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 community[137] 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 Dalgliesh (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 unjust[150] — 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 clear[165] 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 results[173] 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 enacted[186] 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 Miekle* [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 NSWR 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 NSWR 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. Salutary 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 periods[240] (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 less[242] 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 requirements[245] 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

Th 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].