Chapter 8 Reforms to the offence of serious assault

8.1 Introduction

Part D of this report sets out the Council's recommended reforms to the current offence, penalty and sentencing framework that applies to assaults on public officers in Queensland.

The focus of this chapter is on reforms recommended to section 340 of the *Criminal Code*. It responds to the request in the Terms of Reference that the Council determine:

- whether the definition of 'public officer' in section 340 of the *Criminal Code* should be expanded to recognise other occupations, including public transport drivers; and
- whether it is appropriate for section 340 of the *Criminal Code* to continue to apply to police officers and other frontline emergency service workers, corrective services officers and other public officers or whether such offending should be targeted in a separate provision or provisions — or through the introduction of a circumstance of aggravation.

The recommendations in this part are intended to operate as a package of reforms. They reflect the Council's view that, while section 340 of the *Criminal Code* — as this section applies to public officers — should be retained, it is in need of reform to simplify and focus its operation. However, the proposed narrowing of focus, which will target assaults on certain frontline and emergency workers, should not detract from the courts' ability to recognise the higher vulnerability of other workers providing essential services to the public, and for this to be treated as an aggravating factor in sentencing.

The Council considers the best way to achieve its dual objectives is through reforms to section 340 that will operate in conjunction with the introduction of a new aggravating factor that will apply under the *Penalties and Sentences Act 1992* (Qld) (PSA). The operation of this new aggravating factor is discussed in detail in Chapter 10 of this report.

8.2 History of section 340

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

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 **Section 340 (Serious assaults) — as originally enacted**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

The *Criminal Code* is a schedule to the *Criminal Code Act 1899* (Qld).[1] It contains most of Queensland's criminal offences. Several offence provision options may be open when a public officer is assaulted. If an offender's criminal conduct means they could be charged with an offence under the *Criminal Code* and also under a different statute, either can be used — but the offender cannot be twice punished for the same offence.[2]

The *Criminal Code* was largely the work of then Queensland Chief Justice Sir Samuel Griffith. He compiled a digest of Queensland's criminal laws, prepared a draft code and 'recommended the repeal or amendment of approximately

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

2 *Criminal Code* (Qld) s 7.

250 Imperial, NSW and Queensland Acts'.[3] This means that the *Criminal Code* is designed to be the single source of Queensland's criminal laws, and any laws existing before it or materials made in drafting it, are not relevant to its use.[4]

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

There have been a total of 16 amending Acts making substantive amendments to section 340 passed between 1988[5] and 2020. The most relevant of these to this issue are discussed below.

In **1997**, shortly after two major Queensland reviews and a failed replacement *Criminal Code*,[6] the maximum penalty was raised from 3 years' imprisonment to 7 years and the offence was changed from a misdemeanour to a crime.[7] Section 340 had always recognised police officers, but only referred to other people by virtue of their actions (e.g. executing a duty imposed by law) as opposed to their occupation, age or disability.

The opposition successfully moved to pass amendments adding persons aged over 60 and persons relying on a guide dog, wheelchair or other remedial device as distinct classes of victim. The then Attorney-General, Mr Denver Beanland, opposed this. He told Parliament that the 7-year maximum was an appropriate penalty. He said that if the prosecution was doing its work, the provisions in the Government's Bill should be adequate to achieve tougher penalties where appropriate 'for offenders assaulting people with disabilities, people who are aged, frail or whatever the situation might be'.[8]

In **2006**, a new subsection was included (which was itself replaced in 2012) which stated that circumstances in which a person assaults a police officer included biting, spitting on or throwing a bodily fluid or faeces at them.[9] This recognition of specific factual circumstances made no change to the penalty or existing definition of 'assault', which always covered such conduct.[10] The second reading speech was highly critical of this form of behaviour and encouraged Parliament's condemnation through:

> Strong legislation … that will send a clear message that it is the will of Parliament that persons who perpetrate, and are found guilty of these acts should be dealt with severely by the courts and that these acts regardless of the circumstances, should at all times be treated as a serious assault.[11]

In **2012**, a major amendment was made with the insertion of new penalty paragraph (a) in subsection (1). It was a Liberal National Party pre-election commitment, as part of a wider raft of amendments aimed at strengthening sentences for certain offences against police.[12] This replaced the 2006 descriptive amendment and doubled the maximum penalty to 14 years for serious assaults against police involving biting, spitting on, throwing at or applying bodily fluids or faeces, causing bodily harm, or being or pretending to be armed. The explanatory notes stated:

> Police perform an essential and unique role in maintaining civil authority. Their duties are frequently dangerous … the increase can be justified given the need to: deter this form of concerning conduct; protect police officers carrying out their duties; and ensure the maintenance of civil authority.[13]

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

4 See *Bank of England v Vagliano Brothers* [1891] AC 107, 145 (Lord Herschell) cited in Kenny (n 3) 7 [1.11], and *Mellifont v A-G for the State of Queensland* (1991) 173 CLR 289, 309 (Mason CJ, Deane, Dawson, Gaudron, McHugh JJ).

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

6 R.S. O'Regan, J.M. Herlihy and M.P. Quinn, *Final Report of the Criminal Code Review Committee to the Attorney-General* (18 June 1992), the Criminal Code [1995] and Peter Connolly QC, Julie Dick, Adrian Gundelach and Michael Quinn, *Report of the Criminal Code Advisory Working Group to the Attorney-General* (July 1996). These are discussed in more detail in Chapter 10 regarding 'A historical Queensland review perspective on aggravating by victim category' and in respect of reforming section 199.

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

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

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

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

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

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

13 Ibid 4.

Legal stakeholders criticised the amendment on multiple grounds:

- The existing 7-year maximum was 'adequate'[14] and 'substantial'.[15]
- A 14-year section 340 maximum would be incongruous with the same penalty in place for more serious offences (e.g. GBH, a more serious offence requiring greater harm). Regard should be had, in particular, to penalties for comparable conduct.[16]
- All lives, irrespective of occupation, should be valued equally under the law.[17]
- Many section 340 offenders were seriously disadvantaged, mentally ill, suffering from substance abuse and acting in desperation and were unlikely to comprehend deterrent penalty increases.[18]

The Queensland Government rejected a Parliamentary Legal Affairs and Community Safety Committee recommendation that the Attorney-General monitor and review the consequences of the proposed amendments on the courts and other criminal justice agencies, and report to Parliament within two years from commencement.[19]

In **2014**, this 2012 police penalty provision (with 14-year maximum) was copied over to the public officer offence provision in section 340(2AA), for much the same reasons as the increase regarding police.[20] The same Act introduced mandatory community service orders for serious assaults committed with a circumstance of aggravation (committed in a public place while adversely affected by an intoxicating substance).

In **2016**, the serious organised crime circumstance of aggravation[21] and mandatory sentence component requiring the making of a community service order in certain circumstances[22] were added.[23]

In **2020**, the *Corrective Services and Other Legislation Amendment Act 2020* (Qld) amended section 340 by copying the circumstances of aggravation, and maximum 14-year penalty, from the penalty provision in section 340(2AA)(a) into section 340(2). This commenced on 21 July 2020.[24]

8.3 The current approach

8.3.1 What is an assault?

The definition of 'assault'[25] is very wide and can be met in two ways. The first is where the offender strikes, touches, moves or otherwise applies force of any kind to another person. This can be direct or indirect. It must be done without the victim's consent, or where consent was obtained by fraud.

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

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

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14 Shane Duffy, Submission No 5 to the Legal Affairs and Community Safety Committee, *Inquiry into the Criminal Law Amendment Bill 2012* (28 June 2012) 2.

15 Roger N Traves SC, Submission No 9 to the Legal Affairs and Community Safety Committee, *Inquiry into the Criminal Law Amendment Bill 2012* (28 June 2012) 4.

16 Ibid.

17 Ibid.

18 Duffy (n 14) 5.

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

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

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

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

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

24 *Corrective Services and Other Legislation Amendment Act 2020* (Qld) s 55, introduced to Parliament 17 March 2020 and passed on 16 July 2020.

25 Section 245 of the *Criminal Code* defines assault.

8.3.2 What is serious assault?

The offence of serious assault applies much higher maximum penalties to the same conduct that would otherwise constitute another general assault charge (such as common assault or AOBH), on the basis that the offence was committed against a particular class of person or for a particular reason. The intention is to 'offer greater deterrence' for such assaults.[26] It has been said they are more aggravated than ordinary common assaults, 'because of the persons involved or the intent with which they are carried out'.[27] Despite this, it has been suggested 'they may in fact not be serious in the sense that they call for a jury trial necessarily or a penalty of any great substance in a particular case'.[28]

Section 340 also covers other behaviour that may not even otherwise be an assault at law: resisting or wilfully obstructing police (or people aiding police) or a public officer (ss 340(1)(b) and (2AA)(a)). In some instances, this provision provides a higher maximum penalty than for AOBH (14 years as against 10 years) and on par with GBH (14 years).

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

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

Serious assault also covers assaults committed:

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

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

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

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

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

Sections 340(1) and 340(2AA) are drafted so that each has two sets of subparagraphs (a) and (b). The first set in each creates offences. The second set creates aggravated offences and sets out the maximum penalties applicable.[29]

Finally, subsection (2) states that a person who unlawfully assaults a 'working corrective services officer' is liable to a maximum penalty of 7 years' imprisonment. This pre-dates the insertion of subsection (2AA) regarding 'public officers' and consultation indicated there may be conflict or uncertainty about what to charge because of the existence of these two separate provisions, which has led to recent legislative changes. These recent changes apply the same circumstances of aggravation carrying the 14-year maximum penalty specifically to this subsection.[30]

'Public officer' has an inclusive (but not exhaustive) definition in section 340. This is distinct from a definition of the same term in section 1 (definitions) of the Code. There are also several definitions of terms relating to the single instance of the term 'working corrective services officer' in section 340(2).

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

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

28 Ibid.

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

30 This is discussed further below in section 8.9.2.

8.4 The approach in other jurisdictions

8.4.1 Introduction

Chapter 6 of the Council's Issues Paper explored the approach in other jurisdictions, with a focus on other Australian jurisdictions and select international jurisdictions (Canada, New Zealand, and England and Wales), finding differences as to:

- what offences can be charged for assaults against police and other public officers;
- whether aggravated forms of offences exist for assaults on public officers carrying higher maximum penalties;
- whether specific provision is made in sentencing legislation for the treatment of assaults against public officers or other categories of workers.

The existence of aggravated forms of offences and special provision made in sentencing legislation for the treatment of assaults on public officers is discussed in Chapter 10 of this report.

The offences that apply to public officers, or specific categories of officers, are summarised below and in Appendix 5.

8.4.2 Commonwealth and the ACT

Section 147.1 of the Commonwealth *Criminal Code* establishes an offence of causing harm intentionally to a public officer. The person who engages in the conduct that caused the harm must have done so because the victim is a public official or because of the victim's actions as a public official. Where committed against a Commonwealth law enforcement officer (the definition of which includes a member or special member of the Australian Federal Police, as well as public servants employed in the Australian Border Force and members of the Board of the Australian Crime Commission and its staff)[31] the maximum penalty is 13 years' imprisonment.[32]

The Australian Capital Territory (ACT) has most recently legislated in this area, creating a new offence of assault of a frontline community service provider under section 26A of the *Crimes Act 1900* (ACT). The rationale behind the introduction of the new offence was to provide recognition of the 'discrete criminality of this kind of offending'[33] and 'ensure that the special occupational vulnerability' of police officers, firefighters, paramedics and correctional officers is 'appropriately recognised though ACT law'.[34] The Minister for Corrections, in introducing these reforms, identified the legislative intention as being to protect those workers who 'routinely render assistance in volatile and dangerous situations where they are exposed to an increased risk of violence', as well as those who are 'at high risk at a correctional centre'.[35] This intention is reflected in the Explanatory Statement to the Bill which states: 'Police officers, firefighters and paramedics are required to place themselves in harm's way in service to the community, and it is appropriate for the law to reflect this vulnerability'.[36]

A person commits this offence if:

> (a) the person assaults another person; and
>
> (b) the other person is a frontline community service provider; and
>
> (c) the person knows, or is reckless about whether, the other person is a frontline community service provider; and
>
> (d) the assault is committed —
>
> (i) when the frontline community service provider is exercising a function given to the person as a frontline community service provider; or
>
> (ii) as a consequence of, or in retaliation for, action taken by the person in exercising a function as a frontline community service provider; or
>
> (iii) because the person is a frontline community service provider.[37]

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31 *Criminal Code* (Cth) s 146.1 (definition of a 'Commonwealth law enforcement officer').

32 Ibid s 147.1(1)(f).

33 Explanatory Statement, Crimes (Protection of Police, Firefighters and Paramedics) Amendment Bill 2019, 2.

34 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 21 May 2020, 1100 (Shane Rattenbury MLA).

35 Ibid 1101.

36 Explanatory Statement, Crimes (Protection of Police, Firefighters and Paramedics) Amendment Bill 2019 (ACT) 5–6.

37 *Crimes Act 1900* (ACT) s 26A(1).

In contrast to Queensland, the maximum penalty for this offence is 2 years' imprisonment[38] — the same penalty that applies to the offence of common assault.[39]

The Commonwealth and ACT offences against the specific occupations use complex evidentiary provisions (reflecting their different criminal legislative frameworks from Queensland's). This can affect whether certain defences apply. Most relevantly to this: in Queensland, a person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the reality had been what that person believed was real.[40] For instance, a defendant may believe that a person they were struggling with was not a police officer.

Causing harm to a Commonwealth public official etc.[41] relates to an offender intentionally harming a Commonwealth official because of the official's status as a public official or any conduct engaged in by the official in that capacity. Absolute liability applies regarding the elements of the complainant being a 'Commonwealth public official', their status as such and that the relevant conduct engaged in having been in their official capacity (meaning that, inter alia, the defence of mistake of fact is unavailable).[42]

In the case of the ACT provision, a presumption that the defendant knew the complainant was a frontline community service provider applies, unless there is evidence to the contrary (the onus being reversed and placed on the defendant), if the provider identified themselves as such, or this was: 'reasonably apparent, having regard to all of the circumstances, including the conduct and manner' of the complainant.[43] Examples given are wearing a uniform and being in an emergency vehicle.

Furthermore, strict liability applies to the elements of 'exercising a function' and assaulting the person because of that — and 'it does not matter if the frontline community service provider was off duty' when doing so. This means, inter alia, that the defence of mistake of fact is available.[44]

8.4.3 New South Wales

NSW has an offence of assault, resist or wilfully obstruct any officer, being a constable, or other peace officer, custom-house officer, prison officer, sheriff's officer, or bailiff while in the execution of his or her duty.[45] This carries a maximum penalty of 5 years' imprisonment. This offence also applies to assaults of any person with intent to commit a serious indictable offence, or with intent to resist or prevent apprehension or being detained for any offence.

An offence of assault of a police officer while in the execution of his or her duty also exists, which carries the same penalty of 5 years' imprisonment if no bodily harm is caused (compared to 2 years for common assault[46]), rising to 7 years if this occurs during a 'public disorder'[47] or if bodily harm is caused (compared to 5 years for AOBH, or 7 years if in company),[48] or 9 years if both aggravating features are present (bodily harm caused and assault occurs during a public disorder).[49] Even higher penalties apply if a person wounds or causes grievous bodily harm to a police officer while in the execution of their duties, in circumstances where the offender is reckless as to causing

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38 Ibid s 26A.

39 Ibid s 26.

40 *Criminal Code* (Qld) s 24. See Queensland Supreme and District Courts, *Criminal Directions Benchbook* (March 2017 amendments) 'Mistake of Fact, s 24' 79.2 ('Benchbook'). The mistaken belief is honest if genuinely held by the defendant. The defendant's intoxication may be relevant to whether the defendant's mistaken belief was honest: Benchbook, citing *R v O'Loughlin* [2011] QCA 123 [34]. To be reasonable, the belief must be one held by the defendant, in his or her particular circumstances (based on the circumstances as he or she perceived these to be, including an intellectual impairment or language difficulty), on reasonable grounds: Benchbook, citing *R v Julian* (1998) 100 A Crim R 430, 434; *R v Mrzljak* [2005] 1 Qd R 308, 321, 326; *R v Wilson* [2009] 1 Qd R 476 [20]; *R v Rope* [2010] QCA 194; *R v Keevers* [2004] QCA 207 [37]. The prosecution must prove beyond reasonable doubt that the defendant did not hold the belief or that it was unreasonable: Benchbook.

41 *Criminal Code Act 1995* (Cth) sch (*Criminal Code*) s 147.1 (Causing harm to a Commonwealth public official etc.).

42 Ibid s 6.2.

43 *Crimes Act 1900* (ACT) s 26A(2)(b).

44 See *Crimes Act 1900* (ACT) s 7A and *Criminal Code 2002* (ACT) ss 23 and 36.

45 *Crimes Act 1900* (NSW) s 58.

46 Ibid s 61.

47 'Public disorder' is defined to mean 'a riot or other civil disturbance that gives rise to a serious risk to public safety, whether at a single location or resulting from a series of incidents in the same or different locations': Ibid s 4.

48 Ibid s 59.

49 Ibid s 60. This also applies to acts of throwing a missile at, stalking, harassing and intimidation.

actual bodily harm to that officer or any other person — 12 years (compared to 7 years for reckless wounding,[50] and 10 years for reckless GBH[51]), or 14 years if during a public disorder.[52] Defences that apply include self-defence, and that the police officer was not acting within the execution of his or her duty. Standard non-parole periods apply in some cases.[53] As discussed in Chapter 6 of the Council's Issues Paper, these provide 'guideposts' only as to the appropriate sentence based on an offence falling within the 'mid-range of objective seriousness'.[54]

A separate offence applies under the *Crimes Act 1900* (NSW) to assaults of a law enforcement officer (other than a police officer), the definition of which includes correctional officers, probation and parole officers, juvenile justice officers, Crown prosecutions and DPP staff.[55] As for the equivalent provision that applies to police officers, the maximum penalty for this varies depending on whether bodily harm is caused and its extent. Where no bodily harm is caused, the maximum penalty is 5 years, which increases to 7 years if actual bodily harm is caused, and 12 years if the officer is wounded or grievous bodily harm is caused and the offender was reckless as to causing bodily harm to that person or another person. A similar offence applies where the person assaults a staff member of a school or a student.[56]

Other NSW legislation also establishes special forms of assault offences where committed against specific classes of public officers. For example, it is an offence under section 67J of the *Health Services Act 1997* to intentionally obstruct or hinder an ambulance officer providing or attempting to provide ambulance services to another person. The penalty for this offence is 50 penalty units or 2 years' imprisonment if no act of violence is involved, or 5 years if committed with violence.

These offences are in addition to a general aggravating factor that applies for sentencing purposes to certain categories of victims, including police, emergency services workers, health workers, correctional officers, and other public officers. This provision is discussed in detail in Chapter 10.

8.4.4 Northern Territory

The Northern Territory has introduced an offence of assaults on police or emergency workers under section 189A of the *Criminal Code* (NT). This applies if any person unlawfully assaults a police officer or emergency worker in the execution of the officer's or worker's duty. The maximum penalty is 5 years' imprisonment, increasing to 7 years if the victim suffers harm, and 16 years if the victim suffers serious harm. The definition of an 'emergency worker' is discussed in section 8.6.5 below.

The NT has also created separate circumstances of aggravation that apply to the offence of common assault under section 188 of the Code. Common assault is aggravated if the victim of the assault:

- is a member of the Legislative Assembly, the House of Representatives or the Senate and the assault is committed because of such membership;
- is assisting a public sector employee in carrying out the public sector employee's duties;
- is assisting a justice of the peace in carrying out the justice's functions;
- is engaged in the lawful service of any court document or in the lawful execution of any process against any property or in making a lawful distress; or
- has done an act in the execution of any duty imposed on him by law and the assault is committed because of such act.[57]

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50 Ibid s 35(4). This increases to 10 years if the person is in company.

51 Ibid s 35(2). This increases to 14 years if the person is in company.

52 Ibid ss 60(3) and (3A).

53 The standard non-parole periods are 3 years for an offence under s 60(2) (assault of a police officer occasioning bodily harm) and 5 years for an offence under s 60(3) (wounding or inflicting grievous bodily harm on a police officer): *Crimes (Sentencing Procedure) Act 1999* (NSW) Div 1A (Standard non-parole periods) Table.

54 A standard non-parole period is defined under s 54A of the *Crimes (Sentencing Procedure) Act 1999* as representing 'the non-parole period … that taking into account only the objective factors affecting the relative seriousness of the offence, is in the middle of the range of seriousness'.

55 *Crimes Act 1900* (NSW) s 60A.

56 Ibid s 60E.

57 *Criminal Code Act 1983* (NT) sch 1 (*Criminal Code*) ss 188(2)(e)–(h).

Other aggravating circumstances include if the person assaulted:

- suffers harm;
- is a female and the offender is a male;
- is under the age of 16 years and the offender is an adult;
- is unable because of infirmity, age, physique, situation or other disability effectually to defend himself or to retaliate;
- is indecently assaulted; or
- is threatened with a firearm or other dangerous or offensive weapon.[58]

The aggravated form of common assault attracts a maximum penalty of 5 years' imprisonment, compared to one year for non-aggravated forms of common assault.

In addition to these provisions, the NT has established a stand-alone criminal offence under section 188A of the Code applying to assaults of *any worker* who is working in the performance of his or her duties, without the need to establish any specific intention. Its *Criminal Code* provision is broad: 'A person who unlawfully assaults a worker who is working in the performance of his or her duties is guilty of an offence'. It defines a worker as someone who 'carries out employment related activities (work) in any lawful capacity, including work as any of the following': an employee, contractor or subcontractor, apprentice or trainee, student gaining work experience, volunteer, self-employed person or 'person appointed under a law in force in the Territory to carry out functions or to hold an office'. The section specifically excludes police and emergency workers. They are the subject of a different offence provision.[59] The same maximum penalties apply as for assaults against police and emergency workers (5 years if no harm suffered, or 7 years in circumstances where the assault has resulted in the victim being harmed).[60]

In introducing the Bill inserting this new section into the NT *Criminal Code*, the Attorney-General and Minister for Justice explained that the definition of worker 'extends further than people who provide a service to the public, such as taxi drivers, paramedics and hospital workers' and that it 'extends protection to all types of lawful workers, recognising that many workers are faced with situations where they are at the mercy of violent people'.[61] The creation of such an offence was considered justified on the basis that: 'Work is a fundamental cornerstone of many people's lives, and all Territorians should be assured when they go to work they will be protected by the law'.[62]

8.4.5 South Australia

In South Australia, section 5AA of the *Criminal Law Consolidation Act 1935* (SA) creates 'aggravated offences' (over the course of five pages) based on factual circumstances that are then picked up in discrete offence provisions (including assault),[63] which themselves impose a higher maximum penalty for the aggravated variant of the particular offence. The relevant circumstances include committing an offence:

- against specified occupations, including police, prison or law enforcement officers, either knowing the victim was acting in the course of official duty; or in retribution for something the offender knows or believes was done by the victim in the course of official duty;[64]
- against a community corrections officer or community youth justice officer (as legislatively defined) knowing the victim to be acting in the course of their official duties;[65]
- knowing that the victim was, at the time of the offence, over the age of 60 years;[66]
- knowing that the victim was, at the time of the offence, in a position of particular vulnerability because of physical disability or cognitive impairment;[67]
- against the person, where the victim was, at the time of the offence:

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58 Ibid ss 188(2)(a)–(d), (k)–(m).

59 Ibid s 189A (Assaults on emergency workers).

60 Ibid s 188A(2).

61 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 4 December 2012, Criminal Code Amendment (Assaults on Workers) Bill 2012 (NT) — Second Reading Speech, 696 (John Elferink, Attorney-General and Minister for Justice).

62 Ibid.

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

64 Ibid s 5AA(1)(c).

65 Ibid s 5AA(1)(ca).

66 Ibid s 5AA(1)(f)

67 Ibid s 5AA(1)(j).

- to the knowledge of the offender, in a position of particular vulnerability because of the nature of his or her occupation or employment;[68]
- engaged in a prescribed occupation or employment (whether on a paid or volunteer basis) and the offender knew the victim was acting in the course of official duties.[69]

Such prescriptions are listed in regulations and include a further extensive raft of definitions.[70]

There are evidentiary provisions, including:

- A person is taken to know a particular fact if the person, knowing of the possibility that it is true, is reckless as to whether it is true or not.[71]
- If a person is charged with an aggravated offence, the circumstances alleged to aggravate the offence must be stated in the instrument of charge.[72]

A jury must make findings, if there are multiple circumstances of aggravation, about which of the aggravating factors have been established.[73] This 'does not prevent a court from taking into account, in the usual way, the circumstances of and surrounding the commission of an offence for the purpose of determining sentence'.[74]

Increased penalties apply to aggravated forms of offences, which vary depending on the nature of the substantive offence charged. For example, in the case of assault, the following maximum penalties apply:

- for an assault where no harm has been caused to another person:
  (a) for a non-aggravated offence (called a 'basic offence'): 2 years' imprisonment;
  (b) for an aggravated offence — except one to which (c) or (d) applies: 3 years' imprisonment;
  (c) for an offence aggravated by the use of, or threatened us of, an offensive weapon: 4 years' imprisonment;
  (d) for an offence aggravated by the circumstances referred to in section 5AA(1)(c), (ca) or (ka) (discussed above), which includes where the victim falls into one of a broad range of occupations: 5 years' imprisonment.[75]
- For an assault causing harm to another person (an offence that replaced the South Australian offence of assault occasioning actual bodily harm):
  (a) for a non-aggravated offence: 3 years' imprisonment;
  (b) for an aggravated offence (except one to which paragraph (c) or (d) applies): 4 years' imprisonment;
  (c) for an offence aggravated by the use of, or a threat to use, an offensive weapon: 5 years' imprisonment;
  (d) for an offence aggravated by the circumstances referred to in section 5AA(1)(c), (ca) or (ka) (committed against victims in particular occupations): 7 years' imprisonment.[76]

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68 Ibid s 5AA(1)(k)(i).

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

70 *Criminal Law Consolidation (General) Regulations 2006* (SA) reg 3A. Occupations prescribed are: emergency work; employment as a person (whether a medical practitioner, nurse, midwife, security officer or otherwise) performing duties in a hospital (including, to avoid doubt, a person providing assistance or services to another person performing duties in a hospital); employment as a person (whether a medical practitioner, nurse, pilot or otherwise) performing duties in the course of retrieval medicine; employment as a medical practitioner or other health practitioner (both within the meaning of the *Health Practitioner Regulation National Law (South Australia)*) attending an out of hours or unscheduled callout, or assessing, stabilising or treating a person at the scene of an accident or other emergency, in a rural area; passenger transport work; police support work; employment as a court security officer; employment as a bailiff appointed under the South Australian *Civil and Administrative Tribunal Act 2013*; employment as a protective security officer within the meaning of the *Protective Security Act 2007*; employment as an inspector within the meaning of the *Animal Welfare Act 1985*. Definitions are extensive and include definitions of an 'accident or emergency department of a hospital', a 'court security officer', an 'emergency', and 'emergency services provider', 'emergency work', 'hospital', 'passenger transport service' and 'passenger transport work'.

71 *Criminal Law Consolidation Act 1935* (SA) s 5AA(2).

72 Ibid s 5AA(3).

73 Ibid s 5AA(4).

74 Ibid s 5AA(6).

75 Ibid s 20(3).

76 Ibid s 20(4).

Following legislative amendments that came into effect on 3 October 2019, a new offence was introduced under section 20AA of the *Criminal Law Consolidation Act 1935* (SA) of causing harm to, or assaulting, certain prescribed emergency workers. Who falls within this definition is discussed in section 8.6.5.

