

- (a) the offender has assisted or has given an undertaking to assist, after sentencing, law enforcement authorities in the investigation or prosecution of an offence; or
- (c) the offender proves on the balance of probabilities that—
 - (i) ... at the time of the commission of the offence, he or she had impaired mental functioning³⁸⁶ [not caused solely by self-induced intoxication] that is causally linked to the commission of the offence and substantially reduces the offender's culpability;³⁸⁷ or

³⁸² Ibid.

³⁸³ *Sentencing Act 1991* (Vic) ss 3(1) (definition of 'category 1 offence'), paras (ca), (cb) and (cc); and 5(2G) (requirement to impose custodial order). The amending Act was the *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 73.

³⁸⁴ See, for example, Simone Fox Koob, 'The Community Has Been Misled': Chief Judge Slams Commentary Around 'Mandatory' Sentencing Laws', *The Age* (online, 19 February 2020) <<https://www.theage.com.au/national/victoria/the-community-has-been-misled-chief-judge-slams-commentary-around-mandatory-sentencing-laws-20200219-p5428u.html>>; *DPP v Haberfield* [2019] VCC 2082, 34 [91] (Tinney J); and questions posed to the Victorian Premier, Daniel Andrews, in response to a Question without Notice by the Leader of the Opposition, Michael O'Brien in the Victorian Parliament: Victoria, *Parliamentary Debates*, Legislative Assembly, 20 February 2020, 499–50.

³⁸⁵ *Sentencing Act 1991* (Vic) s 10A(4).

³⁸⁶ Defined in s 10A(1) of the *Sentencing Act 1991* (Vic) to mean: (a) a mental illness within the meaning of the *Mental Health Act 2014* (Vic); (b) an intellectual disability within the meaning of the *Disability Act 2006* (Vic); (c) an acquired brain injury; (d) an autism spectrum disorder; or (e) a neurological impairment, including but not limited to dementia.

³⁸⁷ For a recent judgment in which this finding was made, see *DPP v Haberfield* [2019] VCC 2082.

- (ii) he or she has impaired mental functioning that would result in the offender being subject to substantially and materially greater than the ordinary burden or risks of imprisonment;³⁸⁸ or
- (d) the court proposes to make a Court Secure Treatment Order³⁸⁹ or a residential treatment order³⁹⁰ in respect of the offender; or
- (e) there are substantial and compelling circumstances that are exceptional and rare and that justify doing so.

In deciding if there are substantial and compelling circumstances, the court is required to:

- (a) regard general deterrence and denunciation of the offender's conduct as having greater importance than the other sentencing purposes [under the Act (just punishment, special deterrence, rehabilitation and community protection)]; and
- (b) give less weight to the personal circumstances of the offender than to other matters such as the nature and gravity of the offence; and
- (c) not have regard to—
 - (i) the offender's previous good character (other than an absence of previous convictions or findings of guilt); or
 - (ii) an early guilty plea; or
 - (iii) prospects of rehabilitation; or
 - (iv) parity with other sentences.³⁹¹

Further guidance to courts in deciding if there are substantial and compelling circumstances is contained in section 10A(3) requiring courts to have regard to Parliament's intention that:

- a sentence of imprisonment should ordinarily be imposed for the offences of causing serious injury recklessly and causing serious injury intentionally where committed against an emergency worker on duty, a custodial officer on duty or a youth justice custodial worker

³⁸⁸ Ibid.

³⁸⁹ A Court Secure Treatment Order is a sentencing order requiring an offender to be compulsorily taken to, and detained and treated, at a designated mental health service: *Sentencing Act 1991* (Vic) ss 94A and 94B(1). Criteria for the making of the order include: (a) but for the person having a mental illness, the court would have sentenced the person to a term of imprisonment; (b) the court has considered the person's current mental condition, his or her medical, mental health and forensic history and social circumstances; and (c) the court is satisfied based on a psychiatrist's report and other evidence that the person has a mental illness, and needs treatment to prevent serious deterioration in their mental or physical health, or serious harm to the person or another person, and there is no less restrictive means readily available to enable the person to receive the treatment they need: *Sentencing Act 1991* (Vic) s 94B(1).

³⁹⁰ Residential treatment orders are orders directing that an offender be detained for a period of up to 5 years in a residential treatment facility: *Sentencing Act 1991* (Vic) s 82AA. These orders can only be made for certain sexual offences, or if an offender has been found guilty of a 'serious offence' as defined in section 3(1) of the Act – which includes a number of offences, including causing serious injury intentionally in circumstances of gross violence (*Crimes Act 1958* (Vic) s 15A), causing serious injury recklessly in circumstances of gross violence (*Crimes Act 1958* (Vic) s 15B), and causing serious injury intentionally (*Crimes Act 1958* (Vic) s 16). The Secretary to the Department of Health and Human Services must first specify that the person is suitable for admission to a residential treatment facility; and specify in the plan of available services, that services are available in a residential treatment facility.

³⁹¹ *Sentencing Act 1991* (Vic) s 10A(2B).

on duty, and that a non-parole period of not less than the length specified should ordinarily be fixed in respect of that sentence;³⁹² and

- a sentence of imprisonment should ordinarily be imposed for the offence of intentionally or recklessly causing injury committed against an emergency worker on duty, a custodial officer on duty or a youth justice custodial officer on duty.³⁹³

At the time of introducing the new mandatory minimum sentencing provisions, the Attorney-General indicated that the provisions for departure from the scheme avoids limiting protection from cruel, inhuman or degrading punishment, consistent with section 10 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), because where a court is satisfied a special reason exists, it has full sentencing discretion.³⁹⁴ Later amendments in 2018 which narrowed 'special reasons' exceptions (reflecting their current form) were defended by the then Government on the basis these provisions remained compatible with human rights, targeting 'a narrow and well-defined class of victims' and providing a proportionate response to this form of offending.³⁹⁵ However, they attracted strong criticism from stakeholders, including the Federation of Community Legal Centres and the Law Institute of Victoria in their joint submission to the Victorian Parliamentary Scrutiny of Acts and Regulations Committee. The same justifications were repeated regarding further proposed narrowing of 'special reasons' exceptions in 2020.³⁹⁶

The human rights implications of specific sentencing reforms which may be considered to current Queensland offence and sentencing frameworks are discussed in Chapter 9 of this paper.

The options available to courts as a result of the 2018 Victorian sentencing amendments mean that even where the court has found that a special reason exists for a Category 1 offence, a court's sentencing options are limited. In these circumstances, a court must make either:

- a custodial order (under pt 3, div 2 of the Act) which includes imprisonment, drug treatment orders, youth justice centre and youth residential centre orders; or
- a mandatory treatment and monitoring order³⁹⁷ (whether or not a sentence of imprisonment is imposed under 44 in combination with a community correction order), a residential treatment order³⁹⁸ or a Court Secure Treatment Order³⁹⁹ if:
 - (a) the offender proves on the balance of probabilities that, at the time of the commission of the offence, the offender had impaired mental functioning [excluding that solely caused by self-induced intoxication] causally linked to the commission of the offence which substantially and materially reduced the offender's culpability; and
 - (b) the court is satisfied [one of these orders] is appropriate.⁴⁰⁰

³⁹² Ibid s 10A(3)(a).

³⁹³ Ibid s 10A(3)(ab).

³⁹⁴ Victoria, *Parliamentary Debates*, Legislative Assembly, 26 June 2014, 2395 (Robert Clark, Attorney-General).

³⁹⁵ Victoria, *Parliamentary Debates*, Legislative Assembly, 21 June 2018, 2134 (Martin Pakula, Attorney-General).

³⁹⁶ These justifications were repeated for the Sentencing Amendment (Emergency Worker Harm) Bill 2020 - see Victoria, *Parliamentary Debates*, Legislative Council, 19 March 2020, 1254 (Jaala Pulford, Minister for Roads, Minister for Road Safety and the TAC, Minister for Fishing and Boating).

³⁹⁷ Mandatory treatment and monitoring orders are a form of community correction order with mandatory conditions attached, being a judicial monitoring condition and either a treatment and rehabilitation condition, or a justice plan condition, and can also have other conditions attached: *Sentencing Act 1991* (Vic) s 44A.

³⁹⁸ Residential treatment order (n 390).

³⁹⁹ Court Secure Treatment Order (n 389).

⁴⁰⁰ *Sentencing Act 1991* (Vic) ss 3(1) (definition of 'category 1 offence'), paras (ca), (cb) and (cc); and 5(2GA).

The presumption to impose custodial sentences in Victoria also applies to the offence of common assault in circumstances where the person assaulted is a police officer or protective services officer on duty and involves an offensive weapon, firearm or an imitation firearm if the assault consisted of, or included the direct application of force.⁴⁰¹ There are stated exceptions to this.⁴⁰²

The combined effect of these new provisions has been described by a judge of the County Court of Victoria in the recent appeal decision of *DPP v Haberfield*⁴⁰³ in the following terms:

Under these provisions, undoubtedly more people will be sent to prison for these offences, even people who would not be imprisoned in the absence of these laws. That is plainly the intention of Parliament.

The message sent by Parliament could not be clearer. Do not assault emergency services workers. If you do, don't say you have not been warned. Prison will ordinarily be the outcome, whoever you are, whatever your character, whatever the reasons for you so acting, whatever damage may be caused to you in prison.⁴⁰⁴

*DPP v Haberfield*⁴⁰⁵ was the first case applying this complex legislation. At first instance, a magistrate found that the offender had impaired mental functioning caused solely by drug use, yet erroneously found that on this factual basis, the legislation still permitted the imposition of a non-custodial penalty. The prosecution appealed to the County Court [District Court equivalent], which reheard the matter. The County Court would have had to imprison the offender if the same factual finding was made. However, the judge had a new medical report and evidence from an expert, who had the benefit of information about the offender between the first sentence and the appeal. This led to the judge finding, contrary to the magistrate, that there was an underlying, enduring mental illness, not just a drug induced psychosis – meaning that the impaired mental functioning was not, in fact, caused solely by drug use (although drugs did play a 'sizeable' role).⁴⁰⁶ The offender had, (unknown to him) underlying, developing schizophrenia (triggered by drug use). This opened the door to a special reason finding which permitted consideration of one form of non-custodial penalty. The County Court judge, being careful to convey that the comments were not intended to criticise Parliament,⁴⁰⁷ noted the complexity of the legislation:

I had great difficulty myself following the legislative framework and ascertaining the consequences of finding the existence of a special reason. Those consequences are not described in section 10A which is the provision setting out the special reasons. Those consequences can only be discovered by going to the definition section of the Act (section 3) and then to a number of further provisions including s 5 ss (2G), s 5 ss (2GA), s 5 ss (2GB) and s 5 ss (2GC). It is a bit cumbersome.⁴⁰⁸

⁴⁰¹ This requirement arises from the classification of common assault committed in the relevant circumstances and consisting of or including the direct application of force as a 'category 2 offence' for the purposes of the *Sentencing Act 1991* (Vic): see *Sentencing Act 1991* (Vic) ss 3(1)(m) and 5(2H).

⁴⁰² See *Sentencing Act 1991* (Vic) s 5(2H) (a) to (e). The sentence must, unless otherwise directed by the court, be served cumulatively on any uncompleted sentence or sentences of imprisonment imposed on that offender, whether before or at the same time as that term: s 16(3E).

⁴⁰³ This case is further discussed in Chapter 9.

⁴⁰⁴ *DPP v Haberfield* [2019] VCC 2082, 36–37 [98]–[99] (Tinney J). This case is discussed further in Chapter 9, in the context of deterrence as a key sentencing purpose.

⁴⁰⁵ *Ibid* 2 [4] 2, 3 [5] 3, 6–7 [15] 6–7, 26 [72]–[3] 26, 28–9 [77] 28, 29 [79] (Tinney J).

⁴⁰⁶ *Ibid* 40 [112].

⁴⁰⁷ *Ibid* 7 [16].

⁴⁰⁸ *Ibid* 7 [15].

The special reasons provisions are not, in truth, mandatory sentencing provisions:

A mandatory provision would say that if ‘crime X’ is committed, ‘sentence Y’ is the invariable, the only result. No ifs. No buts ... That is not the position here at all and never has been. There are a very limited number of special reasons deliberately inserted into section 10A [and if one is] established by an offender on the balance of probabilities, then there is no requirement to impose a 6 month term at all, and in one particular setting contemplated by the legislation, there is no requirement to imprison at all.⁴⁰⁹

There is a Bill currently before the Victorian Parliament that will require courts to have regard to the fact that a sentence of at least the length of the statutory minimum sentence should ordinarily be imposed unless the cumulative impact of the circumstances of the case (including the special reason) justifies departure from that sentence.⁴¹⁰ It will also narrow the application of special reasons to exclude mental functioning caused ‘substantially’ rather than ‘solely’ by self-induced intoxication and direct courts where the ‘burden of imprisonment’ due to impaired mental functioning is high (a basis for finding ‘special reasons’ exist when sentencing for a category 2 offence under section 3(2H)(c)) courts must have regard to Parliament’s intent as to the length of sentence that should ordinarily be imposed. This would possibly alter the outcome of a case like *Haberfield* in future: It ‘will narrow the range of circumstances in which self-induced intoxication will be able to constitute special reasons for not imposing any applicable statutory minimum sentence’.⁴¹¹

The justification for the original form of the WA reforms, when introduced in 2009 under the *Criminal Code Amendment Act 2009* (WA), simply stated, was to implement an election commitment of the then Government. Its broader objective, as described by the then Attorney-General in introducing the Bill, was ‘to take strong and decisive action to ensure that offenders are severely punished’ and to ‘clearly indicate to others who may contemplate such crimes that the law’s response will be swift and firm’, serving the purposes of general deterrence.⁴¹²

The amendment Act as introduced confined the application of the mandatory minimum penalty to assaults committed against police causing bodily harm. In limiting its scope in this way, the Attorney-General suggested:

Mandatory sentencing is a tool of criminal law that should be used very cautiously. Only in situations in which there are problems of undeniably crucial public significance and in which other alternatives are or would be ineffective should mandatory sentences be contemplated. However, this government considers this legislation to be the only way to ensure that the sentencing in this area reflects the expectations of the Parliament and our community.⁴¹³

The Bill was subsequently expanded to include ambulance officers, prison officers and some security officers during the debate of the Bill.

In Tasmania, by operation of section 16A of the *Sentencing Act 1997* (Tas), a mandatory minimum sentence of 6 months’ imprisonment applies to any offence committed against a police officer while the police officer was on duty and the officer suffered serious bodily harm caused by, or arising from the offence unless there are exceptional circumstances. This minimum sentence

⁴⁰⁹ Ibid 5 [13].

⁴¹⁰ Sentencing Amendment (Emergency Worker Harm) Bill 2020 (Vic) introduced into the Legislative Assembly on 3 March 2020.

⁴¹¹ Explanatory Notes, Sentencing Amendment (Emergency Worker Harm) Bill 2020 (Vic) 2, 4.

⁴¹² Western Australia, *Parliamentary Debates*, Legislative Assembly, 4 December 2008, 965 (C Porter, Attorney-General). Evaluations of this legislation are discussed in Chapter 9.

⁴¹³ Ibid.

applies irrespective of whether the offence is punishable by imprisonment, or the maximum penalty is a term of imprisonment less than 6 months.⁴¹⁴

There is a Bill currently before the Tasmanian Parliament introduced by the Liberal Government that, if passed, will introduce the same minimum penalty in circumstances where serious bodily harm has been caused to other frontline workers.⁴¹⁵ During the House of Assembly's debate of the Bill, the Shadow Attorney-General indicated that while the mandatory minimum sentence for serious bodily harm to a police officer had been in place since 2014, only one person had been charged under those mandatory provisions.⁴¹⁶

6.5.2 Standard non-parole periods and standard sentences

While the Victorian standard sentence scheme applies only to the most serious of criminal offences, such as murder, rape and sexual offending against children, the NSW non-parole scheme extends, relevant to this review, to assault of a police officer occasioning bodily harm (3 year SNPP)⁴¹⁷ and wounding or inflicting GBH on a police officer (5 year SNPP).⁴¹⁸ Other offences to which it applies include sexual assault (7 year SNPP),⁴¹⁹ and aggravated sexual assault,⁴²⁰ but the SNPP in these cases is not confined to offences committed on police.

6.6 Conclusion

The approach in other jurisdictions illustrates what reforms have been introduced elsewhere that might be considered for introduction in Queensland should the current approach in Queensland to the offences and sentencing framework for assaults of public officers be considered to be in need of reform.

It has also briefly considered the justification for some of these reforms, which is explored further in Chapter 9 of this paper.

⁴¹⁴ *Sentencing Act 1997* (Tas) s 16A(3).

⁴¹⁵ Justice Legislation (Mandatory Sentencing) Bill 2019 (Tas) passed by the House of Assembly on 26 November 2019, and introduced that same day into the Legislative Council.

⁴¹⁶ Tasmania, *Parliamentary Debates*, House of Assembly, 26 November 2019, 70 (Ella Haddad, Shadow Attorney-General).

⁴¹⁷ Table to pt 4, div 1A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) to the *Crimes Act 1900*, item 5 referring to s 60(2) of the *Crimes Act 1900* (NSW).

⁴¹⁸ *Ibid* item 6 referring to s 60(3) of the *Crimes Act 1900* (NSW).

⁴¹⁹ *Ibid* item 7 referring to s 61I of the *Crimes Act 1900* (NSW).

⁴²⁰ *Ibid* item 8 referring to s 61J of the *Crimes Act 1900* (NSW).

Chapter 7 Aggravated assault based on victim status

7.1 Introduction

The current Terms of Reference have been referred to the Council on the assumption that:

- the Queensland community expects that police officers and other frontline emergency service workers, corrective services officers and other public officers who face inherent dangers in carrying out their duties, should not be the subject of assault during the execution of their duties.
- public officers need to have confidence that the criminal justice system properly reflects the inherent dangers they face in the execution of their duty and the negative impacts that an assault in the course of these duties has on those workers, their colleagues and their families.

A threshold question for the Council in responding to the Terms of Reference is the basis on which assaults and assault related offences were committed against a public officer should be treated as more serious than the same conduct when committed against people who are not public officers, or specific classes of public officer.

Historically in Queensland and other common law jurisdictions,⁴²¹ assaults of police officers and any other person performing a lawful duty have been treated at law as more serious. This is expressed in Queensland, in particular, through the existence of section 340 of the *Criminal Code*. At the time section 340 first appeared in the Code in 1899 (in force from 1 January 1901), the maximum penalty was 3 years' imprisonment – 2 years higher than for common assault, but fixed at the same level as for assaults occasioning bodily harm (AOBH) and wounding. However, as discussed in the preceding chapters of this paper the maximum penalty has increased significantly over time to its current level of 7 years for non-aggravated forms of serious assault, and 14 years where there are aggravating circumstances following changes introduced in 2012 and 2014. This has resulted in a widening gap between the maximum penalties for these offences and other offences that might otherwise be charged in the absence of section 340.

Other classes of victims that aggravate what would otherwise be an offence of common assault, or AOBH across jurisdictions are quite broad and include: women, including pregnant women,⁴²² school students and members of school staff at school,⁴²³ people over a prescribed age

⁴²¹ On equivalent interstate and overseas provisions, see discussion in Chapter 6 of this paper.

⁴²² ACT: *Crimes Act 1900* ss 24(2), 48A(2). Offence of assault occasioning actual bodily harm is aggravated if committed on a pregnant woman causing loss of or serious harm to the pregnancy or the death of or serious harm to any child born alive from the pregnancy; NT: *Criminal Code* s 188(2)(b) (female victim and male offender); Tas: *Criminal Code* s 184A (assault on pregnant woman); Vic: *Summary Offences Act 1966* s 24(1)(a) (penalty for aggravated assault of female).

⁴²³ NSW: *Crimes Act 1900* s 60E(1), 60E(2) (offence is aggravated if actual bodily harm is caused). It is also an offence to stalk, harass or intimidate a school student or member of staff of a school: *Ibid* s 60E(1).

(60 years in Queensland),⁴²⁴ people suffering a physical or mental disability,⁴²⁵ members of parliament,⁴²⁶ persons connected to legal proceedings (including judicial officers),⁴²⁷ members of crew on board an aircraft,⁴²⁸ members of clergy⁴²⁹ and spouses, domestic partners and children.⁴³⁰

While some types of assaults are treated as aggravated when committed against specific classes of victim, it has equally been recognised: ‘Equality before the law is a fundamental principle which ensures that individuals are not subject to discrimination in the enjoyment of their legal rights and entitlements’.⁴³¹

The Queensland *Human Rights Act 2019* (Qld) (‘HRA’) has given legislative recognition to the right to equality before the law, and to the equal protection of the law without discrimination, as important human rights. As discussed in Chapter 3 of this paper, these rights may be limited provided the limit is ‘reasonable and justifiable’ with reference to factors that include the nature of the human right, the nature and purpose of the limitation, the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose, whether there are any less restrictive and reasonably available ways to achieve the purpose, and the importance of the purpose of the limitation.

⁴²⁴ NT: *Criminal Code* s 188(2)(c) (where victim under 16 years and offender is an adult); Qld: *Criminal Code* s 340(1)(g) (person aged 60 or more); SA: *Criminal Law Consolidation Act 1935* s 5AA(1)(e)(ii) (general circumstance of aggravation to commit offence knowing the victim is under 12), 5AA(1)(f) (general circumstance of aggravation to commit an offence knowing the victim is over 60), 20(3)(b) (aggravated assault); Vic: *Summary Offences Act 1966* s 24(1)(a) (assault of male 14 years or younger, or female victim of any age); WA: *Criminal Code* ss 221(1)(d), 313(1)(a) (assault of person who is of or over the age of 60 years).

⁴²⁵ NT: *Criminal Code* s 188(2)(d) (person unable because of infirmity, age, physique, situation or other disability to effectively defend or retaliate); Qld: *Criminal Code* s 340(1)(h) (person who relies on a guide, hearing or assistance dog, wheelchair or other remedial device); SA: *Criminal Law Consolidation Act 1935* s 5AA(1)(j) (general circumstance of aggravation to commit an offence knowing the person is in a position of vulnerability because of physical disability or cognitive impairment), 20(3)(b) (aggravated assault).

⁴²⁶ NT: *Criminal Code* s 188(2)(e) (assault of member of parliament). SA: *Criminal Law Consolidation Act 1935* s 83E(4) (offence to assault a public officer (includes member of parliament: s 83D(1)) intending to participate or reckless as to participation in the criminal activity of a criminal group. Note: the definition of a ‘public officer’ in Queensland includes persons holding office under the Crown: *Criminal Code* s 1, including for purposes of s 340 Criminal Code).

⁴²⁷ For example: Cth: *Crimes Act 1914* s 36A (threaten, intimidate, restrain, use violence to, inflict an injury on or cause or procure violence, damage, loss or disadvantage to a witness); and in Queensland: *Criminal Code* ss 119B(1) (cause or threaten to cause injury or detriment to a judicial officer, juror, witness or member of a community justice group in retaliation for something lawfully done by that person and includes causing injury or detriment to a member of the family of that person) with a maximum penalty of 7 years, or 10 years if committed with a circumstance or aggravation; and s 122 (attempt to influence juror by threat or intimidation).

⁴²⁸ For example, NT: *Criminal Code* s 191 (with intent to affect the performance by the crew member of their functions and duties); NSW: *Crimes Act 1900* s 206 (includes crew of vessels so as to interfere with their function or duty); Qld: *Criminal Code* s 338A (Assault etc with intent to affect the performance by the crew member of their functions and duties) which carries a 14 year maximum penalty; Tas: *Criminal Code* s 276E; WA: *Criminal Code* s 318A.