The maximum penalties that apply to this offence range from 15 years' imprisonment for causing harm intentionally[77] down to 5 years for an assault where harm has not been caused either recklessly or intentionally.[78] 'Harm' is defined for the purposes of this section as including harm inflicted by causing human biological material to come into contact with the victim.[79]

During the Second Reading in the Legislative Assembly, the Treasurer identified the need for this new offence on the following basis:

> It must be made absolutely clear that the criminal law is not deficient in terms of what offences are available to be charged and prosecuted. Despite this, a clear message must be sent to both offenders and the courts as to what is an appropriate sentence for someone who harms our front-line emergency services workers. This has been actioned through increased penalties aligning with the position in New South Wales, as requested by the Police Association and the commissioner, and also through secondary sentencing considerations.
>
> The creation of a new offence and increased maxima will better protect police and other emergency services workers while complementing existing laws capturing offences against police and broader assault laws …[80]

8.4.6 Tasmania

Special provisions targeted at assaults on public officers under the *Criminal Code* in Tasmania are more limited. An offence exists under the *Criminal Code* (Tas) of assaulting, resisting or wilfully obstructing any police officer in the due execution of his or her duty, or any other person lawfully assisting, which also applies to the same acts done against any person lawfully arresting, or about to arrest, any person,[81] but this does not extend further to emergency workers or other public officers. Tasmania applies a 21-year maximum penalty to all offences, subject to the provisions of the *Sentencing Act 1997* (Tas) or any other statute providing otherwise.[82]

A separate offence, however, exists under section 34B of the *Police Offences Act 1935* of assault, resist, or wilful obstruct. This offence applies in circumstances where these acts are committed against a police officer acting in the execution of their duty or a person lawfully assisting a police officer in the execution of their duty, or a person lawfully arresting another person, and where committed against a public officer or an emergency service worker acting in the execution of their duty, performing a duty imposed by an Act, or in the exercise of a public duty or authority. The maximum penalty is 50 penalty units, or 2 years' imprisonment, if the victim is a public officer or emergency worker, and 100 penalty units, or 3 years' imprisonment, otherwise. The maximum penalty for common assault in comparison is 20 penalty units, or 12-months' imprisonment, unless the offender committed the offence knowing the victim was pregnant, in which case it increases to 50 penalty units or 2 years.[83]

8.4.7 Victoria

Victoria has established a complex offence and sentencing regime that applies to assaults on emergency workers, youth justice custodial workers and custodial officers.

The offence of assault under section 31 of the *Crimes Act 1958* (Vic) includes an offence of assault, threaten to assault, resist or intentionally obstruct an emergency worker on duty, a youth justice custodial worker on duty, or a custodial officer on duty, knowing or being reckless as to whether the person was an emergency worker, youth justice custodial worker, or custodial officer.[84] It is also an offence to assault someone assisting one of these workers knowing they are rendering assistance to such persons.[85] Other acts caught under this section are assaults or threats to assault another person with intent to commit an indictable offence, and assaults or threats to assault

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77 Ibid s 20AA(1).

78 Ibid s 20AA(3).

79 Ibid s 20AA(6).

80 South Australia, *Parliamentary Debates*, Legislative Council, 4 July 2019, Criminal Law Consolidation (Assaults on Prescribed Emergency Workers) Amendment Bill 2019 — Second Reading, 4055 (Rob Lucas, Treasurer).

81 *Criminal Code Act 1924* (Tas) sch 1 (*Criminal Code*) s 114.

82 Ibid s 389.

83 *Police Offences Act 1935* (Tas) s 35.

84 *Crimes Act 1958* (Vic) s 31(1)(b). All terms are defined for these purposes using the definitions that apply under section 10AA of the *Sentencing Act 1991* (Vic).

85 Ibid s 31(1)(ba).

a person with intent to resist or prevent the lawful apprehension or detention of a person.[86] All forms of this assault carry a maximum penalty of 5 years' imprisonment.

A summary offence equivalent exists under section 51 of the *Summary Offences Act 1966,* carrying a maximum penalty of 60 penalty units, or 6 months' imprisonment.

Section 320A of the *Crimes Act* also applies a higher maximum penalty to the offence of common assault if an offensive weapon or firearm is available to an offender during an assault involving a police officer or a protective services officers, and the victim knows, or is reckless as to whether, the victim is such an officer. For this higher penalty to apply, the offender must be proven to have either allowed the victim to see the weapon (or its shape) or suggested to the victim that they have it readily available and that they knew, or should have known, their conduct would be likely to cause apprehension or fear. The maximum penalty is 10 years if the weapon is an offensive weapon, and 15 years if it is a firearm.

In addition to these offences, the *Sentencing Act 1991* (Vic) creates aggravated forms of offences in circumstances where they are committed against an emergency worker on duty, a youth justice custodial officer on duty, or a custodial officer on duty. This is achieved by requiring a court to set a minimum non-parole period or, alternatively, a minimum sentence of imprisonment or detention unless specific criteria are met — the level of which varies by offence.[87] The offences under the *Crimes Act* to which these provisions apply are:

- causing injury intentionally or recklessly (s 18);
- causing serious injury recklessly (s 17);
- causing serious injury intentionally (s 16);
- causing serious injury recklessly in circumstances of gross violence (s 15B);
- causing serious injury intentionally in circumstances of gross violence (s 15A).

8.4.8 Western Australia

The WA equivalent to section 340 (s 318 of the *Criminal Code* (WA)) establishes an offence of serious assault, which includes the assault of a public officer performing a function of their office or employment (or because of this),[88] and persons acting in aid of that officer as well as other specified categories of workers. The categories of victims captured within this section are discussed in detail in section 8.6.5 below.

As discussed in Chapter 10 of this report, mandatory minimum sentencing provisions apply to those convicted of serious assault where committed against certain classes of public officer, including police, prison officers, youth justice officers, security officers under the *Public Transport Authority Act 2003* (WA), ambulance officers and court security officers, in circumstances where the victim suffers bodily harm.

The maximum penalty that applies to this offence is 7 years, or 10 years if at or immediately before or immediately after the commission of the offence the offender is armed with any dangerous or offensive weapon or instrument or is in company with another person or persons. Temporary amendments that apply for a 12-month period from 4 April 2020 also create an aggravated form of offence if:

> (i) at the commission of the offence the offender knows that he/she has COVID-19; or
>
> (ii) at or immediately before or immediately after the commission of the offence the offender makes a statement or does any other act that creates a belief, suspicion or fear that the offender has COVID-19.[89]

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86 Ibid ss 31(1)(a) and (c).

87 *Sentencing Act 1991* (Vic) s 10AA.

88 *Criminal Code Act Compilation Act 1913* (WA) sch (*Criminal Code*) s 318(1)(d).

89 Ibid s 318(1A).

8.4.9 England and Wales

In 2018, England and Wales introduced an aggravated form of common assault or battery by providing for a higher penalty for this offence where committed against an emergency worker (defined widely to include police, prison officers, people providing fire and rescue services and health services, among others).[90] This doubles the maximum penalty that would otherwise apply in such circumstances from 6 months' imprisonment to 12 months.

At the same time as this reform, a statutory aggravating factor for the purposes of sentencing was introduced that applies when other assaults, including sexual assault, and assault-related offences, are committed against emergency workers. This provision is discussion in detail in section 10.2.2 in Chapter 10.

8.5 Should public officers be treated differently at law?

The Council has been asked to advise whether the current definition of 'public officer' in section 340 of the *Criminal Code* (Qld) should be expanded to recognise other occupations. It has also been asked to consider whether it might be appropriate to target assaults on public officers in the existing section 340, another offence provision or provisions, or through the introduction of a circumstance of aggravation.

Underpinning the questions asked in the Terms of Reference is the threshold question of whether assaults and assault-related offences, where committed against a public officer, should be treated as more serious at law than if the same conduct was committed against private sector workers.

8.5.1 Aggravated assault based on victim status as a public officer

Historically, and in other common law jurisdictions, assaults on police officers and any other person performing a lawful duty have been treated as more serious at law.

It is clear from the analysis above that a number of Australian jurisdictions and other common law jurisdictions have acted to introduce separate offences and/or circumstances of aggravation that increase the penalties that would otherwise apply to an act of assault based on the victim's status as police officer, emergency worker or other type of identified class of public officer.

There are some notable exceptions to this — such as the ACT, which has applied the same penalty for its new offence of assault of a frontline community service provider as applies to the offence of common assault. Some of the penalty enhancements involved are also more modest than others — for example, a 6-month increase for common assault in England and Wales, and 12 months in Tasmania for assault, resist or wilful obstruction of a public officer or emergency service worker under the *Police Offences Act 1935* (Tas).

A common justification for treating assaults on public officers (or particular classes of victims) differently and applying higher penalties to the same criminal conduct when committed against these victims is that these offences are more serious when committed on people performing duties on behalf of the state. As discussed in Chapter 7 of the Issues Paper, determining offence seriousness comprises two key components — harm done by the offence (the 'harmfulness') and the culpability of the offender (the 'wrongfulness'):

> Analytically, the seriousness of criminal conduct has two major components: harm and culpability. (…) Harm refers to the degree of injury done or risked by the act. Culpability refers to the factors of intent, motive, and circumstance that bear on the actor's blameworthiness — for example, whether the act was done with knowledge of its consequences or only in negligent disregard of them, or whether, and to what extent, the actor's criminal conduct was provoked by the victim's own misconduct.[91]

In Chapter 5, we noted the impacts an assault can have on public officers who are assaulted in their workplace.

Apart from individual impacts, which can be experienced by any victim of assault, at an organisational level, an assault on a person at work can result in lost productivity, and the potential to permanently lose a staff member who has had considerable training invested to skill them to perform their duties. This can be a particular concern, for example, in specialised fields like accident and emergency care where there are shortages of skilled professionals.

Of particular relevance to assaults on public officers, there is also potential for assaults on these officers to erode public confidence in government, the justice system and the institutions they represent. In the case of a police

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90 *Assaults on Emergency Workers (Offences) Act 2018* (UK) ss 1 (Common assault and battery) and 3 (Meaning of 'emergency worker').

91 Andrew von Hirsch 'Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and their Rationale' (1983) 74(1) *Journal of Criminal Law and Criminology* 209, 214.

officer who is assaulted, for example, it may undermine public confidence that police are adequately protected from assault, and therefore able to adequately protect others from dangerous individuals.

The Queensland Court of Appeal has recently recognised 'the interest that the community has in the maintenance of an effective police force and the protection of police officers from harm':[92]

> The establishment of a state sanctioned body of police serves a number of important and obvious purposes. One of these purposes is to ensure that the community need not rely upon self-help or upon vigilantism to protect itself against criminal acts. The community does not need to take such measures because some among us have volunteered to undertake this difficult and hazardous duty as members of the Queensland Police Service. There is, therefore, a public interest in ensuring that, so far as laws can do so, police officers are protected against harm in the execution of their duties and that offenders are punished when they harm police.[93]

The public nature of the roles public officers perform and that their duties are performed on behalf of the state is a common justification adopted in many jurisdictions reviewed as increasing the seriousness of an assault. During recent parliamentary debates in England and Wales, the sponsoring Member for a Bill introducing the emergency worker reforms, expressed the rationale for this reform in the following terms:

> I start from a simple premise. An assault on anyone is wrong, but an attack on any emergency worker—whether that is a police constable, a paramedic, an ambulance driver, an accident and emergency doctor or nurse, a fire officer, a prison officer, someone working in search and rescue, or someone working on a lifeboat—is an attack on us all. And when we are all attacked, we all stand firm together.[94]

Similar statements have been made in introducing sentencing reforms in New Zealand, with such assaults described as representing 'an attack on the community and the rule of law'.[95]

While some types of assaults are treated as aggravated when committed against specific classes of victim, it equally has been recognised: 'Equality before the law is a fundamental principle which ensures that individuals are not subject to discrimination in the enjoyment of their legal rights and entitlements'.[96]

The Queensland *Human Rights Act 2019* (Qld) (HRA) has given legislative recognition to the right to equality before the law, and to the equal protection of the law without discrimination, as important human rights. These rights may be limited, provided the limit is 'reasonable and justifiable' with reference to factors that include the nature of the human right, the nature and purpose of the limitation, the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose, whether there are any less restrictive and reasonably available ways to achieve the purpose, and the importance of the purpose of the limitation.

While the HRA does not specifically recognise the human rights of victims of crime, the offence of serious assault, and any reforms that might establish new aggravated forms of assault, where committed against a public officer, or particular classes of officer, engage the right to equal protection of the law because these measures result in a special offence, or form of offence, being established that applies only to victims of assault in certain occupations — namely, police officers and other emergency service workers, corrective services officers and other public officers.

Stakeholder views

The Issues Paper asked respondents to consider the following questions:

1. Should an assault on a person while at work be treated by the law as more serious, less serious, or equally serious as if the same act is committed against someone who is not at work, and why?
2. If an assault is committed on a public officer performing a public duty, should this be treated as more serious, less serious, or as equally serious as if the same act is committed on a person employed in a private capacity (e.g. as a private security officer, or taxi driver) and why?
3. Should the law treat assaults on particular categories of public officer more serious than other categories of public officer, and why?

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92 *R v Patrick (a pseudonym)* [2020] QCA 51, 8 [30] (Sofronoff P, Fraser JA and Boddice J agreeing).

93 Ibid. Similar statements have been made in other jurisdictions with respect to assaults on police. See, for example, the NSW Guideline Judgment, *Attorney-General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (No 2 of 2002)* (2002) 137 A Crim R 196 at [22] and [26].

94 United Kingdom, *Parliamentary Debates*, House of Commons, 20 October 2017, vol 629 (Chris Bryant, Member for Rhondda).

95 New Zealand, *Parliamentary Debates*, House of Representatives, Sentencing (Aggravating Factors) Amendment Bill — First Reading, 12 April 2011, 17, 951 (Judith Collins, Minister for Police).

96 Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (4th ed, 2017) 152 with reference to Article 7 of the Universal Declaration of Human Rights.

Stakeholders were divided in their responses to the above questions. Notably, no stakeholders responded that assaults on workers, public officers or otherwise should be treated as less serious under the law.

Several stakeholders indicated their support for assaults on workers to be treated equally under the law, irrespective of whether these workers were engaged in a private or public capacity, or performing their functions in a frontline, management or support role. For example, the Queensland Council of Unions submitted 'all workers have the right to attend work without being subjected to physical or psychological violence and/or abuse'.[97]

A number of stakeholders supported the view that all victims subject to an assault should be treated equally under the law regardless of whether they were assaulted while working or not. The Independent Education Union, in noting its opposition to the creation of offences that 'create artificial distinctions between individuals', was concerned that: 'distinguishing between different categories of person, by imposing different penalties, is unethical as it implies that some individuals are worth more than others'.[98] The Department of Child Safety, Youth and Women (DCSYW) 'considers all assaults should be treated by the law as equally serious, whether the act is committed against someone at work as a public officer or employed in a private capacity'. However, the department further clarified that, 'assaults on people employed in a private capacity in particular environments or providing specific services, such as residential care facilities, should also be recognised as aggravated forms of assault' like those committed against a public officer. Due to the nature of their work, DCSYW did not believe it was appropriate that penalties for assaults on a child safety officer be higher than those perpetrated against residential care staff.[99]

Both Sisters Inside and the Queensland Law Society (QLS) argued for the repeal of offence provisions that distinguish the severity of an assault based solely on a person's occupation rather than on the harm caused in contrast to the law's treatment of other victims of assault. Sisters Inside submitted that no distinction should be made on this basis as: 'The harm suffered by a public officer is the same as experienced by a civilian exposed to the same offending'.[100] The QLS stated that 'the assessment of the seriousness of an assault, and the weight to be given to the victim's occupation, [should] be matters left to the informed consideration of judges and magistrates'.[101]

However, others suggested there were legitimate justifications for treating assaults on public officers as inherently more serious than those committed on other citizens in a private capacity. For example, the Queensland Catholic Education Council submitted there are:

> strong public policy reasons for treating assaults on public officers as an assault involving aggravating features. The work that is being done by public officers enables the delivery of essential community services and, by the very nature of their work, [they] are subject to wider public exposure.[102]

This perspective was echoed by stakeholders who pointed to the obligation of public officers to comply with duties under the law in the delivery of the functions of their occupations as a distinguishing factor. Queensland Corrective Services (QCS) observed public officers are held to a high standard of accountability due to their obligations under the *Public Sector Ethics Act 1994* (Qld), Code of Conduct for the Queensland Public Service and the HRA.[103] It submitted that given staff 'are expected to work ethically and be accountable for community safety' they 'should be entitled to do so with the strongest protections from harm, ensuring they can come to and go home from work safely'.[104]

The Aboriginal and Torres Strait Islander Legal Service similarly noted:

> the shared attribute of public officers presently protected by section 340 is that they are under the direction and control of government authorities, and therefore obliged to act in accordance with government policy and in accordance with the law. They are also subject to disciplinary regimes which offer a form of recourse if they exceed their powers and/or break the law …
>
> Consequently there is both a level of restraint and accountability on public officers and to that end there is a logic that the frontline public officers subject to direction and control of the state and also subject to obligations towards members of the public should also have special protection under the law from those members of the public.[105]

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97 Submission 16 (Queensland Council of Unions) 2.

98 Submission 13 (Independent Education Union (Queensland and Northern Territory Branch)) 1.

99 Submission 5 (Department of Child Safety, Youth and Women) 1–2.

100 Submission 17 (Sisters Inside) 1.

101 Submission 30 (Queensland Law Society) 5 and see 9 and 12.

102 Submission 2 (Queensland Catholic Education Council) 1.

103 Submission 21 (Queensland Correctional Services) 6.

104 Ibid.

105 Submission 22 (Aboriginal and Torres Strait Islander Legal Service) 3–4.

The Queensland Human Rights Commission observed that corrective services officers, police and other frontline emergency service workers 'often deal with the most complex and challenging people in our community and deserve to undertake their critical duties in a safe working environment'.[106] The common feature of each of these occupational groups is their 'legal obligation to perform duties on behalf of the state that may involve dealing with dangerous people in dangerous situations'.[107] However, the Commission cautioned that treating assaults on these occupational groups as more serious 'will limit rights'[108] and 'there must be a justification, based on the particular risks faced by each occupation selected'.[109]

Legal Aid Queensland submitted: 'there is merit in retaining a specific substantive offence provision of serious assault', and suggested '[the] focus of the offence should be the fact that the victim was a public officer performing a function of office'.[110] It noted: 'Historically, it would seem the policy behind these types of provisions relates to the ability to punish those who do not respect authority where the authority is granted through a public purpose' as well as 'to allow those tasked with a public responsibility to carry out their work'.[111]

The Council's view is discussed in section 8.5.3.

8.5.2 Creation of targeted offences vs circumstances of aggravation

The Terms of Reference ask the Council to consider the most appropriate response to assaults on public officers — including whether these should continue to fall within section 340, form the basis of new offences, or be recognised through circumstances of aggravation.

What are 'circumstances of aggravation'?

Statutory circumstances of aggravation can be applied across existing criminal offences (e.g. common assault, AOBH, wounding, GBH) without creating new specialised offences.

This distinguishes substantive offences with increased maximum penalties by victim occupation, rather than by the criminal conduct involved and resulting harm (still necessary as the basis for the simpliciter offence). The offence charged is the same irrespective of victim status but is more serious, having been committed against a person because of their occupation.

The statutory circumstance of aggravation must be proven beyond reasonable doubt:

> [Circumstance of aggravation] is defined in s 1 of the Code to mean a circumstance whose existence renders an offender is 'liable to a greater punishment' than would apply if the existence of the circumstance is not proved. If the Crown wishes to rely upon such a circumstance upon sentence then it must be charged in the indictment.[112] It must be admitted as part of a guilty plea or found by a jury as part of a guilty verdict. A circumstance of aggravation in the statutory sense operates to provide for a higher maximum penalty if the circumstance is found to exist.[113]

Queensland's *Criminal Code* has existing statutory circumstances of aggravation in various offence provisions that provide for higher maximum penalties. These usually pertain to particular acts or omissions of the offender. Examples are dangerous operation of a motor vehicle, sexual assaults, threats, stalking, fraud, robbery, extortion, burglary and forgery. AOBH is perhaps the most relevant example (being armed or in company).

There are no such circumstances of aggravation present in common assault, GBH, torture or wounding.[114] These offences may be the preferred charges for assaults that section 340 would also cover, because they better reflect the harm caused; yet they do not have specific circumstances of aggravation or aggravating factors that give the same recognition to occupation type that section 340 does.

The WA *Criminal Code*'s GBH offence provision (section 297) has circumstances of aggravation regarding public officers and specified workers as victims harmed while performing their duties. The maximum penalty for the WA

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106 Submission 18 (Queensland Human Rights Commission) 2 [3].

107 Ibid 9.

108 Ibid.

109 Ibid.

110 Submission 29 (Legal Aid Queensland) 5.

111 Ibid.

112 *Criminal Code* (Qld) s 564(2), *Justices Act 1886* (Qld) s 47(4).

113 *R v O'Sullivan; Ex parte Attorney-General (Qld)* [2019] QCA 300, 21 [75] (Sofronoff P, Gotterson JA and Lyons SJA) 25–6 [90].

114 However, the separate organised crime circumstance of aggravation, created by the PSA, which instead adds a cumulative prison term, can apply to each except for common assault.

aggravated offence is 14 years' imprisonment (equal to the maximum for GBH simpliciter in Queensland), increased from 10 years for GBH simpliciter.

A recent example of similar considerations — domestic violence

In Chapter 10, the Council discusses the implementation of the aggravated sentencing factor regarding domestic violence in section 9(10A) of the PSA. That reform came from an initial review recommendation of a 'floating' circumstance of aggravation regarding domestic violence applicable to any offence in the *Criminal Code*, on the basis that it would 'reduce the risk that a crime committed in the context of domestic and family violence is "missed".[115]

Both the government and opposition[116] supported an aggravating sentencing factor over a circumstance of aggravation in the eventual Bill, noting stakeholder advice supporting this. The Attorney-General told Parliament that:

> A circumstance of aggravation increases the maximum penalty for offences. It must be charged by the prosecution and therefore becomes a matter that must be proved beyond reasonable doubt.
>
> Stakeholder responses to the discussion paper acknowledge the inherent complexities of applying a circumstance of aggravation across all criminal offences. One particular limitation of a circumstance of aggravation is that it cannot apply to an offence which already attracts a maximum penalty of life imprisonment.[117] This issue was not canvassed by the task force. While it was not the approach preferred by the task force, there was wide support from stakeholders who responded to the discussion paper for an alternative proposal to amend the *Penalties and Sentences Act 1992* to make provision for domestic and family violence as an aggravating factor on sentence. This amendment is included in the bill.[118]

Discretion, equality, symbolism, acknowledgement — competing issues in recognising certain workers

The use of a stand-alone offence (or offences), or legislated aggravating factors or circumstances of aggravation, which name specific categories of victim or forms of behaviour, even if captured elsewhere under the general criminal law, could be argued to perform an important symbolic function.

This involves statutory recognition of occupation as a factor distinguishing 'eligible complainants' from the rest of the population. It risks tension between the fundamental value of equality before the law and what could arguably be an important symbolic function of recognising certain groups, which could create a strong public statement of society's condemnation (achieving education and awareness) of certain behaviours as applied to the recognised group/s.

This has been justified on the basis that the group in question (e.g. police) carry greater risk than others and act in a way that protects the law and society generally. For example, UK legislation (discussed in section 10.2.2 of Chapter 10) carries a positive requirement that sentencing courts treat assaults on emergency workers as aggravating, and to state in open court that the offence is so aggravated.

The Tasmanian Sentencing Advisory Council (TSAC), in its report on assaults on emergency service workers, noted arguments in favour of this approach included that such offences 'can send a strong public statement of society's condemnation of certain behaviours' and the symbolic function of a law can be 'absolutely and without question sufficient justification for its introduction'.[119]

Arguments against such an approach. raised in the context of an earlier review by the Tasmania Law Reform Institute on racial vilification and racially motivated offences, included that it was not a 'useful or necessary exercise of Parliament's power over citizens to enact criminal laws to serve a "symbolic function"' and '[f]or any additional

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115 Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (Final Report, 28 February 2015) 304.

116 Queensland, *Parliamentary Debates,* Legislative Assembly, 19 April 2016, 1031 (Ian Walker, Member for Mansfield).

117 For instance, *Criminal Code* s 317 (malicious acts) can apply to offending against public officers and carries a maximum penalty of life imprisonment.

118 Queensland, *Parliamentary Debates*, Legislative Assembly, 2 December 2015, 'Criminal Law (Domestic Violence) Amendment Bill (No. 2) — Introduction', 3083 (Yvette D'Ath, Attorney-General and Minister for Justice and Minister for Training and Skills).

119 Sentencing Advisory Council (Tasmania), *Assaults on Emergency Service Workers* (Report No. 2, 2013) 41, citing Tasmania Law Reform Institute, *Racial Vilification and Racially Motivated Offences* (Final Report No. 14, 2011) 30.

restrictions on individual or collective freedom to be justified, their actual rather than their emotive, speculative or "symbolic" benefits must be demonstrated'.[120]

In the context of its own review, TSAC identified the symbolic nature of a separate provision for emergency service workers as 'an important argument in support of its introduction', as such an approach 'acknowledges the community's abhorrence of this type of behaviour and acts to educate members of the public about certain behaviours that are not acceptable'.[121] It consequently recommended that the offence of assault of a public officer be broadened to include an emergency service worker, and that the maximum penalty be increased to 50 penalty units or to imprisonment for a term of two years (or both).[122] This recommendation was accepted by the Tasmanian Government and, as discussed above, reflects the current law.[123]

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

> The labelling effect is important because it reflects the state's explicit message of the role and importance of the police as part of the state. What distinguishes the police officer from other risky professions is that the police represent the state, the community and the law. First, law enforcement is in the interest of the wider public, and condemnation of any interference with the implementation of law and security is therefore justified. Secondly, an attack on a constable is seen as an attack on the Crown, upon which every police officer takes their oath. This is especially true in political demonstrations or riots where officers are attacked just for being 'part of the system'. A strike against an individual officer is therefore of social significance, which goes beyond the individual harm caused. It is a strike against a fundamental institution.[124]

Similar arguments about the need for such provisions are commonly made during parliamentary debates and in explanatory material,[125] and applied equally to the need to establish specific statutory aggravating factors for sentencing purposes.[126]

The COVID-19 pandemic has broadened this issue: quasi criminal health directives (carrying fines for breaches) were created to protect a much broader range of 'essential' workers, balancing a mix of occupational risk and health and economic imperatives.

Queensland's Chief Health Officer issued a direction[127] prohibiting persons from intentionally spitting at, coughing or sneezing on public officials and 'workers', or threatening to do so, in a way that would reasonably be likely to cause apprehension or fear of being exposed to COVID-19. The operation of this directive, and the penalties that apply, are discussed in section 9.3 of Chapter 9. The class of persons to which it applies is discussed in section 8.6.4 (below).

Historical Queensland reviews and outcomes

As discussed in section 8.6.2 (below) and earlier in this chapter, there were large-scale legal reviews of the *Criminal Code*, including section 340, prior to the first set of significant amendments to that section in 1997: a 1992 review (the 'O'Regan Review'),[128] the failed replacement 1995 *Criminal Code*, and the 'Connolly Review' of 1996,[129] which informed the *Criminal Law Amendment Act 1997* (Qld), which itself repealed the unproclaimed replacement Code and made the first major reforms to section 340 since its inception in 1899.

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120 Ibid (references omitted).

121 Ibid.

122 Ibid 47, Recommendation 1(2).

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

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

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

126 See, for example, New Zealand, *Parliamentary Debates*, House of Representatives, 12 September 2012, Sentencing (Aggravating Factors) Amendment Bill — Third Reading, 5193 (Judith Collins, Minister for Justice).

127 The *Protecting Public Officials and Workers (Spitting, Coughing and Sneezing) Direction (No. 3)*, issued under the Chief Health Officer's powers pursuant to the *Public Health Act 2005* (Qld) s 362B. <https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers/protecting-public-officials-and-workers-direction>.