⁴²⁹ NT: *Criminal Code* s 125 and *Summary Offences Act 1923* s 46C(b) (person lawfully officiating or a person assembled for religious worship); NSW: *Crimes Act 1900* s 56; Qld: *Criminal Code* s 206 (assault etc minister of religion), carrying a maximum penalty of 2 years, and s 207 (person officiating at religious worship) – 2 months’ imprisonment, or fine of \$10; Tas: *Criminal Code* ss 120, 121.

⁴³⁰ For example, Qld: *Penalties and Sentences Act 1992* s 9(10A) (commission of a domestic violence offence is an aggravating factor, unless court considers it is not reasonable because of exceptional circumstances); SA: *Criminal Law Consolidation Act 1935* ss 5(1) (definition of aggravated offence), 5AA(1)(g) (general circumstance of aggravation to commit against spouse, domestic partner, former spouse and domestic partner and certain children), 20(3)(b) (aggravated assault); WA: *Criminal Code* ss 313(1)(a), 221(1)(a) (circumstance of aggravation).

⁴³¹ Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (4th ed, 2017) 152 with reference to Article 7 of the Universal Declaration of Human Rights.

While the HRA does not specifically recognise the human rights of victims of crime, the offence of serious assault, and any reforms which might establish new aggravated forms of assault where committed against a public officer, or particular classes of officer, engage the right to equal protection of the law because these measures result in a special offence, or form of offence, being established that applies only to victims of assault in certain occupations – namely police officers and other emergency service workers, corrective services officers and other public officers.

The below case study illustrates how offences against victims may be treated differently at law even where the criminal conduct involved is the same and committed by the same offender in similar circumstances.

Case study 1 (Lisa): AOBH and serious assault

Lisa, who was a young woman of 20 at the time, attended a concert, having consumed six shots of vodka before arriving at the venue and then having a further two shots of vodka shortly after entering the venue. A security guard evicted her from the venue due to her extreme intoxication. As he was assisting her into a taxi Lisa bit his arm. She was then detained by security guards who called police. This formed a charge of AOBH as the private security guard did not meet the definition of a public officer. The maximum penalty for this offence is 7 years' imprisonment.

After police arrived, Lisa was transported to hospital, where she continued to act aggressively. When a nurse attempted to remove a catheter for Lisa's safety, she became further agitated and started yelling. Two other nurses, with the assistance of a wardman, attended to assist the nurse. During this altercation, Lisa bit the wardman on the right and his left index finger with enough force to draw blood through the latex glove. Because the hospital wardman was a public officer, this formed the basis of a charge of serious assault with circumstances of aggravation, which carries a maximum penalty of 14 years.

Lisa had abstained from alcohol for some time after her arrest and had not engaged in any binge drinking activity since that time. A report by a forensic psychologist identified that Lisa suffered from an adjustment disorder with mixed anxiety and depression. Lisa received a probation order for the AOBH charge and was released under the supervision of a corrective services officer for a period of 2 years, with standard reporting conditions in addition to a requirement to submit to medical, psychiatric or psychological treatment as directed. For the serious assault with circumstances of aggravation, Lisa was sentenced to imprisonment for nine months, which was suspended, with a conviction recorded.

Although the HRA does not reference victim rights, the *Qld Charter of Victims' Rights*⁴³² describes the treatment a victim can expect to receive from Queensland Government agencies and funded service providers. The rights protected under the Charter are discussed in more detail in Chapter 8.

7.2 Judging offence seriousness

A common justification for treating assaults on public officers (or particular classes of victims) differently and applying higher penalties to the same criminal conduct when committed against these victims is that these offences are more serious when committed on people performing duties on behalf of the state.

⁴³² *Victims of Crime Assistance Act 2009* (Qld) sch 1AA.

As discussed in Chapter 4, the *Penalties and Sentences Act 1992* (Qld) ('PSA') requires judges to assess the seriousness of the offence when determining an appropriate sentence, including any physical, mental or emotional harm done to a victim⁴³³ as well as the extent to which the offender is to blame for the offence,⁴³⁴ among other matters.

Assessing the seriousness of an offence is a complex issue that has long been debated among academics and legal stakeholders. Over the last century, theorists have tackled the question of how to appropriately assess and 'rank' the impact (and therefore the seriousness) of various types of criminal offending. Dating back to a paper by Louis Thurstone in 1927,⁴³⁵ academics have attempted to measure the differences and distances between crime types to gain an understanding of how to punish crimes based on their level of seriousness, how to commit policing and other resources more efficiently and how to ensure like offences are treated in a like manner.

One approach has been to assess the views of different groups in the community about offence seriousness using survey techniques, asking participants to rank various offences according to perceptions of seriousness, to choose between multiple pairs of offence types to assess views about severity, or to assign a score according to their sense of the seriousness of particular vignettes.⁴³⁶ While these studies provide a useful insight into the views and opinions of different groups in the community, they have often been criticised for weaknesses in the survey sample approach and for other aspects of research design (e.g. Cullen et al).⁴³⁷

Over more recent decades, commentators have acknowledged the need for a somewhat more sophisticated approach to incorporate metrics such as sentencing outcomes, maximum penalties set by Parliament, and the costs, impacts and prevalence of particular offence categories as an indicator of where on the continuum of seriousness an offence lies.

The literature describes offence seriousness as comprising two key components as central to the question of seriousness – the harm done by the offence (the 'harmfulness'), and the culpability of the offender (the 'wrongfulness'):

Analytically, the seriousness of criminal conduct has two major components: harm and culpability. (...) Harm refers to the degree of injury done or risked by the act. Culpability refers to the factors of intent, motive, and circumstance that bear on the actor's blameworthiness – for example, whether the act was done with knowledge of its consequences or only in negligent disregard of them, or whether, and to what extent, the actor's criminal conduct was provoked by the victim's own misconduct.⁴³⁸

⁴³³ *Penalties and Sentences Act 1992* (Qld) s 9(2)(c).

⁴³⁴ *Ibid* s 9(2)(d).

⁴³⁵ Louis Thurstone, 'The Method of Paired Comparisons for Social Values' (1927) 21(4) *The Journal of Abnormal and Social Psychology* 384.

⁴³⁶ *Ibid*; Thorsten Sellin and Marvin E. Wolfgang, *The Measurement of Delinquency* (Wiley, 1964); Peter H. Rossi et al, 'The Seriousness of Crimes: Normative Structure and Individual Differences' (1974) 39(2) *American Sociological Review* 224; Marvin E. Wolfgang et al, *The National Survey of Crime Severity* (US Department of Justice, 1985); Mark Warr 'What is the Perceived Seriousness of Crimes?' (1989) 27(4) *Criminology* 795; Michael O'Connell and Anthony Whelan 'Taking Wrongs Seriously: Public Perceptions of Crime Seriousness' (1996) 36(2) *British Journal of Criminology* 299.

⁴³⁷ Francis T. Cullen et al, 'Consensus in Crime Seriousness: Empirical Reality or Methodological Artefact?' (1985) 23(1) *Criminology* 99.

⁴³⁸ Andrew von Hirsch 'Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and their Rationale' (1983) 74(1) *Journal of Criminal Law and Criminology* 209, 214.

While the element of culpability refers to the person who commits the offence, e.g. their age, mental health, intentions, or whether the person was intoxicated,⁴³⁹ the element of harm refers to the ‘physical, mental or emotional harm done to a victim’.

The Victorian Sentencing Advisory Council has acknowledged that harm and culpability are not sufficient to assess seriousness of offending and added another element to recently conducted research: the circumstances of the offence — involving the victim, the offender, or the nature of the offence.⁴⁴⁰ While the Victorian study limited its investigation of the role of victim characteristics to age and gender, other factors relating to the victim’s identity may be relevant to conceptualising offence seriousness, including:

- the perceived vulnerability of the victim;
- the symbolic significance of the victim’s identity; and
- the social impact of the offence.

The concepts of harm and culpability are considered further below.

7.2.1 Assessing harm

Academics and criminologists have, for some time, acknowledged the need for a better approach to assessing the impact of crime than using a simple measure such as sheer numbers of offences. For example, Sherman et al comment that: ‘All crimes are not created equal. Counting them as if they are fosters distortion of risk assessments, resource allocation, and accountability’.⁴⁴¹

Over the last few decades, there have been attempts to assess the impact of crime by quantifying the degree of harm arising from different offences. There are, of course, several ways that harm can be conceptualised and offences ranked. Victoria Greenfield and Letizia Paoli (and mirrored by Adriaenssen et al) have set out a ‘taxonomy’ of harm, by looking separately at different types of harm (functional integrity, material interest, reputation and privacy), as well as the different ‘bearers’ of harm (individuals, private sector entities, government entities and the environment).⁴⁴²

In the United Kingdom, where sentencing guidelines have been in place since the early 2000s to assist judicial officers guide sentencing decisions (see further below), the Cambridge Crime Harm Index was created based on the ‘starting point’ for sentencing of each crime type, multiplied by the number of crime events in that category.⁴⁴³ As the authors indicate, this approach measures the concept of harm without reference to culpability — the reason being that the same crime committed by a first offender as opposed to a serious recidivist offender, results in the same level of harm.

New Zealand, like Queensland, does not have sentencing guidelines to assist in setting the ‘starting point’ for sentencing, so the New Zealand Crime Harm Index quantifies harm by reference

⁴³⁹ Queensland Sentencing Advisory Council, *Queensland Sentencing Guide* (2019, 2nd ed).

⁴⁴⁰ Sentencing Advisory Council (Victoria), *Community Attitudes to Offence Seriousness* (State of Victoria, 2012) 7–8.

⁴⁴¹ Lawrence Sherman, Peter William Neyroud and Eleanor Neyroud, ‘The Cambridge Crime Harm Index: Measuring Total Harm from Crime Based on Sentencing Guidelines (2016) 10(3) *Policing* 171.

⁴⁴² Victoria A. Greenfield and Letizia Paoli ‘A Framework to Assess the Harms of Crimes’ (2013) 53(5) *British Journal of Criminology* 868; An Adriaenssen, Letizia Paoli, Susanne Karstedt, Jonas Visschers, Victoria A. Greenfield and Stefaan Pleysier, ‘Public Perceptions of the Seriousness of Crime: Weighing the Harm and the Wrong’ (2018) 17(2) *European Journal of Criminology*, 6.

⁴⁴³ Sherman et al (n 441).

to the average sentence length (translated into ‘equivalent prison days’) actually served by offenders over a 10-year period for particular offence types.⁴⁴⁴

A Crime Harm Index developed in Queensland as a collaboration between Griffith University and the Queensland Police Service has resulted in a weighted ranking of 33 broad crime types which integrates community and police views on crime seriousness and harm, but does not incorporate sentencing trends, maximum penalties or offence prevalence.⁴⁴⁵

An understanding of the incidence (or prevalence) of a particular crime type has also been considered worthy of using to help understand the concept of seriousness. For example, while homicide clearly results in the most extreme and catastrophic impact on an individual, the incidence of homicide is very low in comparison to the crime of assault which, while the personal harm may not be anywhere near the harm impact of homicide, occurs far more often than homicide. Therefore, the overall harm of assault may not be as far from the overall impact of homicide as one might think. The prevalence, or recently increased prevalence of a particular crime type has been acknowledged as a legitimate element to incorporate into setting sanctions in the context of the principle of deterrence.⁴⁴⁶

7.2.2 Assessing culpability

The ‘wrongfulness of an offence’, or the degree of blameworthiness of the offender, is the other central component to consider when thinking about offence seriousness, with increasing culpability associated with increasing penalty outcomes.

Fox and Freiberg conceptualise culpability into three categories ranked according to their level of seriousness – an act can be done intentionally (most serious), recklessly or negligently (least serious), relating to the level of an offender’s awareness and motivation.⁴⁴⁷ This has been expanded by the Victorian Sentencing Advisory Council to recognise a five-level taxonomy, from least to most serious:

- strict liability (which does not encompass intent);
- dangerousness (falling between an accident and criminal negligence);
- criminal negligence;
- recklessness; and
- intention.

Two other elements also contribute to the culpability of an offender:

- offender characteristics, for example where an offender has a cognitive impairment which can mitigate the level of his or her culpability; and
- offence characteristics, for example if a particularly vulnerable person has been the target of an offence, or if weapons have been used as part of the offence.

⁴⁴⁴ Sophie Curtis-Ham and Darren Walton, ‘The New Zealand Crime Harm Index: Quantifying Harm Using Sentencing Data’ (2017) 12(4) *Policing* 455.

⁴⁴⁵ Janet Ransley, Kristina Murphy, David Bartlett, Susanne Karstedt and Harley Williamson, ‘Final Summary Report: Queensland Crime Harm Project’ (unpublished, 2018).

⁴⁴⁶ Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (Lawbook Company, 3rd ed, 2014) 164.

⁴⁴⁷ Richard Fox and Arie Freiberg, ‘Ranking Offence Seriousness in Reviewing Statutory Maximum Penalties’ (1990) 23 *Australian and New Zealand Journal of Criminology* 169.

7.2.3 What makes 'serious assault' serious?

As discussed in Chapter 3 of this paper, the offence of serious assault is treated as an aggravated form of assault on the basis that the criminal conduct involved is targeted at certain classes of person, including police, corrective services officers and other public officers.

In considering the harm caused by this form of criminal conduct, there is no doubt that personal (or individual) harm is a central element of the offence. This can include physical injury, damage to a body part or function (either temporary or permanent), and/or psychological injury (either temporary or permanent). These harms can impact the ability of the individual to continue to do their job, function as a family member, or continue to enjoy life (social contact, recreational activities, etc.). In turn, these can impact other family members, either directly or indirectly, materially or psychologically. Of less direct impact, but no less important, are the impacts on family and friends of the direct victim, who might be considered 'indirect' victims of the offence.

There are also the broader impacts on the material interests of the assault victim – the costs associated with the injuries (medical care, counselling), loss of income leading to impacts on housing or other material issues (sometimes impacting indirect victims).

The offence may further impact on the reputation or the privacy of an individual assault victim – such as how they are viewed in the workplace and the disclosure of their identity in media reports. Family members may experience similar impacts.

In addition to the impacts on individual victims, a serious assault may impact on the government entity employing the individual, such as resulting in lost productivity, and the potential to permanently lose a staff member who has had considerable training invested to skill them to perform their duties.

Finally, and of relevance to assaults on public officers, there is potential for assaults on these officers to impact public confidence in government, the justice system and the institutions employing these officers. In the case of a police officer who is assaulted, for example, it may undermine public confidence that police are adequately protected from assault, and therefore able to adequately protect others from dangerous individuals. The status of the victim as being a person performing a duty on behalf of the state, and the associated harm to the state that ensues, generally has been accepted as increasing the seriousness of the offence for the purposes of sentencing. Or to put this more succinctly as this principle applies to law enforcement officers:

An assault on a law enforcement officer is considered as being more serious than an assault on an ordinary citizen because it is considered an assault on the state itself and because police are charged with protecting the community.⁴⁴⁸

The Queensland Court of Appeal recently commented on 'the interest that the community has in the maintenance of an effective police force and the protection of police officers from harm':⁴⁴⁹

The establishment of a state sanctioned body of police serves a number of important and obvious purposes. One of these purposes is to ensure that the community need not rely upon self-help or upon vigilantism to protect itself against criminal acts. The community does not need to take such measures because some among us have volunteered to undertake this difficult and hazardous duty as members of the Queensland Police Service. There is, therefore,

⁴⁴⁸ Osman Isfen and Regina E Raetzlöh, 'Police Officers as Victims: Sentencing Standards and their Justifications in England and Germany' (2017) 81(1) *The Journal of Criminal Law* 33, 34.

⁴⁴⁹ *R v Patrick (a pseudonym)* [2020] QCA 51, 8 [30] (Sofronoff P, Fraser JA and Boddice J agreeing).

a public interest in ensuring that, so far as laws can do so, police officers are protected against harm in the execution of their duties and that offenders are punished when they harm police.⁴⁵⁰

Turning to culpability, questions about the intentionality of the behaviour, the cognitive capacity and other characteristics of the offender, or any premeditation are all relevant factors for sentencing considerations. The fact a person has assaulted, resisted or obstructed a public officer in the performance of their duties (or because of this) is also of relevance to the assessment of culpability because the behaviour is targeted at someone who is doing their job on behalf of the state, and may therefore be more vulnerable to being victimised in this way.

Few studies reviewed assessing offence seriousness specifically focused on the offence of assaulting a police officer or other public official. However, those that did indicated that the fact the victim was a police officer made the offence more serious in the eyes of those surveyed:

- Rossi et al ranked 140 offences in their survey, finding that the ‘planned killing of a police officer’ ranked as the most serious offence of all, with ‘planned killing of a person for a fee’ ranking second. In addition, ‘impulsive killing of a police officer’ was ranked at number 5, ahead of ‘impulsive killing of a spouse’ (ranked 19) and ‘planned killing of an acquaintance’ (ranked 7). ‘Assault with a gun on a police officer’ ranked at number 11 ahead of ‘assault with a gun on a stranger’ ranked at number 18.⁴⁵¹
- In their 1996 article, O’Connell and Whelan selected 10 offences to gauge the perceived seriousness of their cohort of 623 participants.⁴⁵² Their study included the offence of assaulting a police officer, which respondents ranked as fourth most serious, mirroring an earlier finding by Levi and Jones (1985).⁴⁵³ Unfortunately, because there was no comparison offence of assaulting a non-police officer it is not known whether a similar assault against another member of the community would have ranked as seriously.
- A 1994 paper outlining the crime seriousness rankings of 25 offences by 115 New Zealanders found that ‘aggravated assault of a police officer’ ranked higher at number 9 than did ‘aggravated assault’ at number 10.⁴⁵⁴

As discussed in Chapter 6, the higher perceived offence seriousness of assaults on police and other public officers is recognised in other jurisdictions in a variety of ways – through the creation of stand-alone offences, aggravated forms of existing offences of general application, and by recognising the fact the victim of a relevant offence was a public officer in legislation as an aggravating factor.

In England and Wales, which have adopted formal sentencing guidelines with ‘starting points’ and sentencing ranges, different tariffs have been set regarding the offences of ‘assault with intent to resist arrest’ and ‘common assault’.⁴⁵⁵ As illustrated in Table 7-1 below, these sentencing guidelines make it clear that assaults against police are considered more serious than assaults against any other person.

⁴⁵⁰ Ibid.

⁴⁵¹ Peter H. Rossi et al (n 436).

⁴⁵² O’Connell and Whelan (n 436).

⁴⁵³ Michael Levi and S Jones ‘Public and Police Perceptions of Crime Seriousness in England and Wales’ (1985) 25(3) *British Journal of Criminology*.

⁴⁵⁴ Stephen A.B. Davis and Simon Kemp, ‘Judged Seriousness of Crime in New Zealand’ (1994) 27 *Australian and New Zealand Journal of Criminology* 254.

⁴⁵⁵ Sentencing Council (UK), *Magistrates’ Court Sentencing Guidelines Online*, 2020, Sentencing Council (UK), <https://www.sentencingcouncil.org.uk/offences/>.

Table 7-1: Starting point for sentencing of three assault offences, England and Wales

| | Category 1 | Category 2 | Category 3 |
|--|----------------------------|------------------------------|----------------------------|
| Assault on a police constable in execution of his duty | 12 weeks' custody | Medium level community order | Band B fine ⁴⁵⁶ |
| Assault with intent to resist arrest | 26 weeks' custody | Medium level community order | Band B fine |
| Common assault | High level community order | Medium level community order | Band A fine ⁴⁵⁷ |

Source: Sentencing Council of England and Wales

7.3 Historical justifications and the approach in other jurisdictions

The current section 340 of the *Criminal Code* may have had its origin in an Imperial Act (1&2 George IV C 88) which provided for a separate penalty to be imposed for assault or wounding of a constable, officer, or any other person with intent to obstruct, resist or prevent the lawful arrest or detention of a person charged with a suspected felony, if the offender was convicted of a misdemeanour. This separate penalty, of between 6 months and 2 years' imprisonment, was to be imposed in addition to any penalty imposed for the offence.

The justification for the original provisions was stated in terms of general deterrence – 'it might tend more effectually to prevent the Commission of Such Offences if further Provisions were made for the Punishment of Persons who may hereafter be convicted thereof ...' (emphasis in original).

If this provision was the precursor to the current serious assault provision, it may suggest that the intended focus was on the prevention of the commission of such offences by applying the principle of deterrence, rather than necessarily on victim status.

More recently, the justifications pointed to by members of Parliament, sentencing councils and others as to why these assaults against public officers should be treated as more serious and/or attract higher penalties include:

- the higher level of vulnerability of public officers and the risks inherent in their role (as well as other people providing a service to the public, including private employees): 'people in public facing roles are more exposed to the possibility of harm and consequently more vulnerable';⁴⁵⁸
- the protection of those providing a public service: 'someone who is working in the public interest merits the additional protection of the courts';⁴⁵⁹

⁴⁵⁶ A Band B fine starts at 100% of relevant weekly income and ranges from 75–125% of relevant weekly income.

⁴⁵⁷ A Band A fine starts at 50% of relevant weekly income and ranges from 25–75% of relevant weekly income.

⁴⁵⁸ Sentencing Council for England and Wales, Assault Occasioning Bodily Harm/Racially or Religiously Aggravated ABH: Definitive Guideline (effective from 13 June 2011) under 'other aggravating factors', <<https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/assault-occasioning-actual-bodily-harm-racially-religiously-aggravated-abh/>> text under 'Offence committed against those working in the public sector or providing a service to the public'. See also Australian Capital Territory, Explanatory Notes: Crimes (Protection of Police, Firefighters and Paramedics) Amendment Bill 2019, 5–6.

⁴⁵⁹ Sentencing Council for England and Wales, Assault Occasioning Bodily Harm/Racially or Religiously Aggravated ABH: Definitive Guideline (effective from 13 June 2011) under 'other aggravating factors', <<https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/assault-occasioning-actual-bodily-harm-racially-religiously-aggravated-abh/>> text under 'Offence committed against those working in the public sector or providing a service to the public'.

- denunciation of acts of violence against people who are acting to protect the community and uphold the rule of law,⁴⁶⁰ save the lives of others,⁴⁶¹ and ‘who put themselves on the line in emergency situations on behalf of the community;’⁴⁶²
- deterrence: to send ‘a clear message to perpetrators of these acts that violence against emergency workers will not be tolerated and will be met with strong penalties’.⁴⁶³

During the 2018 Victorian parliamentary debates on the Justice and Legislation Miscellaneous Amendment Bill, which narrowed the ‘special reasons’ on which courts can depart from mandatory minimum sentences for assaults on emergency workers, one Member of Parliament commented:

We need to send a strong message to the community at large and to offenders that it is not okay to attack emergency workers who are attempting to save lives, and that if you attack an emergency worker you will be given special treatment. That is what the bill does. Yes, we are giving special treatment for special offences. We are making an exception so that if you attack an emergency worker, you will be dealt with a bit differently to any other person. That is not because we believe we should discriminate between humans. Everyone should be equal; that principle is sound. But what we are saying here is that you will be harshly dealt with if you attack emergency workers.⁴⁶⁴

As discussed in Chapter 6, in New Zealand, the distinction appears to have been made on the basis that, in contrast to other members of the community, police and other frontline emergency workers do not have the choice to leave dangerous or risky situations ‘because their jobs require them to protect and save the lives of others’.⁴⁶⁵

However, the special protection afforded to police and emergency workers, as well as other public officer victims, is not universal. For example, under German penal law, the position of the victim as a public officer does not afford any special protection (with some exceptions, such as coercion and resistance against enforcement officers). Instead, the general offences under the criminal law apply. Further, German penal law does not allow for different weighting of victims for sentencing purposes based on their status:

In other words, the protection of a lawfully acting office-holder cannot call for a more serious penal consequence, as this would imply that a police officer is more valuable than an ordinary citizen. Where the state intends to ensure additional protection of its authorities beyond the general penal law provisions, this is achieved through special provisions such as §113 (resisting enforcement officers), as well as through offences of state protection, but not through an officially sanctioned increased sentence practice.⁴⁶⁶

The German position, which opposes the concept that police officers are deserving of greater protection than ordinary citizens has been said to be ‘based on the fact that the police force has

⁴⁶⁰ New Zealand, *Parliamentary Debates*, House of Representatives, 12 April 2011, Sentencing (Aggravating Factors) Amendment Bill — First Reading 17, 951 (Judith Collins, Minister for Police).

⁴⁶¹ Ibid. See also statements made to this effect by the Victorian Attorney-General: Victoria, *Parliamentary Debates*, Legislative Assembly, 26 June 2014, 2397 (Robert Clark, Attorney-General).

⁴⁶² Ibid.

⁴⁶³ Ibid. See also similar comments made by the WA Attorney-General in introducing mandatory minimum sentencing reforms: Western Australia, *Parliamentary Debates*, Legislative Assembly, 4 December 2008, 965 (Christian Porter, Attorney-General).

⁴⁶⁴ Victoria, Legislative Council, *Parliamentary Debates*, 18 September 2018, 5014 (Cesar Melhem, Member for Western Metropolitan electorate).

⁴⁶⁵ New Zealand, *Parliamentary Debates*, 12 September 2012, Sentencing (Aggravating Factors) Amendment Bill — Third Reading 5193 (Judith Collins, Minister for Justice).

⁴⁶⁶ Isfen and Rauzloh (n 448) 43.

special training, legal authority and special equipment, which puts them in a stronger position than the offender, who feels vulnerable when faced with the force of the law'.⁴⁶⁷

In fact, critics of the arguments for increasing penalties for the offence of resist police in Germany (from two to three years) have raised concerns that 'having such a strong charge at their disposal for relatively minor acts of resistance gives the police too much power to ensure the submission of citizens'.⁴⁶⁸

7.4 Stakeholder views on victim status

There was recognition in various stakeholder preliminary submissions to the Council of the particular risks to public officers in performing their duties, and the need for legislation to have a protective effect. Feedback included:

Assaults on nurses, midwives, police, emergency service workers, corrective service officers and other public officers is unacceptable. Nurses and midwives are particularly vulnerable to assaults while at work as often the people they care for are unwell, upset, stressed, unpredictable and potentially volatile ... The impact of these assaults in Queensland's HHSs [Hospital and Health Services] is far reaching. "There is a victim; and employee who is potentially injured physically, psychologically or emotionally in the course of their work" (Queensland Government, 2016, p. 5). And there are other individuals such as colleagues and patients as well as the profession, the organisation and the overall quality of health care which can be negative impacted by assaults (Queensland Government, 2016).⁴⁶⁹

It is the QPU's position that police and emergency workers deserve adequate legislative protection for simply doing their duty and serving the people of Queensland.⁴⁷⁰

'What? There needs to be submissions on this topic to warrant further action/protection against people [who] injure those [who] want to protect and keep safe public officers from harm? Isn't that an inalienable right for these people? ... C'mon. This is a no-brainer.'⁴⁷¹

The Queensland Teachers' Union (QTU) raised concerns that assaults on school staff not only have an impact on the direct victims of these assaults, but also have a psychological impact on students.⁴⁷² It referred to evidence from other jurisdictions, particularly Victoria and the ACT, which suggests a close link between attitudes to domestic and family violence and occupational violence experienced in schools.⁴⁷³ Because the majority of teachers are women, the QTU suggested the psychological impacts of students witnessing violence against teachers and principals 'is significant and a basis for concern'.⁴⁷⁴

The view that the position of public officers is unique and warranting of special protection was not shared by Sisters Inside which submitted:

The harm suffered by a police or public officer is the same as experienced by a civilian exposed to the same offending. ... it is inappropriate that the legislation creates different penalties for

⁴⁶⁷ Ibid 43–4.

⁴⁶⁸ Ibid 48.

⁴⁶⁹ Preliminary submission (Queensland Nurses and Midwives' Union) 3. The QNMU also argued for other health care workers working in private health facilities, private aged care facilities and agency nurses and midwives to be extended the same protections. See discussion below at 9.2 – 'The definition of a public officer'.

⁴⁷⁰ Preliminary submission 23 (Queensland Police Union of Employees) 1.

⁴⁷¹ Preliminary submission 16 (M Griffin).

⁴⁷² Preliminary submission 13 (Queensland Teachers Union) 8.

⁴⁷³ Ibid.

⁴⁷⁴ Ibid.

the same action, with the only relevant distinction between cases being the claimant's profession. This is especially problematic considering how low the threshold is for making out a charge of serious assault.⁴⁷⁵

Sisters Inside put forward the following case example as illustrating what it submitted were disproportionately high maximum penalties for serious assault relative to those applied for the same conduct committed against a member of the public:

Tracey* is an Aboriginal woman who was charged under s 340(2AA)(a) of the Criminal Code for spitting at a bus driver. After a trivial dispute with the driver, Tracey was denied entry onto the only transport to her destination. Tracey has significant long-term mental health issues and sometimes reacts negatively to what she perceives to be unfair or disrespectful use of authority. Her significant history of trauma causes her to display strong emotional outbursts when she experiences feelings of disconnection or unfairness. In this case, Tracey reacted by swearing and spitting at the bus driver. Tracey was charged with serious assault and now faces a maximum penalty of 14 years in prison for spitting at a public officer, an action which is characterised by the legislation as an aggravated form of 'serious assault.' If she had spat on a civilian, she would most likely have been charged with common assault and be facing a maximum sentence of 3 years. We submit that this is unjust; the maximum penalty should not be 11 years higher for an offence committed against a police or public officer compared to a civilian.⁴⁷⁶

Pointing to the original justification for making express reference to public officers in section 340 of the *Criminal Code* being 'to protect Queensland's frontline officers from the dangers inherent in their duties and to ensure the appropriate punishment and deterrence of such offending conduct', Sisters Inside submitted:

We contend that there are no 'inherent dangers' in the duties of bus drivers. For contrast, the work of a taxi or Uber driver, while not a public role, could not be said to be less dangerous than that of a public transport driver. We hold that it is arbitrary to assign greater penalties to assaults on public transit officers than to civilians doing similar work. People should be treated equally before the law, regardless of their profession.⁴⁷⁷

Sisters Inside's submission was supported by the Prisoners' Legal Service.⁴⁷⁸

7.5 Issues

As discussed in Chapters 6 and 9, other jurisdictions have adopted different approaches to the treatment of assaults on police and other frontline emergency workers, corrective service officers and other public officers and justified this in various ways.

Generally, higher penalties apply to assaults committed against certain categories of victims. The way these categories are defined, however, differs by jurisdiction.

The NT has introduced a stand-alone *Criminal Code* offence of assault on workers which applies to assaults on any worker who is working in the performance of his or her duties.⁴⁷⁹ The maximum penalty for this offence is 7 years if the victim suffers harm (3 years if dealt with summarily), and 5 years (or 2 years if dealt with summarily) if no harm resulted.

⁴⁷⁵ Preliminary submission 21 (Sisters Inside Inc) 2.

⁴⁷⁶ Ibid.

⁴⁷⁷ Ibid.

⁴⁷⁸ Preliminary submission 26 (Prisoners' Legal Service Inc) 1.

⁴⁷⁹ *Criminal Code* (NT) s 188A.

A separate offence provision applies to assaults on police or emergency workers, which carries a 7-year maximum penalty if the officer or emergency worker suffers harm, or 5 years otherwise. The maximum penalty is 16 years' imprisonment if the victim has suffered serious harm.

The equivalent maximum penalties in the NT for harm caused to a member of the community who is not a police officer, emergency worker, or other worker assaulted while performing his or her duties are:

- 1 year for common assault, with no circumstance of aggravation;⁴⁸⁰
- 5 years for common assault where circumstances of aggravation apply, including that the person assaulted: suffers harm, is female if the offender is male, is under the age of 16 years if the offender is an adult, is unable because of infirmity, age, physique, situation or other disability effectually to defend themselves or to retaliate, is a member of Parliament and the assault is committed because of this, is assisting a public sector employee or justice of the peace in the exercise of their functions, or is threatened with a firearm or other dangerous or offensive weapon ⁴⁸¹ and
- 14 years if the assault results in serious harm.⁴⁸²

The ACT has introduced a Bill that, if passed, will introduce a new offence of assaulting a police officer, firefighter or paramedic into the *Crimes Act 1900* (ACT).⁴⁸³ The need for this new offence has been justified on the basis that: 'Police officers, firefighters and paramedics are required to place themselves in harm's way in service to the community, and it is appropriate for the law to reflect this vulnerability'.⁴⁸⁴

As is now the case in Queensland, the ACT has a *Human Rights Act 2004* (ACT) which requires consideration of any limitations on human rights in the development of new legislation. In this case, while the Government has accepted the new offence limits the right to equal protection of the law on the basis it elevates the protection of victims who are employed in certain occupations, namely police officers, firefighters and paramedics, it has submitted that: 'the limitation is not significant, as the maximum penalty stipulated for the new assault offence is in line with the penalty for common assault' (2 years).

The Victorian Government, which over recent years has introduced a raft of sentencing reforms targeting assaults on public officers and, like the ACT and Queensland, has human rights legislation in place,⁴⁸⁵ has not specifically addressed whether the differential treatment of victims limits their right to equality. Instead, when considering this right, its focus has been on the potential of these laws to disproportionately impact vulnerable groups with protected attributes, such as young offenders, Aboriginal people and persons with impaired mental functioning.⁴⁸⁶

⁴⁸⁰ Ibid s 188(1). In Queensland, it is an offence to assault another in interference with freedom of trade or work under section 346 of the *Criminal Code*, but in this case the offence is only committed if the requisite intention (to hinder or prevent the other person from working at or exercising their lawful trade, business or occupation, or from buying selling, or otherwise dealing, with any property intended for sale) has been established.

⁴⁸¹ Ibid s 188(2).

⁴⁸² Ibid s 181.

⁴⁸³ Crimes (Protection of Police, Firefighters and Paramedics) Amendment Bill 2019 (ACT) cl 5 proposing to insert a new section 26A. 'Emergency worker' is defined to mean: (a) a police officer; or (b) a member of the fire and rescue service; or a member of the ambulance service who is employed as a paramedic of patient transport officer.

⁴⁸⁴ Explanatory Statement: Crimes (Protection of Police, Firefighters and Paramedics) Amendment Bill 2019 (ACT) 5–6.

⁴⁸⁵ *Charter of Human Rights and Responsibilities Act 2006* (Vic).

⁴⁸⁶ See, for example, Victoria, *Parliamentary Debates*, Legislative Assembly, 4 March 2020, 680 'Sentencing Amendment (Emergency Worker Harm) Bill 2020 — Statement of Compatibility' (Jill Hennessy, Attorney-General).

In Queensland, higher maximum penalties apply under section 340 of the *Criminal Code* to assaults on public officers than would apply if the same conduct was committed against another member of the public, although these penalties were introduced long before the commencement of the new HRA. As an example, while the maximum penalty for non-aggravated forms of serious assault is 7 years imprisonment, a 3 year maximum penalty applies to common assault. The aggravated form of serious assault further results in a 14-year maximum penalty applying in some circumstances that would otherwise constitute a common assault, such as spitting on the victim. Where bodily harm is caused, a 14-year maximum penalty applies to the offence of serious assault if this resulted from an assault committed on a public officer, in comparison to the 7-year maximum penalty that applies to AOBH (or 10 years if the offender is, or pretends to be armed or is in company with another person) where such act is committed on any other person.

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

Understanding the basis on which different occupational groups are, or should be, treated differently under Queensland law is critical to providing this justification should any reforms to current legislation be proposed.

Questions: Aggravated assault based on victim status

- 1. Should an assault on a person while at work be treated by the law as more serious, less serious, or as equally serious as if the same act is committed against someone who is not at work, and why?**
- 2. If an assault is committed on a public officer performing a public duty, should this be treated as more serious, less serious, or as equally serious as if the same act is committed on a person employed in a private capacity (e.g. as a private security officer, or taxi driver) and why?**

Note: the definition of ‘public officer’ is broad and includes any person who is discharging a duty imposed under an Act or of a public nature – including public service employees (as a broad category), police, ambulance officers, health service employees, corrective services officers, child safety officers and transit officers). For further discussion, see Chapter 9.

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

Examples include: police officers, paramedics, fire and emergency services, corrective services officers, public school teachers, doctors and nurses working in the public health system, child safety officers, transit officers, fisheries inspectors, fair trading inspectors etc).

Chapter 8 Responding to the needs of victims

8.1 Impact of assault on public officer victims

Several preliminary submissions received by the Council refer to the impact of assaults on victims of these offences. The Queensland Nurses & Midwives' Union acknowledged that beyond the actual victim of the assault, colleagues, patients, the profession, the organisation and the overall quality of healthcare can be negatively impacted by assaults on health workers.⁴⁸⁷ The Queensland Teachers' Union also pointed out the significant negative psychological impact that can be experienced by children in schools where violence against teachers and principals has been witnessed.⁴⁸⁸

A recent national survey of the mental health and wellbeing of police and emergency services workers found rates of psychological distress, mental health conditions and suicidal ideation were higher among the 21,014 volunteers and employees who participated in the survey than for members of the general community.⁴⁸⁹ Some notable findings arising from the survey include:

- just over half of all employees surveyed (51%) reported having experienced a traumatic event at work that deeply affected them;⁴⁹⁰
- factors associated with poor mental health involved experiences of verbal abuse and physical assault sustained while on duty;⁴⁹¹

The literature review on assaults of public officers commissioned by the Council identifies a number of implications for individuals who have been victims of workplace assault, such as:

- impacts on emotional and physical wellbeing;
- decreased connection to the organisation and a desire to leave the occupation;
- reduced job performance and increased errors at work; and
- lowered productivity within an organisation and difficulties retaining staff.⁴⁹²

The report does, however, make comment about the issue of under-reporting of workplace assault, identifying several studies that report this as a significant issue.⁴⁹³ The authors summarise the general reasons why victims may choose not to report an assault:

- the complexity of the internal process for reporting the incident;
- a lack of support for the victim following the assault;
- lack of satisfaction with managerial responses;
- a view that workplace violence is seen as 'part of the job'; and
- a view that reporting the incident is unlikely to make any difference.⁴⁹⁴

⁴⁸⁷ Preliminary submission 18 (Queensland Nurses & Midwives' Union) 3.

⁴⁸⁸ Preliminary submission 13 (Queensland Teachers' Union) 8.

⁴⁸⁹ Beyond Blue Ltd., *Answering the Call National Survey, National Mental Health and Wellbeing Study of Police and Emergency Services – Final Report*, (Beyond Blue Ltd, 2018) 17.

⁴⁹⁰ Ibid 31.

⁴⁹¹ Ibid 37.

⁴⁹² Christine Bond et al, *Assaults on Public Officers: A Review of Research Evidence* (Griffith Criminology Institute, March 2020) 18.

⁴⁹³ Ibid 17.

⁴⁹⁴ Ibid.

Preliminary submissions received by the Council have also addressed the issue of under-reporting, for example, Queensland Health in its submission commented:

While the number of reported incidents has increased on previous years Queensland Health recognises that under-reporting remains a significant issue. The QOVSU has advised that Queensland Health staff have reported significant barriers to reporting incidents to the Queensland Police Service. Notable barriers include disparity in receiving support to make a complaint; significant delay in time of incident to attending court hearings and sentencing which causes stress for staff and their families; and concern about disparity between sentences for similar incidents.⁴⁹⁵

The Department of Justice and Attorney-General also noted issues that may contribute to under reporting, commenting:

in considering data-based insights as part of this review, we note that factors such as stigma, effectiveness of some reporting systems, management complacency and a perception that 'it's just part of the job' can lead to under reporting across many relevant areas. Therefore, it is likely that the problem of workplace violence and aggression is likely to be more extensive than the data alone might suggest.⁴⁹⁶

The three case studies presented below illustrate both the immediate and longer-term impacts of being a victim of workplace violence.

Case study: police officer assaulted after a traffic stop

In 2006, a police officer was assaulted by the driver of a car which resulted in fractures to his right eye socket and another facial bone, a fractured finger, broken and dislodged teeth and general cuts, swelling and bruising to his face. The officer was hospitalised overnight and required three months' sick leave from work. He was assigned to 'light duties' for 12 months after his return to work and continued his role as a police officer after that. The officer wrote about his experience as follows:

As bad as an incident can get the effort to get back to work can be worse. You suddenly find out that you do not have total control over your life anymore and you have to fight hard to get better. Even though you get some understanding from other officers you work with, they do not have the slightest idea what you are going through and of course they can be cynical. But you hope they do not have to go through what you did to understand. What becomes so frustrating is that you see other officers doing regular police duties without a second thought but you find that for you it becomes a terrifying event. I have learnt so much on the issue of mental health over this.

Source: Gabriel Jose, 'A Night in June' [200] (September) *Police Journal* 23.

⁴⁹⁵ Preliminary submission 2 (Queensland Health) 2.

⁴⁹⁶ Preliminary submission 27 (Department of Justice and Attorney-General) 1.

Case study: paramedic assaulted by a concussed patient

In 2016, a paramedic was called to attend to a patient who had been concussed earlier in the day and was wandering the streets in a confused state. The paramedic located the man and approached him to provide assistance, but the man spat in the victim's face. The paramedic reported there was enough saliva that his vision was temporarily impaired and he could taste what the man had been drinking. When the matter was heard in court in 2019, he reported having suffered depression and mood swings since the incident, and the assault had since impacted the way he approached patients, which he can no longer do on his own. He spent nine months undergoing medical tests following the assault. The victim stated:

I have suffered the indignity and suffering of this disgusting act... [and have experienced moods that swing between] inconsolable misery and white hot anger.

Source: Pete Martinelli, "Scumbag Spat on Me" Paramedic Tells Court of Disgusting Action', *Cairns Post* (Cairns, 2 September 2019) 12.

Case study: Corrections officer assaulted by inmate

In 2014, a Corrections Officer had faeces thrown in his face by an inmate who was infected with Hepatitis C. The officer underwent 10 months of testing, costing his family in excess of \$8,000. The victim's wife described the impact on him and on her family:

it was months of testing which meant we had to put our life on hold... In addition, you go through a two-year court process only to find out the prisoner gets off – it's completely wrong... There are some days where my husband won't want to get out of the car... Sometimes he comes home from two or three days of long shifts and he's not the same person he was before which has an enormous effect on our family.

Source: Unnamed author, 'Violence in QLD Prisons Reaching Tipping Point', *Mareeba Express* (Mareeba, 23 October 2019) 5.

8.2 The role of the criminal justice system in responding to victim needs

For most victims of crime, the criminal justice response is a critical aspect of acknowledging the full consequences of the offending they have experienced. For each individual victim of crime, what they seek from the criminal justice system may differ. For some, simply reporting the incident to police regardless of the outcome is a symbol that they have taken an important stance against violence at work. For others, a criminal conviction and a substantial term of imprisonment is the outcome they seek.⁴⁹⁷

The sentencing purpose of denunciation encapsulates the function of sentencing as a means of public condemnation of the offending behaviour thereby reaffirming the core community values that the offender has violated. In publicly denouncing relevant conduct, the court is conveying the

⁴⁹⁷ Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Executive Summary and Parts I and II* (Royal Commission into Institutional Responses to Child Sexual Abuse, 2017) 159-160. While these comments were made in relation to child sexual abuse victims, they echo the needs of the victim groups more broadly.

community's disapproval. This process is intended to provide an important symbolic acknowledgement that community standards of morality have been offended through the damage done to the dignity of the individual.⁴⁹⁸ This was noted in 2013 by the High Court in this way:

the long-standing obligation of the state to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence.⁴⁹⁹

The Queensland Court of Appeal expanded on this sentiment more recently:

The rational connection between sentencing, denunciation and the moral sense of the community has to be explored further in order to understand the role played by s 9(1)(d) of the *Penalties and Sentences Act*. The late Professor Jean Hampton offered an explanation for the relationships between these ideas. Professor Hampton distinguished between wrongs that result only in loss or harm to an individual and wrongs that, whether or not they also cause loss or harm, violate moral standards in a way that constitutes an affront to a victim's value or dignity. Such an affront causes a moral injury. A wrongful act might result in compensable loss but might also be morally excusable – particularly if the wrongdoer accepts responsibility and immediately offers recompense. On the other hand, when a wrong is constituted by an action that treats the victim as worth less as a human being than the offender, or treats the victim as entirely worthless, the commission of the wrong is both an affront to the victim's dignity and an affront to shared community values. The wrong done to the victim constitutes an insult to the community because it disparages one of the community's essential values, namely the value placed upon each precious individual. If permitted, such affronts might eventually corrode general acceptance of such values.⁵⁰⁰

Another interpretation of the principle of denunciation is that in invoking this as part of the sentencing process, it has the effect of 'social rehabilitation':

the process of social and personal recovery which we attempt to achieve in order to ameliorate the consequences of a crime can be impeded or facilitated by the responses of the courts. The imposition of a sentence often constitutes both a practical and ritual completion of a protracted painful period. It signifies the recognition by society of the nature and significance of the wrong that has been done to affected members, the assertion of its values and the public attribution of responsibility for that wrongdoing to the perpetrator. If the balancing of values and considerations represented by the sentence which, of course, must include those factors which militate in favour of mitigation of penalty, is capable of being perceived by a reasonably objective member of the community as just, the process of recovery is more likely to be assisted. If not, there will almost certainly be created a sense of injustice in the community generally that damages the respect in which our criminal justice system is held and which may never be removed. Indeed, from the victim's perspective, an apparent failure of the system to recognise the real significance of what has occurred in the life of that person as a consequence of the commission of the crime may well aggravate the situation.⁵⁰¹

In this way, an effective criminal justice response is central to ensuring victims of crime have the confidence in the system to report criminal conduct.⁵⁰² In turn, the individual experiences of victims of crime have an important flow-on effect. When a victim of crime has a negative experience (which

⁴⁹⁸ Arie Freiberg, Hugh Donnelly and Karen Gelb, *Sentencing for Child Sexual Abuse in Institutional Context* (Royal Commission into Institutional Responses to Child Sexual Abuse 2015) 39–40.

⁴⁹⁹ *Munda v The State of Western Australia* [2013] HCA 38 [54] as cited in Freiberg, Donnelly and Gelb (n 498) 40.

⁵⁰⁰ *R v O'Sullivan; Ex parte A-G (Qld)* [2019] QCA 300, 36-7 [144] (Sofronoff P and Gotterson JA and Lyons SJA) (citation omitted).

⁵⁰¹ *DPP v DJK* [2003] VSCA 109 [18], cited in Freiberg, Donnelly and Gelb (n 498) 40-1.

⁵⁰² See *DPP v Twomey* [2006] VSCA 90 [22]–[24], cited in Freiberg, Donnelly and Gelb (n 498) 41.

can exacerbate the trauma of the victim), or where a victim's expectations of the criminal justice response are not met, this can influence the views of other members of the community, leading to broader community dissatisfaction and higher levels of under-reporting of offences. As the Council found during its work on sentencing for child homicide offences, better information and support for victims of crime can greatly enhance their experience⁵⁰³ and has potential to contribute to building greater public confidence in the criminal justice system.