128 O'Regan, Herlihy and Quinn (n 6) 200–1.

129 Connolly et al (n 6).

These reviews reveal cogent arguments against adding further aggravating factors and have influenced the Council in determining its final preference for a broader aggravating sentencing factor model over statutory circumstances of aggravation in offence provisions. The Council's view and recommendations are presented in section 10.2.10.

The Connolly Review's task 'was made very much easier by the O'Regan Committee Report on the one hand and [1995 Code] on the other, both of which have been constantly consulted'.[130] The review recommended no amendment to sections 335, 339 or 340, except maximum penalty increases (which occurred), and made the following comment:

> the [working group] **do not recommend the creation of the aggravated offences** detailed in the 1995 Code. The specific offences created in the 1995 Code **are only some of the more serious aggravating facts which sentencing courts presently can and do take into account** when determining an appropriate sentence. **There are many other serious aggravating circumstances which are not the subject of separate aggravated offences** in the 1995 Code. **In attempting to make a list of these aggravating circumstances, it is inevitable that some serious aggravating circumstances are omitted**. The [working group] believe the better course would be to increase the general maximum penalty for the general offence and allow the sentencing court to take into account on sentence the **particular aggravating circumstances of each given offence.** That is what is recommended.[131]

However, that 1997 Act also included references to victims over 60 and guide dogs, wheelchairs or other remedial devices, taken from the repealed Code and moved by the new Labor Opposition as enabled by an independent Member of Parliament. Then Attorney-General, Denver Beanland, opposed this. His comments show the inherent tension in having an offence with increased penalties for distinct classes of people to the exclusion of the rest of the community. He told Parliament that in his view:

- the current provisions (with 7-year maximum, having been increased from 3 years) had appropriate penalties. If the prosecution was doing its work, those provisions should be adequate to achieve tougher penalties where appropriate 'for offenders assaulting people with disabilities, people who are aged, frail or whatever the situation might be';[132]
- a range of penalties was available, at the courts' discretion, and should stay at the courts' discretion: 'We cannot provide for all circumstances, otherwise we would be forever trying to keep up with them. Circumstances vary with each particular case';[133]
- the Opposition's amendment sought to set out some particular class of victim but would 'introduce more irregularities and create more problems'.[134] It was further criticised on the basis it could lead to confusion.

Stakeholder views — statutory circumstance of aggravation

Generally, most stakeholders who specifically engaged on the questions regarding a statutory circumstance of aggravation and an aggravating sentencing factor preferred the latter (discussed in detail in Chapter 10 at sections 10.2.8 and 10.2.10). However, this was also generally a secondary issue for them, with the threshold position often being support for retaining (or curtailing, or in some cases, repealing) the current form of section 340 — without the need for separate additional offences or circumstances of aggravation to be introduced.

The Queensland Human Rights Commission stated that 'tailored and aggravated offences — depending on the justification provided, may represent a reasonable limitation on rights'.[135]

QCS supported a standalone serious assault offence in combination with circumstances of aggravation, but not an aggravating sentencing factor. It pointed to the 'unique operating environment of corrections, and heightened risks associated with the work environment' as reasons to afford its staff greater protection 'in comparison to an assault, for example section 335 of the *Criminal Code*':[136]

> Assaults against public officers require a separate offence provision to send the clear message denouncing and labelling the behaviour as unacceptable, specifically due to the status of the victim. QCS also supports the symbolic and declarative function a separate provision serves, as recognised by the Tasmanian Sentencing Advisory Council in relation to the Tasmanian provision for emergency services workers in sections 34B(2)–(2A) of the *Police Offences Act 1935* (Tas).

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130 Ibid, cover letter signed by authors.

131 Ibid 69 (emphasis added).

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

133 Ibid 736.

134 Ibid.

135 Submission 18 (Queensland Human Rights Commission) 9 [28].

136 Submission 21 (Queensland Corrective Services) 13.

> QCS supports a standalone offence for serious assault. QCS also supports amendments to include an aggravating circumstance due to the victim being a public officer, noting that the aggravating circumstance would not adequately replace the standalone offence.
>
> In addition to the labelling and symbolic functions, the stand-alone offence currently recognises additional aggravating circumstances public officers may experience when being assaulted. Including risk of assault by bodily fluid or faeces, bodily harm, or a person being, or pretending to be, armed with a dangerous or offensive weapon or instrument.
>
> The additional circumstances of aggravation serve a similar purpose as the stand-alone offence in denouncing and labelling specific conduct as unacceptable towards a public officer. The circumstances of aggravation also provide symbolic and declarative recognition of the specific kinds of aggravated assault a public officer may be subjected to. [137]

The Transport Workers' Union sought, 'where legislatively appropriate, to either widen the definition of "Public Officer" to include private bus drivers and personalised transport operators, or recognise such offences in separate provisions with higher penalties or circumstances of aggravation'.[138]

The Department of Agriculture and Fisheries 'would be content with the removal of the offence provision'[139] on the basis that:

> It is most appropriate to reflect that the victim of an assault is a public officer in either or both of a circumstance of aggravation and an aggravating factor for sentencing purposes … this would provide a sentencing Court with the means to consider the nuances of the circumstances of the assault when imposing a penalty.[140]

The Bar Association of Queensland did not support a circumstance of aggravation (while not opposing an aggravating sentencing factor):[141]

> … If a specific result occurs such as death or grievous bodily harm then those substantive offences can be indicted (grievous bodily harm, murder, manslaughter, etc) and the fact it was on a public officer performing a function of their office would be a factually aggravating circumstance.
>
> [Therefore adding a circumstance of aggravation to such offences] is unnecessary and would elevate offences against public officers (irrespective of the vulnerability of a particular officer) above all other occupations including many medical practitioners, police officers and corrective service officers.[142]

The QLS also preferred an aggravating sentencing factor to a statutory circumstance of aggravation:

> The better approach would be to amend section 9 of the Penalties and Sentences Act to statutorily recognise the aggravating feature of the victim being a public officer. This approach preserves judicial discretion and will minimise the prospect of perverse outcomes stemming from the combination of a broad definition of 'public officer' and higher maximum penalty.[143]

8.5.3 Council's view

The Terms of Reference stipulate that the Council must consider the expectation of the community and government that public officials should not be subjected to assault while carrying out their duties, and the need for public officers to have confidence that the criminal justice system properly reflects the inherent dangers they face in the execution of their duties and the negative impact that assaults can have on themselves, their colleagues, and their families.

As discussed above, responding to assaults on public officers as victims of crime requires a careful balancing to ensure that these expectations are met and recognising the vulnerability to assault inherent in these roles while also respecting the fundamental principle of equality before the law.

The Council considers that there are legitimate public policy reasons for continuing to treat assaults on those performing public functions on behalf of the state, and who play a key role in keeping the community safe, as being in a different category from other assaults, justifying a special targeted response. Assaults on public officers — particularly those in frontline and emergency roles — are *sui generis* (in a unique class of their own) involving those engaged to act on the state's behalf in performing roles that are essential to keeping the community safe. As recognised by those who have legislated in this area, unlike many other employees or private citizens, these are

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137 Ibid 14–15.

138 Submission 12 (Transport Workers' Union) 3.

139 Submission 7 (Department of Agriculture and Fisheries) 5.

140 Ibid.

141 Submission 27 (Bar Association of Queensland) 7.

142 Ibid 6.

143 Submission 30 (Queensland Law Society) 10 and see 7.

people who do not have the choice to leave dangerous or risky situations 'because their jobs require them to protect and to save the lives of others'.[144]

Section 340 is a longstanding provision — having formed part of the original *Criminal Code* when first enacted. In the Council's view there is no need to create new special offence or offences to capture conduct that can be addressed through the simple retention of this existing provision.

The Council's primary concern is that section 340 has been amended over time and that in its current form, its application is too broad — capturing assaults both on victims who are vulnerable due to their occupation or the functions they are performing, and others whose vulnerability arises from their age and/or physical disability. The Council's view is that its scope needs to be more clearly defined and its focus narrowed. The approach proposed, discussed in more detail below, will bring Queensland more closely in line with most other jurisdictions examined, which set out in detail the officers performing functions that warrant this additional layer of protection through the creation of stand-alone offences.

The Council has considered but specifically rejected the alternative approach of establishing the fact that the victim was a public officer assaulted while performing his or her functions, or because of these functions, as a circumstance of aggravation that applies to offences of general application — such as common assault, AOBH, GBH and wounding.

In the Council's view this approach would create an unnecessary layer of complexity to Queensland criminal law that would outweigh any potential advantages. In particular, under such an approach, if the prosecution intends to seek a higher penalty based on there being circumstances of aggravation, these generally must be contained in the charge, with the prosecution carrying the burden of proof of establishing such circumstances existed.[145] A new tiered approach to maximum penalties would need to be established for each offence to which it is to apply, or a standardised approach taken as for Queensland's 'serious organised crime circumstance of aggravation', establishing a set 'tariff' that is to apply for offences committed against the prescribed classes of victim.

The Council's findings presented in Chapter 7 of this report show that the overwhelming majority of assaults on police, corrective services officers and public officers are prosecuted under section 340 of the Code, or its summary offence equivalents. The current maximum penalties that apply to serious assault are also set at a level that provides sentencing courts with a broad scope in setting the appropriate sentence for even the most serious examples of assault. These factors combined suggests there is no legislative 'gap' that needs to be filled.

While the Council does not support the introduction of statutory circumstances of aggravation, or penalty enhancement provisions as these are sometimes known, it considers there is value in introducing an aggravating factor for sentencing purposes for those who are at higher vulnerability of assault due to their role in delivering services to the public. The Council's proposals and its rationale are discussed in Chapter 10.

Recommendation 1: Retention of section 340

Section 340 of the *Criminal Code* should be retained and redrafted to simplify its operation and narrow its focus to assaults on frontline and emergency workers while performing a function of their office, or because of this.

Recommendation 2: Statutory circumstances of aggravation

Statutory circumstances of aggravation regarding assaults of frontline and emergency workers because of their occupation, housed in current offence provisions or separately in the *Criminal Code*, should not be created.

8.6 Victim categories under section 340

8.6.1 Current position

As discussed earlier in section 8.3.2 of this chapter, the current section 340 applies to assaults on a number of different victim classes including:

- any person, where committed with a specific intent (e.g. to commit a crime, or to resist or prevent lawful arrest or detention) (s 340(1)(a));

144 New Zealand, *Parliamentary Debates*, 12 September 2012, Sentencing (Aggravating Factors) Amendment Bill — Third Reading, 5193–4 (Judith Collins, Minister for Justice).

145 See, for example, *Criminal Code* (NT) s 174H (Procedure for proving aggravated offence); *Criminal Law Consolidation Act 1935* (SA) s 5AA(3).

- police officers acting in the execution of their duties, or any person acting in aid of a police officer while so acting (s 340(1)(b));
- any person performing, or because they have performed, a duty imposed on them by law (ss 340(1)(c)–(d));
- public officers (s 340(2AA);
- working corrective services officers, where assaulted by a prisoner (s 340(2));
- persons aged 60 years or more (s 340(1)(g)); and
- persons who rely on a guide, hearing or assistance dog, wheelchair or other remedial device (s 340(1)(h)).

The Council's analysis of the occupation of victims caught under these different subsections shows there is substantial overlap in the application of provisions contained within section 340 to specific victim classes. For example, assaults of police officers are most commonly charged under 340(1)(b), but are also charged under 340(1)(a), (c), (d) and (2AA).

The Council has been asked under the Terms of Reference for its advice about whether the definition of a 'public officer' in section 340 should be expanded to recognise other occupations, including public transport drivers (e.g. bus drivers and train drivers). It has also been asked whether assaults on police and other frontline emergency service workers, corrective services officers and other public officers should continue to come within scope of this section or, alternatively, targeted in a separate provision or provisions, or through circumstances of aggravation.

The current definition of 'public officer' in section 340 of the *Criminal Code* is inclusive. It includes:

- a member, officer or employee of a service established for a public purpose under an Act (with the example provided of the Queensland Ambulance Service established under the *Ambulance Service Act 1991* (Qld));
- a health service employee under the *Hospital and Health Boards Act 2011* (Qld);
- an authorised officer under the *Child Protection Act 1999* (Qld);[146] and
- a transit officer under the *Transport Operations (Passenger Transport) Act 1994* (Qld).[147]

Section 1 of the *Criminal Code* expands on the offence-specific definition by providing an exhaustive definition of 'public officer' as meaning:

> a person other than a judicial officer, whether or not the person is remunerated—
>
> (a) discharging a duty imposed under an Act or of a public nature; or
>
> (b) holding officer under or employed by the Crown;
>
> and includes, whether or not the person is remunerated—
>
> (c) a person employed to execute any process of a court; and
>
> (d) a public service employee; and
>
> (e) a person appointed or employed under any of the following Acts—
>
> (i) the *Police Service Administration Act 1990*;
>
> (ii) the *Transport Infrastructure Act 1994*;
>
> (iii) the *State Buildings Protective Security Act 1983*; and
>
> (f) a member, officer, or employee of an authority, board, corporation, commission, local government, council, committee or other similar body established for a public purpose under an Act.

In its current form, the inter-relationship between the definition contained in section 340 and the definition contained in section 1 of the *Criminal Code* has the potential to cause confusion about who is and who is not covered by the serious assault provisions under section 340.

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

147 Transit officers are appointed by the chief executive under the *Transport Operations (Passenger Transport) Act 1994* (Qld) s 111(3) and can include public service employees, employees of rail operators and managers that are rail government entities; and an employee of the Authority (established under the *Queensland Rail Transit Authority Act 2013* (Qld) s 6).

8.6.2 A history of the *Criminal Code* definitions

The exhaustive definition of a 'public officer' was inserted by the *Criminal Law Amendment Act* (Qld) in 1997[148] — the only explanation regarding the need for the new definition being that it was 'relevant to the reforms' contained in the Bill.[149]

In particular, prior to the 1997 reforms, the offence of official corruption under section 87 of the *Criminal Code* was restricted to a person 'employed in the public service, or being the holder of a public office', and while a number of other offences included the term 'public officer' in their section heading, they were in practice restricted in application to public servants through the wording of the offence provisions themselves.[150]

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

In his second reading speech explaining the need for these amendments, then Attorney-General Dean Wells referred to Chapter 4 of the Bill as dealing with abuse of office by a public officer, making particular comment that: 'The offence no longer just covers officers of the public service but is extended to include all statutory office holders, from Ministers of the Crown to clerks in local authorities'.[151] The intention to broaden the application of who was captured by this new form of offence (and amendments that followed in later years) seems to have been the main driver for the introduction of the new definition.[152]

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

> Subclause (4) inserts a new subsection (2AA) to apply to assaults on public officers performing a function of their office or employment. The term 'public officer' is defined in section 1 of the Code. That definition includes a person, other than a judicial officer, discharging a duty of a public nature or executing any process of a court. Therefore, persons protected under current 340(1)(c) and (d) will continue to fall under the provision. Subclause (5) inserts into section 340 an inclusive definition of 'public officer' to ensure assaults on emergency services personnel, health service employees and child safety officers (an authorised officer appointed under section 149 of the *Child Protection Act 1999* would not necessarily be a public service employee) are captured by the provision.[153]

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

As a general principle of statutory interpretation in Queensland, a definition in or applying to an Act applies to the entire Act.[154] Generally, where a legislative definition is expressed in a provision to 'include' a concept, this does not displace another legislative definition, unless the included concept is inconsistent with a concept in the other definition.[155] Any displacement generally occurs only to the extent of any inconsistency.[156]

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

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

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

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

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

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

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

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

156 Ibid.

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

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

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

The approach under the *Criminal Code* is in contrast to that recently adopted for the purposes of the HRA. Section 10 of the HRA sets out specific criteria for determining if a function is 'of a public nature' for the purposes of the Act. In accordance with the *Acts Interpretation Act 1954* (Qld), a 'function' includes a 'duty'.[157]

Relevant matters to be considered include:

(a) whether the function is conferred on the entity under a statutory provision;

(b) whether the function is connected to or generally identified with functions of government;

(c) whether the function is of a regulatory nature;

(d) whether the entity is publicly funded to perform the function; and

(e) whether the entity is a government owned corporation.

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

(a) the operation of a corrective services facility under the *Corrective Services Act 2006* or another place of detention;

(b) the provision of any of the following—

(i) emergency services;

(ii) public health services;

(iii) public disability services;

(iv) public education, including public tertiary education and public vocational education;

(v) public transport;

(vi) a housing service by a funded provider or the State under the *Housing Act 2003*.

The phrase 'of a public nature' is applied in the context of defining what a 'public entity' is for the purposes of the HRA[158] which, in addition to other entities expressly referred to in the definition (such as public service employees, police, and local government employees), includes: 'an entity whose functions are, or include, functions of a public nature when it is performing the functions for the State or a public entity (whether under contract or otherwise)'.[159] The following (converse) example appears directly below this provision:

> *Example of an entity not performing functions of a public nature for the State—*
>
> A non-State school is not a public entity merely because it performs functions of a public nature in educating students because it is not doing so for the State.[160]

8.6.4 Responding to COVID-19 — protecting workers from infection

On 27 April 2020, Queensland's Chief Medical Officer issued a direction prohibiting persons from intentionally spitting, coughing or sneezing on a public official or threatening to do so.[161] The *Protecting Public Officials and*

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

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

159 Ibid s 9(1)(h). This applies also to a person, not otherwise mentioned in paragraphs (a)– (h) who is a staff member or executive officer of a public entity: s 9(1)(i).

160 Ibid s 9(1)(h) — example.

161 It has since been superseded by the *Protecting Public Officials and Workers (Spitting, Coughing and Sneezing Direction (No. 3)* on 15 May 2020.

Workers (Spitting, Coughing and Sneezing) Direction was introduced in response to concern about transmission of the recently emerged COVID-19 virus to public officials and frontline workers via these behaviours.[162] It is discussed in more detail in Chapter 9. The most recent iteration of the Direction provides the following definition for the occupations identified for protection:

> For the purposes of this Public Health Direction:
>
> 5. Health worker means—
>
> a. an ambulance officer under the *Ambulance Service Act 1991*;
>
> b. a health service employee under the *Hospital and Health Boards Act 2011*;
>
> c. a registered health practitioner or a student under the Health Practitioner Regulation National Law;
>
> d. a member of staff of a private health facility within the meaning of the *Private Health Facilities Act 1999*;
>
> e. an allied health professional; or
>
> f. a person who works in a pharmacy or on other premises at which a registered health practitioner routinely practises the practitioner's profession.
>
> 6. Public official means—
>
> a. a health worker;
>
> b. a police officer;
>
> c. a fire service officer under the *Fire and Emergency Services Act 1990*;
>
> d. an emergency officer under the *Public Health Act 2005*;
>
> e. a teacher under the Education (Queensland College of Teachers) Act 2005;
>
> f. a corrective services officer under the *Corrective Services Act 2006*;
>
> g. a youth justice staff member under the *Youth Justice Act 1992*;
>
> h. a local government employee or a local government worker under the *Local Government Act 2009*;
>
> i. a council employee or a council worker under the *City of Brisbane Act 2010*;
>
> j. another person exercising public functions under a law of Queensland;
>
> k. an Immigration and Border Protection worker within the meaning of the *Australian Border Force Act 2015* of the Commonwealth; or
>
> l. a person employed or otherwise engaged by the Commonwealth Department of Health.
>
> 7. Worker includes, without limitation—
>
> a. a retail worker;
>
> b. a person who works at an airport;
>
> c. a person who works for an electricity, gas, water or other utility company;
>
> d. a person who works in the transport industry or a transport-related industry; and
>
> e. a member of the Australian Defence Force.
>
> *Note — Examples of public officials and workers include hospital staff, bus drivers, train drivers, ferry deckhands, taxi drivers, ride share drivers, food delivery workers, security guards, electricity, gas and water meter readers and postal delivery staff (including persons working for an entity under a contract, directly or indirectly, on behalf of the Queensland Government).*[163]

The class of persons the Direction protects is a 'public official' and 'another worker while the worker is … at the worker's place of work, or … travelling to or from that place of work'. It recognises that a worker's place of work may be their residential premises by excluding 'any part of the premises used solely for residential purposes'.

The relevant definitions are extensive, can overlap, include some Commonwealth positions and are arguably redundant in the sense that at its base, the Direction applies to conduct directed at a 'worker' then defined to include, 'without limitation' other types of specified workers.

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162 Ibid.

163 Ibid.

8.6.5 Approach of other jurisdictions

Other Australian jurisdictions have approached the sentencing of perpetrators of assault against certain occupational groups in various ways. Broadly, these differences reflect the occupational groups they have singled out for special treatment, in turn reflecting the cultural values of the state or territory to which they apply. The terminology used to describe these protected workers also varies across jurisdictions.

The WA equivalent to section 340 (s 318 of the WA *Criminal Code*) establishes an offence of assaulting a public officer performing a function of their office or employment (or because of this),[164] but:

- there is no separate definition of a 'public officer' set out in the offence provision;[165]
- the definition of a 'public officer' that appears in WA section 1 does not refer to a person 'discharging a duty … of a public nature' but rather to 'a person exercising authority under a written law'[166] [this is similar to the wording of sections 340(1)(c) and (d) of the Queensland *Criminal Code* (assault of a person while performing, or because the person has performed, 'a duty imposed on the person by law')];
- while there is a separate offence (under s 318(1)(e)) of assaulting *any person* performing a function of a public nature, or on account of this, this is limited to a person performing functions of a public nature 'conferred on [the person] by law'.

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

> **318. Serious assault**
>
> (1) Any person who—
>
> (d) assaults a public officer who is performing a function of his office or employment or on account of his being such an officer or his performance of such a function; or
>
> (e) assaults any person who is performing a function of a public nature conferred on him by law or on account of his performance of such a function; or
>
> (f) assaults any person who is acting in aid of a public officer or other person referred to in paragraph (d) or (e) or on account of his having so acted; or
>
> (g) assaults the driver or person operating or in charge of—
>
> a vehicle travelling on a railway; or
>
> a ferry; or
>
> a passenger transport vehicle as defined in the *Transport (Road Passenger Services) Act 2018* section 4(1);[167] or

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

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

166 Ibid. 'Public officer' is defined under s 1 to mean any of the following: (a) a police officer; (aa) a Minister of the Crown; (ab) a Parliamentary Secretary appointed under *Constitution Acts Amendment Act 1899* (WA) s 44A; (ac) a member of either House of Parliament; (ad) a person exercising authority under a written law; (b) a person authorised under a written law to execute or serve any process of a court or tribunal; (c) a public service officer or employee within the meaning of the *Public Sector Management Act 1994* (WA); (ca) a person who holds a permit to do high-level security work as defined in the *Court Security and Custodial Services Act 1999* (WA); (cb) a person who holds a permit to do high-level security work as defined in the *Prisons Act 1981* (WA); (d) a member, officer or employee of any authority, board, corporation, commission, local government, council of a local government, council or committee or similar body established under a written law; (e) any other person holding office under, or employed by, the State of Western Australia, whether for remuneration or not.

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

(h) assaults—

an ambulance officer; or

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

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

who is performing his or her duties as such; or

(i) assaults a person who—

is working in a hospital; or

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

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

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

is guilty of a crime.

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

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

The treatment of these categories of victim, however, is different for the purposes of applying the mandatory minimum sentencing provisions. These provisions are confined in their application to certain occupational groups only in circumstances where the victim has suffered bodily harm. For example, they do not apply to assaults of public transport drivers under section 318(1)(g), fire and emergency services staff under sections 318(1)h)(ii)–(iii), or those working in a hospital or providing health services to the public under section 318(1)(i), which do not meet the definition of 'prescribed circumstances' for the purposes of these subsections.[168]

In comparison, as discussed in section 8.4.5 above, the South Australian section 5AA(1) of the *Criminal Law Consolidation Act 1935* (SA) sets out circumstances of aggravation that apply across specified general criminal offences, including assault,[169] creating an aggravated form of assault. The aggravating circumstances, which result in a higher maximum penalty being applied if committed in these circumstances, apply in circumstances including that:

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

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

(ka) the victim of the offence was at the time of the offence engaged in a prescribed occupation or employment (whether on a paid or volunteer basis) and the offender committed the offence knowing the victim to be acting in the course of the victim's official duties.[170]

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

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

170 Ibid ss 5AA(1)(c), (ca) and (ka).

Occupations and employment prescribed for the purposes of these provisions are:[171]

(a) emergency work;[172]

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

(c) employment as a person (whether a medical practitioner, nurse, pilot or otherwise) performing duties in the course of retrieval medicine;[173]

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

(e) passenger transport work;[174]

(f) police support work;[175]

(g) employment as a court security officer;[176]

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

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

(j) employment as an inspector within the meaning of the *Animal Welfare Act 1985*.[177]

For the purposes of the legislative amendments that came into effect on 3 October 2019, which establish a new offence of causing harm to, or assaulting, certain prescribed emergency workers,[178] a 'prescribed emergency worker' is defined as:

(a) a police officer; or

(b) a prison officer; or

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

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

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171 *Criminal Law Consolidation (General) Regulations 2006* (SA) r 3A(1).

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

173 'Retrieval medicine means the assessment, stabilisation and transportation to hospital of patients with severe injury or critical illness (other than by a member of SA Ambulance Service Inc)': Ibid.

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

175 'Police support work' means work consisting of the provision of assistance or services to South Australia Police (and includes, to avoid doubt, the provision of assistance or services to a member of the public who is being assisted, or seeking to be assisted, by South Australia Police)': Ibid.

176 'Court security officer means a sheriff, deputy sheriff, sheriff's officer or security officer within the meaning of the *Sheriff's Act 1978*': Ibid.

177 'Inspector means (a) a police officer; or (c) a person holding an appointment as an inspector under Part 5 [of this Act]': *Animal Welfare Act 1985* (SA) s 3.

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

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

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

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

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

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

(j) a law enforcement officer; or

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

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

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

whether acting in a paid or voluntary capacity, but does not include a person, or person of a class, declared by the regulations to be excluded from the ambit of this definition.[179]

NSW identifies police officers, law enforcement officers,[180] and members of school staff[181] under specific provisions in the *Crimes Act 1900* (NSW). The occupational groups identified are supplemented by the 'aggravating factors' provision under section 21A(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) which lists the victim's status as a 'police officer, emergency service worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker, or other public official' as being an aggravating factor if the offence arose because of their occupation or voluntary work. The victim's vulnerability because of their geographical location or because of their occupation (e.g. a person other than a health worker working in a hospital, taxi driver, bus driver, or other public transport worker, bank teller or service station attendant) further expands the list of occupational groups considered to be subject to 'aggravating factors'.

In addition to an offence that applies to assaults committed on *any* worker who is working in the performance of his or her duties,[182] as discussed in section 8.4.4 above, the NT recognises assaults on emergency workers under a separate provision in its *Criminal Code*. Under section 189A, an emergency worker is defined as encompassing:

(a) a member of the Northern Territory Fire and Rescue Service established under section 5(1) of the *Fire and Emergency Act*;

(b) a member of the Northern Territory Emergency Service as defined in section 8 of the *Emergency Management Act*;

(c) an ambulance officer or paramedic employed or engaged in providing ambulance services;

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179 Ibid s 20AA(9).

180 'Law enforcement officer' is defined as a police officer, the Commissioner for the Independent Commission Against Corruption, the Commissioner or an officer for the Police Integrity Commission, the Commissioner or member of staff of the New South Wales Crime Commission, the Commissioner of Corrective Services, governors of Corrective Services, correctional officers, probation officers, parole officers, an officer of the Department of Juvenile Justice, a crown prosecutor or acting crown prosecutor, a legal practitioner employed as a member of staff of the Director of Public Prosecutions, a sheriff 's officer, or a recognised law enforcement officer within the meaning of the *Police Act 1990*, or a special constable within the meaning of s 82L of the *Police Act 1990*, or an officer of an approved charitable organisation, within the meaning of *Prevention of Cruelty to Animals Act 1979,* who performs investigation, confiscation or other law enforcement function: *Crimes Act 1900* (NSW) s 60AA.

181 Ibid s 60E.

182 *Criminal Code* (NT) s 188A. An offence exists under the Queensland *Criminal Code* of assault in interference with freedom or trade or work (s 346), which is constituted by the act of hindering or preventing a person from working at or exercising their lawful trade, business or occupation, or from buying, selling or otherwise dealing with any property intended for sale, but in this case it must be proven the accused person acted with the requisite intention. The closest equivalent to the NT offence may therefore be the categories of serious assault that fall within sections 340(1)(c) and 340(1)(d) of the *Criminal Code* which are constituted by an unlawful assault on 'any person while the person is performing a duty imposed on the person by law' or 'because the person has performed a duty imposed on the person by law'. The definition of a 'public officer', who are also expressly protected under section 340(2AA), further extends the provisions of section 340 to a person 'discharging a duty ... of a public nature'. To the extent the duties imposed on a worker are 'imposed by law' and/or 'of a public nature', the same protections that apply to police, corrections officers and other named categories of 'public officer' apply to other workers.

(d) a medical practitioner or a health practitioner, as defined in the Health Practitioner Regulation National Law:

(i) accompanying or assisting a person mentioned in paragraph (c); or

(ii) attending a situation in the absence or unavailability of a person mentioned in paragraph (c).[183]

In the Explanatory Notes explaining the purpose of this section, the rationale behind including medical practitioners and health practitioners was described as being to ensure that they were provided with the same protection as ambulance officers and paramedics in circumstances where formal ambulance services were not available due to remoteness.[184]

In 2014, Victoria introduced a mandatory (or presumptive) minimum term of imprisonment of 6 months, which applies in circumstances where a person, without lawful excuse, has intentionally or recklessly caused injury to an emergency worker on duty, a custodial officer on duty or a youth justice custodial officer on duty in circumstances where the offender knew or was reckless as to whether the victim was such a person.[185]

In its current form, section 10AA(8) of the *Sentencing Act 1991* (Vic) defines 'emergency worker' as meaning:

(a) a police officer or protective services officer within the meaning of the *Victoria Police Act 2013*; or

(b) an operational staff member within the meaning of the *Ambulance Services Act 1986*; or

(c) a person employed or engaged to provide, or support the provision of, emergency treatment to patients in a hospital; or

(d) a person employed by Fire Rescue Victoria established under the *Fire Rescue Victoria Act 1958* or a member of a fire or emergency service unit established under that Act; or

(e) an officer or employee of the Country Fire Authority under the *Country Fire Authority Act 1958*; or

(f) an officer or member of a brigade under the *Country Fire Authority Act 1958*, whether a part-time officer or member, a permanent officer or member or a volunteer officer or member within the meaning of that Act; or

(g) a casual fire-fighter within the meaning of Part V of the *Country Fire Authority Act 1958*; or

(h) a volunteer auxiliary worker appointed under section 17A of the *Country Fire Authority Act 1958*; or

(i) a person with emergency response duties employed in the Department of Environment, Land, Water and Planning or the Department of Transport or the Department of Jobs, Precincts and Regions; or

(j) a registered member or probationary member within the meaning of the *Victoria State Emergency Service Act 2005* or an employee in the Victoria State Emergency Service; or

(k) a volunteer emergency worker within the meaning of the *Emergency Management Act 1986*; or

(l) any other person or body—

(i) required or permitted under the terms of their employment by, or contract for services with, the Crown or a government agency to respond (within the meaning of the *Emergency Management Act 2013*) to an emergency (within the meaning of that Act); or

(ii) engaged by the Crown or a government agency to provide services or perform work in relation to a particular emergency; or

(m) any other person or body who—

(i) is employed or engaged in another State or a Territory or by the Commonwealth to perform functions of a similar kind to those referred to in any other paragraph of this definition; and

(ii) is on duty in Victoria;

hospital means a public hospital, private hospital, denominational hospital or day procedure centre within the meaning of the *Health Services Act 1988*;[186]

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183 *Criminal Code* (NT) s 187(2).

184 Explanatory Statement, Criminal Code Amendment Bill 2018 (NT) 3, cl 5.

185 *Crimes Act 1958* (Vic) s 18; *Sentencing Act 1991* (Vic) ss 3 (definition of 'category 1 offence' — which includes an offence against s 18 of the *Crimes Act 1958* (Vic) if the victim falls into one of the identified categories of worker and the offender knew or was reckless as to this fact (para (cc)); 5(2G) (requirement to impose a custodial order for a category 1 offence); and 10AA(4) (requirement to impose a term of imprisonment of not less than 6 months unless the court finds a special reason exists).

186 *Sentencing Act 1991* (Vic) s 10AA(8).

On 21 May 2020, the ACT Legislative Assembly passed the Crimes (Protection of Frontline Community Service Providers) Bill 2019, which inserted 26A and 26B into the *Crimes Act 1900* (ACT).[187] The Bill introduced the new offence of assault of a frontline community service provider into the *Crimes Act 1990* (ACT).

A 'frontline community service provider' is defined to mean:

(a) a police officer; or

(b) a protective service officer [meaning a person in relation to a declaration under the *Australian Federal Police Act 1979* (Cth) s 40EA is in force]; or

(c) a corrections worker [meaning a corrections officer, or an interstate escort officer, exercising a function under the *Corrections Management Act 2007* (ACT)]; or

(d) a member of an emergency service.[188]

A 'member of an emergency service' is defined with reference to the definition in the *Emergencies Act 2004* (ACT) and includes:

- a person operating in the ACT in accordance with a cooperative arrangement under the *Emergencies Act 2004*, section 176; and
- a person employed by the ACT Emergency Services Agency; and
- a volunteer assisting the ACT Emergency Services Agency.[189]

An 'emergency service' under the *Emergencies Act 2004* (ACT) means the ambulance service, the fire and rescue service, the rural fire service or the SES.[190]

8.6.6 Stakeholder views — definition of 'public officer'

Questions 6 and 7 of the Council's Issues Paper asked:

6. Who should be captured within the definition of a 'public officer' and how should this be defined? Are the current definitions under sections 1 and 340 of the *Criminal Code* sufficiently clear, or are they in need of reform? For example:

    a. Should the definition of 'public officer' in section 340 of the *Criminal Code* be expanded to expressly recognise other occupations, including public transport workers (e.g. bus drivers and train drivers) and public transport workers?

    b. Should people employed or engaged in another state or territory or by the Commonwealth to perform functions of a similar kind to Queensland public officers who are on duty in Queensland, also be expressly protected under section 340?

7. Should assaults on people employed in other occupations in a private capacity, working in particular environments (e.g. hospitals, schools or aged care facilities) or providing specific types of services (e.g. health care providers or teachers) also be recognised as aggravated forms of assault? For example:

    a. by recognising a separate category of victim under section 340 of the Criminal Code — either with, or without, providing for additional aggravating circumstances (e.g. spitting, biting, throwing bodily fluids, causing bodily harm, being armed) carrying a higher maximum penalty;

    b. by stating this as a circumstance of aggravation for sentencing purposes under section 9 of the *Penalties and Sentences Act 1992* (Qld);

    c. other?

The submissions received by the Council indicated there was an underlying need to clarify the scope of the current definition of 'public officer'. Submissions received from QCS and the Bar Association both indicated the current definition was unclear and would benefit from being made 'simpler, less cumbersome' and therefore more 'accessible and understandable to the public'.[191] The QLS noted the interaction of the two definitions of 'public officer' contained in the *Criminal Code* 'creates needless uncertainty about the roles and people who may or may not be victims of an offence for the purposes of section 340'.[192]

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187 The Bill was originally introduced to the Legislative Assembly under the title Crimes (Protection of Police, Firefighters and Paramedics) Amendment Bill 2019.

188 *Crimes Act 1900* (ACT) s 26A(5).

189 Ibid.

190 *Emergencies Act 2004* (ACT), dictionary.

191 Submission 27 (Bar Association of Queensland) 5.

192 Submission 30 (Queensland Law Society) 6.

The Queensland Human Rights Commission was of the view that: 'if certain offences are to carry higher penalties, the law must be clear about the definition of the workers covered'.[193] It submitted to justify these higher penalties, 'there must be a justification based on the particular risks faced by each occupation selected for increased penalties, rather than a blanket approach'.[194] It identified as a 'common feature' of the frontline workers under consideration as part of the review that they have 'a legal obligation to perform duties on behalf of the state that may involve dealing with dangerous people in dangerous situations'.[195]

Significant input was received from stakeholders regarding the form and occupational groups that should be included in a refined section 340. The views expressed generally reflect an expectation that the important work that public-facing roles across various sectors delivering services to the community deserve recognition and validation of the risk of assault that workers place themselves in to perform these roles. Of note, submissions did not generally advocate for a distinction to be drawn between the public and private sector. Rather there was a tendency to raise concern about ensuring the equal application of the law for private sector workers who they observed as being engaged in delivering essentially the same function as public sector workers and therefore should be afforded the same protections under the law.

For example, the Queensland Catholic Education Commission submitted:

> Catholic **schools and kindergartens** deliver education to a significant portion of Queensland children across all regions of the State, thereby performing a vital public function. Given this, although the schools and kindergartens are operated by non-government entities, it would be appropriate for their staff to be classified under an expanded definition of 'public officer' for the purpose of establishing an applicable penalty and sentencing framework that covers all staff working in education facilities. This would be in recognition that the staff are in essence performing the role of delivering an essential public service to the broader community, and therefore should attract similar protections to staff undertaking comparable functions within government entities … These roles require dealing extensively with not only students but parents, carers and the general public, and unfortunately is a small number of cases these interactions may expose them to risk of threats or actual physical violence.'[196]

A similar perspective was offered by the Transport Workers' Union:

> We assert that bus drivers and personalised transport workers should be captured within the definition of 'public officer' and the definition of 'public officer' in section 340 of the Criminal Code be expanded to expressly recognise other occupations, including **public transport drivers** (e.g. bus drivers and train drivers) and assaults on people employed in other occupations in a private capacity, working in particular environments or providing specific types of services (i.e. privately employed bus drivers and other transport workers, and personalised transport drivers) should also be recognised as aggravated forms of assault'[197]

The Australasian Railway Association indicated support for penalties for people who assault **public transport staff** being brought into line with penalties for those who assault police and emergency services personnel stating:

> COVID-19 has demonstrated the essential service that public transport provides. Public transport staff continued to work throughout COVID-19 to ensure the ongoing operation of transport networks to support the movement of essential workers. These individuals deserve to go to work and return home safely. Heightened penalties for those who assault public transport staff, supported with a public awareness campaign of the change will help provide a deterrent to individuals who may otherwise mis-treat public transport staff.'[198]

QCS was concerned to ensure that any reforms 'also cover **any contracted service providers and Queensland Health staff** working in a corrective services facility',[199] noting:

> QCS engages a range of non-government organisations to deliver programs and services in corrective services facilities, both in custody and the community. This includes psychologists, re-entry service providers and religious visitors. These people are also performing duties on behalf of the government and in the interest of the community, rather than seeking to promote private interests.[200]

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193 Submission 18 (Queensland Human Rights Commission) 9 [31].

194 Ibid 9 [32].

195 Ibid 9 [33].

196 Submission 2 (Queensland Catholic Education Commission) 1–2.

197 Submission 12 (Transport Workers' Union) 12.

198 Submission 15 (Australian Railway Association) 1.

199 Submission 21 (Queensland Corrective Services) 12.

200 Ibid 13.

It submitted:

> Given the unique operating environment of corrections, and heightened risks associated with the work environment, assaults on anyone working in a corrective service facility should be recognised as an aggravated form of assault in comparison to an assault.[201]

Submissions consistently reflected acknowledgement that functions of a public nature are delivered in a broad range of settings by both public and private entities. The Queensland Nurses and Midwives' Union reiterated the position from their preliminary submission requesting the Council to consider coverage of all **healthcare workers** regardless of whether they work in public or private health facilities under section 340.[202] This was echoed in the preliminary submission by Queensland Health in which they stated '**the safety of all people in healthcare settings is of equal importance whether that person be in a hospital, a clinic, an aged care facility, a prison or in the community**' and should 'be treated with equal importance in any sentencing regime'.[203]

Concern for the inclusion of non-departmental staff engaged by the department to deliver services was raised by the Department of Housing and Public Works:

> DHPW considers the broader definition of 'public officer' [should] be further expanded to include non-departmental staff who are engaged in DHPW through an employment agency, as well as contractors, where it would be reasonable for the public to identify them as performing works for departments and agencies of the State of Queensland. The reason for this is that agency staff and contractors are often used by DHPW to carry out its activities.[204]

DCSYW suggested that a separate category of worker could be inserted under section 340 of the *Criminal Code* recognising people providing a public service while working in a private capacity.[205]

Queensland Fire and Emergency Services proposed the definition of a 'public officer' should be reformed to acknowledge **volunteers,** given the important services provided to Queensland communities by the Rural Fire Service, State Emergency Service, and other volunteers.[206]

Several submissions highlighted the context in which the roles of particular occupational groups leave them vulnerable to a heightened risk of assault while in the performance of their duties. The risk arose particularly in circumstances where the occupational group is compelled under law to engage with members of the community, sometimes in volatile situations.

The Queensland Teachers' Union indicated the 'unique position' of **state schools** in being compelled to create and maintain long-term relationships with students and/or their family members/carers due to the legal obligations placed both on the school to enrol and the parent/carers to maintain the enrolment of students of school age in an approved education program.[207]

QCS supported special provisions continuing to apply to **corrective service officers**, noting they do not get to choose who they are responsible for supervising and are obliged to manage 'often dangerous and vulnerable people'.[208] It submitted '[CSOs'] health and safety in the workplace should be protected due to the public service they perform managing and supervising some of society's most dangerous and complex individuals'.[209]

The QPS, supporting comments made by the New Zealand Minister for Justice in introducing reforms in this area, noted **police officers**' legal obligation to deal 'with dangerous people in dangerous situations' and that they 'do not have the ability to leave a situation when it gets too dangerous'.[210] The Commissioner emphasised the role of her officers, in particular, in keeping the community safe, noting that assaults on police were 'an unfortunate consequence of the policing environment in which they work'.[211]

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201 Ibid.

202 Submission 14 (Queensland Nurses and Midwives' Union) 3.

203 Preliminary submission 2 (Queensland Health) 2.

204 Submission 28 (Department of Housing and Public Works).

205 Submission 5 (Department of Child Safety, Youth and Women) 2.

206 Submission 32 (Queensland Fire and Emergency Services).

207 Submission 20 (Queensland Teachers' Union) 5.

208 Submission 21 (Queensland Corrective Services) 7.

209 Ibid 5

210 Submission 25 (Queensland Police Service) 1.

211 Cover letter to Submission 25 (Queensland Police Service) 24 June 2020.

While a significant number of the submissions received indicated support for expanding the definition of section 340 to list additional occupational groups, Sisters Inside opposed further expansion on the 'grounds that it is unwarranted, unjust and unlikely to have a deterrent effect'.[212]

Legal Aid Queensland (LAQ) also cautioned that expanding the definition 'could lead to unintended consequences'. For example, it was concerned that 'a definition extended to include officers who are contracted or employed by the Department of Child Safety who provide care to children or who have a role in parenting the child would entrench the criminalisation of children in care'.[213] Any further extension to other occupational groups, the LAQ suggested, would 'run the risk of unnecessarily overcomplicating section 340 and creating arbitrary barriers to sentencing processes.'[214] It viewed this as 'unnecessary given the current sentencing regime under the PSA and approach taken by courts'.[215] It also raised concerns about 'treating assaults on particular categories of public officers being more serious than other categories, because it creates classes of victims without due regard to the particular vulnerabilities of each case.'[216]

Responses to the question of whether people engaged or employed by another state or territory or by the Commonwealth performing similar functions to Queensland public officers should be expressly included were generally affirmative. LAQ noted there should be no distinction and that a 'one in–all in approach' should be taken.[217] The QLS indicated it would be logical to include public officers from other states and territories but stated it would be 'unnecessary to include Commonwealth officers as Commonwealth legislation applies to them'.[218] The DCSYW noted that interstate public officers should be afforded the same protections as Queensland public officers, highlighting the interaction between officers from Queensland and close neighbouring states in the performance of child protection and domestic violence prevention roles.[219]

The QPS noted that if a person is charged with 'assault police' under section 790 of the PPRA, 'an interstate police officer falls within the definition of a Queensland police officer' due to the definition of a 'police officer' that applies under Schedule 6. Schedule 6 of that Act defines a police officer to include (apart from chapters 11 and 13) a police officer who is performing duties for the Queensland Police Service.[220] The position under section 340 of the Code is slightly different as the term 'police officer' is not defined. In this case, it suggested: 'reliance may be made on Schedule 1 of the *Acts Interpretation Act 1954* which provides that a police officer means a police officer under the *Police Service Administration Act 1990* (PSAA)'. It advised: 'Generally where an interstate officer is to perform the functions of a police officer in Queensland, they will be appointed as a special constable by the QPS' and under section 5.16 of the PSAA, a special constable is deemed to be a police officer as far as may be reasonably applied.

Overall, the key theme raised by the submissions is that the **nature of the work**, the **environment** in which it is being performed, and the **service** that is being provided should all factor into any moves to refine or amend section 340.

8.6.7 Council's view

Understanding who is captured within the definition of 'public officer' is a fundamental challenge to understanding section 340 in its current form. The need for clarity was evident in several of the submissions received and provides an explanation for why certain stakeholder groups asked for their members to be explicitly included in any reforms made to the section.

The Terms of Reference ask the Council to provide advice about whether the definition of 'public officer' in section 340 of the *Criminal Code* should be expanded to recognise other occupations, including transport drivers. The original section 340 that appeared in the *Criminal Code* as enacted was focused on assaults committed in particular contexts — such as to commit a crime or to resist or prevent an arrest — as well as against police officers and others assaulted in the performance, or on account of, the performance of their public duty.

As discussed earlier in this chapter, this section largely remained in its original form until 1997 when it became the focus of increasing legislative attention — resulting in increases being made to the maximum penalty (from 3 to 7 years), the introduction of distinct victim categories (working corrective services officers and other public officers) as well as new classes of victim (people aged 60 years or more, and who rely on guide, hearing or assistance dog,

212 Submission 17 (Sisters Inside Inc) 2.
213 Submission 29 (Legal Aid Queensland) 5.
214 Ibid 7.
215 Ibid.
216 Ibid 3.
217 Ibid 2.
218 Submission 30 (Queensland Law Society) 6.
219 Submission 5 (Department of Child Safety, Youth and Women) 2.
220 Submission 25 (Queensland Police Service) 1.

wheelchair or other remedial device), and the creation of circumstances of aggravation carrying a 14-year maximum penalty — initially applying to assaults on police and later to all public officers.

The reforms made over time, while clearly well-intentioned, have resulted in a section that is awkwardly structured, with areas of overlap and unnecessary duplication and, of most concern to the Council, an absence of a clear rationale and focus.

While the Council shares concerns expressed by some about the lack of evidence of penalties offering an effective deterrent to reducing assaults, if the offence and associated penalties are to achieve this objective, then the intention and scope of the offence needs to be clear. As it currently stands, the Council considers this is not the case.

The Council's position is that the current section should be rationalised and redrafted to target assaults on specific classes of public officer who are at heightened risk of assault and who, unlike other officers who may also meet the definition of being a 'public officer', do not have a choice to leave dangerous or risky situations because their jobs require them to protect and save the lives of others. The listing of those captured should be exhaustive so as to avoid, as far as possible, the existing uncertainty about its operation and scope.

Use of the term 'public officer' should be avoided to remove any ambiguity about who is and is not included and its relationship with the definition that applies under section 1 of the Code, which is far broader.

The occupations listed for inclusion in the recommended reformed section 340 could aptly be described as 'frontline and emergency workers'. Their fundamental duty is to respond in situations where they accept a responsibility for safeguarding the health and safety of community members. During the course of undertaking these duties they are often placed in environments and contexts where there is an inherent risk of assault due to the nature of the work they are performing.

The proposed reformed section 340 offence would be targeted at responding to assaults on:

- those who keep us safe;
- perform critical response duties on behalf of the community; and
- who also perform a unique role in the supervision and management of offenders.

The recommended reforms are intended to capture within the scope of section 340:

- police,[221] watch-house[222] and security personnel[223] employed by the Queensland Government;
- corrective services officers;[224]
- youth justice staff members;[225]
- authorised officers under the *Child Protection Act 1999* (Qld);[226]

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221 Assaults on police are currently captured under s 340(1)(b) and have always been separately identified under s 340. The definition of a 'police officer' for the purposes of s 340 is that which applies under sch 1 of the *Acts Interpretation Act 1954* (Qld). A 'police officer' is defined in that Act to mean: 'a police officer within the meaning of the *Police Service Administration Act 1990*' (PSAA). Section 1.4 of the PSAA defines 'police officer' to mean 'a person declared under section 2.2(2) to be a police officer' being: (a) the commissioner of the police service; (b) the persons holding appointment as an executive police officer; (c) the persons holding appointment as a commissioned police officer; (d) the persons holding appointment as a non-commissioned police officer; (e) the persons holding appointment as a constable.

222 'Watch-house officers' currently fall within scope of ss 340(1)(c), (d) and (2AA) but are not expressly named. Section 1.4 of the PSAA cross-references the definition in s 4.9(6) of the PSAA, which defines a 'watch-house officer' to mean (in this section): 'a staff member who is appointed by the commissioner to be a watch-house officer'.

223 State protective security staff are currently separately listed in the definition of a 'public officer' in section 1 of the *Criminal Code* but are not named in the definition of a 'public officer' in s 340(3). Protective security staff currently fall within scope of ss 340(1)(c), (d) and (2AA).

224 'Working corrective services officers' are the subject of a separate offence provision under s 340(2), but this only applies to assaults by prisoners on corrective services officers. A 'working corrective services officer' is defined under s 340(3) to mean 'a corrective services officer [as defined under sch 4 of the *Corrective Services Act 2006* (Qld)] present at a corrective services facility in his or her capacity as a corrective services officer'. Corrective services officers assaulted by probationers, for example, do not fall within scope of this provision, but would fall within ss 340(1)(c), (d) or (2AA).

225 Youth justice officers are not separately listed in the definition of a 'public officer' in s 340(2AA). They would fall within the scope of ss 340(1)(c), (d) or (2AA).

226 Child safety officer/authorised officers are listed in the definition of a 'public officer' in s 340(2AA). 'Authorised officers' are appointed under the *Child Protection Act 1999* (Qld) s 149 and include an officer or employee of the Department of Child Safety, Youth and Women, but can also be a person included in a class of persons declared by regulation as eligible for appointment (they may not necessarily be public servants).

- a person appointed as an employee under the *Fire and Emergency Services Act 1990* (Qld),[227] a volunteer of a rural fire brigade registered under the Act,[228] a member of the State Emergency Service,[229] or a volunteer engaged in an activity to support functions under that Act;
- ambulance officers;[230]
- health service providers[231] employed under the *Hospital and Health Boards Act 2011* (Qld)[232] or delivering services in a private hospital,[233] prison or detention centre environment,[234] as well as people acting in aid;
- workers engaged by the Commonwealth or another state or territory to deliver similar functions to those outlined above.

Under the reforms proposed, section 340 would apply to health service providers working in a public or private capacity in contexts where they are more vulnerable to assault, including when providing services in hospitals, prisons and detention centres (the inclusion regarding the latter two recognises the high-risk nature of these custodial environments and the essential nature of the care provided to prisoners and detainees). It would extend protection to persons 'acting in aid' of these providers where the assault occurs in the course of that person's employment, recognising that, particularly in healthcare settings, others who support those delivering these essential services are frequently exposed to the risk of assault, such as security personnel and support staff.

The Council has not recommended section 340 be extended further to include assaults that occur in other private health care settings or aged care facilities. This is because the Council has been guided by the original intention of the section to focus on assaults committed in particular contexts — that is, responding to situations to safeguard the health and safety of the community. In the case of private healthcare providers, the Council has determined it appropriate to sharpen the focus on assaults committed in the hospital, prison and detention centre environments and the delivery of acute care within that context vital to meeting the immediate health needs of patients. While we

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227 Employees under the *Fire and Emergency Services Act 1990* (Qld), including 'fire officers' as defined under that Act, would fall within the existing definition in s 340(3) of a 'public officer', which is defined to include: '(a) a member, officer or employee of a service established for a public purpose under an Act'.

228 Any group of persons may apply to the commissioner for registration as a rural fire brigade: *Fire and Emergency Services Act 1990* (Qld) s 79(1).

229 SES members are appointed by the commissioner under s 132 of the *Fire and Emergency Services Act 1990* (Qld) (FES Act). SES members would fall within the existing definition of a 'public officer' under s 340(3) as '(a) a member, officer of a service established for a public purpose under an Act'.

230 Ambulance officers are included within the definition of 'public officer' in s 340(3) by virtue of being 'a member, officer or employee of a service established for a public purpose under an Act'. The 'Queensland Ambulance Service established under the *Ambulance Service Act 1991*' is listed as an example of such a service.

231 'Health service provider' comes from the *Health Practitioner Regulation National Law Act 2009* (Qld). Its schedule defines health service provider as 'a person who provides a health service', which is defined to include a list of services, 'whether provided as public or private services' some of which are '(a) services provided by registered health practitioners; (b) hospital services; (c) mental health services and (d) pharmaceutical services'. In the same schedule, 'registered health practitioner means an individual who — (a) is registered under this Law to practise a health profession, other than as a student; or (b) holds non-practising registration under this Law in a health profession'. 'Health profession' means any of 16 professions. It includes a recognised specialty in those professions, being: Aboriginal and Torres Strait Islander health practice; Chinese medicine; chiropractic; dental (including dental hygienist etc.); medical; medical radiation practice; midwifery; nursing; occupational therapy; optometry; osteopathy; paramedicine; pharmacy; physiotherapy; podiatry, and psychology. A registered health practitioner would not be captured under current definition of a 'public officer' unless the person was also a 'health service employee under the *Hospital and Health Boards Act 2011*'— HHBA.

232 To be clear, the HHBA does not use the term 'health service provider' in the context discussed above. Health service employees are appointed under s 67 of the HHBA by the chief executive. Appointment may be on tenure, on a fixed-term contract, on a temporary or casual basis, or, for a senior health service employee, on contract for an indefinite term. A 'health service' is defined under s 15 of the HHBA and is defined to include: (a) a service provided to a person at a hospital, residential care facility, community health facility or other place; and (b) a service dealing with public health including for the prevention and control of disease or sickness; or the prevention of injury; or the protection and promotion of health. The positions are listed in the definition of a 'public officer' in s 340(3).

233 A 'private health facility' is defined under s 8 of the *Private Health Facilities Act 1999* (Qld) to mean: (a) a private hospital; or (b) a day hospital. Under s 9, a private hospital is defined as a facility at which health services are provided to persons who are discharged from the facility on a day other than the day on which the persons were admitted to the facility, but does not include a hospital operated by the state; or a nursing home, hostel or other facility at which accommodation and nursing or personal care are provided to persons who, because of infirmity, illness, disease, incapacity or disability, have a permanent need for nursing or personal care. Such positions would not be captured under current definition in s 340 of a 'public officer'.

234 'Prison or detention centre environment' is narrower than the term 'corrective services facility' in the *Corrective Services Act 2006* (Qld) sch 4, which means a prison, community corrections centre, work camp or declared temporary corrective services facility.

acknowledge calls for the coverage of section 340 to be extended even further, we consider the same outcomes can be achieved through the introduction of a statutory aggravating factor that requires courts to take this into account at sentencing. As this will operate as a sentencing factor, rather than as an element of an offence, the definition of its coverage will not need to be so narrowly circumscribed.