The rest of this chapter considers the current approach to incorporating the 'voice' or experience of a victim of crime in the prosecution and sentencing of an offence, and alternative approaches.

8.3 Current approach

8.3.1 The rights of victims of crime

The Queensland Charter of Victims' Rights (the Charter) sets out the rights and entitlements of victims of crime in Queensland.⁵⁰⁴ In summary, these rights include:

- to be treated with courtesy, compassion, respect and dignity, taking into account each victim's needs;
- to have their personal information protected from unauthorised disclosure, and to be protected against unnecessary contact with the accused, or violence or intimidation during court proceedings by the accused, defence witnesses and family members and supporters of the accused;
- to be informed at the earliest practicable opportunity about services (including support services) and remedies available to them;
- to be informed about the progress of the criminal justice process, including progress of the investigations, charges brought against the defendant and substantial changes to these charges or acceptance of a plea of guilty to a lesser charge, and details of court proceedings.

Under the Charter and the provisions of the *Penalties and Sentences Act 1992* (Qld) ('PSA'), victims also have a right to make a Victim Impact Statement (VIS), which is described further below.

The rights of victims as outlined in the Charter reflect different aspects of procedural justice. Adherence to these principles is important to victims feeling heard and part of the process.

Criminal justice agencies are required to meet certain minimum standards in providing support and assistance to victims. These standards are set out under the *Victims of Crime Assistance Act 2009* (Qld) or VOCAA. Significant changes were introduced to the VOCAA on 1 July 2017 following a review of the legislation,⁵⁰⁵ to ensure the legislation 'continues to provide an effective response to assist victims of crime'.⁵⁰⁶

Changes included replacing the former Fundamental Principles of Justice for Victims of Crime in the Act with the current Charter.⁵⁰⁷ The Charter informs victims about what they can expect from government departments and non-government agencies that support crime victims. It also places an onus on relevant agencies to provide information to victims proactively, if appropriate and

⁵⁰³ Queensland Sentencing Advisory Council, *Sentencing for Criminal Offences Arising from the Death of a Child: Final Report* (Queensland Sentencing Advisory Council 2018) 171–2.

⁵⁰⁴ *Victims of Crime Assistance Act 2009* (Qld) sch 1AA, pt 1, divs 1–2.

⁵⁰⁵ These amendments were made by the *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld).

⁵⁰⁶ *Explanatory Notes*, Victims of Crime Assistance and Other Legislation Amendment Bill 2016 (Qld) 1.

⁵⁰⁷ *Victims of Crime Assistance Act 2009* (Qld) ch 2 and sch 1AA.

practical to do so. The Charter applies to the Queensland Police Service (QPS) and the Office of the Director of Public Prosecutions (ODPP) – the two key agencies involved in investigating and prosecuting offences – as well as to non-government agencies funded to provide support to victims.

Information to be provided under the Charter includes:

- the progress of a police investigation (unless this may jeopardise the investigation);
- major decisions made about the prosecution of an accused person, including the charges brought against the accused person (or a decision not to bring charges), any substantial changes to the charges, and the acceptance of a plea of guilty to a lesser or different charge;
- the name of the person charged;
- information about court processes including hearing dates and how to attend court, and the outcome of criminal court proceedings against the accused person, including the sentence imposed and the outcome of any appeal; and
- if the victim is a witness at the accused's trial, information about the trial process and the victim's role as a witness.⁵⁰⁸

There are processes that provide for a victim to make a complaint if they feel the Charter has not been followed, but the Charter does not create enforceable legal rights. Victim Assist Queensland (VAQ) can receive complaints about breaches of the Charter relating to any agency, although complaints can also be made directly to the agency concerned.

In the case of a serious assault that occurs in circumstances where the victim is a police officer, the QPS's *Operational Procedures Manual* provides that, where practicable, investigation of the offence should be undertaken by an independent investigation office, such as criminal investigation branch, or child protection investigation unit.⁵⁰⁹ There are a number of matters set out to which a senior officer, who is not involved in the relevant incident, must have regard when determining whether an independent officer should investigate the assault including the serious nature of the assault, the injuries sustained, the complexity of the incident, the number of victims and witnesses, the number of suspects and the availability of resources.⁵¹⁰ It further states as a relevant consideration 'where practicable the investigator should be senior in rank to the victim'.⁵¹¹

⁵⁰⁸ Ibid sch 1AA, pt 1, div 2.

⁵⁰⁹ Queensland Police Service, 'Chapter 2 – Investigative Process', *Operational Procedures Manual* (3 April 2020, Issue 75, Public Edition) 26 [2.5.3] 'Investigation of serious assault offences where police officers performing duty are victims'.

⁵¹⁰ Ibid.

⁵¹¹ Ibid.

8.3.2 Victims Impact Statements

The criminal trial in the adversarial legal system is centred on the principle of the independent, impartial and fair prosecution of criminal offending.⁵¹² In the adversarial system, offences are prosecuted by the State rather than by the individual victim of the offence; victims, therefore, appear in court as a witness and/or observer during the process.⁵¹³

As discussed in Chapter 4, where an offence involved the use of, or attempted use of, violence against another person, or that resulted in physical harm, a court must have regard primarily to a number of additional factors. These include the need to protect any members of the community from the risk of physical harm if a custodial sentence were not imposed, the nature and extent of the violence used, or intended to be used, in the commission of the offence, and the personal circumstances of any victim.⁵¹⁴

The primary way courts currently take the impact on the victim into account is through the use of a Victim Impact Statement (VIS). A VIS is a mechanism for a victim of crime to provide a written account of the impact of an offence on them, which is presented to the sentencing court – most often in a written format to the judge, although sometimes the victim can read the statement to the court, or the prosecutor can read the VIS to the court.⁵¹⁵ This forms part of the court's assessment of the seriousness of the offence and may be accompanied by other evidence of harm tendered to the court in the schedule of facts, a document which generally presents the agreed facts relevant to the case before the sentencing court.

All Australian states and territories have now introduced legislation to facilitate the use of a VIS in the sentencing process, which generally provides:

- who may give a VIS;
- the form a VIS must take; and
- what information a VIS can contain.

There is no mandatory requirement for a person to provide a VIS, nor can a court draw any inference about the level of harm caused to a person if no VIS has been provided. The court has discretion to determine how they take the information contained in a VIS into account and how much weight to give to information provided in a VIS. The content of a VIS may also be challenged, particularly if detail contained in the VIS is inconsistent with information previously provided by the person in a police statement or in evidence given to a court.

The statutory requirements applying to the use of victim impact statements were summarised by the Queensland Court of Appeal in *R v Evans*:⁵¹⁶

- section 15 of the VOCAA [since omitted – but inserted in a modified form in s 179K of the PSA] allows for a VIS to be given to a sentencing court detailing the harm caused to the victim by the offence for the purpose of informing the sentencing court, with provision for the prosecutor to determine what details (if any) are appropriate to be given to the sentencing court, but having regard to the victim's wishes; however, the fact the details of the harm caused to a victim by the offence are absent at sentencing does not give rise to an inference the offence caused little or no harm to the victim;

⁵¹² Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Victorian Law Reform Commission 2016) 133.

⁵¹³ Edna Erez, 'Victim Impact Statements' (1991) *Trends and Issues in Crime and Criminal Justice* (33) 1-8.

⁵¹⁴ *Penalties and Sentences Act 1992* (Qld) ss 9(2A)–(3).

⁵¹⁵ *Ibid* ss 179M–179N.

⁵¹⁶ [2011] 2 Qd R 571.

- section 15 of the PSA provides that ‘In imposing sentence on an offender, a court may receive any information, ... , that it considers appropriate to enable it to impose the proper sentence’;
- in accordance with section 132C of the *Evidence Act 1977* (Qld), a sentencing judge or magistrate may act on an allegation of fact that is admitted or is not challenged or, if the allegation of fact is not admitted or is challenged, to act on it if satisfied on the balance of probabilities that the allegation is true (the level of satisfaction varying according to the consequences, adverse to the person being sentenced, or finding the allegation to be true).⁵¹⁷

In this same judgment, Chesterman JA acknowledged that a VIS not only may serve a therapeutic purpose, but ‘may serve other purposes, such as informing the court of “details of the harm caused ... by the offence”, which is often a factor relevant to the level of sentence imposed’.⁵¹⁸

The potential benefits of using a VIS in sentencing have been identified as including that they:

- allow the victim greater input into the formal court process thereby reducing the perception of the victim's lack of involvement in the criminal justice process;
- provide a cathartic and psychological benefit to the victim as the victim is allowed to prepare the statement in their own words with less formality than police statements;
- contribute to proportionality⁵¹⁹ and accuracy in sentencing as a result of information provided about the harm experienced by the victim;⁵²⁰
- assist in making the sentencing process more transparent and more reflective of the community's response to crime; and
- aid the sentencing court to make an informed decision; particularly when the offender has pleaded guilty and the court has not had an opportunity to hear the complainant's testimony.⁵²¹

However, other commentators have raised concerns about the use and utility of VISs. For example, having the ability to submit a VIS may create unrealistic expectations for victims regarding the level of influence a VIS will have on the sentence outcome.⁵²² It has been suggested that if victim expectations are not realised in the sentencing process, there is a risk of creating or amplifying victim resentment and disappointment with the criminal justice system which is contrary to the aims of a VIS.⁵²³ There is also potential for inequity based on the literacy competence of the victim preparing the VIS, and the ability for the victim to clearly understand and articulate the likely future impacts of the crime. This is particularly the case where the real impacts on a victim's life are not evident for some period of time, and may not yet have become apparent at the time of sentencing.

⁵¹⁷ Ibid 574 [4] - 576 [7] (McMurdo P, Chesterman JA agreeing as to this approach at 577 [15]–[19]).

⁵¹⁸ Ibid 577 [17] (Chesterman JA).

⁵¹⁹ Proportionality is a sentencing principle that sets out that the punishment of an offender should fit the crime. See further Chapter 4.

⁵²⁰ Edna Erez, ‘Victim Participation in Sentencing: Rhetoric and Reality’ (1990) 18(1) *Journal of Criminal Justice* (1990) 19.

⁵²¹ Joan Baptie, ‘The Effect of the Provision of Victim Impact Statements on Sentencing in the Local Courts of New South Wales’, (2004) 7(1) *Judicial Review* 73.

⁵²² Erez (n 520).

⁵²³ Sam Garkawe, ‘The Effect of Victim Impact Statements on Sentencing Decisions’ (Conference Paper, Sentencing: Principles, Perspectives and Possibilities, 10–12 February 2006).

Others have suggested that the subjective contents contained in a VIS may:

- have the effect of skewing an objective process with the inclusion of possible emotional and vengeful content;
- influence the court to give too great a weight to the effect of the crime on the victim, neglecting other considerations such as the rehabilitation of the offender;
- result in inconsistent sentences when one victim complains of greater psychological injury than another more robust victim; and
- undermine the court's impartiality from unacceptable public pressures.⁵²⁴

It is not known how many victims of serious assault provide a VIS as part of the sentencing process in Queensland.

8.3.3 Financial assistance and support for victims of crime

Victims of an act of violence⁵²⁵ can apply for financial assistance under the VOCAA of up to \$75,000 to aid in their recovery, which may include reimbursement of medical and counselling expenses, incidental travel expenses, loss of earnings of up to \$20,000, loss or damage to clothing, and other exceptional circumstance expenses (e.g. relocation expenses or costs of securing a place of residence). In addition, they can be eligible to be granted up to \$500 in legal assistance incurred by the victim in applying for assistance under the VOCAA.⁵²⁶

However, financial assistance cannot be granted under the VOCAA if the person who is the victim of the crime has, or will receive payment of an amount in relation to the act of violence from another source.⁵²⁷ For victims of serious assault, therefore, an application for assistance from WorkCover must be made and finalised before applying for financial assistance under the VOCAA.

Chapter 2 presents information from WorkCover regarding applications for assistance by workers who have been victims of workplace violence. The Council will be examining the amount of compensation obtained through WorkCover claims in its final report.

8.3.4 Restitution and compensation

As part of the sentencing process, and in addition to any other sentence imposed, a court may order that an offender:

- make restitution of property that has been damaged or taken in association with the commission of an offence (a restitution order);
- pay compensation to a person for loss or destruction of property in connection with the commission of an offence (a compensation order);
- pay compensation for an injury suffered by someone because of the commission of an offence (a compensation order).⁵²⁸

⁵²⁴ Erez (n 513); William Cox, 'Sentencing and the Criminal Law: Address at the University of Tasmania Faculty of Law Graduation Ceremony' (2005) 24(2) *University of Tasmania Law Review* 173.

⁵²⁵ See *Victims of Crime Assistance Act 2009* (Qld) s 21.

⁵²⁶ Ibid ss 37–39.

⁵²⁷ Ibid s 21(4).

⁵²⁸ *Penalties and Sentences Act 1992* (Qld) s 35.

Restitution ‘means the return or redelivery of particular property’, as distinct from ‘compensation for damage to it’.⁵²⁹ Therefore, ‘It follows that compensation orders for damage or loss to property or the person will be made in the majority of cases’.⁵³⁰

Such orders are not a form of punishment [although they are part of the sentence] but a summary and inexpensive method of compensating a person, avoiding the need to institute separate proceedings to establish civil liability. The potentially punitive consequences of such an order are relevant in considering the appropriateness of the overall sentence taking into account here that the applicant might be sent to prison for non-payment of the compensation.⁵³¹

Any order made by the court under section 35 of the PSA can include details as to the amount of money to be paid by way of restitution or compensation, the person to whom the money is to be paid, the timeframe within which the money must be paid, and the details of how the money must be paid.⁵³² The court may also order that the offender may be imprisoned if they fail to pay the restitution or compensation. On written application to the court, the length of time to pay may be extended.⁵³³

The PSA twice states that, if necessary, the imposition of a fine comes second to compensating a victim. A sentencing court must give preference to making an order for compensation — but may also impose a sentence other than imprisonment — if the offender cannot pay both the compensation and the fine or similar amount, even though both would be appropriate.⁵³⁴ Also, where it would be appropriate both to impose a fine and to make a restitution or compensation order, a sentencing court must give more importance to restitution or compensation, if the offender does not have the means to pay both.⁵³⁵

The imposition of a term of imprisonment may mean that compensation is not a reasonable prospect. The Court of Appeal has stated that:

In the absence of cogent evidence that an offender has the capacity to pay compensation after release from a term of actual imprisonment imposed as part of a sentence, courts are reluctant to order offenders to pay compensation after serving a term of imprisonment. To do so may jeopardise the offender’s prospects of rehabilitation; it would be apt to amount to a crushing sentence and would risk setting up the offender to fail at the time of release from prison when most in need of support to reintegrate into society.⁵³⁶

⁵²⁹ *R v Ferrari* [1997] 2 Qd R 472, 475 (McPherson JA, Davies JA and White J agreeing), citing *R v Beldan, Ex parte A-G* [1986] 2 Qd R 179, 198.

⁵³⁰ John Robertson, Thomson Reuters, *Queensland Sentencing Manual* (online at 3 March 2020) [15.2050].

⁵³¹ *R v Allison* [2012] QCA 249, 5 [27] (Douglas J, Fraser and White JJA agreeing), citing *R v Ferrari* [1997] 2 Qd R 472, 477 for the first sentence, and *R v Matauaina* [2011] QCA 344, [35] for the second. As to the statutory power to provide a set period of time within which to pay (or referral under the *State Penalties Enforcement Act 1999* (Qld)) and power to order imprisonment if the offender fails to comply with the order, see *Penalties and Sentences Act 1992* (Qld) ss 36-39.

⁵³² *Penalties and Sentences Act 1992* (Qld) s 36.

⁵³³ *Ibid* s 38.

⁵³⁴ *Ibid* s 14.

⁵³⁵ *Ibid* s 48(4).

⁵³⁶ *R v Flint* [2015] QCA 275, 9 [24] (McMurdo P, Morrison JA and Jackson J agreeing). See also *R v Jacobs* [2016] QCA 028.

In that case, the default term of imprisonment the offender was liable to serve if he failed to pay the compensation upon his release, would, as a matter of law, be cumulative on the term imposed for the offence itself – ‘the court held that this order made the overall sentence manifestly excessive’.⁵³⁷

Court data available from the Courts Database for the period 2012–13 to 2018–19 shows of the 7,912 cases involving a serious assault, 14.5 per cent involved one or more compensation orders (n=1,150). The average amount of compensation ordered was \$773.42, and the highest amount of compensation was \$14,500.00. Unfortunately, the data is unable to differentiate between compensation which relates to property, and compensation which relates to a personal injury, so this detail cannot be provided. These compensation orders relate only to sentencing orders made under section 35 of the PSA and do not include compensation or financial assistance provided to victims that is not part of the sentencing process, such as a victim’s right to seek compensation by making a WorkCover claim and, once their WorkCover application has been finalised, to seek financial assistance under VOCAA.

Restitution orders were imposed in 137 cases involving a serious assault (1.7% of cases) with an average amount of \$729.10 per case.

Table 8-1: Restitution and compensation orders for serious assaults of a public officer

| Order | N (cases) | % (of all cases) | Average amount (by case) | Min | Max |
|---------------------|--------------|---------------------|-----------------------------|---------|-------------|
| Compensation | 1,150 | 14.5% | \$773.42 | \$10.00 | \$14,500.00 |
| Restitution | 137 | 1.7% | \$729.10 | \$8.90 | \$5,000.00 |

Data includes: adult and juvenile, lower and higher courts, sentenced 2012-13 to 2018-19

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

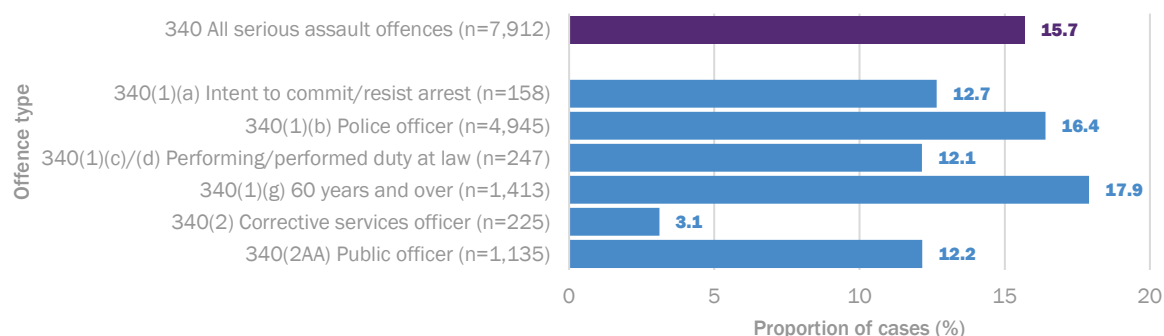
Note: Orders within a case were summed to create a total compensation amount and a total restitution amount per case and then averaged.

In the subsequent analyses, restitution orders and compensation orders are examined collectively. Due to the small number of cases involving restitution, and the fact that the data does not distinguish between compensation involving property or personal injury, it was not possible to analyse these penalties separately.

⁵³⁷ John Robertson, Thomson Reuters, *Queensland Sentencing Manual* (online at 3 March 2020) [15.2125]. See also [15.2120] discussing *R v Silasack* [2009] QCA 88.

Approximately 1 in 6 serious assault cases involved a compensation and/or restitution order (15.7%). This percentage was slightly higher when the offence was serious assault of a person aged 60 years and over (17.9%) or a police officer (16.4%). Assault of a corrective services officer was the least likely to result in a compensation and/or restitution order being made — see Figure 8-1.

Figure 8-1: Proportion of serious assault cases receiving a compensation and/or restitution order

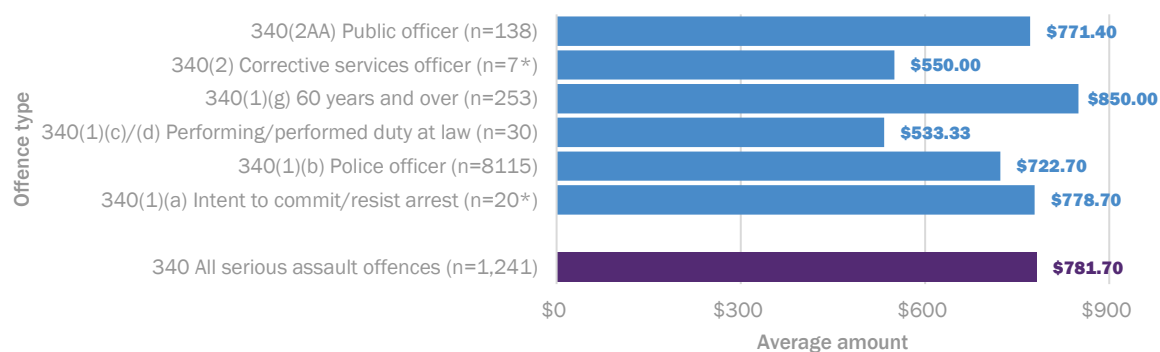


Data includes: adult and juvenile, lower and higher courts, sentenced 2012-13 to 2018-19
Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

The average amount of compensation and/or restitution was \$781.70 per case. The average payment was highest when the assault involved a victim aged 60 years and over at \$850.00, and lowest for assault of a person performing/performed a duty at law — see Figure 8-2.

For more information about the amount of restitution and/or compensation for specific subsections of section 340, please refer to Table A4-5 in Appendix 4.

Figure 8-2: Average amount of compensation and/or restitution ordered for serious assault cases



Data includes: adult and juvenile, lower and higher courts, sentenced 2012-13 to 2018-19
Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.
* Small sample sizes

8.4 Alternative mechanisms

Although each victim and victim experience is unique, the relatively passive role victims have played in the trial and sentencing process has resulted in many victims reporting that they feel both confused and alienated from the process, leading to perceptions of injustice.⁵³⁸ This has led to much debate and discussion about how the experiences and views of victims of crime could be better incorporated into the criminal justice process.

⁵³⁸ Erez (n 520).

8.4.1 Victims' involvement in the criminal trial process

The Victorian Law Reform Commission conducted a significant review of the role of victims in the criminal trial process and provided a comprehensive report in 2016 following extensive consultation with stakeholders and the community. The Commission characterised the views of stakeholders as largely falling into two camps:

- legal stakeholders largely opposed an increased role for victims in court proceedings, concerned that this could undermine the principles of a fair trial and lead to delays and additional complexity in court matters.
- Victims, support workers, academics, some lawyers, Victoria Police and the Victorian. Victims of Crime Commissioner supported an increased role for victims at particular points in the criminal trial process, to contribute to the decision-making of the court.⁵³⁹

Among the second group who supported an expanded role for victims, there were arguments that victims of crime should be heard in court proceedings when issues are raised that relate to the personal interests of the victim, although stakeholders were not altogether clear about what constitutes a 'personal interest', and it became clear to the Commission that a definitive list of personal interests could not be adequately made.

The Commission also outlined the view of some victim supporters that a victim of crime should be able to participate in the proceedings via a legal representative, who should have the ability to protect and advocate for the personal interests of the victim, for example by protecting the victim from improper questioning. The Commission further explored the question of expanding the functions of victims in proceedings to give them equal footing to prosecutors – enabling them to introduce evidence or to cross-examine witnesses, although there was little support in submissions to the review for this approach.