The protection of a person employed or engaged by the Commonwealth or in another state (including another territory)[235] to perform functions of a similar kind to those set out under the new section who are on duty in Queensland is also recommended. This is based on reforms recently introduced in Victoria to clarify that the special sentencing provisions that apply to emergency workers also apply to these officers.[236] Although the Council notes that some stakeholders did not support the extension to Commonwealth officers on the basis that these offences can be prosecuted under Commonwealth law, the Council considers it important that equivalent state protections are applied so as not to potentially disadvantage these officers while acting in Queensland. As discussed in section 8.4.2, the requirements to establish the Commonwealth offence of causing harm to a Commonwealth official are quite different from those that exist in Queensland.

The recommendations presented in this section regarding who should fall within scope of a redrafted section 340 have implications for other subsections currently in section 340. These are discussed below. In particular, the Council suggests that there should be no need to retain sections 340(1)(b)–(d), (2) or (2AA).

The Council acknowledges that the recommendation to refine section 340 to focus on frontline and emergency workers excludes occupational groups that had previously been included either under the umbrella term of 'public officer' or by specific listing. The Council's position does not mean that it considers that assaults on other public officers or, for that matter, anyone assaulted at work while just trying to do their job, are not serious. On the contrary, the Council is of the view that the aggravated nature of these assaults is best recognised through amendments to section 9 of the *Penalties and Sentences Act 1992* (Qld) (the Council's view and recommendations are presented at 10.2.10). This approach will have the advantage of requiring courts to consider this fact as aggravating when sentencing for any offence of violence against the person, rather than limiting recognition of this to one offence, while keeping section 340 focused on specific classes of victim. This is particularly important given that where the harm caused to the officer is serious, charges will be brought under other provisions of the Code — such as under section 317 (acts intended to cause grievous bodily harm and other malicious acts), section 320 (grievous bodily harm) or section 323 (wounding).

As one example, 'transit officers' would no longer be included within those who would fall under section 340. Analysis pertaining to the scope of 'transit officer', as it is currently defined under section 340 of the *Criminal Code,* indicates that in its current form it encompasses only a very narrow subset of transport workers. Consultation with representatives from Queensland Rail indicated that a much broader range of station staff and rail traffic crew regularly interact with customers, leaving them exposed to assaults, a risk sometimes exacerbated by working in environments where they are often performing their duties in isolation. The functions that these staff perform by their very nature are essential to the delivery of the rail network. However, it is the Council's view that they do not provide a service that fits within the scope of the definition of 'frontline and emergency worker' in the limited sense in which it is intended and would be better captured under proposed amendments to section 9 of the PSA.

The section 9 amendments proposed will have the benefit of capturing a far broader class of transport workers who are at higher risk of assault due the nature of their work and interactions with members of the public, such as bus drivers, taxi and rideshare drivers, ferry operators and other transport workers, than limiting its protection to transit officers. Recognition of the increased seriousness of assaults on transport workers based on their higher-level vulnerability under this approach will be possible without risking making artificial distinctions based on whether those workers are operating in a public or private capacity — the distinctions between which may not always be clear.

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235 'State' is defined under Schedule 1 of the *Acts Interpretation Act 1954* (Qld) to mean a state of the Commonwealth and includes the Australian Capital Territory and the Northern Territory. For this reason, there is no need to separately identify those engaged or employed by a territory.

236 *Sentencing Amendment (Emergency Worker Harm) Act 2020* (Vic) ss 4(2)(b) and (3) extend the operation of certain sentencing provisions that apply under the *Sentencing Act 1991* (Vic) to emergency workers to these officers.

Recommendation 3–1: Frontline and emergency service workers under new section 340

The categories of people captured within section 340 should be limited to the following in circumstances where the assault occurs in the performance of the functions of their office, or because of the performance of those functions:

(a) police officers;

(b) watch-house officers as defined under the *Police Service Administration Act 1990* (Qld);

(c) a person appointed or employed under the *State Buildings Protective Security Act 1983* (Qld);

(d) a corrective services officer under the *Corrective Services Act 2006* (Qld);

(e) a youth justice staff member under the *Youth Justice Act 1992* (Qld);

(f) an authorised officer under the *Child Protection Act 1999* (Qld);

(g) a person appointed as an employee under the *Fire and Emergency Services Act 1990* (Qld), a volunteer of a rural fire brigade registered under the Act, a member of the State Emergency Service, or a volunteer engaged in an activity to support functions under that Act;

(h) an ambulance officer under the *Ambulance Service Act 1991* (Qld);

(i) a 'health service provider' as defined under the Health Practitioner Regulation National Law:

  i. employed under the *Hospital and Health Boards Act 2011* (Qld); or

  ii. providing health services under the *Private Health Facilities Act 1999* (Qld); or

  iii. delivering health services in either:

    a. a prison; or

    b. a detention centre under the *Youth Justice Act 1992* (Qld);

(j) any person acting in aid of a health service provider delivering a health service in the circumstances set out in paragraph (i), where the assault occurs in the course of his or her employment; or

(k) a person employed or engaged by the Commonwealth or in another state to perform functions of a similar kind to those set out in paragraphs (a)–(i) who are on duty in Queensland.

Recommendation 3–2: Term 'public officer'

The term 'public officer' should not be used in the redrafted version of section 340 given the lack of clarity about the scope and meaning of this term, and that it is separately defined for different purposes in section 1 of the *Criminal Code*.

8.7 Scope of section 340 — acts of 'assault' and 'obstruction'

8.7.1 The current position

Behaviour constituting obstructing or resisting public officers is covered by both sections 199 and 340 of the *Criminal Code* (and various summary offences discussed in more detail in Chapter 9).

An offence against section 199 (resisting public officers) is committed if any person obstructs or resists any public officer (using the section 1 *Criminal Code* definition) while engaged in the discharge or attempted discharge of the duties of office under any statute or obstructs or resists any person while engaged in the discharge or attempted discharge of any duty imposed on the person by any statute.

Section 199 is largely unchanged from its original 1901 form. It now uses inclusive language; 'statute' is no longer capitalised; and hard labour is no longer an option. It is an indictable offence (a misdemeanour) that must be dealt with summarily with a maximum penalty of 2 years' imprisonment. By contrast, the prosecution has the power to elect if a section 340 charge (a crime) is to be dealt with in this way (see ss 552A and 552B of the *Criminal Code* and the discussion of this in section 10.6 of this report).

The words 'resist' and 'obstruct' in section 340 appear as elements only in sections 340(1)(b) regarding police and 340(2AA)(a) regarding public officers. They do not feature in any aggravated version of serious assault, so that the relevant maximum sentence is 7 years' imprisonment.

The presence of 'resist' and 'obstruct' in section 340 means that, despite its title, the section also covers behaviour that may not actually be an assault at law.

Because these terms are housed in the same subsections of section 340 that also cover assaults, and because section 199 has no subsections, data are not collected on how section 340 and section 199 are being used for resisting or obstructing offences. By contrast, assaults and obstructions are housed in separate sub-sections of

section 790(1) of the *Police Powers and Responsibilities Act 2000* (Qld) (PPRA), which allows analysis of the use of these different formulations for sentencing purposes.[237]

8.7.2 Options discussed in the Issues Paper

Questions 10 and 11 of the Council's Issues Paper asked:

> 10. What benefits are there in retaining multiple offences that can be charged targeting the same or similar behaviour (e.g. sections 199 and 340 of the *Criminal Code* as well as sections 655A and 790 of the *Police Powers and Responsibilities Act 2000* (Qld), sections 124(b) and 127 of the *Corrective Services Act 2006* (Qld), and other summary offences)?
>
> 11. Should any reforms to existing offence provisions that apply to public officer victims be considered and, if so, on what basis?

The Council identified an option in the Issues Paper of removing references to resisting and obstructing from section 340, and utilising section 199 as the sole Code provision in this regard. This follows the WA example and accords with the aim of simplifying and clarifying section 340.

The Council's analysis shows there were only seven instances over the data period in which a section 199 charge was the most serious offence (MSO) charged (all of which, as required, were sentenced in Magistrates Courts). Examining all charges (not just those where it was the MSO sentenced), there were 25 cases involving an offender sentenced under section 199 — two in the District Court (involving co-offenders), and 23 in Magistrates Courts. Sentences ranged from good behaviour bonds of between 6 and 12 months and fines of between $250 and $1,000 up to a 6-month term of imprisonment.[238]

In its Issues Paper, the Council also raised two other potential options:

- repealing section 199 due to disuse; or
- classifying section 199 as a summary offence to create a general offence of resistance or obstruction of a public officer in place of the number of offence provisions capturing the same conduct that exist across the Queensland statute book.

As to repealing section 199, it could be said that the very small numbers of cases sentenced, and the level of penalties imposed for this offence, which must be dealt with summarily, suggest there may be little practical utility in retaining it in the *Criminal Code*.

However, if references to obstruct and resist were removed from section 340, section 199 may be used a great deal more. It is not known how often section 340 is used for acts of obstructing or resisting. Section 199 would occupy a unique position in the *Criminal Code*, bridging a gap between summary offences carrying maximum penalties of 12 months' imprisonment or less, and section 317 ('Acts intended to cause grievous bodily harm and other malicious acts'), which carries a maximum of life imprisonment (resist or prevent a public officer from acting in accordance with lawful authority is caught by sub-section 1(c)).

Finally, the vast majority of section 340 offences are dealt with summarily, on prosecution election, despite the fact that they carry up to 14 years' imprisonment.

As to classifying section 199 as a summary offence, doing this may provide an opportunity to consider the repeal of a number of summary offences scattered across the Queensland statute book that appear to serve the primary purpose, as for section 790 of the PPRA, of providing an alternative charge to what would otherwise need to proceed as a more serious charge under section 340.

However, the Council has recommended, in Recommendation 9–3, creating a new summary offence under the *Summary Offences Act 2005* (Qld) that establishes an offence of assault or obstruct a public officer (other than officers to which ss 790 of the PPRA and 124(b) and 127 of the CSA apply) as a summary offence alternative to an offence being charged under sections 340 or 199 of the *Criminal Code*. If section 199 were repurposed to this end, and section 340 was narrowed to strictly cover assaults only, the gap between summary offences and very serious Code offences covering obstructing and resisting would be very wide.

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237 See Explanatory Notes, Police Powers and Responsibilities and Other Legislation Amendment Bill 2018 (Qld) 4, which discusses improved data collection as one of the reasons for separating acts of assault and obstruction under section 790 of the *Police Powers and Responsibilities Act 2000*.

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

8.7.3 The Western Australian position

There are numerous other jurisdictions that, like Queensland, group assaulting, resisting and obstructing together as equal bases for criminal culpability in the context of offending against police or other public officials, that carry maximum penalties of varying lengths.[239]

The WA Code is the closest example to Queensland's Code and provides an example of how sections 340 and 199 could be amended. Its serious assault (s 318) and resisting public officers (s 172) offence provisions were originally identical to the original Queensland provisions. Section 318 has recognised only assaults since 1985.

Section 172 was replaced in 2005. It alone deals with obstructing public officers with maximum penalties of 3 years' imprisonment (or 18 months if convicted summarily).

The Criminal Code — A General Review was compiled by Mr Murray QC (later Murray J, Supreme Court of Western Australia) in June 1983. He recommended that the penalty for section 172:

> ought to be increased to three years imprisonment and I make that recommendation basically because the offences set out in [then] Section 318(2), (3) & (4), which may involve resistance or obstruction to particular types of public officer, are penalised by punishment of up to three years imprisonment, and they are obviously related offences.[240]

This recommendation would not be realised until May 2005. He noted that 'certain paragraphs of [section 318] are related to the offence contained in Section 172 which is recommended for amendment so that it deals specifically with obstructing or resisting public officers'.[241] He went on to recommend that the maximum penalty for section 318 be increased to 5 years' imprisonment, 'coinciding with that recommended for assault occasioning bodily harm'.[242]

He also recommended that sections 318(2), (3) and (4) — equivalents to provisions including Queensland's current section 340(1)(b) — be replaced with a single paragraph and 'there is no need for this paragraph to refer to offering resistance to or obstructing such public officers because that is a type of activity specifically covered by Section 172'.[243] A very similar recommendation would later be made in Queensland (see below).

The *Criminal Law Amendment Act 1985* (WA) repealed section 318 and inserted a new version with a maximum penalty of 5 years' imprisonment. It did not contain any reference to resisting or obstructing. The same is true of the current section 318, though it has been amended extensively since. That Act did not amend section 172.

A 1992 WA Law Reform Commission report records the landscape as it then was:

> Though there is some common ground between [s 172] and the Police Act offence [s 20, interference with police; performing the role of Queensland's section 790 of the PPRA], the Code offence is concerned with any public officer carrying out statutory duties and so is much wider. The Commission considers that s 20 should continue to deal specifically with the police. The *Criminal Code* contains some other provisions relevant to interference with the police … Under s 318, before its amendment in 1985, it was an offence to assault, resist or wilfully obstruct a police officer in the execution of his duty. Following recommendations in the Murray Report 213, s 318 has been limited to assaults on public officers, on the basis that resistance and wilful obstruction is covered by s 172. Amendments to s 172 suggested in the Murray Report 107 have not been implemented.[244]

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239 For instance, *Crimes Act 1900* (NSW) s 58 Assault, resist, or wilfully obstruct any officer (includes a constable or other peace officer) while in the execution of his or her duty — 5 years; *Criminal Code* (Tas) s 114 Assault, resists or wilfully obstruct any police officer in the due execution of his duty, or any other person lawfully assisting — 21 years; *Crimes Act 1958* (Vic) s 31(1)(b) Assault or threaten to assault, resist or intentionally obstruct an emergency worker (includes police officer) on duty or custodial officers on duty, knowing or being reckless as to whether the person is such a worker or officer — 5 years; *Criminal Code* (NT) s 155A Unlawfully assault, obstruct or hinder a person who is providing rescue, resuscitation, medical treatment, first aid or succour of any kind to a third person — 5 years.

240 Murray (n 27) 107.

241 Ibid.

242 Ibid.

243 Ibid.

244 Law Reform Commission of Western Australia, *Police Act Offences* (Project No 85, Report, 14 August 1992) 43, fn 11.

That report led to an Act, a decade later, in 2004.[245] It replaced section 172 with the current version, which commenced on 31 May 2005.[246] The Act was said to implement the majority of the recommendations of the Law Reform Commission's report and many from the Murray Review.[247] The new section 172 reads:

> 172. Obstructing public officer
>
> (1) In this section — obstruct includes to prevent, to hinder and to resist.
>
> (2) A person who obstructs a public officer, or a person lawfully assisting a public officer, in the performance of the officer's functions is guilty of a crime and is liable to imprisonment for 3 years. Summary conviction penalty: imprisonment for 18 months and a fine of $18 000.

8.7.4 Queensland reviews and analysis

A 1992 review (the 'O'Regan Review') of the *Criminal Code* noted the 1985 WA Act in making a very similar recommendation:

> The present [section 340] ss.(2), (3) and (4) [including current (1)(b) and encompassing all references in the original section 340 to resist and obstruct] should be amalgamated into one offence of assaulting a public officer (ss.2) and the aspects of resisting or obstructing should be deleted because they would be covered by the new offence proposed in relation to s.199 (Draft s.136) which should carry two years' imprisonment.[248]

A new section 136 would have borne the same heading and repeated the wording used in the first half of current section 199, stopping after 'duties of the office'.[249] It also used 'the office' instead of the current 'his or her office'. Section 199 continues with 'under any statute' and the second half relates to 'any person' in the same context. Section 136 would have been a crime and retained the same 2-year maximum penalty — section 199 is a misdemeanour.

Queensland's failed 1995 *Criminal Code* had a new section 201:

> Obstructing or resisting public officer
>
> 201. A person must not unlawfully obstruct a public officer in the exercise of a power, or the performance of a function, of the office.
>
> Maximum penalty—3 years imprisonment.

The subsequent 'Connolly Review' of 1996,[250] which informed the *Criminal Law Amendment Act 1997* (Qld), which itself repealed the unproclaimed replacement Code and made the first major reforms to section 340 since its inception in 1899, was silent on section 199 or an equivalent.

A 2008 Queensland Court of Appeal decision of *R v Spann*[251] represents 'a very serious example of obstruction of a police officer'[252] charged under section 340 leading to a 'severe'[253] head sentence of 3 years' imprisonment.

The offender, Spann, was an acquaintance of a man, Cardwell, who viciously assaulted a police officer resulting in GBH. Spann's conduct involved kicking the officer's capsicum spray away and taking hold of his baton as he used it to defend himself against Cardwell. Cardwell then forcibly removed the baton from Spann after she refused to give it to him, using it to further his assault on the officer, who was forced to shoot Cardwell. A piece of projectile lodged in Spann's leg.

Cardwell was charged with malicious acts under section 317 of the *Criminal Code*. At first, so was Spann. She was 'charged under s 317(c)(e) … with malicious act with intent (that with intent to resist the lawful arrest of Cardwell the applicant did grievous bodily harm to the complainant) as an alternate to the charge of serious assault under s 340(1)(b)'.[254] On pleading guilty to serious assault (by wilfully obstructing the officer in the execution of his duty),

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245 *Criminal Law Amendment (Simple Offences) Act 2004* (WA) s 16.

246 Western Australia, *Western Australian Government Gazette*, No 8, 14 January 2005, 163.

247 Explanatory Memorandum, Criminal Law Amendment (Simple Offences) Bill 2004 (WA) 1 and see 9.

248 O'Regan, Herlihy and Quinn (n 6) Schedule 4, 201.

249 Ibid Schedule 3, 74–5.

250 Connolly et al (n 6).

251 [2008] QCA 279.

252 Ibid 9 [32].

253 Ibid 9 [33].

254 *R v Spann* [2008] QCA 279, 4 [10].

the prosecutor discontinued the count of malicious act with intent. She was sentenced 'only for her role in the incident and not for the very significant injuries inflicted upon the complainant'.[255]

Her sentence was 3 years' imprisonment, with parole release fixed at 588 days (that period having been spent in pre-sentence custody). The maximum was 7 years' imprisonment,[256] as it still is. The Court of Appeal described this as 'severe'[257] but refused leave to appeal. It rejected a submission that:

> there was ordinarily a hierarchy of seriousness as to the three examples of offences dealt with in [s 340(1)(b)] of the *Criminal Code*, with an assault being more serious than resisting a police officer, which in turn was more serious than obstructing a police officer. However, each of the offences [then attracted] a maximum penalty of seven years imprisonment and the severity of any particular offending will depend on its facts.[258]
>
> 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.[259]

The case above shows that a Code offence covering resisting and wilfully obstructing an officer can be useful as an alternative basis for culpability to a defendant being charged as a party to a principal offender's more serious offence. Increasing the maximum penalty for section 199 would arguably fill this niche while also reducing duplication and complexity in the *Criminal Code* (and especially in section 340).

8.7.5 Stakeholder views

The Council received limited feedback on this issue in written submissions.

The QLS supported the recommendation to remove obstruct and resist from section 340. It described 'an increase in the threshold for the section 340 offence to one requiring at least "bodily harm" as 'particularly desirable':[260]

> Otherwise … there is little if any practical delineation between this offence and the Police Powers and Responsibilities Act (PPRA) counterpart. Similarly, resisting and obstructing should be removed from section 340, and charged under the PPRA or section 199 of the Code.[261]

LAQ acknowledged that 'there may be value in rejigging the legislative framework and leaving section 790 of the PPRA and section 199 to deal with resisting and less serious assaults on public officers',[262] but was concerned:

> there is little evidence of a difficulty with interpreting or application of section 340. Any rejigging would work more as a tidying up of provisions rather than the instigation of systemic change. There is of course always the risk of unintended consequences that may stem from such change.[263]

QCS, while noting there is some overlap in the conduct captured under sections 340 and 199, considered, due to the different categorisation of these two offences (one a crime, and the other a misdemeanour) and very different maximum penalties, that 'there is a benefit to retaining section 199 of the Criminal Code'.[264]

8.7.6 Council's view

To better target the offence of serious assault in section 340, the Council recommends that the conduct captured in the amended section 340 be limited to acts of assault, leaving acts of resisting or obstructing a police officer or other public officer to be charged under section 199 of the *Criminal Code*.

This change will avoid unnecessary duplication in the offences that can be charged under the *Criminal Code* for the same types of criminal acts and is consistent with the approach in WA, which, like Queensland, has a separate

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255 Ibid 4 [11].

256 Ibid 4 [12].

257 Ibid 9 [33].

258 Ibid 9 [31]. See also *R v Patrick (a pseudonym)* [2020] QCA 51, 8 [32] (Sofronoff P, Fraser JA and Boddice J agreeing) where the Court of Appeal made a similar point in respect of 'resisting' in section 317. It rejected a contention that some of the four different forms of intention to cause GBH in that section were more serious than others: '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'.

259 Ibid 9 [32].

260 Submission 30 (Queensland Law Society) 7, repeated at 13.

261 Ibid.

262 Submission 29 (Legal Aid Queensland) 5.

263 Ibid.

264 Submission 21 (Queensland Corrective Services) 15.

offence of 'serious assault'. This was recommended long ago in each jurisdiction by separate legal reviews and, while given effect to in WA in 2005, is yet to be acted on in Queensland.

We recommend the maximum penalty that can be applied under section 199 be increased from 2 years to 3 years, taking into account that more serious examples of resist and obstruct may be sentenced under this provision following these changes. This is also consistent with the penalty for the equivalent offence in WA.

In doing so, we acknowledge the Court of Appeal in *R v Spann*[265] rejected an argument that assault, resist and obstruct should always be viewed as representing different positions on a hierarchy of seriousness. There is a possibility that there may be concerns that the 3-year penalty is not sufficient on this basis. However, the prosecution retains the option of charging a defendant as a party to a more serious offence on the basis that the offender, for instance, '[did] or [omitted] to do any act for the purpose of enabling or aiding another person to commit the offence'.[266] Furthermore, the Council's role in making recommendations to government regarding matters of policy and potential legislative reform places it in a very different position from a court, which must apply the legislation as it stands.

The Council does not suggest that section 199 should be further amended by removing the term 'public officer' and inserting the new definitions recommended to apply to an amended section 340. The existing definition of 'public officer' in section 1 would continue to apply to section 199 (as it would to, for example, section 317(1)(d)).

Recommendation 4–1: Limiting section 340 to acts of assault

The criminal conduct captured within section 340 should be limited to acts of assault on frontline and emergency workers. References to resisting and obstructing a police officer or public officer should be omitted.

Recommendation 4–2: Maximum penalty for section 199 ('Resisting public officers')

The maximum penalty that applies to offences under section 199 of the *Criminal Code* ('Resisting public officers') should be increased from 2 years' to 3 years' imprisonment, taking into account that more serious resist and obstruct charges that might have been charged under section 340 may instead be charged under section 199.

8.8 Other matters relevant to reform of section 340

8.8.1 Introduction

Several consequences flow from the Council's view that the existing section 340 should be reformed and narrowed in scope. The Council's view is that this section should be redrafted to apply to assaults on frontline and emergency workers, as defined in Recommendation 3–1.

Certain subsections in section 340 do not directly address public officers as a distinct victim class. However, acceptance of the Council's recommendations as regards section 340 would mean that these subsections could compromise the clarity and purpose of a refined section 340 if they remained within it. They are all from subsection 340(1) (emphasis added):

(a) assaults *another* with intent to commit a crime, or with intent to resist or prevent the lawful arrest or detention of himself or herself or of any other person

(c) unlawfully assaults *any person* while the person is performing a duty imposed on the person by law

(d) assaults *any person* because the person has performed a duty imposed on the person by law

(f) assaults *any person* in pursuance of any unlawful conspiracy respecting any manufacture, trade, business, or occupation, or respecting any person or persons concerned or employed in any manufacture, trade, business, or occupation, or the wages of any such person or persons

(g) unlawfully assaults *any person* who is 60 years or more

(h) unlawfully assaults *any person* who relies on a guide, hearing or assistance dog, wheelchair or other remedial device.

They each create separate categories of serious assault, with a 7-year maximum penalty and, in contrast to assaults of police officers and other public officers, they do not have an aggravated form carrying a higher 14-year maximum penalty.

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265 [2008] QCA 279.

266 *Criminal Code* (Qld) s 7(1)(a).

The Council makes observations only in respect of each of subsections (1)(a) and (1)(f) as it views these as being outside the scope of the Terms of Reference.

It makes recommendations in respect of subsections (c) and (d), and separately, subsections (g) and (h), on the basis that these constitute 'any other matter relevant' to the reference.

Given that the WA offence of serious assault in section 318 of its *Criminal Code*[267] was originally identical to Queensland's section 340 (although both provisions have since diverged), the Council notes that section 318 no longer contains equivalents of Queensland's section 340(1)(a) or (f). It does not contain equivalents to Queensland's section 340(1)(g) or (h). It does retain section 340(1)(c) and (d) equivalents.[268]

The Council is conscious of the fact that the Terms of Reference refer to determining whether it is appropriate for section 340 to continue to apply to public officers or whether such offending should be targeted in a separate provision or provisions, possibly with higher penalties, or through the introduction of a circumstance of aggravation.

The Council is recommending, and making observations about, the reverse — potentially moving certain subsections out of section 340 in order to focus it sharply on frontline and emergency workers, as supported by the data. The main point, though, is separation. The secondary point, and the reason for the reversal, is that section 340 has historically (in the truest sense of that word) been targeted at public officials and it has a rich history in terms of data, case law, and common usage in this context.

8.8.2 A historical Queensland review perspective on aggravating by victim category

The 1992 O'Regan Review recommended retaining but revising and simplifying 'the present scheme of offences contained in s.340'.[269] It recommended that 'the present ss.(2), (3) and (4) [now sections (1)(b), (c) and (d)] should be amalgamated into one offence of assaulting a public officer (ss.2) [which closely resembled current section 340(2AA)(a) and (b), except that it lacked references to resisting or obstructing]'.[270]

The recommended provision would have covered assaults:

1. with intent to commit a crime or to resist or prevent another's lawful detention or arrest [current (1)(a)];
2. of a public officer performing a function of their office or employment or on account of their performance of such a function [very similar to current (2AA)];
3. of any person performing any act in the execution of any duty imposed upon them by law or on account of any act done in the performance of such a function;[271]
4. of any person acting in aid of a public officer or other person noted above, or on account of the person having so acted;
5. of a child under 16 or a person over 60 [latter current (1)(g)];
6. of 'the driver or person operating or in charge of a conveyance whilst the conveyance is in operation ('in view of the danger created by such assaults').[272]

In 1995, a replacement *Criminal Code* for Queensland was assented to. It was never proclaimed and was repealed in 1997,[273] but it created a new section 114, 'Assault',[274] which carried the following statutory circumstances of aggravation:

1. the assault was committed with intent to commit a crime;
2. the person knew the victim was pregnant;
3. the victim was under 16 or over 60 [latter current (1)(g)];

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267 Originally enacted as the *Criminal Code Act 1902* (WA) s 316.

268 *Criminal Code* (WA) s 318(1)(e) 'function of a public nature conferred on him by law'.

269 O'Regan, Herlihy and Quinn (n 6) 200–1 and see 59. The report then made further recommendations regarding removing references to resisting and obstructing, which are taken up earlier in this chapter regarding s 199.

270 Ibid 201.

271 This remains similar to current (1)(c) and (d), despite the amalgamation point above, but it is largely because it was based on now-repealed s 340(1)(e), which s 340(c) was later created to encompass in 2008. See the discussion of ss 340(1)(c) and (d) below and O'Regan, Herlihy and Quinn (n 6) 110.

272 Ibid and see 59.

273 By the *Criminal Law Amendment Act 1997* (Qld) s 121.

274 It had no offence of wounding, replaced s 245 (definition of assault) with a different provision regarding the definition and amalgamated and replaced sections 335 (common assault), 339 (AOBH), 340 (serious assault), 343A (AOBH) and 206 (offering violence to officiating ministers of religion, to the extent that it relates to assaults: Explanatory Notes, Criminal Code Bill 1995 (Qld) 30.