While the Commission concluded that expanding the participation for victims of crime in the court would ultimately impact on the central principle of a fair trial, it nevertheless conceded there may be circumstances where the interests of the prosecution and a victim of crime may diverge, presenting a legitimate right for the victim to be heard by the court on a matter that affects them. The Commission commented that interventions of this nature can already be accommodated by the courts.⁵⁴⁰

⁵³⁹ Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Victorian Law Reform Commission 2016) 158–9.

⁵⁴⁰ Ibid 163–4.

8.4.2 Restorative justice approaches

The Victorian Law Reform Commission also explored in some detail the potential for restorative justice conferencing to deliver improved outcomes for victims of crime. Restorative justice conferencing involves a dialogue between the parties (victim and offender) directly affected by a criminal offence, whereby the harm suffered by the victim can be expressed, acknowledged by the offender and an agreement reached about the way to repair the harm, where possible.⁵⁴¹ These processes have been consistently evaluated as resulting in high levels of victim satisfaction for those who elect to participate in this process, and of being beneficial for offenders who accept responsibility for their actions.

While the Commission recognised that this approach is not appropriate or desirable for all victims and offenders, the Commission concluded that it has the potential to deliver a much more meaningful and effective outcome for victims of crime, provided appropriate safeguards are in place and it is treated as ‘supplementary, not diversionary’ in the case of more serious offences.⁵⁴² The Commission went on to recommend that the Victorian Government introduce a scheme for restorative justice conferencing for indictable offences in the following circumstances:

- where a decision is made by the Director of Public Prosecutions to discontinue a prosecution;
- after a guilty plea and before sentencing; and
- after a guilty plea and in connection with an application for restitution or compensation orders by a victim.⁵⁴³

The recommendations of the Victorian Law Reform Commission in respect of restorative justice conferencing have not been adopted by the Victorian Government thus far.

To date in Queensland, restorative justice conferencing has been formalised as a process in Childrens Court matters, and is also a service offered by the Dispute Resolution Branch within the Queensland Department of Justice and Attorney-General (DJAG). Adult Restorative Justice Conferencing (ARJC) is a service for adult offenders, their victims and their respective families and provides support in the aftermath of a criminal offence. A conference of this nature can occur at any stage of the criminal justice process, such as:

- prior to charges being laid;
- prior to a matter being heard in court;
- after a finding has been made in the court but before a sentence is imposed; or
- post-sentence, either while a person is serving a term of imprisonment or some other community-based correctional order, or after the person has completed their sentence.⁵⁴⁴

⁵⁴¹ Jane Bolitho and Karen Freeman, *The Use and Effectiveness of Restorative Justice in Criminal Justice Systems Following Child Sexual Abuse or Comparable Harms* (Report for the Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney, 2016) 9.

⁵⁴² Victorian Law Reform Commission (n 539) 182–183 [7.275]–[7.278].

⁵⁴³ Ibid Recommendation 32.

⁵⁴⁴ Dispute Resolution Branch, Submission No 37 to Queensland Sentencing Advisory Council, *Review of Sentencing for Criminal Offences Arising from the Death of a Child* (14 August 2018) 1.

The Dispute Resolution Branch has advised the Council that they conduct restorative justice conferences for victims and offenders in serious assault cases, including where a victim of serious assault may be a public officer.⁵⁴⁵

Under most restorative justice schemes, even where a victim does not wish to participate directly in a conference, they may participate in a different way or send a representative to the conference to represent their interests.⁵⁴⁶

Questions: Responding to the needs of victims

4. Does the current sentencing process in Queensland adequately meet the needs of public officer victims?
5. Should any changes be considered to the current approach to better respond to victim needs? If so, what reforms should be considered?

⁵⁴⁵ Email from Practice Manager, Dispute Resolution Branch to Director, Queensland Sentencing Advisory Council, 19 March 2020.

⁵⁴⁶ For example, the legislative restorative justice conference scheme in the Australian Capital Territory allows for a substitute participant to take part instead of the victim provided the victim asks for, or agrees to this and the convenor agrees: *Crimes (Restorative Justice) Act 2004* (ACT) s 43. The Queensland restorative justice conference scheme for child offenders under the *Youth Justice Act 1992* (Qld) also allows for a representative of the victim (at the victim's request), or an organisation that advocates on behalf of victims of crime, to attend in their place, as well as the use of pre-recorded communication: *Youth Justice Act 1992* (Qld) ss 34(1)(g)-(h) and 35(1)(b).

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—

- (c) a person employed to execute any process of a court; and
- (d) a public service employee; and
- (e) a person appointed or employed under any of the following Acts—

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 1997⁵⁵⁰ – 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

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.

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 HRA⁵⁶⁰ 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

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

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*;

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 years⁵⁷⁶, 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

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 intentionally⁵⁸¹ 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.

...

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

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

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.

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

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'.

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 confinement⁶¹⁰ 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.

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 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

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.

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 police⁶²¹ and assaults on school students or staff members⁶²² 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

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)

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 material⁶³⁷ 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.

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) <i>Criminal Code</i> (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 <i>Criminal Code</i>) |
| 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 <i>Criminal Code</i>) |
| 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 <i>Criminal Code</i>) |
| 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 <i>Criminal Code</i>) |
| 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 <i>Criminal Code</i>) |
| 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 laws⁶⁴⁵ 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.

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) <i>Criminal Code</i> (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 <i>Criminal Code</i>) |
| 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 <i>Criminal Code</i>) |
| s 199 <i>Criminal Code</i> (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 <i>Criminal Code</i>) |
| 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 <i>obstruct</i> 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 <i>obstruct</i> includes hinder, resist, and attempt to obstruct | 40 penalty units or 6 months | Summary offence |
| s 150C <i>Fire and Emergency Services Act 1990</i> (Obstruction of person performing functions) | Obstruct another person in the performance of a function (including power) under the Act without reasonable excuse <i>obstruct</i> 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 <i>Education and Care Services Act 2013</i> (Obstructing authorised officer) | Obstruct an authorised officer, or someone helping an authorised officer, exercising a power without reasonable excuse <i>obstruct</i> includes assault, hinder, resist, attempt to obstruct and threaten to obstruct | 100 units | penalty Summary offence |
| s 187(1) <i>Hospital and Health Boards Act 2011</i> (Obstructing an authorised person or security officer) | Obstruct an authorised person or security officer in the exercise of a power without reasonable excuse <i>obstruct</i> includes assault, hinder, resist, threaten, attempt to obstruct and threaten to obstruct | 100 units | penalty Summary offence |
| s 475ZB <i>Transport Infrastructure Act 1994</i> (Obstruction of authorised person) | Obstruct an authorised person in the exercise of a power without reasonable excuse <i>obstruct</i> includes assault, hinder, resist and attempt or threaten to obstruct | 20 units | penalty 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

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

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

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

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 imprisonment⁶⁷²

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

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

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

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

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 deterrence⁶⁹⁷ 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

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

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.

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?

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

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

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

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 influenced 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

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](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

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

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:

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

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 Parliament⁷⁷⁴ 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

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 story⁷⁸² 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’.

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

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

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 officer⁷⁹⁴ [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 officer⁸⁰⁰ 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

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

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.

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 (MSO)

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 penalty⁸²⁰ of 14 years, as were 5.6 per cent of sentences for GBH. None of the sentences for aggravated serious assault met this threshold.

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

Guidance in Victoria: Report (2016) xxi, 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

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

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 Dalglish (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

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

⁸³⁵ *DPP v Dalglish (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 Dalglish (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 | <i>Criminal Code</i> (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 | <i>Crimes Act 1900</i> (NSW) ss 60(2) & (2A) (police), 60A(2) (law enforcement officers other than police), 60E (school staff) | Assault occasioning actual bodily harm | AOBH: 7 years, 9 years (police only) if during public disorder |
| | | Wounding where reckless as to causing actual bodily harm | Wounding: 12 years, 14 years (police only) if during public disorder |
| Northern Territory | <i>Criminal Code</i> (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 | <i>Criminal Code</i> (Qld) ss 340(1)(b) and (2AA) | Assault causing bodily harm to: - police - public officer | 14 years |
| South Australia | <i>Criminal Law Consolidation Act 1935</i> (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 | <i>Crimes Act 1958</i> (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 |
| | <i>Crimes Act 1958</i> (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 | <i>Criminal Code</i> (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 |
|--------------|---|---|---|
| Canada | | | 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. |
| | <i>Criminal Code</i> (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 | <i>Crimes Act 1961</i> (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.

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

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

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

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

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

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

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

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 causes 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

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 mind⁸⁹⁸ 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

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

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 offence⁹¹⁰ (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' offences⁹¹² 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

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

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 serious⁹³¹ or associated⁹³² 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

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

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);

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).

Chapter 10 Enhancing community knowledge and understanding

10.1 Introduction

Among those matters the Council has been asked to report on, the Terms of Reference ask the Council to ‘identify ways to enhance community knowledge and understanding of the penalties for this type of offending’.

In Chapter 9, we discussed deterrence and denunciation as two of the primary purposes of sentencing for assaults on police and other frontline emergency service workers and other public officers. For these two purposes to have any chance of being met the consequences of committing an assault (including an aggravated form of assault) on a public officer need to be known (in support of effective deterrence), as do the sentencing outcomes and penalties imposed.

Sentencing commentators have observed that in the sentencing of offenders: ‘Courts often declare that they intend to “send a message” to the community through the sentencing process and that the behaviour in question “will not be tolerated”’.⁹⁴² However, the achievement of this objective ‘assumes that the sentences, or reports of them in the media, will be known and understood’.⁹⁴³

There are many who question whether deterrence ‘works’, including as an effective means of reducing assaults on police and other frontline emergency service workers, corrective services officers and other public officers. If deterrence is to have any impact, general awareness about the maximum penalties and any minimum penalties that apply is of central importance.

Increasing community knowledge and understanding of the incidence and impacts of assaults on public officers is important, however, for other reasons, including because it may support behavioural change by making clear that such behaviour is unacceptable, thereby reducing the likelihood of public officers being subjected to violence.

The importance of clearly communicating legislative change to the general public was discussed in Chapter 9 (section 9.6.3) in the context of the implementation of WA’s mandatory sentencing regime. In that jurisdiction, a positive change in community attitudes towards police was advanced by the government as a possible reason for the claimed success of the reform. The Police Union raised concerns about a lack of advertising or continued public awareness campaigns following the introduction of the mandatory provisions. Some years later, both the Government and Opposition sought to attribute a rise in assault rates to negative change in community attitudes. These issues were not evaluated other than at an anecdotal level.

10.2 Raising public awareness

An entire literature exists in the public relations and marketing field that focuses on how to achieve behaviour change on a large scale. Public communication campaigns:

use the media, messaging, and an organised set of communication activities to generate specific outcomes in a large number of individuals and in a specified period of time. They are an attempt to shape behaviour toward desirable social outcomes. To maximise their chances

⁹⁴² Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (Lawbook Company, 3rd ed, 2014) 254.

⁹⁴³ Ibid.

of success, campaigns usually coordinate media efforts with a mix of other interpersonal and community-based communication channels.⁹⁴⁴

There are two categories of public communication campaign – the first aims to achieve behaviour change in individuals to address broader social problems, and the second, to raise public awareness about a particular issue to bring about policy change.⁹⁴⁵

Public awareness campaigns have been used since the 1970s to achieve many things:

- **Road safety** – Combined with policing and stronger penalties, very successful public advertisements have reduced the incidence of drink driving and speeding, and resulted in an increase in the number of people who wear seatbelts and bike helmets;⁹⁴⁶
- **Public health** – Various public health campaigns have achieved behaviour change in relation to smoking,⁹⁴⁷ sun exposure, drinking and smoking while pregnant, and obesity management;⁹⁴⁸ and
- **Environmental issues** – Other campaigns have targeted issues such as air quality, littering and recycling.⁹⁴⁹

In many respects, the exercise of raising public awareness and achieving behaviour change is not dissimilar to any advertising campaign which aims to sell products to individuals, only the target behaviour is much more complex. Brad Hesse from the Communication and Informatics Research Branch at the National Cancer Institute (in the United States) says:

Communication campaigns are more successful if they are tailored to the context, values, language and resources available to local audiences. Priorities for which audiences to reach are usually set by an understanding of who is most vulnerable.⁹⁵⁰

Various approaches can be considered as part of a campaign, including the use of paid advertising using a mass media commercial, identifying a well-known spokesperson, using social media, interactive web advertising, posters and brochures.⁹⁵¹ The best outcomes are achieved, however, when careful research work has been done to develop the message in an appropriate way for the intended target audience, and then ensuring the medium used will reach the highest number within the target population.

A significant challenge documented in the literature, however, is the difficulty of measuring the impact of a public communication campaign due to their complexity, the unpredictable nature of

⁹⁴⁴ Julia Coffman, *Public Community Campaign Evaluation: An Environmental Scan of Challenges, Criticism, Practice and Opportunities* (Harvard Family Research Project, 2002) 2.

⁹⁴⁵ Ibid.

⁹⁴⁶ Barry Elliott, *Road Safety Mass Media Campaigns: A Meta Analysis* (The Federal Office of Road Safety, 1993).

⁹⁴⁷ Trish Cotter, Sarah Durkin and Megan Bayly, *Mass Media Public Education Campaigns: An Overview* (The Cancer Council Website, November 2019) <<https://www.tobaccoinaustralia.org.au/chapter-14-social-marketing/14-1-social-marketing-and-public-education-campaig>>.

⁹⁴⁸ Public Health Association Australia, *Top 10 Public Health Successes Over the Last 20 Years*, Public Health Association Australia Monograph Series No. 2 (Public Health Association of Australia, 2018).

⁹⁴⁹ Tom Evison and Adam D Read, 'Local Authority Recycling and Waste – Awareness Publicity/Promotion' 32(3–4) *Resources, Conservation and Recycling*; Zero Waste Scotland, *7 of the Best Litter Prevention Campaigns from Around the World, 2020* (Zero Waste Scotland Limited Website) <<https://www.zerowastescotland.org.uk/litter-flytipping/top-campaigns>>.

⁹⁵⁰ Lacey Mayer, *Are Public Awareness Campaigns Effective?* (Cure: Cancer Updates, Research and Education Website, 10 March 2008) <<https://www.curetoday.com/publications/cure/2008/spring2008/are-public-awareness-campaigns-effective>>.

⁹⁵¹ Ibid.

their interventions, the context and other factors that can confound outcomes and the difficulty in finding control or comparison groups.⁹⁵² A strong investment in evaluation of a campaign can not only document the nature of behaviour change that has been achieved, but can also help refine what approach has the best impact for the message and the target audience.

10.2.1 Public awareness campaigns on workplace violence

Over recent years, a range of strategies, including public awareness campaigns, have aimed to raise the issue of assaults of public officers, including campaigns that have specifically aimed to make it clear that strong penalties apply to this behaviour.

As part of a broader campaign to improve pay and conditions for police, the Queensland Police Union issued a series of advertising campaigns in 2007 and 2010, one of which depicted the need for higher penalties for people who assault police.⁹⁵³ When the maximum penalty for aggravated serious assault of public officers was raised from 7 to 14 years imprisonment as part of the Safe Night Out Strategy,⁹⁵⁴ this was supported by an awareness campaign highlighting the new maximum penalty. The campaign featured images of some of the injuries received by nurses, doctors and paramedics as a result of assault, see below.



A Safe Night Out at Work

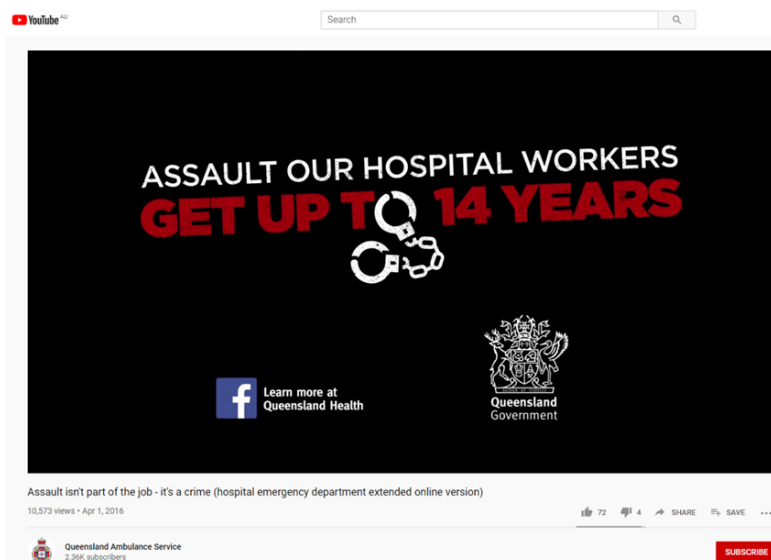
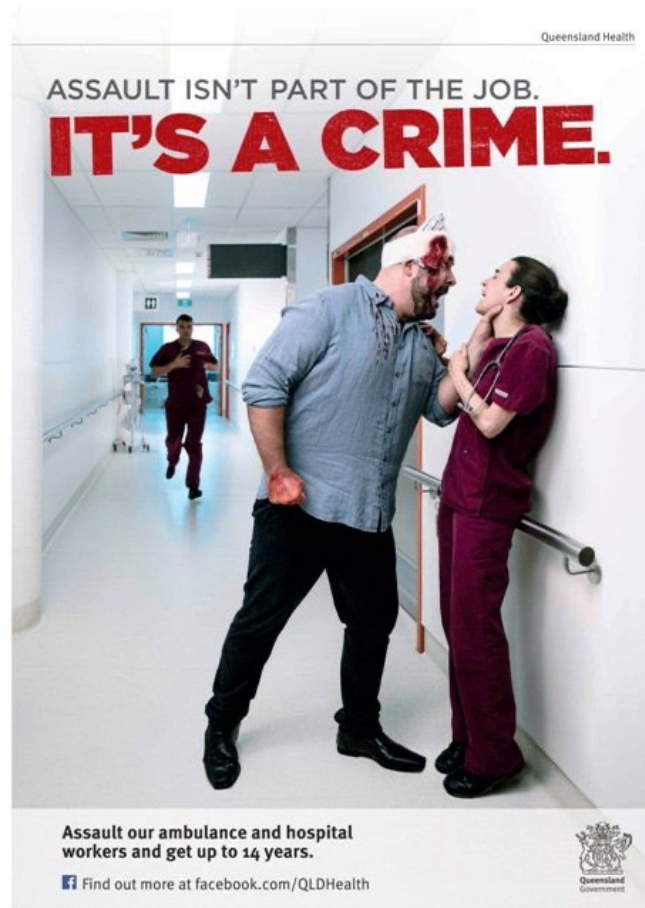
Since then, an advertising campaign was designed by Queensland Health in 2016, which aimed to prevent assaults on paramedics and frontline emergency workers with a mix of advertising on social and digital media, television, on billboards and on bus stops.⁹⁵⁵ This campaign included reference to the 14 year maximum penalty for aggravated forms of serious assault. The image used as part of the social media campaign is below, and an image accompanying a YouTube clip is also included on the next page.

⁹⁵² Coffman (n 944).

⁹⁵³ ABC News, 'Police Union Steps Up TV Ad Campaign' (online, 29 July 2007) <<https://www.abc.net.au/news/2007-07-29/police-union-steps-up-tv-ad-campaign/2516400>>; 'Queensland Police Union Rejects 'Insulting' 2.5% Pay Rise and Start Advertising Campaign for Better Pay', *The Sunday Mail* (online, 11 July 2010) <<https://www.couriermail.com.au/news/queensland-police-union-rejects-insulting-25-pay-rise/news-story/ea734ce478f552b5aeef897698398fcd>>.

⁹⁵⁴ Queensland Government, *Safe Night Out Strategy* (June 2014).

⁹⁵⁵ Queensland Health, 'To Violence, We Say No' (Web Page) <<https://www.health.qld.gov.au/news-events/news/160401-occ-vi> accessed 18 March 2020>.



Following a statewide Paramedic Safety Taskforce Report delivered in 2016, a campaign titled 'Respect our Staff' was launched by the Queensland Government in 2019 and included interviews with paramedics speaking about their experiences. The campaign used the slogan 'Violence in the workplace affects much more than me', highlighting that paramedics are also parents, partners and friends with their own lives, interests and contributions to the community.⁹⁵⁶


Queensland Health launched a campaign to raise awareness about the problem of violence against nurses, with a short video depicting the impact of violence on staff and patients (see the online ABC article below, with links to the video).



Also in 2019, the Queensland Government launched a public awareness campaign in conjunction with a raft of new measures to improve bus safety, with the message of zero tolerance for violence against bus drivers. The campaign involved a series of television advertisements depicting real-life violent scenarios faced by drivers. Other companion measures included a 12-month trial of an increased presence of officers on particular services, and more driver safety barriers and anti-shatter windows.⁹⁵⁷


⁹⁵⁶ Jude Skatsoon, 'Queensland Targets Violence Against Paramedics', *Government News* (online, 25 April 2019) < <https://www.governmentnews.com.au/qld-targets-violence-against-ambulance-workers/>>.

⁹⁵⁷ Mark Bailey, Minister for Transport and Main Roads, 'Palaszczuk Government Strengthens Bus Safety Commitment' (Media Statement, 30 September 2019).



When was the last time you were assaulted at work? Spat on? Abused? Had things thrown at you? These are just some of the acts of physical and verbal aggression directed towards bus drivers who should be able to do their job without the threat of violence.


Bus drivers are people, just like you. They deserve to feel safe at work. They deserve our respect.



Avoiding the fare

Fare evasion costs the Queensland Government \$25 million a year in lost revenue. It is also one of the key catalysts for acts of aggression towards bus drivers.


[Watch TV ad >](#)



Distracting the driver

Distracting the bus driver when they are driving the bus is dangerous for everyone on board. Show drivers respect so that everyone gets home safely.

[Watch TV ad >](#)



Blaming the driver

Sometimes the unexpected happens – roadwork or accidents can lead to services running late. Bus drivers shouldn't cop abuse when the circumstances are beyond their control.

[Watch TV ad >](#)

It is unknown whether an evaluation of the impact of these public awareness campaigns has been undertaken, so whether these efforts have resulted in a reduction of assaults against specific types of public officer is not known.

10.2.2 Role of the media

While the impact on the public of recent public awareness campaigns is unknown, numerous studies have found the primary way the general public is informed about sentencing is via the media.⁹⁵⁸

In recognition of the important role that journalists play in helping the Queensland community understand sentencing, the Council developed a *Court Reporting Guide for Journalists* last year in consultation with print and radio journalists, media advisors from the Supreme and District Courts and the Queensland Law Society.⁹⁵⁹ The guide, which is available on the Council's website, provides a simple, plain English overview of the courts and court processes, as well as commonly used terms, to assist journalists to cover court proceedings accurately.

However, with the limited time and coverage the media is able to devote to an issue, journalists are unlikely to be able to provide a comprehensive understanding of what the sentencing judge took into account to determine an appropriate sentence.

⁹⁵⁸ Karen Gelb, *More Myths and Misconceptions*, Research Paper (Sentencing Advisory Council (Victoria), 2008) 6.

⁹⁵⁹ Queensland Sentencing Advisory Council, *Court Reporting Guide for Journalists* (2019).

A complex case may only have some elements reported on, or in some instances, legislative restrictions mean key sentencing information that impacted on the sentence cannot be reported.

The Victorian Sentencing Advisory Council found media reporting is selective, often choosing stories with the aim of entertaining rather than informing, focusing on criminal cases which are unusual, dramatic and violent.⁹⁶⁰ This means the public may be given only a partial picture, and at times a distorted view, of what really took place, which may contribute to community dissatisfaction with sentencing outcomes. The issue of assault of public officers has been regularly reported on over the last decade, with a number of calls for increases in penalties having been made over that time by union organisations and employee groups, as well as reports of rising numbers.