4. the victim relied on a guide dog, wheelchair or other remedial device (current (1)(h)];
5. the victim was operating a motor vehicle;
6. the assault was committed on the other person while he or she was 'performing, or because the other person has performed, a lawful duty' [current (1)(c) and (d)];
7. the person did bodily harm and was, or pretended to be, armed [current penalty provision (a)(iii) in aggravated serious assaults]; or
8. the person did bodily harm and was in company [former is current penalty provision (a)(ii) in aggravated serious assaults].

This went beyond the recommendations of the 1992 O'Regan Review and was criticised by the Opposition during parliamentary debate as being unrepresentative of the Review Committee's original draft.[275] The Opposition stated that all legal stakeholders opposed the amended Code.[276]

The Opposition won government and commissioned the 'Connolly Review' of 1996,[277] which informed the *Criminal Law Amendment Act 1997* (Qld), which itself repealed the unproclaimed replacement Code and made the first major reforms to section 340 since its inception in 1899.

The Connolly Review's task 'was made very much easier by the O'Regan Committee Report on the one hand and [1995 Code] on the other, both of which have been constantly consulted'.[278] It recommended no amendment to sections 335, 339 or 340, except maximum penalty increases (which occurred), and recommended against the creation of extra aggravated offences.[279]

However, that 1997 Act also included references to victims over 60 and guide dogs, wheelchairs or other remedial devices, taken from the repealed Code and moved by the new Labor Opposition as enabled by an independent Member of Parliament. As discussed above, numerous substantial amendments have been made to section 340 since 1997.

8.8.3 Section 340(1)(a)

Apart from the addition of the words 'or herself' after 'himself', this subsection is the same as the original version from the *Criminal Code*'s enactment.

As noted in Table 2-2 in Chapter 2, over the Council's data period from 2009–10 to 2018–19, this subsection featured in 294 section 340 cases, with 292 offenders and 366 offences. It was the MSO on 169 occasions. As shown in Figure 2-3 in that chapter, this subsection accounted for 2.1 per cent of sentenced serious assault cases (MSO) over that data period.

It cannot be determined how many prosecutions of section 340(1)(a) involved victims who were not police or public officers, or people working in occupations outside of what is contemplated by the proposed reformed section 340 in Recommendation 3–1. As was discussed in section 1.6 of Chapter 1, agencies in the criminal justice sector collect little information on the circumstances of a person's offending in a way that can be analysed. This limitation extends to data collected by courts on the occupation of victims of crime. Analysis performed by the Council found that data on the occupation of victims were not recorded in over one-third (41.7%) of cases that involved a section 340(1)(a) offence.

As was discussed in section 3.2.1 in Chapter 3, the Council overcame this limitation for sections 340(1)(c), (1)(d) and (2AA) (because they were viewed as being within scope of the Terms of Reference) by using supplementary information from QP9s — but supplementary information was not sought for section 340(1)(a).

While subsection (1)(a), like (c) and (d), applies to any person, its scope goes beyond them by requiring proof of an intent to 'commit a crime' to 'resist or prevent the lawful arrest or detention of himself or herself or of any other person'. It serves a specific purpose and replicates, to some degree, other serious, specific offences in the *Criminal Code* that combine an assault or similar behaviour with an intent to commit a particular crime or escape detention, regardless of victim type. Examples are:

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275 'This legislation could no longer be described as even a shadow of the June 1992 draft prepared by the then O'Regan committee': Queensland, *Parliamentary Debates*, Legislative Assembly, 14 June 1995, 'Criminal Code — Second Reading', 12534 (Denver Beanland).

276 Ibid 12536.

277 Connolly et al (n 6).

278 Ibid, cover letter signed by authors.

279 Ibid 69 (emphasis added).

- 315 — Disabling in order to commit an indictable offence ('who, by any means calculated to choke, suffocate, or strangle, and with intent to commit or to facilitate the commission of an indictable offence, or to facilitate the flight of an offender after the commission or attempted commission of an indictable offence, renders or attempts to render any person incapable of resistance').
- 317(1)(d) — Malicious acts, which requires an intent 'to resist or prevent a public officer from acting in accordance with lawful authority' combined with certain physical actions.
- 346 — Assaulting another with intent to hinder or prevent the other person from working at or exercising the other person's lawful trade, business, or occupation, or from buying, selling, or otherwise dealing, with any property intended for sale.
- 351 -— Assaulting another with intent to commit rape.
- 413 — Assaulting any person with intent to steal anything.
- 409 — Robbery — stealing anything, and, at or immediately before or immediately after the time of stealing it, using or threatening to use actual violence to any person or property in order to obtain the thing stolen or to prevent or overcome resistance to its being stolen.

Section 340(1)(a) also covers assaults on persons who are not police officers making an arrest or assisting a police officer in effecting a lawful arrest or detention of a person.[280]

The Council makes the observation that this subsection might continue to exist in a revised, more targeted section 340, although this may continue the incongruous and inconsistent nature of the offence, which the Council's recommendations are designed to address. Alternatively, if the Council's recommendations are accepted, the Government might consider moving this subsection or creating a new provision entirely.

8.8.4 Sections 340(1)(c) and (d)

The Council recommends below that sections 340(1)(c) and (d) be repealed if Recommendation 3–1 is accepted because they act to extend section 340 beyond the narrowed scope achieved. The aggravating sentencing factor that would be created if Recommendation 10–1 were accepted would cover this cohort of victim, with an emphasis on vulnerability.

The most significant amendment of these sections was in the *Criminal Code and Other Acts Amendment Act 2008* (Qld). Section 61 omitted the existing versions of subsections (c), (d) and (e) and inserted current (c) and (d) ('performing/has performed a duty imposed on the person by law'). The omitted provisions were identical to those in the original *Criminal Code*, save for a change from 'him' to 'the person' in (e):

> (c) unlawfully assaults, resists, or obstructs, any person engaged in the lawful execution of any process against any property, or in making a lawful distress, while so engaged; or
>
> (d) assaults, resists, or obstructs, any person engaged in such lawful execution of process, or in making a lawful distress, with intent to rescue any property lawfully taken under such process or distress; or
>
> (e) assaults any person on account of any act done by the person in the execution of any duty imposed on the person by law; or

The explanatory notes to the 2008 Bill explained that:

> New subparagraph (c) applies to an unlawful assault on a person performing a duty imposed by law. This extends omitted section 340(1)(e) which provided that such an assault had to be committed 'on account' of an act done by the person performing the duty.
>
> … Subclause (4) inserts a new subsection (2AA) to apply to assaults on public officers performing a function of their office or employment. The term 'public officer' is defined in section 1 of the Code. That definition includes a person, other than a judicial officer, discharging a duty of a public nature or executing any process of a court. Therefore, persons protected under current section 340(1)(c) and (d) will continue to fall under the provision.[281]

The Council has based its recommendations regarding narrowing section 340 to key frontline and emergency workers on sentencing patterns observed in the data. Remaining occupations with demonstrable vulnerability not covered by section 340 would instead be covered by the aggravating sentencing factor in section 9.

Maintaining the very wide language in sections 340(1)(c) and (d) would render the Council's recommended changes to section 340 pointless. The intention is for a case to clearly fall under either section 340 or the section 9 aggravating factor. In the Council's view, subsections (1)(c) and (d) are obtuse (especially so in the context of the proposed amended provision) and would serve only to complicate and confuse if they were retained. Those

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280 See *Criminal Code* (Qld) chapter 58 'Arrest' (ss 545A–552) and ss 137(b), 252(2), 257, 258, 450A, 479.

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

occupational cohorts not covered by section 340 would instead be covered by either of sections 335 or 339 (or more serious offences if required) in concert with the new aggravated sentencing factor in section 9 of the PSA. This is illustrated by Table 3-8 in Chapter 3, which shows the overwhelming majority (if not all) assaults prosecuted under these subsections would likely be captured under the revised section 340 or the section 9 aggravating factor.

The other basis on which the Council makes this recommendation regarding sections 340(1)(c) and (d) is that they are little used. As noted in Table 2-2 in Chapter 2, over the Council's data period from 2009–10 to 2018–19:

- subsection (1)(c) accounted for 236 cases, 229 offenders, 306 offences (160 being the most serious offence); and
- subsection (1)(d) accounted for 85 cases, 82 offenders, 101 offences (60 being the most serious offence).

As shown in Figure 2-3 in Chapter 2, subsection (1)(c) accounted for only 2.0 per cent of sentenced serious assault cases (MSO) over that data period, and (1)(d) accounted for only 0.8 per cent.

Recommendation 5: Repeal of sections 340(1)(c) and (d)

Subsections (1)(c) and (d) of section 340 should be repealed and the language used within them should not form part of any redrafted section 340 in response to Recommendation 3–1 of this review.

8.8.5 Section 340(1)(f)

Section 340(1)(f) is identical to the original version as enacted. It has the evidentiary challenge of requiring proof of a conspiracy and that the assault occurred in this context. The *Criminal Practice Rules* set out the requirements as:

> Assaulted EF, in pursuance of an unlawful conspiracy respecting—
>
> (a) the [describe the manufacture, trade, business or occupation]; or
>
> (b) GH who was concerned (or employed) in the [describe the manufacture, trade, business or occupation]; or
>
> (c) the wages of GH who was concerned (or employed) in the [describe the manufacture, trade, business or occupation].[282]

Between 2009–10 and 2018–19, there were two cases sentenced involving section 340(1)(f) offences.[283] Both involved juvenile offenders who were sentenced in the Childrens Court. In one case (sentenced in 2016–17), the offence was the MSO (the single (1)(f) MSO in a total of 7,932 section 340 MSOs), for which 12 months' probation was ordered. The other case (sentenced in 2013–14) received a probation order for 9 months; however, the offence was not the MSO. In this case the MSO was section 339(1) AOBH, for which the offender received a 9-month probation order.

The 1992 O'Regan Review recommended repealing section 340(1)(f) on the basis that it was covered by section 340(1)(a).[284] In WA, the 1983 Murray Report[285] recommended deleting 'existing paragraph (6)' of section 318 of the WA *Criminal Code* [the equivalent to Queensland's s 340(f)] on the basis that it was 'inappropriate to be retained having regard to the recommendations to be made with respect to the law of conspiracy and discussed in more detail later in this report'.[286] No such paragraph survives in WA's section 318.

The Council makes the observation that there appears to be no need to retain section 340(1)(f) — assault of a person in pursuance of an unlawful conspiracy. It appears to be an anachronism and rarely charged. The Council could find only two cases over the 10-year period examined in which this offence had been charged and sentenced — both involving juvenile offenders. Of those sentences for which sentencing remarks could be accessed, it was unclear the basis on which this offence was charged as these cases appeared to possibly involve the assaults of youth detention centre workers.

Retaining this section may also continue the incongruous and inconsistent nature of the offence, which the Council's recommendations are designed to address.

Under the reforms recommended to section 9 of the PSA, the Council can see no real benefit to be gained in retaining this provision as any assaults committed against someone for reasons associated with trade, business or occupation will be recognised as an aggravating factor that is applied across all offences that can be charged involving the use, or threatened use, of violence against the person.

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282 *Criminal Practice Rules 1999* (Qld) Sch 3, Form 193 'Serious Assault' (5).

283 See Chapter 2, Table 2-2. Two more were 'not further defined' beyond 'section 340'.

284 O'Regan, Herlihy and Quinn (n 6) 201.

285 Murray (n 27) 214.

286 Ibid.

Finally, as the O'Regan Report noted, the conduct covered (in a very complicated way) by subsection 1(f) is likely covered by subsection (1)(a) in any event, given that assaulting someone in pursuance of an unlawful conspiracy would usually also constitute assaulting someone with intent to commit a crime.

8.8.6 A new offence to cover sections 340(1)(g) and (h)?

Sections 340(g) and (h) were introduced by unusual means into the Code by the *Criminal Law Amendment Act 1997* (Qld). The Labor Opposition passed them with the support of an independent Member of Parliament. The people-aged-over-60 provision had been recommended as part of the O'Regan Review and included in the failed 1995 Code, while the person-using-a-guide-dog etc. provision had appeared in the 1995 Code. Neither was supported by the Connolly Review and the Government opposed the Opposition's amendments.

As noted in Table 2-2 in Chapter 2, over the Council's data period from 2009–10 to 2018–19:

- subsection (1)(g) accounted for 1,702 cases, 1,664 offenders, 1,823 offences (1,329 being the MSO); and
- subsection (1)(h) accounted for 40 cases, 39 offenders, 45 offences (32 being the MSO).

As shown in Figure 2-3 in Chapter 2, subsection (1)(g) accounted for 16.8 per cent of sentenced serious assault cases (MSO) over that data period, and (1)(h) accounted for 0.4 per cent.

The Council recommends relocating subsections (1)(g) and (h) from section 340 and into a new, standalone section regarding assaults of vulnerable persons. The Council notes that it has not specifically sought the views of disability support groups and other relevant stakeholders, and this may be required, although such a move would not appear to the Council to disadvantage the people covered by these subsections.

The proposed aggravated sentencing factor in section 9 of the PSA would not apply to the new provisions, just as it would not apply to an amended section 340. The aggravating factor would apply to persons made vulnerable because of their occupation. The standalone offence would be inherently aggravated anyway.

Alternatively, these subsections could be moved from section 340 and into other provisions regarding offences against the person, to form circumstances of aggravation within each — as is the approach adopted in WA for offences against the person in circumstances where the victim is aged 60 years or more. However, this would create disparity within these sections by creating another layer of maximum penalty. There would also be a question of whether such circumstances of aggravation should apply to every offence against the person, or only some. Again, given the coverage that section 9(3)(c) of the PSA affords, the Council considers this would be the best way to recognise and protect such cohorts.

Recommendation 6: Assaults on vulnerable persons under sections 340(1)(g) and (h)

Subsections (1)(g) and (h) of section 340 should be relocated from section 340 to a new, standalone provision targeting assaults of vulnerable people.

8.8.7 Section title of 'serious assault'

The language used to describe conduct captured within criminal offences is important when taking into account that one of the objectives of the criminal law is to prescribe what behaviour is to be treated as unlawful and deserving of criminal punishment.

The offence titles assigned in legislation can aid community understanding of what type of conduct the offence is targeted at. Conversely, offence titles that do not accurately reflect the conduct captured may contribute to misunderstandings about the nature of these offences.

While the term 'serious assault' is well understood by police and criminal lawyers, to general members of the community it often suggests something very different — an assault that has resulted in serious injury or harm to the victim. In its submission, the QLS noted 'the label "serious assault" is confusing, particularly to a potential employer considering the results of a criminal history check'.[287]

Under existing Director of Public Prosecution Guidelines, when an assault has resulted in serious injury being caused to a police officer, serious assault is only to be charged for injuries that fall short of GBH or wounding, meaning that cases involving more serious injuries are charged under other sections of the *Criminal Code*.[288]

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287 Submission 30 (Queensland Law Society) 5.

288 Office of the Director of Public Prosecutions (Queensland), *Director's Guidelines* (30 June 2019) 17.

For the offence of 'serious assault' to be established, there is no need for any bodily harm to have been caused or intended to be caused. The conduct may also involve an act of resisting or obstructing a public officer, rather than an assault (although under the Council's proposed reforms, this latter issue would be resolved).

To further confuse matters, the nomenclature of 'serious assault' is used for statistical purposes to report on offences and sentencing outcomes under the Australian Standard Offence Classification Scheme.[289] Two forms of 'serious assault' are specified under the Queensland extension to this classification scheme: 'serious assault resulting in injury', which is constituted by offences such as GBH, AOBH, wounding and torture, and 'serious assault not resulting in injury'.[290] The offence of 'serious assault' is coded to both broad offence categories, depending on whether injury has resulted from the assault.

The Council recommends that, should its recommendations regarding the repeal of subsections (1)(c) and (d) (Recommendation 5) and relocation of subsections (1)(g) and (h) (Recommendation 6) be accepted, and other advice regarding subsection (1)(a) and (f) be accepted, section 340 should be retitled to better reflect the nature of the conduct captured with a view to promoting community understanding of the scope of the redrafted offence. Alternatively, should the Council's recommendations regarding the relocation of subsections (1)(g) and (h) not be accepted, we see merit in making this change, but including a reference to 'vulnerable persons'. This change should also assist agencies whose officers are captured within scope to better target any public awareness campaigns about penalties that apply to these forms of assault.

Recommendation 7: New section title — 'Assaults on frontline and emergency workers'

To support enhanced public understanding of the conduct falling within scope of this section, and knowledge of relevant penalties that apply, section 340 should be retitled: 'Assaults on frontline and emergency workers'. Such amendment should only be made if the Council's recommendations regarding the repeal of subsections (1)(c) and (d) (Recommendation 5) and the relocation of subsection (1)(g) and (h) (Recommendation 6) are adopted. Alternatively, the section might be retitled: 'Assaults on frontline and emergency workers and vulnerable persons'.

8.9 Penalties for serious assault

8.9.1 Introduction

In Chapter 7, we discussed in some detail sentencing trends for offences involving assaults against police officers, corrective services officers and all other public officers that fall within the scope of section 340 of the *Criminal Code* (Qld) in the execution of their duties. The impact of the 2012 and 2014 amendments introducing higher maximum penalties was also considered.

In this section, we discuss whether the current penalties are appropriate and if this is in accordance with stakeholder expectations.[291]

8.9.2 Current position in Queensland

Serious assault

Assaults on police officers are, and have always been, specifically recognised in section 340. The 7-year maximum penalty applies where a person assaults, resists or wilfully obstructs a police officer while acting in the execution of duty (or any person acting in aid of a police officer so acting). The maximum penalty is 14 years where the victim is a police officer and when committing the offence, the offender:

- bites or spits on a police officer;
- throws at or applies to a police officer a bodily fluid or faeces;
- causes bodily harm to the police officer; or

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289 Australian Bureau of Statistics, *Australian and New Zealand Standard Offence Classification: Australia* (2011, 3rd ed) Catalogue ref 1234.0.

290 Queensland, Office of Economic and Statistical Research *Australian Standard Offence Classification (Queensland Extension)* (QASOC) (2008) Div 02 'Acts intended to cause injury', subdiv 021 'Assault' comprises categories 0211 (Serious assault resulting in injury), 0212 'Serious assault not resulting in injury,' and 0213 'Common assault'.

291 This was addressed in question 14 of the Council's Issues Paper, which sought feedback on stakeholder support for s 340 and whether structural changes should be considered, appropriateness of maximum penalties with reference to those for other assault-based offences, and whether the objectives of the aggravated forms of serious assault were being achieved.

- is, or pretends to be, armed with a dangerous or offensive weapon or instrument.

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

In some instances, this provision provides a higher maximum penalty than for AOBH (s 339, 14 years as against 10 years) and on par with GBH (s 320, 14 years).

Sections 340(1) and 340(2AA) are drafted so that each has two sets of subparagraphs (a) and (b). The first set in each creates offences. The second set creates aggravated offences and sets out the maximum penalties applicable.[292]

A similar approach has now also been applied under subsection (2), which previously provided only that a person who unlawfully assaults a 'working corrective services officer' is liable to a maximum penalty of 7 years' imprisonment. This pre-dated the insertion of subsection (2AA). The Queensland Parliament added the 14-year maximum and aggravated penalty provision to section 340(2) in July 2020 (commenced 21 July 2020).[293]

Alternative *Criminal Code* charges to serious assault

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

> One difficulty is that quite often offences of the type in question are associated with other, frequently more serious, offences and the penalties imposed with respect to the offences in question are affected by other sentences imposed at the same time.[294]

This is a key point when considering criticism of sentences for section 340 offences: more serious offences could be charged instead, and/or the serious assault offence may be caught up in a wider range of charges where a higher head sentence is imposed for a more serious charge. Alternatively, the breadth of the section is such that the conduct involved could be extremely minor, and thus attract a sentence reflective of that.

Other *Criminal Code* offences that can be used instead of, or beside, section 340 are:

- common assault (s 335) — maximum penalty 3 years' imprisonment;
- AOBH [295] (s 339) — maximum penalty 7 years' imprisonment, or 10 years where the offender is or pretends to be armed with any dangerous or offensive weapon or instrument, or is in company with someone else;
- wounding[296] (s 323) — maximum penalty 7 years' imprisonment;
- GBH [297] (s 320) — maximum penalty 14 years' imprisonment;
- acts intended to cause GBH and other malicious acts ('malicious acts', section 317) — maximum penalty life imprisonment;
- resisting public officers (s 199) — maximum penalty 2 years' imprisonment; [298] and
- torture[299] (s 320A) — maximum penalty 14 years' imprisonment.

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

293 *Corrective Services and Other Legislation Amendment Act 2020* (Qld) s 55.

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

295 'Bodily harm' means any bodily injury that interferes with health or comfort: *Criminal Code* (Qld) s 1.

296 Case law says that wounding means the true skin is broken and penetrated (not merely the cuticle or outer skin). It does not matter how the wound was inflicted (for instance, a weapon does not have to be used): Justice Ryan, Judge Rafter and Judge Devereaux, LexisNexis, *Carter's Criminal Law of Queensland* (online at 3 January 2020) [s 323.20] Unlawful wounding.

297 The term 'grievous bodily harm' means the loss of a distinct part or an organ of the body, serious disfigurement, or any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health; whether or not treatment is or could have been available: *Criminal Code* (Qld) s 1.

298 This offence covers obstruct and resisting public officers and so duplicates aspects of s 340. It is discussed in detail in section 8-7 of this chapter.

299 Torture is the intentional infliction of severe pain or suffering on a person by an act or series of acts done on one, or more than one, occasion. 'Pain or suffering' includes physical, mental, psychological or emotional pain or suffering, whether temporary or permanent: *Criminal Code* (Qld) s 320A.

8.9.3 Position in other jurisdictions

The cross-jurisdictional tables at Appendix 5 show examples of indictable offences dealing with assaults of police and various groups of public officers, collected by occupational group. These cover the Commonwealth, New South Wales, Northern Territory, South Australia, Tasmania, Victoria, Western Australia, and Canada.

The analysis of penalties that apply in other jurisdictions demonstrates that a wide range of penalties apply to these offences depending on the type of conduct captured. In some cases, higher penalties are only applied if 'bodily harm' is caused or if accompanied by an intention to cause harm, or reckless indifference to this. Some of the penalties applying to these offences, and the nature of these offences is discussed above in section 8.6.5.

8.9.4 The Council's approach to assessing 'adequacy'

As discussed in the Council's Issues Paper, the 'adequacy' of penalties is a difficult concept to measure in an evidence-based way.

In the Council's report on penalties imposed on sentence for criminal offences arising from the death of a child, we discussed the concept of 'adequacy' in some detail. We noted that unless legislation fixes a mandatory penalty, 'the discretionary nature of the judgment required means that there is no single sentence that is just in all the circumstances',[300] or an 'objectively correct sentence'.[301]

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

> At best, experienced judges will agree on a range of sentences that reasonably fit *all* the circumstances of the case. There is no magic number for any particular crime when a discretionary sentence has to be imposed.[302]

Even an agreement to accept a plea to a lesser charge (in this case, to an offence under section 790 of the PPRA, rather than to serious assault) 'cannot affect the duty of either the sentencing judge or a court of criminal appeal to impose a sentence which appears to the court, acting solely in the public interest, to be just in all of the circumstances'.[303]

Sentencing courts have a wide discretion, yet 'must take into account all relevant considerations (and only relevant considerations)'[304] including legislation and case law.

As discussed in Chapter 6, it can be inferred that the sentencing discretion has 'miscarried' when the sentence is clearly unjust, being 'manifestly excessive' or 'manifestly inadequate'.[305] Such sentences, which an appeal court can set aside, are those falling 'outside the *range* of sentences which could have been imposed if proper principles had been applied'.[306]

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

In responding to this reference, the Council therefore sought to identify:

- any evidence of inconsistency in the approach of courts to sentencing for these offences — including whether aggravated forms of serious assault are treated by courts, in general, as more serious, and that the distribution of sentences is what could be expected based on the maximum penalties that apply;
- any inconsistencies between the approach in Queensland and that in other Australian and select overseas jurisdictions; and
- any evidence of a lack of community confidence in sentencing for assaults on public officers, including any disparities between current sentencing practices and stakeholders' and Parliament's views of offence seriousness. The consultation process has informed the Council's response. Taking into account that,

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

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

302 Ibid 383 [65] (McHugh J) (emphasis in original).

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

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

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

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

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

The Council has also considered whether the current penalty and sentencing framework provides an appropriate response to this form of offending with respect to meeting the primary purposes of sentencing.

8.9.5 Evidence of consistency in approach of courts — by the data

The Council's analysis looked at sentencing outcomes by the type of offence and the type of sentencing court.

The circumstances of aggravation with 14-year maximum penalties in section 340 signal to courts the more serious nature of the offending. However, they also widen the disparity between applicable maximum penalties for the same conduct, based not necessarily on the harm caused but on the occupation of the victim. For example:

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

Sentencing outcomes for non-aggravated serious assault and other 'acts intended to cause injury' carrying a 7-year maximum penalty (by MSO)

Non-aggravated serious assault carries a maximum penalty of 7 years. Other offences falling within the category of 'acts intended to cause injury' also have a 7-year maximum penalty: AOBH where there are no circumstances of aggravation, and wounding. Figure 8-1 (below) shows the distribution of the length of custodial sentences applied for these offences. Further summary statistics are set out in Tables A4-7 and A4-9 in Appendix 4.

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

In the higher courts, outcomes of note were:

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

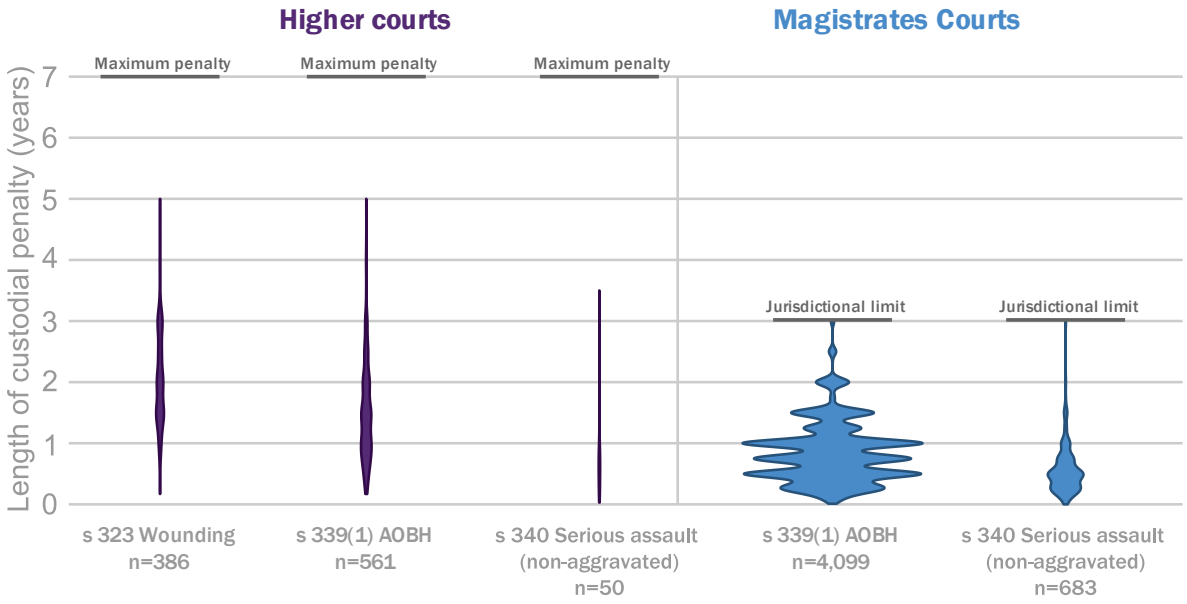
In the Magistrates Courts (which cannot sentence above 3 years, nor for wounding), outcomes of note were:

- highest proportion of cases receiving a custodial penalty: non-aggravated serious assault (54.5%), followed by AOBH (50.3%);
- highest sentence imposed for both offences: 3 years;
- use of custodial penalties less frequent (about half of cases);
- custodial penalty lengths clustered differently for the two offences: about 6 months for non-aggravated serious assault (with an average sentence of 0.6 years, or just over 7 months) and a more even spread from 6 months up to 2 years for AOBH (with an average of 0.8 years, or around 9.5 months).

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

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

Figure 8-1: Distribution of custodial penalties for 'acts intended to cause injury' offences carrying a 7-year maximum penalty (MSO)



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

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

Aggravated serious assault carries a maximum penalty of 14 years, as do the offences of GBH and torture. Figure 8-2 (below) shows the distribution of the length of custodial sentences applied for these offences.

Both GBH and torture must be dealt with on indictment in the higher courts. All offences of torture (n=62) and almost all GBH offences (99.1%; n=567/572) sentenced over the data period received a custodial penalty. Further summary statistics are set out in Table A4-8 in Appendix 4.

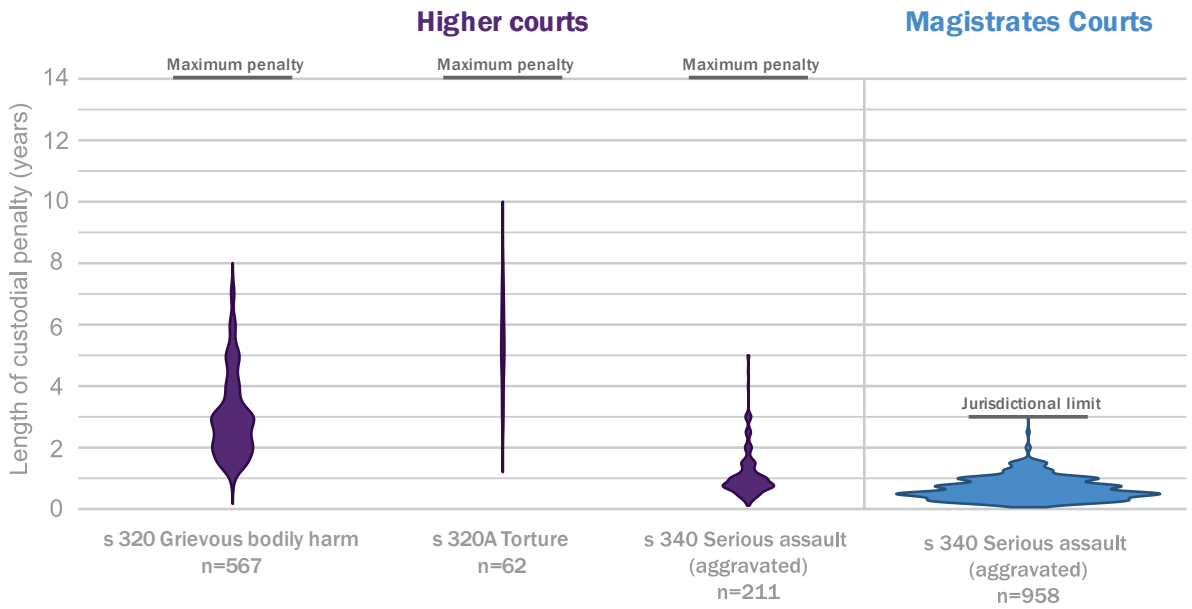
Aggravated serious assaults can only be dealt with in the Magistrates Courts on prosecution election. The majority of aggravated serious assaults (84.9%; n=1,280/1,507) were sentenced in the Magistrates Courts with three-quarters (74.8%) resulting in a custodial sentence being imposed. Those cases dealt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

In the higher courts, outcomes of note were:

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

In the Magistrates Courts, custodial sentences were imposed in 74.8 per cent of cases of aggravated serious assault. The highest custodial penalty was 3 years. The majority of sentences were under 2 years (6 months was most common). The average sentence was 0.7 years or about 8.5 months (compared to 1.1 years in the higher courts). It can be assumed that aggravated forms of serious assault dealt with summarily are at the less serious end of the spectrum.

Figure 8-2: Distribution of custodial penalties for 'acts intended to cause injury' offences carrying a 14-year maximum penalty (MSO)



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

Sentencing outcomes for section 317: Acts intended to cause grievous bodily harm and other malicious acts (MSO)

The Council also analysed data for acts intended to cause grievous bodily harm and other malicious acts (s 317).

The section 317 offence carries a maximum penalty of life imprisonment and cannot be dealt with summarily. The prosecution must prove one of a list of four specific intentions (not required for s 340) accompanying one of seven physical actions. The intentions are to maim/disfigure/disable; do GBH or transmit a serious disease; resist or prevent arrest or detention; or resist or prevent a public officer from acting in accordance with lawful authority. The physical actions include wounding; doing GBH or transmitting a serious disease; and striking with a projectile (or anything else capable of achieving the intention).

Like various other *Criminal Code* offences, this offence can be used instead of (or in addition to, in which case the malicious acts sentence will likely attract the highest penalty) section 340 for offending against public officers For example, it has been used when offenders have driven a vehicle into a police officer causing GBH,[307] shot at them with firearms,[308] stabbed them with knives (resulting in wounds)[309] and poured petrol over them (no physical injury).[310]

From 2009–10 to 2018–19, there were 276 cases involving section 317 offences as the MSO. All of these cases were sentenced in the higher courts and were predominantly adult offenders (96.4%, n=266). All adult offenders received a custodial sentence, with an average length of 6.4 years — see Table 8-1. The longest sentence was 15 years, as shown in Figure 8-3.

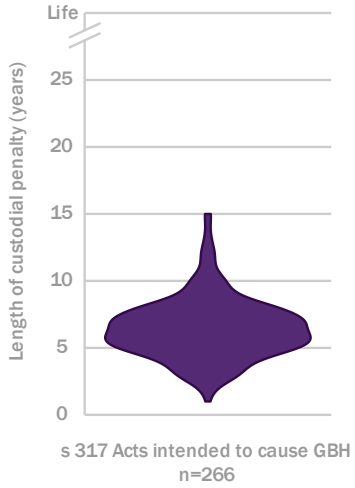
307 *R v Patrick (a pseudonym)* [2020] QCA 51.
308 *R v Mulholland* [2001] QCA 480, *R v Treptow* [1995] QCA 582.
309 *R v Williams* [1997] QCA 476.
310 *R v Kolb* [2007] QCA 180.

Table 8-1: Summary of custodial penalties for malicious acts offences (MSO)

Offence description	Cases with custodial penalties (%)	Length of custodial penalty (years)			
		Average	Median	Minimum	Maximum
s 317 malicious acts (n=266)	100%	6.4	6.0	1.0	15.0

Data include adult offenders, higher courts, sentenced 2009–10 to 2018–19.
Source: QGSO, Queensland Treasury — Courts Database, extracted November 2019.

Figure 8-3: Distribution of custodial penalties for malicious acts offences (MSO)



Data include adult offenders, higher courts, sentenced 2009–10 to 2018–19.
Source: QGSO, Queensland Treasury — Courts Database, extracted November 2019.

The main finding from the Council's analysis

The main finding regarding sentencing in the higher courts is that they treat both torture and GBH, in general, as more serious than aggravated serious assault — even though all three offences share the same 14-year maximum penalty. For section 317 offences, which are more serious again, the higher courts treat these as the most serious of all offences analysed.

Over two in five (41.9%) torture sentences imposed were for a period at or over 40 per cent of the maximum penalty[311] of 14 years, as were 5.6 per cent of sentences for GBH. None of the sentences for aggravated serious assault met this threshold.

In the higher courts, custodial penalties were ordered in 211 cases in which aggravated serious assault was the MSO (93.0%); in 567 cases where GBH was the MSO (99.1%); 62 cases where torture was the MSO (100.0%); and 276 cases where malicious acts was the MSO (100%). In the Magistrates Courts, there were 958 cases resulting in a custodial penalty where aggravated serious assault was the MSO (74.8%). The offences of GBH, torture and malicious acts cannot be sentenced in the Magistrates Courts.

It is arguable that, once offending has a sufficiently serious gravamen, serious assault is no longer the most suitable or appropriate charge — other *Criminal Code* charges may be better suited to a particular case and result in a higher head sentence and non-parole period.[312] This may even be the case with offences of wounding and AOBH, which carry a lower maximum penalty than aggravated serious assault.[313]

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311 The use of 40 per cent of the maximum penalty as a meaningful point of assessment is based on the Victorian Sentencing Advisory Council's consideration of how 'standard sentence' levels might be set under a standard sentence scheme. Under the Victorian Council's recommendations, 40 per cent was chosen to represent the mid-range of objective seriousness, before subjective factors (those personal to the offender) are accounted for. See Sentencing Advisory Council (Victoria), *Sentencing Guidance in Victoria: Report* (2016) xxxi, 186–7. A lower sentence for a mid-range offence might be appropriate once subjective factors are factored in including, for example, the lack of a relevant prior criminal history, remorse, and an early guilty plea.

312 For a discussion of this issue in the context of the ODPP's *Director's Guidelines*, see section 8.8.7 of this report.

313 See (n 312).

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

For example, a recent torture and assault of a vulnerable victim case[314] demonstrates how different *Criminal Code* charges, which carry the same maximum penalty as serious assault, are used for extremely serious offending — and can be preferred to assault charges because they are recognised historically, and because of their elements, as more serious.

In this case, the Court of Appeal refused an application to appeal against a sentence of 10 years' imprisonment (with an automatic serious violent offence declaration requiring 80 per cent of that term to be served in actual custody).[315] Other charges were common assault, GBH and domestic violence order breaches, which received lesser, concurrent penalties.

The victims were a 39-year-old man with cerebral palsy and limited use of one side of his body, and a 28-year-old woman. The offender threatened to kill the woman while holding scissors open against her throat, grabbed her around the neck, spat in her face and threw the scissors at her, striking her abdomen. The disabled male victim was subjected to a 10-hour ordeal that left him with a life-threatening injury (traumatic large left pneumothorax with partial collapse of the left lung), rib fractures, fractures to his vertebra, partial thickness burns, multiple abrasions and contusions, and a nasal bone fracture.

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

> The offences to which the [offender] pleaded guilty involved a course of conduct over a protracted period in which [he], as the principal offender, terrorised two complainants. The torturous assault of those complainants was properly described by the sentencing Judge as 'cowardly, vicious and evil'. One complainant suffered serious and life-threatening injuries. He was callously left for dead. That complainant was disabled, rendering him largely defenceless. There was nothing in that complainant's conduct which provided any sensible reason for the [offender's] behaviour.
>
> Notwithstanding the [offender's] pleas of guilty and his expressed remorse and the other matters in mitigation such as his troubled childhood, drug addiction and prospects of rehabilitation, an effective head sentence of 10 years imprisonment imposed on an offender who had a relevant and significant criminal history, including previous convictions for violence and drugs, and who had committed the offences in question while on probation and when on bail for the domestic violence offence, fell well within an appropriate exercise of the sentencing discretion.[316]

This reflects the data analysis — that offending of an extremely high level, with the intentional infliction of harm and serious injury, will not necessarily result in a head sentence above 10 years (this is compounded by the serious violent offence scheme and its mandatory application to sentences of 10 years or more).

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

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

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314 *R v Drews* [2020] QCA 18. Serious assault could not have been used here. See 8 [38] (Sofronoff P, Fraser and Philippides JJA agreeing) and *R v WBJ* [2020] QCA 32, 2 [1]–[2]. 3 [5], 5 [15]–[17], 6 [27].

315 For an explanation of the serious violent offence provisions, see Queensland Sentencing Advisory Council, *Queensland Sentencing Guide* (December 2019) 9.

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

The way in which the offence sits within the hierarchy of *Criminal Code* offences is important. An unintended consequence of a precise amendment to the maximum penalty for one offence in the Code may be that this does not take into account the relationship that that offence bears to other offences in the same Code that have co-existed since its creation, and the way in which this is borne out in sentencing and charging practice.

The Court of Appeal rejected prosecution arguments, in a 2014 section 340 case, that sentences for the aggravated form of serious assault should be comparable to those for GBH because they shared the same maximum penalty (in the context of the particular facts of that case, which did not involve actual physical injury, nor psychological injury or trauma):

> The legislature, the applicant contended, intended that offences of this kind were to be dealt with as severely as offences of doing grievous bodily harm …
>
> The legislature in increasing the maximum penalty clearly intended that sentencing courts should impose significantly heavier penalties in respect of serious assaults committed on police officers acting in the execution of their duty where, as here, the offender applies a bodily fluid to the police officer. As this Court identified in *R v CBI*, this increase 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. But that does not mean that a sentence of actual imprisonment is inevitable in every case, even where, as here, the maximum penalty has been increased from seven to 14 years imprisonment.
>
> I cannot accept … that the sentences imposed for offences of this kind should be comparable to those imposed for the offence of grievous bodily harm. The extent of the injuries suffered by a complainant in offences of physical violence is relevant in determining the appropriate sentence.
>
> It is fortunate for both the complainant and the respondent that the complainant was not apparently physically injured beyond the obvious revulsion she must have experienced … This case was not as serious as those where offenders claimed to suffer from serious contagious diseases and threw blood, saliva or other bodily fluids on police officers. There was no suggestion the respondent was suffering from any contagious disease, that the complainant had reason to think he was, that his urinating on her shoes and lower pants could spread life-threatening illness, or that the complainant had reason to think it could. It is also fortunate for both the complainant and the respondent that there was no evidence that the complainant suffered psychological injury or trauma as a result of the assault, although that possibility certainly cannot be discounted in cases of this kind. [317]

The data and discussion above reflect stakeholder concerns raised with the relevant Parliamentary Committee when considering the first doubling of maximum penalty in section 340 in 2012 (and repeated to the Council during this review), that:

- a 14-year maximum would be incongruous with the same penalty in place for more serious offences; and
- regard should in particular be had to penalties for comparable conduct.[318]

Such amendments, regardless of the jurisdiction, are often election commitments. This approach is at odds with one leading academic's suggestion that, if a legislature is seeking to deter crime by increasing maximum penalties it should consider:[319]

> [w]hat resources should be used in order to calculate the extra margin of severity that is required in order to reduce the incidence of the crime to a 'tolerable' level, or whatever level is specified. If it is effectiveness that is important … then that would indicate that there should be some empirical testing of different marginal increases, perhaps through research with offenders and non-offenders. [320]

Evidence of consistency in approach of courts — by the data — aggravated and non-aggravated serious assaults

The Council found that, on average, aggravated forms of serious assault attract higher penalties (1.1 years for higher courts sentences, and 0.7 years in the Magistrates Courts) than non-aggravated forms of serious assault (0.9 years for higher courts sentences, and 0.6 years in the Magistrates Courts).

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317 *Queensland Police Service v Terare* (2014) 245 A Crim R 211, 218 [22], 221 [35]–[37] (McMurdo P, Fraser and Gotterson JJA agreeing) (citations omitted).

318 Traves (15) 4.

319 'The assumption here is that marginal general deterrents work in a hydraulic fashion (sentences up, crimes down), whereas [it is argued that] they can rarely be expected to do so': Andrew Ashworth, 'The Common Sense and Complications of General Deterrent Sentencing' (2019) *Criminal Law Review* 7, 577.

320 Ibid 573.

The proportion of offences attracting a custodial sentence are also much higher for aggravated serious assault (93.0% of offences dealt with in the higher courts, and 74.8% in the Magistrates Courts) than for non-aggravated forms (82.0% of offences dealt with in the higher courts, versus 54.5% in the Magistrates Courts).

There was also a high level of consistency in the length of custodial sentences imposed when examined by court level.

Further sentencing outcome analysis — section 340 and common assault, AOBH

The Council undertook analysis of a further three sentencing outcome comparisons:

- section 340 simpliciter and common assault;
- aggravated section 340 (causing bodily harm) and AOBH simpliciter; and
- aggravated section 340 (while armed) and common assault associated with other weapons offences.

In each, the section 340 offence was more likely to result in a custodial sentence, supporting the finding that serious assault, when considered against its closest analogues, is treated by sentencing courts as being a more serious offence warranting a higher or more severe sentence. This is consistent with Parliament's intention in setting higher maximum penalties for this offence.

Sentencing outcomes for non-aggravated serious assault and common assault (MSO)

As noted above, the maximum penalty for non-aggravated serious assault is more than double that of common assault (7 years' imprisonment comparted with 3 years, respectively). Bodily harm is not an element of either offence. Figure 8-4 below shows the distribution of the length of custodial sentences applied for these offences.

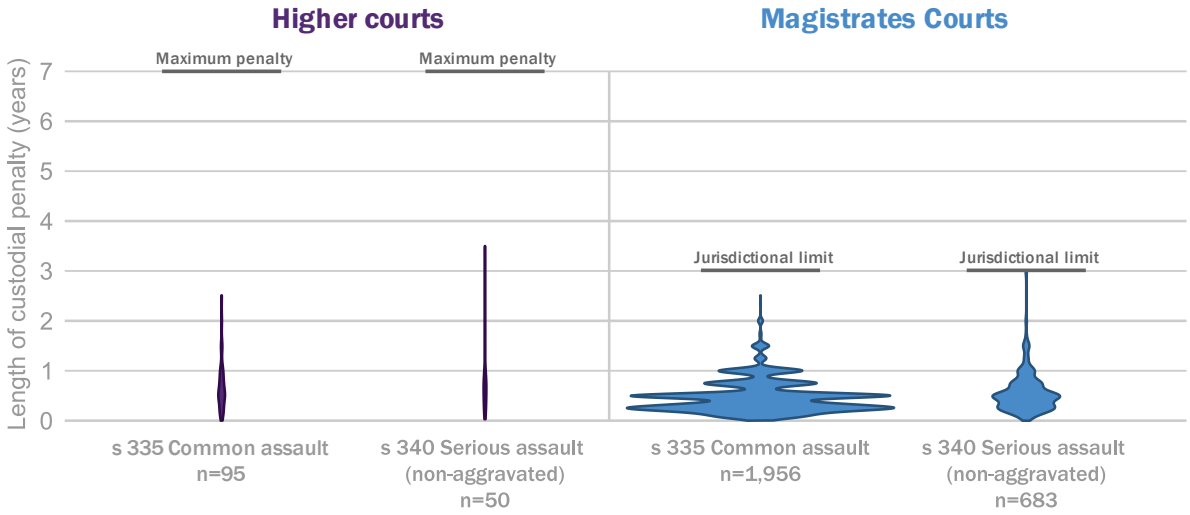
- Non-aggravated serious assault offences are much more likely to attract a custodial sentence. In the higher courts, 82.0 per cent attracted a custodial penalty, compared to 41.7 per cent for common assault. In the Magistrates Courts the difference was even greater (54.5% and 21.5%, respectively).
-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

For offences resulting in a custodial sentence, the distribution of custodial sentences for non-aggravated serious assault and common assault is more similar than for other 'acts intended to cause harm' offences analysed above.

The longest sentence imposed for common assault across both court levels was 2.5 years. The distribution of sentences, however, was quite different. For common assaults in the higher courts, the sentence lengths were distributed relatively evenly; whereas in the Magistrates Courts, which imposed 95.1 per cent of all custodial penalties for this offence, sentences were concentrated at less than one year. Further summary statistics are set out in Table A4-9 in Appendix 4.

The longest sentence imposed for non-aggravated serious assault was 3 years in the Magistrates Courts, and 3.5 years in the higher courts — both of which exceeded the highest sentence imposed for common assault.

Figure 8-4: Distribution of custodial penalties for common assault (MSO) and non-aggravated assault of public officer offences (MSO)



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

Sentencing outcomes for section 340 (bodily harm circumstance of aggravation) vs section 339(1) (AOBH simpliciter) (MSO)

The Council analysed data for serious assault causing bodily harm, and non-aggravated AOBH, after the release of its Issues Paper. The only difference in elements between these offences is the occupation of the victim of a serious assault. The offences are otherwise identical, but the maximum penalty for serious assault is double that of AOBH (14 years as against 7 years). There are two forms present in section 340: those regarding police officers and those regarding public officers (a third regarding working correctional services officers commenced on 21 July 2020).[321]

In the Magistrates Courts, serious assault (of police and public officers) with the bodily harm circumstances of aggravation (penalty provision sections 340(a)(ii) and 340(2AA)(a)(ii)) was more likely to receive a custodial penalty (68.1%) than non-aggravated AOBH (s 339(1) (50.3%).

The highest sentence for both AOBH and serious assault causing bodily harm was 3 years (the jurisdictional limit). The average custodial sentence for serious assault causing bodily harm was 0.7 years (approximately 9 months), similar to that for AOBH at 0.8 years (approximately 10 months).

In the higher courts, custodial sentence lengths for serious assault causing bodily harm (average custodial penalty 1.2 years) were slightly lower than non-aggravated AOBH (average custodial penalty 1.5 years).

Table 8-2: Summary of custodial penalties for AOBH (MSO) versus serious assault of a public officer causing bodily harm (MSO)

		Length of custodial penalty (years)			
Offence	**Cases with custodial penalties (%)**	**Average**	**Median**	**Minimum**	**Maximum**
Higher courts					
s 339(1) Non-aggravated assault occasioning bodily harm (n=701)	80.0	1.5	1.5	0.2	5
s 340 Serious assault causing bodily harm* (n=78)	89.7	1.2	1	0.3	5
Magistrates Courts					
s 339(1) Non-aggravated assault occasioning bodily harm (n=8,145)	50.3	0.8	0.8	(5 days) 0.0	3
s 340 Serious assault causing bodily harm* (n=420)	68.1	0.7	0.7	0.1	3

Data include MSO, adult offenders, offences occurring on or after 5 September 2014, sentenced 2014–15 to 2018–19.
Source: QGSO, Queensland Treasury — Courts Database, extracted November 2019.
Note: (*) Includes offences under the following sections: s 340(1) — penalty para (a)(ii) and s 340(2AA) — penalty para (a)(ii).

[321] *Corrective Services and Other Legislation Amendment Act 2020* (Qld) s 55.

The most common penalty for non-aggravated AOBH and serious assault of a public officer causing bodily harm in both Magistrates and higher courts was imprisonment — see Table 8-3. However, in the Magistrates Courts the use of monetary orders was much higher for non-aggravated AOBH than serious assault of a public officer causing bodily harm.

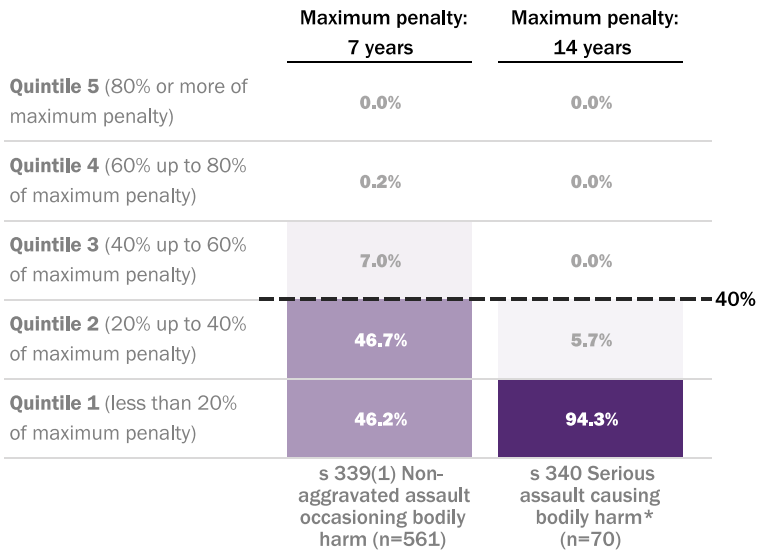
Table 8-3: Summary of penalty types for non-aggravated AOBH (MSO) and serious of a public officer causing bodily harm (MSO)

	Higher Courts		Magistrates Courts	
Penalty type	**s 339(1) Non-aggravated AOBH (%)**	**s 340 Serious assault causing bodily harm* (%)**	**s 339(1) Non-aggravated AOBH (%)**	**s 340 Serious assault causing bodily harm* (%)**
Imprisonment	57.2	70.5	33.6	46.4
Partially suspended	5.9	5.1	1.8	2.6
Wholly suspended	15.7	11.5	14.0	18.3
Intensive correction order	1.3	2.6	1.0	0.7
Community service	4.4	2.6	7.7	9.8
Probation	9.1	7.7	18.4	15.2
Monetary	4.7	0.0	20.4	6.0
Good behaviour, recognisance	1.4	0.0	3.0	0.5
Convicted, not further punished	0.3	0.0	0.2	0.5
Total	**n=701**	**n=78**	**n=8,145**	**n=420**

Data include MSO, adult offenders, offences occurring on or after 5 September 2014, sentenced 2014–15 to 2018–19.
Source: QGSO, Queensland Treasury — Courts Database, extracted November 2019.
Note: (*) Includes offences under ss 340(1) — penalty para (a)(ii) and 340(2AA) — penalty para (a)(ii).

In the higher courts, the longest penalty for both offences was 5.0 years. Of the 70 serious assaults of a public officer causing bodily harm (MSO) sentenced in the higher courts to a custodial order, none met the threshold of 40 per cent or more of the maximum penalty. Of the 561 non-aggravated AOBH offences (MSO) sentenced in the higher courts to a custodial order, 7.1 per cent received a sentence at or over 40 per cent of the maximum penalty (approximately 1.2 years or 14 months).

Figure 8-5: Proportion of maximum penalty, non-aggravated AOBH versus serious assault of a public officer causing bodily harm

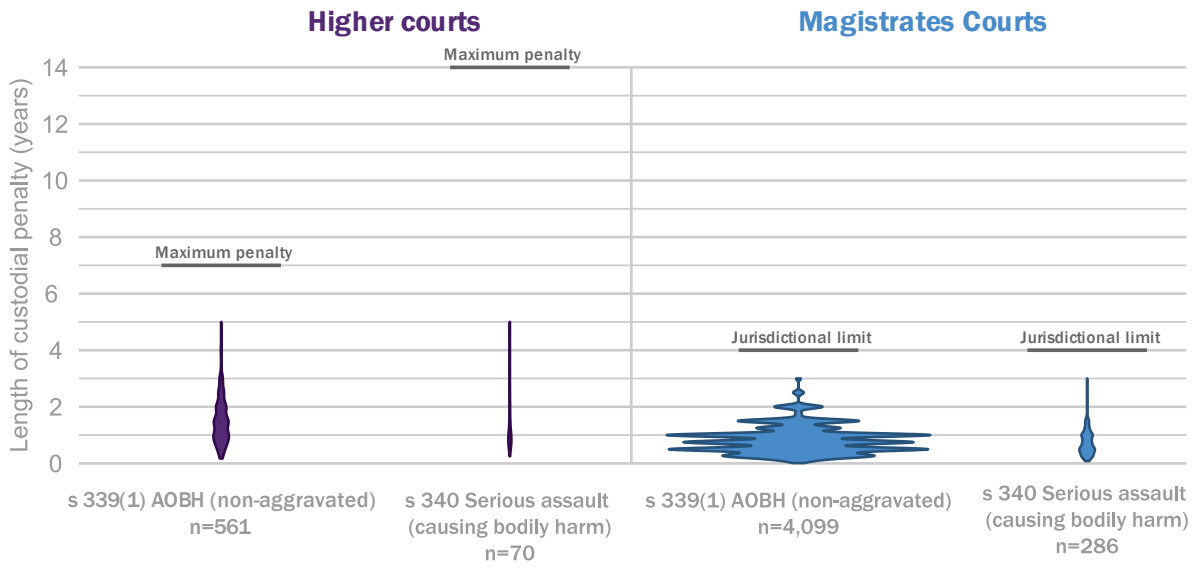


Data include MSO, adult offenders, higher courts, offences occurring on or after 5 September 2014, sentenced 2014–15 to 2018–19.
Source: QGSO, Queensland Treasury — Courts Database, extracted November 2019.
Note: (*) Includes offences under ss 340(1)(a)(ii) and 340(2AA)(a)(ii).