10.2.3 Role of the Council

The Council's statutory functions under section 199 of the PSA include:

- to give information to the community to enhance knowledge and understanding of matters relating to sentencing;
- to publish information about sentencing;
- to research matters about sentencing and publish the outcomes of the research; and
- to obtain the community's views on sentencing.

Information published as part of this review, together with consultation activities, is one way the Council is contributing to community understanding about the context in which assaults on public officers occur, the current offence and penalty framework, as well as sentencing practices and what factors impact on sentencing.

However, one barrier, as reported in Chapter 5, is the ability to accurately report on sentencing outcomes where the offence charged is one other than serious assault, or one of the other defined categories of simple offences committed against specific classes of public officer. This is because victim status is not consistently and reliably recorded in the Courts data, and linked data from the Queensland Police Service may record a victim's occupation, but not the context in which an alleged assault occurred. For example, the victim's occupation might be recorded as a 'paramedic', but without specifying whether the victim was assaulted in the course of their work. The context in which an assault is alleged to have occurred might only be obtained by reviewing the relevant court brief (known as a 'QP9') or case file.

The NSW Legislative Assembly Committee on Law and Safety in its 2017 report on violence against emergency services personnel, made a similar observation, finding:

access to information about sentencing patterns for violence against emergency services personnel is limited. While sentencing data is available for the specific offences against particular victims ... there is a lack of sentencing data where a person who has been violent towards emergency services personnel has been charged with a general offence under the *Crimes Act 1900*. This is because any sentencing data that is published about such offences is indistinguishable from the data that relates to offences against general members of the public.

For example, if a person assaults a police officer and is charged and sentenced under one of the specific 'assault police' provisions of the *Crimes Act 1900*, it will be clear from the statistics that are published that the victim was a police officer. In contrast, if a person assaults a paramedic and is charged and sentenced under one of the general assault provisions of the *Crimes Act 1900* there will be no way of knowing from the published statistics whether it was a paramedic assault or some other type of assault.

⁹⁶⁰ Gelb (n 958).

In short, the fact that the victim is emergency services personnel is not recorded for statistical purposes. While the victim's status as an emergency services worker is taken into account as an aggravating factor in sentencing ... aggravating factors are not recorded.⁹⁶¹

The Parliamentary Committee noted that the fact that most cases of violence against emergency services personnel were heard in the Local Court (the equivalent to the Queensland Magistrates Courts) also limited access to this information given that 'sentencing remarks in the Local Court and District Court are not routinely transcribed or published'.⁹⁶² This reflects the position in Queensland. The Committee recommended:

That the NSW Government consider changes to require the NSW Police Force and the Courts to record where the victim of an offence is an emergency services worker, so that all sentencing statistics that relate to violence against emergency services personnel are clearly identifiable.⁹⁶³

It further recommended that, 'the NSW Government consider additional funding so that a greater number of judgments of the Local and District Courts of NSW can be transcribed and published on the NSW Caselaw website'.⁹⁶⁴

The Committee viewed the broader availability of this information as important to promote community confidence that those who offend against emergency services personnel are being dealt with appropriately.⁹⁶⁵

Citing 2007 reforms to enable the identification of offences committed in a domestic violence context, similar to reforms introduced in Queensland, it suggested '[a] similar approach may be able to be taken to identify offences committed against emergency services personnel' which could be built into the existing Judicial Information Research System database.⁹⁶⁶

In its response to the Committee's report, the NSW Government noted it would refer the issue of the recording of victim status to the NSW Police Force to determine the most appropriate method of recording this additional information in its police database.⁹⁶⁷ The Department of Justice was tasked with considering whether there is scope to increase the number of District Court and Local Court sentencing remarks that are transcribed and published online, while noting 'any increase will require additional resources'.⁹⁶⁸

10.2.4 Preliminary submissions

The Council received some limited feedback on this issue during the initial period of consultation.

The Office of the Public Guardian indicated its support for 'education of the general population as a means to reduce offending behaviour' but questioned the value of this approach for its clients, 'particularly adults with impaired capacity'.⁹⁶⁹ The Office of the Public Guardian recommended the

⁹⁶¹ NSW, Legislative Assembly Committee on Law and Safety, *Violence Against Emergency Services Personnel* (Report 1/56, 2017) 65 [4.27]–[4.20].

⁹⁶² Ibid 65–66 [4.30].

⁹⁶³ Ibid 68, Recommendation 42.

⁹⁶⁴ Ibid, Recommendation 43.

⁹⁶⁵ Ibid [4.38].

⁹⁶⁶ Ibid [4.39].

⁹⁶⁷ NSW, *NSW Government Response to Recommendations from the Legislative Assembly's Inquiry into Violence Against Emergency Services Personnel* (2018) 12.

⁹⁶⁸ Ibid 13.

⁹⁶⁹ Preliminary submission 7 (Office of the Public Guardian) 3.

Council consider specific alternatives for this cohort, who may have difficulty applying information in a situation where they are 'in a stressful situation and have reached crisis point'.⁹⁷⁰

The Queensland Teachers' Union (QTU) identified a need for accurate data to be collected and made available on occupational violence more generally to better understand the scope of the problem, to support the assessment of risks and to ensure responses are appropriate and properly targeted.⁹⁷¹ In the absence of this data it was concerned 'it is difficult to contemplate how the Queensland Sentencing Advisory Council can assess the impact of current legislation or predict the impact of prospective legislative changes'.⁹⁷²

The QTU further commented there is:

a general lack of awareness among educators of legal protections afforded to them both in terms of workplace health and safety and section 340 of the Criminal Code. Indeed, most teachers and principals are surprised to learn that they are protected by the same legislative framework as that which underpins the high-profile media campaign around health workers, paramedics and ambulance officers.⁹⁷³

While the QTU referred to its role in informing educators about current legal provisions in professional learning sessions, it noted this 'does little to educate the general population about the expected standards of behaviour in schools and the consequences for inappropriate behaviour choices'.⁹⁷⁴ It therefore supported a need for '[a]ctions to enforce standards, correct poor choices of behaviour and protect all who learn and work in schools' being 'visible to the whole community'.⁹⁷⁵

Queensland Advocacy Incorporated identified a number of areas of potential focus, including 'better health education for Queensland emergency service personnel, particularly education that dispels myths about the transmission risks of communicable diseases'.⁹⁷⁶

10.2.5 Issues

The above discussion has identified a number of potential areas of focus to improve community knowledge and understanding of the penalties that apply to offences of assault committed against public officers and sentencing practices.

Improving the data collected about victims may enhance the Council's ability to report on relevant sentencing trends given some assaults are likely to be charged under one of the general offence provisions rather than, for example, the offence of serious assault or other offences readily identified as involving a public officer victim. However, the Council acknowledges that system limitations and costs associated with any system enhancements may make the adoption of such measures prohibitive.

Another suggestion made by the NSW Legislative Assembly's Inquiry into Violence Against Emergency Services Personnel was to have more sentencing judgments for these offences transcribed and made available to the general public, given that most of these matters are dealt

⁹⁷⁰ Ibid.

⁹⁷¹ Preliminary submission 13 (Queensland Teachers' Union) 5–6.

⁹⁷² Ibid 6.

⁹⁷³ Ibid 8.

⁹⁷⁴ Ibid 8.

⁹⁷⁵ Ibid 9.

⁹⁷⁶ Preliminary submission 35 (Queensland Advocacy Incorporated) 10.

with in the lower courts and District Court. The practicality and costs associated with such an approach may make a commitment by the courts to adopt such an approach challenging.

There are, however, a range of strategies that could be implemented to better inform the community about sentencing for these offences at relatively little cost. This might include the continued provision of information of the kind the Council routinely produces, such as sentencing fact sheets and statistical publications, as well as engagement with the media.

As discussed above, the media continue to be a key source of information for the public on sentencing. The Victorian Chief Judge in recent years has spoken about the importance of using existing media channels to communicate the work of the courts given much of the public criticism of the courts concerns criminal law and sentencing.⁹⁷⁷ Both the Council and criminal law practitioners can continue to actively support this process in Queensland by providing the media and the public with relevant information about the principles and factors that guide sentencing, including in these cases, and explaining the range of matters to which courts must have regard in setting an appropriate sentence. In this way, public understanding of the complex range of matters that inform sentencing and the application of the law can be enhanced.

Preliminary submissions have further highlighted the importance of relevant data and information being collected and made available to guide the assessment of risks, and to help give confidence to those who are subject to such assaults that it should be reported. The benefits of broader community education have also been identified.

The Council welcomes views on these issues to inform its final advice and recommendations.

Questions: Community understanding

16. What issues contribute to, or detract from, the community's understanding of penalties and sentencing for assaults on public officers?
17. How can community knowledge and understanding of penalties and sentencing practices for assaults against public officers be enhanced?

10.3 Other issues

A range of other matters were raised in preliminary submissions to the review.

The Office of the Public Guardian made a number of recommendations to improve current responses regarding defendants with impaired capacity, including:

- legislating diversionary options to focus on preventative rather than punitive measures;
- considering offence context at each stage of the offence, penalty and sentencing framework;
- legislating a requirement for formal pre-sentence reports on capacity, trauma history and previous engagement with therapeutic and rehabilitative programs;
- examining the value of public education for adults with impaired capacity and alternative measures for them;

⁹⁷⁷ Karin Derkley, 'Going Public in the Court's Defence', *Law Institute Journal* (online, 8 March 2019) <[https://www.liv.asn.au/Staying-Informed/LIJ/LIJ/March-2019-\(1\)/Going-public-in-Court%E2%80%99s-defence](https://www.liv.asn.au/Staying-Informed/LIJ/LIJ/March-2019-(1)/Going-public-in-Court%E2%80%99s-defence)>.

- specifically considering the impact of any changes on children and young people engaging with the criminal justice system.⁹⁷⁸

A number of other stakeholders also supported attention being focused on the prevention of incidents rather than the adoption of more punitive responses, including the Council's Aboriginal and Torres Strait Islander Advisory Panel.

The Prisoners' Legal Service (PLS) suggested: 'Many use of force incidents initiated by correctional staff could be avoided if more appropriate communication methods [were] adopted when communicating with vulnerable people in prison'. In its submission, the PLS also referenced concerns raised with the Crime and Corruption Commission (CCC) previously about unlawful or disproportionate use of force by correctional staff against prisoners — the majority of whom had spent 'extended periods of time in solitary confinement'.⁹⁷⁹

Both Sisters Inside and the PLS supported frontline workers being provided with appropriate training to support them in their interactions with vulnerable persons to reduce the likelihood of staff being subject to acts of violence.⁹⁸⁰ Taskforce Flaxton, referencing a submission made by the PLS and by the Human Rights Watch, found that prisoners who require health care are particularly vulnerable to assault and the excessive use of force.⁹⁸¹

Taskforce Flaxton identified prison overcrowding has a number of potential impacts, including increasing prisoners' anger and frustration and the risk of conflict, violence and serious assaults against prisoners and staff.⁹⁸² It reported: 'An analysis of data from the last five years shows that as the utilisation rate (a measure of overcrowding) of Queensland prisons increased, so too did prisoner-on-prisoner and prisoner-on-staff assaults, self-harm incidents, and incidents requiring the use of force'.⁹⁸³ It also identified a greater risk of corrupt conduct as 'greater volatility in the correctional environment ... reduces the capacity of custodial correctional officers ... to maintain order and security and increases the risk of excessive force to deter poor behaviour'.⁹⁸⁴

Based on the findings of a survey of staff and prisoners, the CCC identified that the use of physical assault or use of excessive force against prisoners was likely to be under-reported as while 20 per cent of staff and 58 per cent of prisoners indicated they had seen a staff member assault or use excessive force against someone in the last six months, 68 per cent of those staff and 75 per cent of those prisoners indicated they did not report this.⁹⁸⁵

Views on the need for better public awareness campaigns to reduce incidents of violence, including by the QTU, are discussed above.

While the focus of this review is on the appropriateness of the current penalty, sentencing and offence framework to respond to assaults on public officers, the Council welcomes views about other strategies that might be put in place to minimise the incidence of violence against public officers, thereby improving the safety of those involved in undertaking these critical roles.

⁹⁷⁸ Preliminary submission 7 (Office of the Public Guardian). These recommendations are discussed in more detail in Chapter 9 and above in this Chapter under 10.2.4.

⁹⁷⁹ Preliminary submission 26 (Prisoners' Legal Service) 2.

⁹⁸⁰ Preliminary submission 21 (Sisters Inside) 7; and Preliminary submission 26 (Prisoners' Legal Service) 2.

⁹⁸¹ Crime and Corruption Commission Queensland, *Taskforce Flaxton: An Examination of Corruption Risks and Corruption in Queensland Prisons* (2018) 8.

⁹⁸² Ibid 5.

⁹⁸³ Ibid.

⁹⁸⁴ Ibid.

⁹⁸⁵ Ibid 13.

Appendix 1: Terms of Reference

TERMS OF REFERENCE

QUEENSLAND SENTENCING ADVISORY COUNCIL

PENAL TIES FOR ASSAULTS ON POLICE AND OTHER FRONTLINE EMERGENCY SERVICE WORKERS, CORRECTIVE SERVICES OFFICERS AND OTHER PUBLIC OFFICERS

I, Yvette D'Ath, Attorney-General and Minister for Justice, having regard to:

- the Queensland Government and community expectation that police officers and other frontline emergency service workers, corrective services officers and other public officers who face inherent dangers in carrying out their duties, should not be the subject of assault during the execution of their duties;
- the significance of police officers and other frontline emergency service workers, corrective services officers and other public officers needing to have confidence that the criminal justice system properly reflects the inherent dangers they face in the execution of their duty and the negative impacts that an assault in the course of their duties has on those workers, their colleagues and their families;
- the importance of the penalties provided for under legislation and the sentences imposed for assault of frontline public officers being adequate to meet the relevant purposes of sentencing under section 9(l) of the *Penalties and Sentences Act 1992* (Qld), including punishment, deterrence and community protection, while also taking into account the individual facts and circumstances of the case, the seriousness of the offence concerned and offender culpability;

refer to the Queensland Sentencing Advisory Council, pursuant to section 199(l) of the *Penalties and Sentences Act 1992* (PSA), a review of the sentencing options and penalties for assault of police officers and other frontline emergency service workers, corrective services officers and other public officers in the execution of their duty.

In undertaking this reference, the Queensland Sentencing Advisory Council will:

- consider and analyse the penalties and sentencing trends for offences involving assaults against police officers, corrective services officers and all other public officers that fall within the scope of section 340 of the Criminal Code in the execution of their duties, including the impact of the 2012 and 2014 amendments introducing higher maximum penalties, and determine if this is in accordance with stakeholder expectations;
- determine whether it is appropriate for section 340 of the Criminal Code to continue to apply to police officers and other frontline emergency service workers, corrective services officers and other public officers ('public officers') or whether such offending should be targeted in a separate provision or provisions, possibly with higher penalties, or through the introduction of a circumstance of aggravation;
- determine whether the definition of 'public officer' in section 340 of the Criminal Code should be expanded to recognise other occupations, including public transport drivers (e.g. bus drivers and train drivers);

- review section 790 of the *Police Powers and Responsibilities Act 2000* (Qld) and section 124(6) of the *Corrective Services Act 2006* (Qld) and similar provisions in other legislation 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 for offences under section 340 of the Code, and whether the penalties imposed on offenders convicted of these offences reflect stakeholder expectations;
- examine relevant offence, penalty and sentencing provisions in other Australian and relevant international jurisdictions to address this type of offending and any evidence of the impact of any reforms;
- identify ways to enhance community knowledge and understanding of the penalties for this type of offending;
- have regard to any relevant statistics, research, reports or publications regarding causes, frequency and seriousness of offending against police officers and other frontline emergency service workers, corrective services officers and other types of public officers;
- consult with stakeholders, including but not limited to the Queensland Police Service, Queensland Ambulance Service, Queensland Corrective Services, Queensland Health, Queensland Fire and Emergency Service, the judiciary, legal profession, employee unions or any other relevant government department and agencies;
- advise on options for reform to the current offence, penalty and sentencing framework to ensure it provides an appropriate response to this form of offending; and
- advise on any matters relevant to this reference.

The Queensland Sentencing Advisory Council is to provide a report on its examination to the Attorney-General and Minister for Justice by **30 June 2020**.*

Dated the 2nd day of December 2019

YVETTE D'ATH

Attorney-General and Minister for Justice

Leader of the House

* Reporting date extended to 31 August 2020. Notified by the Attorney-General and Minister for Justice, Yvette D'Ath, on 29 April 2020.

Appendix 2: Preliminary submissions

| No. | Person / Organisation |
|-----|---|
| 1. | Security Providers Association of Australia Limited |
| 2. | Queensland Health |
| 3. | Queensland Human Rights Commission |
| 4. | Australian Lawyers Alliance |
| 5. | Joint Submission – Australasian Railway Association, Bus Industry Confederation, Rail, Tram and Bus Union, TrackSAFE Foundation |
| 6. | Goldline Pty Ltd – Gold Coast Light Rail |
| 7. | Office of the Public Guardian |
| 8. | Department of Communities, Disability Services and Seniors |
| 9. | Queensland Fire and Emergency Services |
| 10. | Not published |
| 11. | Not published |
| 12. | State Member for Morayfield, Mark Ryan, on behalf of a constituent |
| 13. | Queensland Teachers' Union |
| 14. | Together Queensland, Industrial Union of Employees |
| 15. | Name withheld |
| 16. | Mark Griffin |
| 17. | Not published |
| 18. | Queensland Nurses and Midwives' Union |
| 19. | Office of the Information Commissioner Queensland |
| 20. | Not published |
| 21. | Sisters Inside |
| 22. | Legal Aid Queensland |
| 23. | Queensland Police Union of Employees |
| 24. | Transport Workers' Union (Queensland Branch) |
| 25. | Not published |
| 26. | Prisoners' Legal Service |
| 27. | Department of Justice Attorney-General |
| 28. | Not published |
| 29. | Bar Association of Queensland |

| | |
|------------|---|
| 30. | Office of Industrial Relations, Department of Education |
| 31. | Queensland Corrective Services |
| 32. | Department of Youth Justice |
| 33. | Department of Housing and Public Works |
| 34. | Queensland Law Society |
| 35. | Queensland Advocacy Incorporated |

Appendix 3: Summary of changes to section 340 of the *Criminal Code*

| From | Beginning of dataset | From | 08 December 2005 | From | 01 December 2008 | From | 29 August 2012 | From | 05 September 2014 | |
|----------------|---|----------------|---|----------------------|--|---|---|---|---|---|
| 340(1)(a) | resist or prevent the lawful arrest | 340(1)(a) | resist or prevent the lawful arrest | 340(1)(a) | resist or prevent the lawful arrest | 340(1)(a) | resist or prevent the lawful arrest | 340(1)(a) | resist or prevent the lawful arrest | |
| 340(1)(b) | police officer | 340(1)(b) | police officer | 340(1)(b) | police officer | 340(1)(b) | police officer | 340(1)(b) | police officer | |
| 340(1)(b)(i) | | 340(1)(b)(i) | | 340(1)(b)(i) | | 340(1)(b)(i) | bites or spits, bodily fluid or faeces | 340(1)(b)(i) | bites or spits, bodily fluid or faeces | |
| 340(1)(b)(ii) | | 340(1)(b)(ii) | | 340(1)(b)(ii) | | 340(1)(b)(ii) | bodily harm | 340(1)(b)(ii) | bodily harm | |
| 340(1)(b)(iii) | | 340(1)(b)(iii) | | 340(1)(b)(iii) | | 340(1)(b)(iii) | armed with a dangerous or offensive weapon | 340(1)(b)(iii) | armed with a dangerous or offensive weapon | |
| 340(1)(c) | 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 | 340(1)(c) | 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 | Break in time series | 340(1)(c) | unlawfully assaults any person while the person is performing a duty imposed on the person by law | 340(1)(c) | unlawfully assaults any person while the person is performing a duty imposed on the person by law | 340(1)(c) | unlawfully assaults any person while the person is performing a duty imposed on the person by law |
| 340(1)(d) | 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 | 340(1)(d) | 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 | | 340(1)(d) | assaults any person because the person has performed a duty imposed on the person by law | 340(1)(d) | assaults any person because the person has performed a duty imposed on the person by law | 340(1)(d) | assaults any person because the person has performed a duty imposed on the person by law |
| 340(1)(e) | assaults any person on account of any act done by the person in the execution of any duty imposed on the person by law; or | 340(1)(e) | assaults any person on account of any act done by the person in the execution of any duty imposed on the person by law | | 340(1)(e) | | 340(1)(e) | | 340(1)(e) | |
| 340(1)(f) | manufacture, trade, business, or occupation | 340(1)(f) | manufacture, trade, business, or occupation | 340(1)(f) | manufacture, trade, business, or occupation | 340(1)(f) | manufacture, trade, business, or occupation | 340(1)(f) | manufacture, trade, business, or occupation | |
| 340(1)(g) | 60 years or more | 340(1)(g) | 60 years or more | 340(1)(g) | 60 years or more | 340(1)(g) | 60 years or more; or | 340(1)(g) | 60 years or more | |
| 340(1)(h) | guide dog, wheelchair or other remedial device | 340(1)(h) | guide dog, wheelchair or other remedial device | 340(1)(h) | guide dog, wheelchair or other remedial device | 340(1)(h) | guide, hearing or assistance dog, wheelchair or other remedial device | 340(1)(h) | guide, hearing or assistance dog, wheelchair or other remedial device | |
| 340(2) | | 340(2) | corrective services officer | 340(2) | corrective services officer | 340(2) | corrective services officer | 340(2) | corrective services officer | |
| (2AA) | | 340(2AA) | | 340(2AA) | public officer | 340(2AA) | public officer | 340(2AA) | public officer | |
| 340(2AA)(i) | | 340(2AA)(i) | | 340(2AA)(i) | | 340(2AA)(i) | | 340(2AA)(i) | bites or spits, bodily fluid or faeces | |
| 340(2AA)(ii) | | 340(2AA)(ii) | | 340(2AA)(ii) | | 340(2AA)(ii) | | 340(2AA)(ii) | bodily harm | |
| (2AA)(iii) | | 340(2AA)(iii) | | 340(2AA)(iii) | | 340(2AA)(iii) | | 340(2AA)(iii) | armed with a dangerous or offensive weapon | |

Note: green text indicates when a new offence was introduced, red text indicates when an offence was repealed, and orange text indicates when a section was amended.

Appendix 4: Data tables

Table A4-1: Frequency of accepted WorkCover claims for assaults of public officers, by agency and occupation over time, 2014–15 to 2018–19

| Reported Occupation | 2014–15 | 2015–16 | 2016–17 | 2017–18 | 2018–19 |
|--|--------------|--------------|--------------|--------------|--------------|
| Queensland Police Service | | | | | |
| Police Officer | 488 | 572 | 708 | 570 | 726 |
| Other/Unknown | 10 | 7 | 14 | 9 | 16 |
| Department of Justice and Attorney-General* | | | | | |
| Prison Officer | 53 | 84 | 124 | 38 | |
| Youth Worker | 41 | 46 | 87 | 23 | |
| Other/Unknown | 13 | 3 | 17 | 3 | 3 |
| Queensland Corrective Services* | | | | | |
| Prison Officer | | | | 59 | 105 |
| Other/Unknown | | | | 5 | 15 |
| Department of Child Safety, Youth and Women* | | | | | |
| Youth Worker | | | | 43 | 90 |
| Prison Officer | | | | 1 | 19 |
| Other/Unknown | | | | 12 | 28 |
| Department of Communities Child Safety & Disability Services* | | | | | |
| Aged/Disabled/Residential Care Officer | 25 | 29 | 32 | 10 | |
| Other/Unknown | 28 | 35 | 31 | 16 | |
| Department of Communities Disability Services and Seniors* | | | | | |
| Aged/Disabled/Residential Care Officer | | | | 18 | 30 |
| Other/Unknown | | | | 5 | 15 |
| Department of Health | | | | | |
| Nursing Professionals | 144 | 156 | 209 | 218 | 196 |
| Nursing Assistant | 45 | 72 | 74 | 70 | 63 |
| Health Professionals | 21 | 66 | 62 | 31 | 35 |
| Medical Practitioners | 3 | 7 | 7 | 6 | 2 |
| Other/Unknown | 61 | 105 | 71 | 90 | 72 |
| Department of Education | | | | | |
| Teacher | 224 | 205 | 259 | 291 | 347 |
| Teacher Aide | 104 | 113 | 120 | 161 | 204 |
| Other/Unknown | 41 | 50 | 39 | 80 | 83 |
| Department of Transport and Main Roads | | | | | |
| Other/Unknown | 2 | 10 | 12 | 14 | 17 |
| Queensland Fire and Emergency Services | | | | | |
| Fire Fighter | 0 | 1 | 1 | 1 | 0 |
| Queensland Ambulance Service | | | | | |
| Ambulance Operative | 32 | 47 | 47 | 29 | 44 |
| Other | | | | | |
| Other/Unknown | 4 | 12 | 9 | 3 | 10 |
| Guards and Security Officers | | | | | |
| Department of Health | 13 | 45 | 63 | 60 | 42 |
| Department of Justice and Attorney-General* | 3 | 3 | 16 | 10 | |
| Queensland Corrective Services* | | | | 7 | 10 |
| Queensland Police Service | 1 | 0 | 2 | 3 | 4 |
| Department of Transport and Main Roads | 0 | 1 | 2 | 3 | 1 |
| Department of Communities* | | | | 0 | 4 |
| Other | 3 | 8 | 0 | 0 | 0 |
| Total | 1,359 | 1,677 | 2,006 | 1,889 | 2,181 |

Source: WorkCover – unpublished data, 2014–15 to 2018–19.

Note: Guards and Security Officers are displayed separately as they appeared across many different agencies.

* Over the data period, some agencies were amalgamated, merged, or otherwise affected by Machinery-Of-Government changes. This is reflected by the missing values reported above.

Table A4-2: Summary of custodial penalties for 'acts intended to cause injury' offences carrying a 7-year maximum penalty (MSO)

| a 7-year maximum penalty (MSP) | | Length of custodial penalties (years) | | | |
|--|---|---------------------------------------|--------|---------------|---------|
| Offence | Proportion of cases that received a custodial penalty | Average | Median | Minimum | Maximum |
| Higher courts | | | | | |
| s 340 Serious assault (non-aggravated)* (n=61) | 82.0 | 0.9 | 0.8 | (10 days) 0.0 | 3.5 |
| s 339(1) Assault occasioning bodily harm (n=701) | 80.0 | 1.5 | 1.5 | 0.2 | 5.0 |
| s 323 Wounding (n=398) | 97.0 | 2.1 | 2.0 | 0.2 | 5.0 |
| Lower courts | | | | | |
| s 340 Serious assault (non-aggravated)* (n=1,253) | 54.5 | 0.6 | 0.5 | (rise) 0.0 | 3.0 |
| s 339(1) Assault occasioning bodily harm (n=8,144) | 50.3 | 0.8 | 0.8 | (5 days) 0.0 | 3.0 |

Data includes: adult offenders, offences occurring on or after 5 September 2014, cases sentenced 2014–15 to 2018–19.

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

* Includes offences under the following sections: s 340(1)(b), s 340(1)(c), s 340(1)(d), s 340(2), s 340(2AA).

Table A4-3: Summary of custodial penalties for 'acts intended to cause injury' offences carrying a 14-year maximum penalty (MSO)

| Offence | | Length of custodial penalties (years) | | | |
|---|-------|---------------------------------------|--------|---------|---------|
| Proportion of cases that received a custodial penalty | | Average | Median | Minimum | Maximum |
| Higher courts | | | | | |
| s 340 Serious assault (aggravated)* (n=227) | 93.0 | 1.1 | 1.0 | 0.1 | 5.0 |
| s 320 Grievous bodily harm (n=572) | 99.1 | 3.0 | 3.0 | 0.2 | 8.0 |
| s 320A Torture (n=62) | 100.0 | 5.4 | 5.2 | 1.2 | 10.0 |
| Lower courts | | | | | |
| s 340 Serious assault (aggravated)* (n=1,280) | 74.8 | 0.7 | 0.5 | 0.1 | 3.0 |

Data includes: adult offenders, offences occurring on or after 5 September 2014, cases sentenced 2014–15 to 2018–19.

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

* Includes offences under the following sections: s 340(1)(b)(i/ii/iii) and s 340(2AA)(a/b)(i/ii/iii).

Table A4-4: Summary of custodial penalties for common assault and non-aggravated serious assault (MSO)

| assault (MSO) | | Length of custodial penalties (years) | | | |
|---|---|---------------------------------------|--------|---------------|---------|
| Offence | Proportion of cases that received a custodial penalty | Average | Median | Minimum | Maximum |
| Higher courts | | | | | |
| s 340 Serious assault (non-aggravated)* (n=61) | 82.0 | 0.9 | 0.8 | (10 days) 0.0 | 3.5 |
| s 335 Common assault (n=228) | 41.7 | 0.7 | 0.5 | (rise) 0.0 | 2.5 |
| Lower courts | | | | | |
| s 340 Serious assault (non-aggravated)* (n=1,253) | 54.5 | 0.6 | 0.5 | (rise) 0.0 | 3.0 |
| s 335 Common assault (n=9,103) | 21.5 | 0.5 | 0.5 | (rise) 0.0 | 2.5 |

Data includes: adult offenders, offences occurring on or after 5 September 2014, cases sentenced 2014–15 to 2018–19.

Source: QGSO, Queensland Treasury – Courts Database, extracted November 2019.

* Includes offences under the following sections: s 340(1)(b), s 340(1)(c), s 340(1)(d), s 340(2), s 340(2AA).

Table A4-5: Restitution and compensation orders for serious assaults of a public officer

| Offence | N (cases) | % (of all cases) | Average amount (by case) | Min | Max |
|--|--------------|------------------------|--------------------------------|----------|-------------|
| 340 All serious assault offences (n=7,912) | 1,241 | 15.7% | \$781.70 | \$10.00 | \$14,500.00 |
| 340(1)(a) Intent to commit/resist arrest (n=158) | 20 | 12.7% | \$778.70 | \$24.70 | \$2,500.00 |
| 340(1)(b) Police officer (n=4,945) | 811 | 16.4% | \$722.70 | \$10.00 | \$5,000.00 |
| 340(1)(c)/(d) Performing/performed duty at law (n=247) | 30 | 13.9% | \$533.33 | \$100.00 | \$1,000.00 |
| 340(1)(g) 60 years and over (n=1,413) | 253 | 17.9% | \$850.00 | \$30.00 | \$14,500.00 |
| 340(2) Corrective services officer (n=225) | 7 | 3.1% | \$550.00 | \$250.00 | \$1,500.00 |
| 340(2AA) Public officer (n=1,135) | 138 | 12.2% | \$771.40 | \$100.00 | \$5,000.00 |

Data includes: adult and juvenile, lower and higher courts, sentenced 2012–13 to 2018–19.

Note: Each order within a case/offence summed to create a total amount (compensation and restitution) per case, and then averaged.

Appendix 5: Cross jurisdictional analysis: Australia and select international jurisdictions

Table A5 – 1: Examples of specific offences involving assaults on police—Australia, Canada, England and Wales and New Zealand

| Jurisdiction | Provision | Nature of act/s constituting offence | Minimum penalty | Maximum penalty |
|---------------------------|--|---|---|--|
| AUSTRALIA | | | | |
| Commonwealth | <i>Criminal Code</i> (Cth) s 147.1 | Engaging in conduct causing harm to a Commonwealth public official etc with the intention of causing harm without that person's consent. | N/A | If the official is a judicial officer or Commonwealth law enforcement officer: 13 years Otherwise: 10 years |
| New South Wales | <i>Crimes Act 1900</i> (NSW) s 58 | Assault, resist, or wilfully obstruct any officer (includes a constable or other peace officer) while in the execution of his or her duty. | N/A | 5 years |
| | <i>Crimes Act 1900</i> (NSW) ss 60(1) and (1A) | (1) Assault, throw a missile at, stalk, harass or intimidate a police officer while in the execution of the officer's duty, although no actual bodily harm caused. (1A) As for (1), but occurs 'during a public disorder'. | N/A | (1) 5 years (1A) 7 years |
| | <i>Crimes Act 1900</i> (NSW) ss 60(2) and (2A) | (2) Assault a police officer while in the execution of the officer's duty, and by the assault occasion actual bodily harm. (2A) As for (2), but occurs 'during a public disorder'. | No – but in the circumstances listed in s 60(2), a SNPP of 3 years applies | (2) 7 years (2A) 9 years |
| Northern Territory | <i>Criminal Code</i> (NT) s 189A | Unlawfully assault a police officer (or emergency worker) in the execution of the officer's duty. If: (i) the commission of the offence involved the actual or threatened use of an offensive weapon (defined in s 1 of the Criminal Code); and | If Level 5 offence, and first time convicted of a 'violent offence', 3 months' actual imprisonment If Level 5 offence, and offender has previously been convicted of a 'violent offence': 12 months' actual imprisonment | 7 years if victim suffers harm 5 years if victim does not suffer harm |

| Jurisdiction | Provision | Nature of act/s constituting offence | Minimum penalty | Maximum penalty |
|--------------|---|--|--|--|
| Queensland | | <p>(ii) the victim suffered physical harm as a result of the offence, it is a Level 5 offence for the purposes of the <i>Sentencing Act 1995</i> (NT).</p> <p>If the victim suffers physical harm as a result of the offence, and the offence is not a Level 5 offence, it is a Level 4 offence.</p> | <p>If Level 4 offence: (irrespective of previous): 3 months' actual imprisonment</p> <p>(<i>Sentencing Act 1995</i> (NT) ss 78CA, 78D, 78DA and 78DB)</p> <p>Exceptional circumstances exemption (ss 78DI, DG) – must still impose a term of actual imprisonment. Suspension or home detention can be ordered for some but not all of the order.</p> | |
| | <i>Police Administration Act 1978</i> (NT) s 158 | Resist a member in the execution of his duty or aid or incite any other person to resist a member in the course of his duty. | N/A | 8 penalty units, or 6 months imprisonment |
| | <i>Criminal Code</i> (Qld) s 340(1)(b) | <p>Assault, resist, or wilfully obstruct, a police officer while acting in the execution of the officer's duty, or any person acting in aid of a police officer while so acting.</p> <p>Aggravating factors:</p> <p>(i) the offender bites or spits on the police officer or throws at, or in any way applies to, the police officer a bodily fluid or faeces;</p> <p>(ii) the offender causes bodily harm to the police officer;</p> <p>(iii) the offender is, or pretends to be, armed with a dangerous or offensive weapon or instrument.</p> | N/A, but court must make a community service order if offence committed in a public place while offender adversely affected by an intoxicating substance, unless court is satisfied the offender is incapable of complying because of any physical, intellectual or psychiatric disability. | 7 years, or 14 years where aggravating factors |
| | <i>Police Powers and Responsibilities Act 2000</i> (Qld), s 790(1)(a) | <p>Assault a police officer in the performance of the officer's duties</p> <p>Aggravating circumstances:</p> <p>Assault or obstruction happens within licensed premises, or in the vicinity of licensed premises: 60 penalty units or 12 months imprisonment</p> | N/A, but court must make a community service order if offence committed in a public place while offender adversely affected by an intoxicating substance, unless court is satisfied the offender is incapable of complying because of any physical, intellectual or psychiatric disability. | <p>40 penalty units or 6 months imprisonment</p> <p>60 penalty units, or 12 months' imprisonment (aggravating circumstances)</p> |

| Jurisdiction | Provision | Nature of act/s constituting offence | Minimum penalty | Maximum penalty |
|--------------------------|--|--|--|---|
| South Australia | <i>Criminal Law Consolidation Act 1935</i> (SA) s 20AA | Various conduct captured: (1) cause harm to a prescribed emergency worker (includes a police officer) acting in the course of official duties, intending to cause harm (s 20AA(1)) (2) cause harm to a prescribed emergency worker (includes police officer) acting in the course of official duties, and is reckless in doing so (s 20AA(2)) (3) assault a prescribed emergency worker (includes a police officer) acting in the course of official duties (s 20AA(3)) (4) hinder or resist a police officer acting in the course of official duties, causing harm (s 20AA(4)). | An offence under s 20AA(1), (2) or (4) is a 'designated offence' under s 96 of the <i>Sentencing Act 2017</i> (SA) which limits the availability of suspended sentences in particular circumstances – including where the person is being sentenced as an adult for a designated offence and in the 5 years prior to the offence date, and a court has suspended a sentence of imprisonment or period of detention for another designated offence, unless there are exceptional circumstances. | (1) Cause harm with intent to cause harm: 15 years (2) Cause harm recklessly: 10 years (3) Assault: 5 years (4) Hinder or resist police officer causing harm: 10 years |
| Tasmania | <i>Criminal Code</i> (Tas) s 114 | (1) assault, resists or wilfully obstruct any police officer in the due execution of his duty, or any other person lawfully assisting; (2) assault, resist, or wilfully obstruct any person lawfully arresting or about to arrest any person. | N/A | 21 years^ |
| Victoria | <i>Crimes Act 1958</i> (Vic) s 31(1)(b) | Assault or threaten to assault, resist or intentionally obstruct an emergency worker (includes police officer) on duty or custodial officers on duty, knowing or being reckless as to whether the person is such a worker or officer. | N/A | 5 years |
| | <i>Summary Offences Act 1966</i> (Vic) s 51(2) | Assault, resist, obstruct, hinder or delay an emergency worker (includes police officer) on duty, a custodial officer on duty or a youth justice custodial worker on duty. | N/A | 60 penalty units or 6 months' imprisonment |
| Western Australia | <i>Criminal Code</i> (WA) s 318(1)(d)–(e) | Assault a public officer (includes police 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 (s 318(1)(d)). 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(s 318(1)(e)). Aggravated form: at or immediately before or immediately after the commission of the offence – | Yes – if adult commits offence in 'prescribed circumstances, including where offence committed against a police officer and officer suffers bodily harm; 6 months, or 9 months if aggravating circumstances which cannot be suspended. For offences committed by a 16 or 17-year-old offender (at time of offence), | 7 years 10 years (aggravated) |

| Jurisdiction | Provision | Nature of act/s constituting offence | Minimum penalty | Maximum penalty |
|-------------------------------|---|---|---|---|
| | | (i) the offender is armed with any dangerous or offensive weapon or instrument; or (ii) the offender is in company with another person or persons. Aggravated as to the maximum penalty (but does not enliven mandatory sentence): s 318(la): (temporary, for 12 months only from 4 April 2020) if: (i) at the commission of the offence the offender knows that 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. | 3 months' imprisonment or youth detention | |
| OVERSEAS JURISDICTIONS | | | | |
| Canada | <i>Criminal Code</i> (R.S.C., 1985, c. C-46) s 270 | Assault a public officer or peace officer (including a police officer) engaged in the exercise of his or her duty. | N/A | 5 years |
| | <i>Criminal Code</i> (R.S.C., 1985, c. C-46) s 270.01 | As above and, in committing such assault the offender: (a) carried, used or threatened to use a weapon or imitation weapon; or (b) caused bodily harm to the officer. | N/A | 10 years |
| England and Wales | <i>Assaults on Emergency Workers (Offences) Act 2018</i> (UK) s 1 | Common assault or battery against an emergency worker (includes a constable) acting in the exercise of their functions. | N/A | Fine, 12 months imprisonment, or both |
| | <i>Police Act 1996</i> (UK) s 89 | Assault constable acting in the execution of his or her duty. | N/A | Level 5 fine, 6 months imprisonment or both |
| New Zealand | <i>Summary Offences Act 1981</i> (NZ) s 10 | Assault a constable (or prison officer or traffic officer) acting in the exercise of his or her duty. | N/A | \$4,000 fine or 6 months imprisonment |

Notes:

^ All crimes in Tasmania (subject to the provisions of the *Sentencing Act 1997* (Tas) or any other statute) carry a maximum penalty of 21 years: Criminal Code (Tas) s 389.

Table A5- 2: Examples of specific offences involving assaults of public officers — Australia, Canada, England and Wales and New Zealand

| Jurisdiction | Provision | Nature of act/s constituting offence | Minimum penalty | Maximum penalty |
|------------------------|--|--|-----------------|--|
| AUSTRALIA | | | | |
| Commonwealth | <i>Criminal Code</i> (Cth) s 147.1 | Engaging in conduct causing harm to a Commonwealth public official etc with the intention of causing harm without that person's consent. | N/A | 10 years, or 13 years if official is judicial officer or law enforcement officer |
| New South Wales | <i>Crimes Act 1900</i> (NSW) s 58 (Assault with intent to commit a serious indictable offences against certain officers) | Assault, resist, or wilfully obstruct any officer, being a constable, or other peace officer, custom-house officer, prison officer, sheriff's officer, or bailiff while in the execution of his or her duty. | N/A | 5 years |
| | <i>Crimes Act 1900</i> (NSW) s 60A (Assault and other actions against law enforcement officers (other than police officers)) | (1) Assault, throw missiles at, stalk, harass or intimidate a law enforcement officer (other than a police officer – includes correctional officers, probation and parole officers, juvenile justice officers, Crown prosecutors and DPP staff) although no bodily harm caused. (2) Assault law enforcement officer (other than a police officer) while in the execution of the officer's duty and occasion actual bodily harm. (3) Wound or cause grievous bodily harm to law enforcement officer (other than police officer) as for (2) where offender reckless as to causing actual bodily harm to that officer or another. | | (1) 5 years (2) 7 years (3) 12 years |
| | <i>Crimes Act 1900</i> (NSW) s 60E (Assaults etc at schools) | (1) Assault, stalk, harass or intimidate any staff (including volunteer: s 60D) of a school (or student) while the member of staff (or student) is attending a school, although no actual bodily harm is occasioned. (2) Assault occasioning actual bodily harm. (3) Wound or cause grievous bodily harm. | | (1) 5 years (2) 7 years (3) 12 years |

| Jurisdiction | Provision | Nature of act/s constituting offence | Minimum penalty | Maximum penalty |
|--------------------|---|--|--|---|
| Northern Territory | <i>Health Services Act 1997</i> (NSW) s 67J (Obstruction of and violence against ambulance officers) | By an act of violence against an ambulance officer, intentionally obstruct or hinder officer when providing or attempting to provide ambulance services to another person/s (s 67J(2)). Intentionally obstruct or hinder (without act of violence) (s 67J(1)). | | 67J(2): 5 years 67J(1): 50 penalty units or 2 years imprisonment (or both) |
| | <i>Public Health Act 2010</i> (NSW) s 116 (Offence to obstruct or assault persons exercising their functions) | Assault an authorised officer exercising, or attempting to exercise, a function under the Act or regulations (s 116(2)) Intimidates or wilfully obstructs or hinders another person exercising, or attempting to exercise, a function under this Act or the regulations (s 116(1)) | | 100 penalty units or 6 months imprisonment |
| | <i>Criminal Code</i> (NT) s 155A (Assault, obstruction etc of persons providing rescue, medical treatment or aid) | Unlawfully assault, obstruct or hinder a person who is providing rescue, resuscitation, medical treatment, first aid or succour of any kind to a third person (not specific to 'public officers') | Minimum of 3 months or 12 months actual custody (depending if person previously convicted of a 'violent offence' if: (a) an offensive weapon is used or threatened to be used; and (b) the victim has suffered harm as a result of the assault | 5 years, or 7 years if the person endangers the life or causes harm to the third person |
| | <i>Criminal Code</i> (NT) s 189A (Assaults on emergency workers) | Unlawfully assault an emergency worker (includes member of the Fire and Rescue Service or Emergency Service, an ambulance officer or paramedic, a medical practitioner or health practitioner) in the execution of their duty. If: (i) the commission of the offence involved the actual or threatened use of an offensive weapon (defined in s 1 of the <i>Criminal Code</i> (NT)); and (ii) the victim suffered physical harm as a result of the offence, it is a Level 5 offence for the purposes of the <i>Sentencing Act 1995</i> (NT) (see s 78CA(1) of that Act) | If Level 5 offence, and first time convicted of a 'violent offence', 3 months' actual imprisonment (<i>Sentencing Act 1995</i> (NT) s 78D) If Level 5 offence, and offender has previously been convicted of a 'violent offence': 12 months' actual imprisonment (s 78DA) If Level 4 offence (whether or not offender previously convicted of a violent offence): 3 months' actual imprisonment | If victim does not suffer harm: 5 years If victim suffers harm^: 7 years |

| Jurisdiction | Provision | Nature of act/s constituting offence | Minimum penalty | Maximum penalty |
|--------------|--|---|---|---|
| Queensland | | If the victim suffers physical harm as a result of the offence, and the offence is not a Level 5 offence for the purposes of the <i>Sentencing Act 1995</i> (NT), it is a Level 4 offence (see s 78CA(2) of that Act) | | |
| | <i>Criminal Code</i> (Qld) s 340 (Serious assault) | Unlawful assault of a person performing a duty imposed on the person by law (s 340(1)(c)) or because the person has performed a duty imposed on the person by law (s 340(1)(d)) | N/A | 7 years |
| | <i>Criminal Code</i> (Qld) s 340(2) | Unlawful assault of a working corrective services officer (present at a corrective services facility in his or her capacity as a corrective services officer) | N/A | 7 years |
| | <i>Criminal Code</i> (Qld) s 340(2AA) | Unlawful assault, or resist or obstruct public officer while performing a function of the officer's office, or because the officer has performed a function of the officer's office 'Public officer' is defined to include: (a) a member, officer or employee of a service established for a public purpose under an Act (such as the Qld Ambulance Service); (b) a health service employee; (c) an authorised officer under the <i>Child Protection Act 1999</i> ; and (d) a transit officer. | N/A, but court must make a community service order if offence committed in a public place while offender adversely affected by an intoxicating substance, unless court is satisfied the offender is incapable of complying because of any physical, intellectual or psychiatric disability. | 7 years, or 14 years if: (i) the offender bites or spits on the public officer or throws at, or in any way applies to, the officer a bodily fluid or faeces; (ii) the offender causes bodily harm to the public officer; (iii) the offender is, or pretends to be, armed with a dangerous or offensive weapon or instrument. |
| | <i>Corrective Services Act 2006</i> (Qld) s 124 (Other offences) | Assault or obstruct staff member performing function or exercising a power or is in a corrective services facility (s 124(b)) | N/A | 2 years |
| | <i>Fire and Emergency Services Act 1990</i> (Qld) s 150C (Obstruction of persons performing functions) | Obstruct (including assault) an authorised person in the performance of a function under the act | N/A | 100 penalty units, or 6 months imprisonment |

| Jurisdiction | Provision | Nature of act/s constituting offence | Minimum penalty | Maximum penalty |
|-----------------|--|---|--|---|
| South Australia | <i>Police Powers and Responsibilities Act 2000</i> (Qld) s 655A(1)(a) (Offence to assault or obstruct watch-house officer) | Assault a watch-house officer in the performance of the officer's duties | N/A | 40 penalty units or 6 months imprisonment. |
| | <i>Criminal Law Consolidation Act 1935</i> (SA) s 20AA (Causing harm to, or assaulting, certain emergency workers etc) | <p>Various conduct captured:</p> <ul style="list-style-type: none"> (1) cause harm to a prescribed emergency worker acting in the course of official duties, intending to cause harm (s 20AA(1)) (2) cause harm to a prescribed emergency worker (includes police officer) acting in the course of official duties, and is reckless in doing so (s 20AA(2)) (3) assault a prescribed emergency worker (includes a police officer) acting in the course of official duties (s 20AA(3)). <p>'Prescribed emergency worker' includes wide range of officers, including prison officers, community corrections officers, youth justice officers, a person performing duties in a hospital (including medical staff and security officers), paramedics/ambulance officers, and members of a fire service or emergency service.</p> | <p>An offence under s 20AA(1) or (2) is a 'designated offence' under s 96 of the <i>Sentencing Act 2017</i> (SA) which limits the availability of suspended sentences in particular circumstances – including where the person is being sentenced as an adult for a designated offence and in the 5 years prior to the offence date, and a court has suspended a sentence of imprisonment or period of detention for another designated offence, unless there are exceptional circumstances.</p> | <ul style="list-style-type: none"> (1) Cause harm with intent to cause harm: 15 years (2) Cause harm recklessly: 10 years (3) Assault: 5 years |
| Victoria | <i>Crimes Act 1958</i> (Vic) s 31(1)(b) (Assaults) | <p>Assault or threaten to assault, resist or intentionally obstruct an emergency worker on duty, youth justice custodial justice worker on duty, or custodial officers on duty, knowing or being reckless as to whether the person is such a worker or officer.</p> <p>'Emergency worker' includes ambulance officers, hospital emergency staff, fire and emergency services officers, volunteer fire fighters.</p> | N/A | 5 years |

| Jurisdiction | Provision | Nature of act/s constituting offence | Minimum penalty | Maximum penalty |
|-------------------|--|--|--|---|
| Western Australia | <i>Summary Offences Act 1966</i> (Vic) ss 51(2)–(3) (Assaulting, etc. emergency workers, custodial officers, youth justice custodial workers or local authority staff on duty) | Assault, resist, obstruct, hinder or delay an emergency worker on duty, a custodial officer on duty or a youth justice custodial worker; or a member of staff of a local authority in the execution of the member's duty under the Act. | N/A | 60 penalty units or 6 months imprisonment |
| | <i>Summary Offences Act 1966</i> (Vic) s51A 51A(1)–(3) (Assaulting registered health practitioners) | Assault of a registered health practitioner in a hospital or on hospital premises, or who is providing or supporting the provision of, care or treatment to a person other than in a hospital and knowing or being reckless as to whether the practitioner is a health practitioner. | N/A | 60 penalty units or 6 months imprisonment |
| | <i>Criminal Code</i> (WA) s 318(1) (Serious assault) | <p>Assault of:</p> <ul style="list-style-type: none"> 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 (s 318(1)(d)) any person performing a function of a public nature conferred by law or on account of his performance of such a function (s 318(1)(e)) person acting in aid of a public officer or other person referred to in para (d) or (e) (s 318(1)(f)); the driver or person operating or in charge of — <ul style="list-style-type: none"> (i) a vehicle travelling on a railway; or (ii) a ferry; or (iii) a passenger transport vehicle (s 318(1)(g)) an ambulance officer, or member of a FES Unit, SES Unit or VMRS Group, or member of officer of a private or volunteer fire brigade (s 318(1)(h)) person working in a hospital or who is providing a health service to the public (s 318(1)(i)) a contractor providing court security services or custodial services (s 318(1)(j)) | <p>Yes – if adult commits offence in 'prescribed circumstances, where offence committed against range of workers providing public functions including a police officer, prison officer, youth custodial officer, or transport security officer, ambulance officer, fire or emergency services officer, person working in a hospital or providing a health service to the public, contracted court security or custodial services officer or prison officer; and the officer suffers bodily harm: 6 months, or 9 months if aggravating circumstances which cannot be suspended.</p> <p>For a 16 or 17-year-old offender, 3 months' imprisonment or youth detention.</p> | <p>7 years</p> <p>10 years (aggravated)</p> |

| Jurisdiction | Provision | Nature of act/s constituting offence | Minimum penalty | Maximum penalty |
|-------------------------------|---|--|-----------------|-----------------|
| | | <ul style="list-style-type: none"> a contract worker performing functions under the <i>Prisons Act 1981</i> (s 318(1)(k)). <p>Aggravated form: at or immediately before or immediately after the commission of the offence –</p> <p>(i) the offender is armed with any dangerous or offensive weapon or instrument; or</p> <p>(ii) the offender is in company with another person or persons.</p> <p>Aggravated as to the maximum penalty (but does not enliven mandatory sentence): s 318(la): (temporary, for 12 months only from 4 April 2020) if:</p> <p>(i) at the commission of the offence the offender knows that he/she has COVID-19; or</p> <p>(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.</p> | | |
| OVERSEAS JURISDICTIONS | | | | |
| Canada | <i>Criminal Code</i> (R.S.C., 1985, c. C-46) s 270 (Assault a peace officer) | <p>Assault a public officer or peace officer engaged in the exercise of his or her duty.</p> <p>Definitions of 'public officer' and 'peace officer' are broad and include, in the case of 'public officers', customs officers, member of the Canadian Forces, an officer of the Royal Mounted Police. 'Peace officers' include (in addition to police) justices of the peace, prison officers, fisheries officers, and registered aircraft pilots while the aircraft is in flight.</p> | N/A | 5 years |
| | <i>Criminal Code</i> (R.S.C., 1985, c. C-46) s 270.01 (Assaulting peace officer with weapon or causing bodily harm) | <p>As above and, in committing such assault the offender:</p> <p>(a) carried, used or threatened to use a weapon or imitation weapon; or</p> <p>(b) caused bodily harm to the officer.</p> | N/A | 10 years |

| Jurisdiction | Provision | Nature of act/s constituting offence | Minimum penalty | Maximum penalty |
|--------------------------|---|---|--|--------------------------|
| England and Wales | <i>Assaults on Emergency Workers (Offences) Act 2018</i> (UK) s 1 (Common assault and battery) | Common assault or battery against an emergency worker acting in the exercise of their functions. 'Emergency worker' includes police, prison officers, person providing fire or fire and rescue services, person employed or engaged to provide search and/or rescue services, person employed or engaged to provide NHS health services and support services that involve face-to-face interaction with members of the public or people receiving such services. | Fine, 12 months' imprisonment, or both | |
| New Zealand | <i>Summary Offences Act 1981</i> (NZ) s 10 (Assault on police, prison or traffic officer) | Assault a constable, prison officer or traffic officer acting in the exercise of his or her duty. | N/A | \$4,000 fine or 6 months |

Notes: ^ 'Harm' is defined in s 1A of the Criminal Code (NT) to mean: 'physical harm to a person's mental health, whether temporary or permanent': s 1A(1). 'Physical harm' is defined to include: 'unconsciousness, pain, disfigurement, infection with a disease and any physical contact that a person might reasonably object to in the circumstances, whether or not the person was aware of it at the time: s 1A(2). 'Harm to a person's mental health' includes 'significant psychological harm, but does not include mere ordinary emotional reactions such as those of only distress, grief, fear or anger': s 1A(3).

Table A5– 3: Examples of circumstances of aggravation that apply to assault and other offences against the person when committed against specific classes of workers – Australia

| Jurisdiction | Provision | Aggravated form of offence | Minimum penalty | Maximum penalty |
|---------------------------|---|---|--|--|
| Northern Territory | <i>Criminal Code</i> (NT) s 174C (Recklessly endangering life) | Offence committed against a public officer who was, at the time of the offence, acting in the course of his or her duty as a police officer, correctional services officer or other law enforcement officer (s 174G). | | 14 years (cf 10 years if non-aggravated) |
| | <i>Criminal Code</i> (NT) s 174D (Recklessly endangering serious harm) | As above | | 10 years (cf 7 years if non-aggravated) |
| South Australia | <i>Criminal Law Consolidation Act 1935</i> (SA) s 5AA (Aggravated offences) | Aggravated offence if committed against: <ul style="list-style-type: none"> a police officer, prison officer, employee in a (youth justice) training centre or other law enforcement officer knowing victim to be acting in course of duty, or because of actions done or believed to have been taken (s 5AA(1)(c)) a community corrections officer or community youth justice officer knowing the victim to be acting in the course of their official duties (s 5AA(1)(ca)) in case of offence against the person, the victim was engaged in a prescribed occupation or employment (includes emergency work, performing duties in a hospital or in the course of retrieval medicine, passenger transport work, court security officer, animal welfare inspector) whether paid or volunteer, knowing the victim to be acting in the course of the victim's official duties (s 5AA(1)(ka)). | N/A | Higher penalty applies to offences including: Unlawful threat to kill or endanger life: 12 years (s 19(1)) Unlawful threat to harm: 8 years (s 19(2)) Assault: 5 years (s 20(3)(d)) Assault causing harm: 7 years (s 20(4)(d)) Causing harm intentionally: 13 years (s 24(1)) Causing harm recklessly: 8 years (s 24(2)) |
| Victoria | <i>Sentencing Act 1991</i> (Vic) s 10AA (Custodial sentence for certain offences against emergency workers etc) | Offence committed against an emergency worker on duty, a custodial officer on duty, or a youth justice custodial officer on duty. | Minimum NPP (some exceptions where 'special reason' exists) for following <i>Crimes Act 1958</i> offences: s 15A (Causing serious injury intentionally in circumstances of gross violence): 5 years | Same maximum penalties as for non-aggravated offences |

| Jurisdiction | Provision | Aggravated form of offence | Minimum penalty | Maximum penalty |
|--------------|--|---|--|--|
| | | <p>'Emergency worker' includes police officer, ambulance officer, staff providing emergency treatment to patients in a hospital, a member of a fire or emergency service, a volunteer fire-fighter, emergency response workers.</p> | <p>s 15B (Causing serious injury recklessly in circumstances of gross violence): 5 years</p> <p>s 16 (Causing serious injury intentionally): 3 years [or 3 years' detention for young offender 18 years or over, but under 21 if criteria met]</p> <p>s 17 (Causing serious injury recklessly): 2 years [or 2 years' detention for young offender 18 years or over, but under 21 if criteria met]</p> <p>Minimum sentence (unless 'special reason' exists) for following <i>Crimes Act 1958</i> offence:</p> <p>s 18 (Causing injury intentionally or recklessly): 6 months [or 6 months' detention for young offender 18 years or over, but under 21 if other criteria met]</p> | |
| | <p><i>Crimes Act 1958</i> (Vic) s 320A (Maximum term of imprisonment for common assault in certain circumstance)</p> | <p>Common assault if:</p> <p>(1)</p> <p>(a) at the time of the assault, the offender has an offensive weapon readily available; and</p> <p>(b) the victim is a police officer on duty or a protective services officer on duty; and</p> <p>(c) the offender knows or is reckless as to whether the victim is a police officer or a protective services officer; and</p> <p>(d) the offender either allows the victim to see the weapon (or its shape) or tells or suggests to the victim they have a weapon readily available; and</p> <p>(e) the offender knows conduct would be likely to cause apprehension or fear or should have known this.</p> <p>(2) As above, but the weapon involved is a firearm or imitation firearm.</p> | | <p>(1) Offensive weapon: 10 years</p> <p>(2) Firearm: 15 years</p> |

| Jurisdiction | Provision | Aggravated form of offence | Minimum penalty | Maximum penalty |
|-------------------|--|---|---|--|
| Western Australia | <i>Criminal Code</i> (WA) s 297 (Grievous bodily harm) | <p>Aggravated offence if committed against:</p> <ul style="list-style-type: none"> a public officer performing a function of his office or employment, or offence is committed because of this; or a person operating or in charge of a vehicle on a railway (e.g train), ferry, passenger transport vehicle; or an ambulance officer a member of a FES Unit, SES Unit or VMRS Group or a member or officer of a private fire brigade or volunteer fire brigade; or a person working in a hospital or is in the course of providing a health service to the public; or a contracted court security officer or custodial services officer, or a contracted private prison worker. | <p>Yes</p> <p>Adult offender against certain victim types: 12 months' actual imprisonment (s 297(5)(b))</p> <p>Young offender against certain victim types: 3 months' imprisonment or 3 months' detention (s 297(6)(b))</p> | <p>GBH: 14 years (s 297(4))</p> <p>(10 years where not aggravated due to job type and no other aggravating circumstance)</p> |

**Table A5– 4: Examples of aggravating factors for sentencing purposes for assaults and other non-fatal offences against specific categories of workers
— Australia, Canada, England and Wales and New Zealand**

| Jurisdiction | Provision | Aggravating factor/s | Specific offence or general application? |
|--------------------------|---|--|---|
| New South Wales | <i>Crimes (Sentencing Procedure) Act 1999</i> (NSW) s 21A(2) (Aggravating factors) | <p>(a) 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;</p> <p>(l) the victim was vulnerable — examples include vulnerability due to 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).</p> <p>[Note: s 21A(5) states: 'The fact any ... aggravating or mitigating factor is relevant and known to the court does not require the court to increase or reduce the sentence for the offence.']</p> | General application |
| Canada | <i>Criminal Code</i> (R.S.C., 1985, c. C-46) s 269.01 (Aggravating circumstance — assault against a public transit operator) | Offence committed against a public transit officer (an individual who operates a vehicle (including bus, licensed taxi, train, tram and ferry) used in the provision of passenger transport services to the public, including individual who drives a school bus) engaged in the performance of his or her duty. | <p>Specific offences:</p> <p>s 264.1(1)(a) (Uttering threats to cause GBH – to cause death or bodily harm to any person)</p> <p>s 266 (Assault)</p> <p>s 267 (Assault with a weapon or causing bodily harm)</p> <p>s 268 (Aggravated assault)</p> <p>s 269 (Unlawfully causing bodily harm)</p> |
| England and Wales | <i>Assaults on Emergency Workers (Offences) Act 2018</i> (UK) s 2 (Aggravating factor) | <p>Offence committed against an emergency worker acting in the exercise of functions as such a worker.</p> <p>Definition of 'emergency worker' includes:</p> <ul style="list-style-type: none"> • a (police) constable; • a prison officer; • another person employed or engaged to carry out functions in a prison; • a prisoner custody officer or custody officer in the exercise of escort functions; • a person employed or engaged to provide, fire services or fire and rescue services; | <p>Specific offences:</p> <p><i>Offences against the Person Act 1861</i> (UK):</p> <p>s 16 (Threats to kill);</p> <p>s 18 (Wounding with intent to cause GBH);</p> |

| Jurisdiction | Provision | Aggravating factor/s | Specific offence or general application? |
|--------------------|--|---|---|
| | | <ul style="list-style-type: none"> a person employed or engaged to provide, search and/or rescue services; a person employed or engaged to provide— <ul style="list-style-type: none"> (i) NHS health services; or (ii) services in the support of the provision of NHS health services, and whose general activities in doing so involve face to face interaction with individuals receiving the services or with other members of the public. <p>Requirement to state in open court the offence is so aggravated (s 2(2)(b)).</p> | <p>s 20 (Malicious wounding);</p> <p>s 23 (Administering poison etc);</p> <p>s 28 (Causing bodily harm by gunpowder etc);</p> <p>s 29 (Using explosive substances etc with intent to cause GBH)</p> <p>s 47 (Assault occasioning actual bodily harm)</p> <p>s 3 of the <i>Sexual Offences Act 2003</i> (Sexual assault)</p> <p>Manslaughter</p> <p>Kidnapping</p> <p>An ancillary offence in relation to the above.</p> |
| New Zealand | <i>Sentencing Act 2002</i> (NZ) s 9 (Aggravating and mitigating factors) | <p>Victim was:</p> <ul style="list-style-type: none"> a constable, or a prison officer, acting in the course of his or her duty (s 9(1)(fa)); an emergency health or fire services provider acting in the course of his or her duty at the scene of an emergency (s 9(1)(fb)); particularly vulnerable because of his or her age or health or because of any other factor known to the offender (s 9(1)(g)). <p>Statement of aggravating factors does not imply that ‘a factor referred to ... must be given greater weight than any other factor that the court might take into account’ (s 9(4)(b)).</p> <p>Prosecution must prove beyond reasonable doubt the existence of any disputed aggravated fact (s 24(2)(c)).</p> | General application |

Glossary

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| Appeal | Review of all or part of a court's decision by a higher court. An appeal against a sentencing decision of a magistrate can be heard by a District Court judge. An appeal against a sentencing decision of a District Court or Supreme Court judge can be heard by the Court of Appeal. |
| Average | The average is a measure used to determine where the centre of a distribution lies. The average is calculated by adding up all the values in a dataset and dividing the sum by the total number of values. The average is affected by outliers — extreme scores at either end of the distribution can cause the mean to shift significantly. Also referred to as the mean. |
| Case law | Law made by courts, including sentencing decisions and decisions on how to interpret legislation. This is also known as common law . |
| Common law | Law made by courts, including sentencing decisions and decisions on how to interpret legislation. This is also known as case law . |
| Compensation | Compensation is an amount of money provided for any loss, destruction or damage caused to property, and can also address personal injury suffered by a person (whether or not they are a victim of the offence) because of the commission of a criminal offence. |
| Conviction | A determination of guilt made by a court. |
| Court of Appeal | A division of the Supreme Court. The Court of Appeal hears appeals against conviction, sentence or both. It usually comprises three judges. |
| Crown | The prosecution may be referred to as the Crown. The Crown refers to the Queensland Government representing the community of Queensland. |
| Custodial sentencing order | A sentencing order that involves a term of imprisonment being imposed. |
| Defendant | A person who has been charged with an offence but who has not yet been found guilty or not guilty. Can be used interchangeably with accused . |
| Denunciation | Communication of society's disapproval of an offender's criminal conduct. |
| De Simoni (De Simoni principle) | The principle that a person should only be sentenced for an offence for which he or she has been found guilty. |
| Deterrence | Discouraging offenders and potential offenders from committing a crime by the threat of a punishment or by someone experiencing a punishment. One of the five statutory sentencing purposes in Queensland. |

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|--|---|---|---|---|---|---|----|----|----|----|----|----|----|
| Head sentence – imprisonment | The total period of imprisonment imposed. A person will usually be released on parole or a suspended sentence before the entire head sentence is served. | | | | | | | | | | | | |
| Imprisonment | Detention in prison. | | | | | | | | | | | | |
| Mean | The mean is a measure used to determine where the centre of a distribution lies. The mean is calculated by adding up all the values in a dataset and dividing the sum by the total number of values. The mean is affected by outliers – extreme scores at either end of the distribution can cause the mean to shift significantly. Also referred to the average. | | | | | | | | | | | | |
| Median | <p>The median is a measure used to determine where the centre of a distribution lies. The median is the middle value (or the half-way point) of an ordered dataset. Half of the values lie above the median, and half below. The advantage of using the median is that, compared to the mean, it is relatively unaffected by extreme scores at either end of the distribution.</p> <table><tr><td>1</td><td>2</td><td>3</td><td>6</td><td>7</td><td>8</td><td></td><td>10</td><td>11</td><td>12</td><td>14</td><td>20</td></tr></table> <p style="text-align: center;">Median</p> | 1 | 2 | 3 | 6 | 7 | 8 | | 10 | 11 | 12 | 14 | 20 |
| 1 | 2 | 3 | 6 | 7 | 8 | | 10 | 11 | 12 | 14 | 20 | | |
| Most serious offence (MSO) | For this report, the MSO refers to an offender’s most serious offence at a court event. It is the offence receiving the most serious penalty, as ranked by the classification scheme used by the Australian Bureau of Statistics (ABS). An offender records one MSO per court event. | | | | | | | | | | | | |
| Non-parole period | The time an offender serves in prison before being released on parole or becoming eligible to apply for release on parole. | | | | | | | | | | | | |
| Offender | A person who has been found guilty of an offence or who has pleaded guilty to an offence. | | | | | | | | | | | | |
| Office of the Director of Public Prosecutions | The Office of the Director of Public Prosecutions (ODPP) represents the State of Queensland in criminal cases. Also referred to as the prosecution. | | | | | | | | | | | | |
| Parity (Principle of parity) | People who are parties to the same offence should receive the same sentence, although matters that create differences must be taken into account. | | | | | | | | | | | | |
| Partially suspended sentence | Imprisonment of up to five years, with some actual prison time followed by release from prison with the remaining period of imprisonment suspended for a set period (called an ‘operational period’). If the offender commits a further offence punishable by imprisonment during the operational period, they must serve the period suspended in prison (unless unjust to do so), plus any other penalties issued for the new offence. | | | | | | | | | | | | |
| Plea | The response by the accused to a criminal charge – ‘guilty’ or ‘not guilty’. | | | | | | | | | | | | |

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| Proportionality (principle of proportionality) | A sentence must be appropriate or proportionate to the seriousness of the crime. |
| Prosecution | A legal proceeding by the State of Queensland against an accused person for a criminal offence. Prosecutions are brought by the Crown (through the ODPP or police prosecutors). |
| Remand | To place an accused person in custody awaiting further court hearings dealing with the charges against them. A person who has been denied bail, or not sought it, will be placed on remand. This is also known as 'pre-sentence custody'. |
| Restitution | Restitution is a specific form of compensation that relates to property damaged or taken in relation to the commission of a criminal offence. |
| Restorative justice conferencing | Restorative justice conferencing involves a dialogue between the parties (victim and offender) directly affected by a criminal offence, whereby the harm suffered by the victim can be expressed, acknowledged by the offender and an agreement reached about the way to repair the harm, where possible. |
| Sentence | The penalty the court imposes on an offender. |
| Sentencing factors | The factors that the court must take into account when sentencing. |
| Sentencing principles | Principles developed under the common law, which serve as guideposts to assist judges and magistrates to reach a decision concerning the most appropriate sentence to impose. They include parity, proportionality, totality, and the <i>De Simoni</i> principle. |
| Sentencing purposes | The legislated purposes for which a sentence may be imposed. In Queensland there are five sentencing purposes for the sentencing of adults: punishment, deterrence, rehabilitation, denunciation, and community protection. |
| Sentencing remarks | The reasons given by the judge or magistrate for the sentence imposed. |
| Supreme Court | The highest state court in Queensland. It comprises the trial division and the Court of Appeal. All trials and sentencing hearings for murder and manslaughter take place in the Supreme Court trial division. |
| Suspended sentence | A sentence of imprisonment of five years or less suspended in whole (called a 'wholly suspended sentence') or in part (called a 'partially suspended sentence') for a period (called an 'operational period'). If further offences punishable by imprisonment are committed during the operational period, the offender must serve the period suspended in prison (unless unjust to do so), plus any other penalties issued for the new offence. |
| Totality (principle of totality) | When an offender is convicted of more than one offence, the total sentence must be just and appropriate to the offender's overall criminal behaviour. |

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|-------------------------|------------------|---|
| Victim statement | impact | A mechanism for a victim of crime to provide a written account of the impact of an offence on them, which is presented to the sentencing court – most often in a written format to the judge, although sometimes the victim can read the statement to the court. This forms part of the court’s assessment of the seriousness of the offence. |
| Wholly sentence | suspended | A sentence of imprisonment of up to five years but with no actual time served in prison as part of the sentence, unless the person commits a further offence during the operational period. If further offences punishable by imprisonment are committed during the operational period, the offender must serve the period suspended (unless unjust to do so), plus any other penalties issued for the new offence. |

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