As shown in Figure 8-6, in the Magistrates Courts both offences reached the 3-year jurisdictional limit. However, non-aggravated AOBH has a wider spread with sentences predominantly at or below one year. For serious assault causing bodily harm, sentences are more evenly spread up to 1.5 years.

In the higher courts, the longest sentence for non-aggravated AOBH was 5 years, 2 years below the available maximum sentence, with most sentences between 6 months and 2 years. The longest sentence for serious assault causing bodily harm was also 5 years, 36 per cent of the maximum sentence of 14 years, with sentences more evenly spread across the sentence range.

Figure 8-6: Distribution of custodial penalties for offences causing bodily harm (MSO)



Data include MSO, adult offenders, higher courts, received a custodial order, offences occurring on or after 5 September 2014, sentenced 2014–15 to 2018–19.
Source: QGSO, Queensland Treasury — Courts Database, extracted November 2019.

Sentencing outcomes: Serious assault of public officer while armed (ss 340(1) & 340(2AA) — penalty para (a)(iii)) versus common assault (MSO) with associated weapons or going armed offences

In the Magistrates Courts, over two-thirds of serious assault offences with the aggravating circumstance of being, or pretending to be, armed with a dangerous or offensive weapon or instrument ('while armed'— MSO) received a custodial penalty (68.8%). There are two forms present in section 340: those regarding police officers and those regarding public officers (a third regarding working correctional services officers was passed by Parliament in July 2020).

This is considerably higher than for a common assault (MSO) where a weapons offence was sentenced in the same court event (at 44.3%) — see Table A4-10 in Appendix 4 for the types of weapons offences that were sentenced with a common assault MSO.[322] However, there was little difference in the average length of a custodial order when comparing these offences, at 0.7 years for serious assault while armed, and 0.6 years for common assault (with a co-sentenced weapons offence).

In the higher courts, nearly all serious assault offences while armed received a custodial penalty (92.6%) with an average sentence length of 2.2 years. There were not enough common assault offences (MSO) in conjunction with a weapons offence sentenced in the higher courts to allow comparison (n=2).

Table 8-4: Summary of custodial penalties for serious assault while armed (MSO) and common assault (MSO) sentenced with a weapons offence

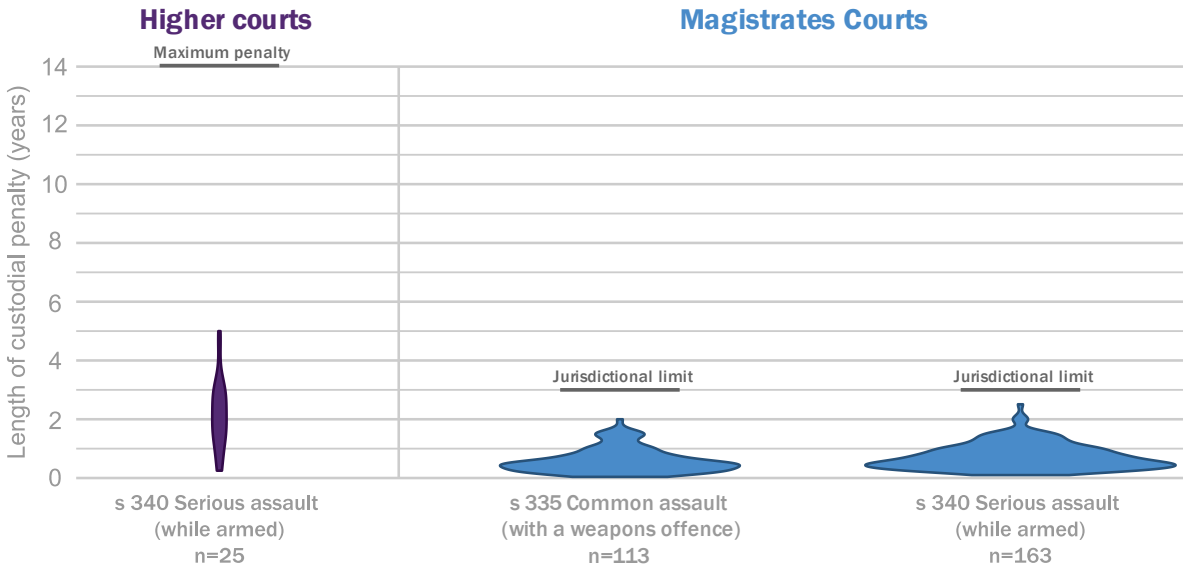
		Length of custodial penalty (years)			
Offence	**Cases with custodial penalties (%)**	**Average**	**Median**	**Minimum**	**Maximum**
Higher Courts					
Common assault (with a weapons offence) (n=2*)	100.0	-	-	-	-
Serious assault while armed^ (n=27*)	92.6	2.2	2	0.3	5
Magistrates Courts					
Common assault (with a weapons offence) (n=255)	44.3	0.6	0.5	0	2
Serious assault while armed^ (n=237)	68.8	0.7	0.7	0.1	2.5

Data include MSO, adult offenders, offences occurring on or after 5 September 2014, sentenced 2014–15 to 2018–19.
Source: QGSO, Queensland Treasury — Courts Database, extracted November 2019.
Notes:
(1) The serious assault offences may also include additional aggravating factors such as bodily fluid, bodily harm, intoxication and/or the domestic violence aggravating sentencing factor (PSA s 9(10A)).
(2) The common assault (MSO) may include additional aggravating factors such as domestic violence (PSA s 9(10A)).
(3) The common assault (MSO) is sentenced at the same court event with one or more weapons offence. The offences that were identified as weapons offences for this analysis are shown in Table A4-10 in Appendix 4.
(*) Small sample size
(^) Includes offences under ss 340(1) — penalty para (a)(iii) & 340(2AA) — penalty para (a)(iii).

322 Note: It is not certain that the common assault in each case involved a scenario where a weapon was used. The data could include sentences where different charges from different dates were dealt with at the same court hearing.

In the higher courts, the distribution of custodial penalties for serious assault while armed is spread relatively evenly, with the longest sentence being 5 years. For the same offence sentenced in the Magistrates Courts, the longest sentence was 2.5 years, not quite reaching the 3-year jurisdictional limit. Common assault (MSO) sentenced in the Magistrates Courts with a weapons offence had a similar distribution to that of serious assault while armed, while the longest sentence was slightly shorter at 2 years.

Figure 8-7: Distribution of custodial penalties for serious assault while armed (MSO) and common assault (MSO) sentenced with a weapons offence



Data include MSO, adult offenders, offences occurring on or after 5 September 2014, sentenced 2014-15 to 2018-19.
Source: QGSO, Queensland Treasury — Courts Database, extracted November 2019.
Notes:
(1) The serious assault offences may also include additional aggravating factors such as bodily fluid, bodily harm, intoxication and/or the domestic violence aggravating sentencing factor (PSA s 9(10A)).
(2) The common assault (MSO) may include additional aggravating factors such as domestic violence (PSA s 9(10A)).
(3) The common assault (MSO) is sentenced at the same court event with one or more weapons offence.

The offences that were identified as weapons offences for this analysis are shown in Table A4-10 in Appendix 4. In the Magistrates Courts, the most common penalty applied was imprisonment for both serious assault while armed (MSO) and common assault (MSO) sentenced with a weapons offence — see Table 8-5. However, the proportion of imprisonment sentences applied was higher for serious assault at nearly half (49.0%), compared to just over one-third for common assault (MSO) sentenced with a weapons offence (34.5%). Probation was quite high for both offence types at 29.4 per cent for serious assault while armed and 20.7 per cent for common assault. Monetary orders were more common for common assault (15.3 per cent) than for serious assault while armed (5.1%).

Table 8-5: Summary of penalty types for serious while armed (MSO) and common assault (MSO) sentenced with a weapons offence.

Penalty type	s 335 Common assault (MSO) sentenced with a weapons offence (%)	s 340(iii) Serious assault while armed^ (%)
Imprisonment	34.5	49.0
Partially suspended	1.2	3.0
Wholly suspended	7.1	16.0
Intensive correction order	1.6	0.8
Community service	7.1	5.1
Probation	29.4	20.7
Monetary	15.3	5.1
Good behaviour, recognisance	2.8	0.4
Convicted, not further punished	1.2	0.0
Total	**n=255**	**n=237**

Data include MSO, adult offenders, Magistrates Courts, offences occurring on or after 5 September 2014, sentenced 2014–15 to 2018–19.
Source: QGSO, Queensland Treasury — Courts Database, extracted November 2019.
Notes:
(1) The serious assault offences may also include aggravating factors such as bodily fluid, bodily harm, intoxication and/or the domestic violence aggravating sentencing factor (PSA s 9(10A)).
(2) The common assault (MSO) may include additional aggravating factors such as domestic violence (PSA s 9(10A)).
(3) The common assault (MSO) is sentenced at the same court event with one or more weapons offences. The offences that were identified as weapons offences for this analysis are shown in Table A-4 in Appendix 4.
(*) Small sample size
(^) Includes offences under ss 340(1)(a)(iii) & 340(2AA)(a)(iii).

8.9.6 Evidence of inconsistencies with the sentencing approach in other jurisdictions

The second point noted above as informing analysis of penalties and sentencing trends for offences involving assaults against public officers, and determination of whether these are in accordance with stakeholder expectations, is: any inconsistencies between the approach in Queensland and that in other Australian and select overseas jurisdictions.

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

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

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

Further, the cross-jurisdictional analysis indicates that, unlike Queensland, other jurisdictions do not treat assaults resulting in bodily harm as equivalent in seriousness to the offence of causing GBH, or its equivalents, for the purposes of setting the maximum penalty. The exception to this is wounding of law enforcement officers in NSW.

Table 8-6: Maximum penalties for AOBH, and equivalents, where committed against a public officer (or specific classes of officer) by jurisdiction

Jurisdiction	Provision	Nature of act/s constituting offence	Maximum penalty
Commonwealth	*Criminal Code* (Cth) s 147.1	Engaging in conduct causing harm to a Commonwealth public official etc. with the intention of causing harm without consent	10 years, or 13 years if official is judicial officer or law enforcement officer
New South Wales	*Crimes Act 1900 (NSW)* ss 60(2) & (2A) (police), 60A(2) (law enforcement officers other than police), 60E (school staff)	Assault occasioning actual bodily harm Wounding where reckless as to causing actual bodily harm	AOBH: 7 years, 9 years (police only) if during public disorder Wounding: 12 years, 14 years (police only) if during public disorder
Northern Territory	*Criminal Code* (NT) ss 155A (person providing rescue services etc.), 189A (emergency workers)	Assault causing harm: person providing rescue, resuscitation, medical treatment, first aid etc. to a third person (not specific to 'public officers') emergency workers	7 years
Queensland	*Criminal Code* (Qld) ss 340(1)(b) and (2AA)	Assault causing bodily harm to: - police - public officer	14 years
South Australia	*Criminal Law Consolidation Act 1935* (SA) s 20AA (prescribed emergency workers)	(1) cause harm intending to cause harm (2) cause harm recklessly (3) assault (not otherwise falling within (1) or (2)) (4) hinder or resist police causing harm	(1) 15 years (2) 10 years (3) 5 years (4) 10 years
Victoria	*Crimes Act 1958* (Vic) s 18 (Note: not specific to public officers)	Cause injury: (1) intentionally; or (2) recklessly	(1) 10 years (2) 5 years
	Common law offence	Common assault	5 years
	Crimes Act 1958 (Vic) s 320A	Common assault on police officer on duty or protective services officer on duty (and offender knows or is reckless as to this): (1) offender has an offensive weapon (2) offender has a firearm or imitation firearm, so as to cause fear	(1) 10 years (2) 15 years
Western Australia	*Criminal Code* (WA) s 318(1)	Assault of: public officer/person performing - function of public nature conferred by law/due to performance of such function/acting in aid of such person - driver or person operating or in charge of train, ferry, passenger transport vehicle - an ambulance officer	7 years 10 years (aggravated) Aggravated if offender: is armed with dangerous or offensive weapon or instrument; or is in company with another person or persons

Jurisdiction	Provision	Nature of act/s constituting offence	Maximum penalty
		- fire and emergency services - hospital worker or person providing a health service to the public - contract worker court security/prisons	Also, aggravated (in force for 12 months only from 4 April 2020) if: at the commission of the offence the offender knows he/she has COVID-19; or at or immediately before or immediately after the commission of the offence the offender makes a statement or does any other act that creates a belief, suspicion or fear that the offender has COVID-19
Canada	*Criminal Code* (R.S.C., 1985, c. C-46) s 270.01	Assault a public officer or peace officer where offender: carried, used/threatened to use a weapon or imitation weapon; or caused bodily harm to the officer	10 years
New Zealand	*Crimes Act 1961* (NZ) s 191 (applies to any person)	Cause injury to any person where committed with intent to facilitate the commission of, or avoid detection of an imprisonable offence, or to avoid arrest etc.	7 years

Forms of mandatory sentences that apply to section 340 offences in Queensland in some circumstances are discussed in Chapter 10. Some jurisdictions have introduced mandatory, or presumptive minimum terms of imprisonment, but these only apply in certain circumstances, or if the offence involves bodily harm.

8.9.7 Sentencing purposes

As discussed in Chapter 6, the primary purposes referred to by courts when sentencing for serious assault are typically general deterrence and denunciation.

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

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

The concept of **proportionality** is central to denunciation and just punishment. 'Ordinal proportionality' has been said by legal theorists to consist of three 'sub-requirements':

- *Parity* — 'when offenders have been convicted of criminal conduct of similar seriousness, they deserve penalties of comparable severity'.
- *Rank-ordering* — 'Punishing crime Y more than crime X expresses more disapproval of crime Y, which is warranted only if it is more serious. Punishments thus should be ordered on the scale of penalties so that their relative severity reflects the seriousness-ranking of the crimes involved'.
- *The spacing of penalties* — 'Suppose crimes X, Y and Z are of ascending order of seriousness; but that Y is considerably more serious than X but only slightly less so than Z. Then, to reflect the conduct's gravity, there should be larger space between penalties for X and Y than those for Y and Z'.[323]

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

Maximum penalties typically provide a rough guide in most jurisdictions as to Parliament's (and, by extension, the community's) view of the perceived relative seriousness of various offences. However, the challenges of identifying a widely accepted and comprehensive scale of what makes one crime more serious than another are well documented.[324]

Where changes to maximum penalties occur on a more ad hoc basis (e.g. in response to an outcry about the sentence in a particular high-profile case), the problem becomes whether the maximum penalties remain an effective measure of relative seriousness.

While increasing maximum penalties is one lever typically used by Parliament to lift penalty levels, there is no one-to-one correspondence between changes to the maximum penalty and shifts in sentencing practices. For example, a doubling in the maximum penalty does not necessarily mean average sentence lengths will double, although it will communicate to courts the increased seriousness with which such offences are viewed. The Court of Appeal explained this in detail in a serious assault (by spitting) sentence appeal judgment in 2014:

> It is also plain that the maximum penalty of 14 years imprisonment for this offence must be taken into account. As Gleeson CJ, Gummow, Hayne and Callinan JJ observed in *Markarian v The Queen* (2005) 228 CLR 357 at [31], 'careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick.' Whilst it is to be expected that the increase in the maximum penalty for the particular offence of which the applicant was convicted will lead to more severe penalties for that offence (see *R v Benson* [2014] QCA 188 at [36] per Morrison JA), '[i]t **does not necessarily follow from the fact of an increase in the maximum penalty that all such offences committed after the amendment came into effect should attract a higher penalty than they previously would have**' (*R v Samad* [2012] QCA 63 at [30] per Wilson AJA). **Nor should a doubling of the maximum penalty necessarily result in a doubling of sentences at all levels** (see *R v SAH* [2004] QCA 329 at [12]–[13]). The respondent's counsel endorsed the following remarks I made in *R v CBI* [2013] QCA 186 at [19] about an increase in a different maximum penalty:
>
> > Those changes in the sentencing regime for this offence, especially the substantial increase in the maximum penalty, are significant. It is to be expected that they would produce a general increase in the severity of sentences, rendering the earlier cases of little utility as comparable sentencing decisions. That is so even though, as the applicant submitted, the increase in the maximum penalty should not necessarily be reflected in proportionate increases in sentences.[325]

While it is possible for the Council to test in a rudimentary way whether current sentencing practices demonstrate a level of ordinal proportionality (e.g. as discussed above, by testing whether, based on the maximum penalties set for assault and related offences, including with and without circumstances of aggravation, offences with a higher level of objective seriousness receive higher sentences), it is not possible for the Council to determine with any degree of certainty or specificity what level or type of sentence, or range of sentences, is 'adequate' or 'appropriate', given there is no one 'correct' sentence or widely accepted 'deserved' penalty.[326]

Looking at **rehabilitation** as another relevant sentencing purpose, other types of sentencing orders that are reasonably equivalent to other forms of penalties that might have been imposed (e.g. imprisonment) might be considered to address underlying factors associated with this offending (e.g. drug and alcohol use and mental health issues).[327] Notably, in Victoria, which introduced a form of mandatory minimum sentence, alternative orders may be made where special circumstances exist. These include forms of treatment orders.

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

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

325 *R v Murray* (2014) 245 A Crim R 37, 42 [16] (Fraser JA, Gotterson and Morrison JJA agreeing) (emphasis added).

326 On the related issues of the appropriate 'anchoring' of penalties by fixing actual (rather than comparative) severity levels for crimes see von Hirsch and Ashworth (n 323) 140 [9.3.2]; and Tonry (n 324) 13–16.

327 On the problems associated with identifying penal equivalency of different sentencing orders, see Tonry (n 324) 23–6.

8.9.8 Stakeholder views

Relevance of stakeholder views

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

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

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

Views were expressed regarding **contentment with the current state of the law**.

The Department of Agriculture and Fisheries stated that 'the current maximum penalty for serious assault is appropriate'[328] (including for relevant summary offences) but noted that it would not support anything certain or likely to result in decrease in penalties.[329]

The view of the Queensland Teachers' Union (QTU) was that the current legislative framework:

> provides an appropriate mechanism for responding to the growing problem of assaults on public officers. The QTU's experience is that police appropriately charge parents or members of the community who assault teachers or principals. The QTU therefore asserts that the current law and penalties, as they apply to our members, are appropriate and do not require amendment.[330]

There was also **support for increases to penalties.** Some stakeholders and victims consulted expressed a view that penalties do not reflect the seriousness of the harm, do not hold offenders accountable, do not encourage reporting, and are inadequate to deter assaults.

The Queensland Police Union, which was among those seeking stronger penalties, noted it had 'long advocated for mandatory or minimum sentencing' in relation to assaults on police officers and other emergency service workers.[331] It submitted:

> It is the QPU's position that police and emergency workers deserve adequate legislative protection for simply doing their duty and serving the people of Queensland. This can only be achieved through a minimum sentencing range being imposed by statute.[332]

Its call for mandatory sentencing is discussed as a separate topic in Chapter 10, section 10.3.5.

The Transport Workers' Union's (TWU) submission called for 'tougher penalties', pointing to the risks borne by public and private bus drivers and personalised transport workers.[333] It would welcome 'other well-targeted interventions and prevention strategies' in tandem with harsher penalties:[334]

> Our view is that the introduction of tougher penalties combined with a robust public service campaign to enhance community awareness would assist in reduction of further instances of violent assaults within the transport industry.[335]

In making this argument, the TWU pointed to WA and South Australian amendments and 'Deloitte's *Department of Transport and Main Roads Queensland Bus Driver Safety Review*'[336] (although that review recommended against adopting reforms to penalties in the short term, finding 'there appears to be sufficient penalties under current legislation in QLD' and voiced concerns that there was insufficient evidence to suggest penalty changes would have

328 Submission 7 (Department of Agriculture and Fisheries) 7.
329 Ibid 8.
330 Submission 20 (Queensland Teachers' Union) 4.
331 Preliminary Submission 23 (Queensland Police Union of Employees) 1.
332 Ibid.
333 Submission 12 (Transport Workers' Union) 3, 8, 9, 12.
334 Ibid 9.
335 Ibid 12.
336 Ibid 8.

the desired impact of deterring violence, and would not directly address the key triggers of violence identified by the review).[337] The TWU also relevantly discussed NT and NSW provisions.

It recognised the need for the concept of 'just punishment', the principle of proportionality and consideration of 'the circumstances surrounding the offence for a person with impaired capacity, and the impact of any proposed changes on children and young people'.[338]

QCS appeared to criticise the effect of the totality and proportionality principles on moderating cumulative sentences under section 156A of the PSA.[339] This section requires that any prison sentence imposed be ordered to be served cumulatively with any other term of imprisonment the offender is liable to serve in circumstances where the offence was committed while the person was a prisoner serving a term of imprisonment, or released on parole, or other specified circumstances.

QCS's concern was that 'those sentences are shorter than they should be because of the existing sentence'[340] and 'there is a perception that prisoners 'get off lightly' for their actions as sentences are mitigated in order to compensate for the cumulative requirements'.[341] It submitted:

> While section 156A … requires a mandatory cumulative sentence to be imposed where the prisoner is already serving a term of imprisonment when they commit an offence under section 340 of the *Criminal Code*, it does not mean that the prisoner should receive a lesser sentence. A prisoner who assaults a CSO present at a corrective services facility in his or her capacity as a corrective services officer should receive the same penalty as any other person who assaults a public officer, ensuring their sentence is not reduced based on their current period of imprisonment.[342]

Ultimately, it stated that it did 'not consider there is a need to explore alternative options'.[343] Those are foundational, general sentencing principles and review of them is beyond the scope of the reference.

QCS considered it crucial that section 340(2) contain the circumstances of aggravation penalty provision, as per (2AA) (commenced 21 July 2020).[344] It considered there was otherwise an inadequacy in the drafting of section 340, which provides for aggravated forms of serious assault carrying a 14-year maximum penalty for police and other public officers. This did not appear in subsection (2), which applies to assaults by prisoners on working corrective services officers. It identified that amendments, now passed, which will mean that these circumstances of aggravation and the associated 14-year penalty will apply to offences charged under subsection 340(2) of the Code, will address this issue. It submitted:

> This aligns with the expectations of CSOs, the Together Union and the broader community that CSOs should be given the same level of protection by the law. It is also a strong deterrent, signalling that assaults against CSOs will not be tolerated. An assault on a CSO in the community or in the custodial environment should attract the same maximum penalty.[345]

It also supported higher maximum penalties for summary offences[346] — but without specifying what these higher penalties should be.

Some preliminary submissions earlier in the review supported increased penalties.

Security Providers Association of Australia Limited supported an increase in penalties for assaults on police and other frontline emergency service workers, corrective service officers and other public officers, but without providing any additional detail of what options would be supported.[347]

A joint submission from the Australasian Railway Association, Bus Industry Confederation, the Rail, Tram and Bus Union and TrackSAFE Foundation supported 'an elevation of penalties for anyone [who] assaults a public transport staff member so that the penalties are equal to the assault of emergency personnel'.[348] They also referred to

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

338 Submission 12 (Transport Workers' Union) 8–9.

339 Submission 21 (Queensland Corrective Services) 5, 8, 11, 18.

340 Ibid 18.

341 Ibid 8.

342 Ibid 5.

343 Ibid 18.

344 By the *Corrective Services and Other Legislation Amendment Act 2020* (Qld) s 55.

345 Submission 21 (Queensland Corrective Services) 17.

346 Ibid 17

347 Preliminary submission 1 (Security Providers Association of Australia Limited) 1.

348 Preliminary submission 5 (Australasian Railway Association and Ors) 1.

reforms in WA, South Australia, and the Northern Territory –– in the NT case, it was noted to involve increasing penalties for assaults on 'non-emergency workers engaged in the course of their duties'.[349]

Some stakeholders raised concerns about section 340 being **too harsh in its effect or too wide in its application**. Several did not the support the rationale for section 340 existing at all but gave feedback about its operation after explaining their opposition to it.

While the QLS 'does not support special offences for assault based on the occupational status of the victim' (because this does not necessarily make the assault more serious and can lead to 'absurd results'),[350] it 'considers that the current sentencing process adequately meets the victim's needs given that the maximum penalty can be up to 14 years imprisonment where the defendant has spat on, bitten or caused bodily harm etc. to the public officer or police officer'.[351] It submitted the maximum penalties for section 340 were 'appropriate for the most serious type of conduct that may be encompassed by the offence, noting however that there are other offence provisions that could respond to conduct of that severity'.[352] The QLS noted that:

> the courts have been far from lenient when sentencing offenders for this offence. Most cases have led to the offender receiving a term of imprisonment. Anecdotally, it appears most offenders receive an actual period of imprisonment for serious assaults with circumstances of aggravation, particularly in cases where the offender has spat upon or bitten the public officer. Even when the offender is a youth or has mental health issues at the time of the offence, most offenders are sentenced to a period of imprisonment, though generally suspended or with immediate parole.[353]

It referred to the Council's sentencing statistics and commented that for non-aggravated serious assaults, 'by virtue of the status of the victim a more serious penalty is generally being imposed that makes the offence akin to a more serious assault (one where bodily harm was sustained)':[354]

> Just over 50% of both received custodial terms, compared to just over 20% for common assault offences.
>
> Whilst the duration of the terms of imprisonment involved was on average somewhat higher for assault occasioning bodily harm offences, that is understandable in view of the breadth of conduct they encompass.[355]

The QLS also commented on the Council's analysis in terms of aggravated serious assaults:

> When aggravated serious assaults (with a maximum penalty of 14 years) are compared with the alternative offences only able to be dealt with on indictment, a larger gap in outcomes does arise. Whilst similar high proportions of both types of offences resulted in terms of imprisonment, the duration of imprisonment on average was markedly higher for grievous bodily harm (average of 3 years), and there was a wider range for torture (average around 5 years), with aggravated serious assaults as high as 5 years but averaging under one.
>
> The point that arises from this is that the likelihood of a custodial sentence for a serious assault offence is generally high, particularly so in cases where if charged as a corresponding serious offence (grievous bodily harm, torture, wounding) it would also likely arise in a term of imprisonment. Whilst there is a difference in the duration of imprisonment imposed on average, that likely reflects the broad range of conduct encompassed by those offences.
>
> For instance, an aggravated serious assault can be as 'minor' as a person pretending to be armed with a knife before being arrested by a police officer, where no physical harm is caused to the victim. The threshold however for a grievous bodily harm offence for instance is markedly higher, in that for the offence to be made out a particular degree of harm to the victim is required.[356]

Sisters Inside's overall position was that section 340 as it relates to public officers — namely, sections 340(1)(b)-(d), (2) and (2AA) — should be repealed because it is inappropriate to legislate different penalties for the same action on the basis of victim profession, rather than the harm caused. It further argued that 'the separate offence of serious assault is gratuitous in that no correlation between higher penalties and reduced offending can be demonstrated'[357] and 'the *Criminal Code* creates offences sufficient to cover the conduct targeted by s 340'.[358]

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349 Ibid 1.

350 Submission 30 (Queensland Law Society) 1 and see 11.

351 Ibid 3 and see 7.

352 Ibid 13.

353 Ibid 3 and see 13–14.

354 Ibid 14.

355 Ibid 13–14.

356 Ibid 14.

357 Submission 17 (Sisters Inside) 1.

358 Ibid 5.

The QLS argued:

- 'The threshold for charging under section 340 is ill-defined and too low' and that sentencing statistics showed that '90% of actions charged under the serious provision are about as serious as common assault'.[359]
- 'Imposing a maximum penalty of 14 years for an aggravated serious assault on a public officer is disproportionate to the penalties imposed on comparable and more serious offences in the *Criminal Code*'.[360]

Sisters Inside proposed various actions if the legislation was amended:[361]

- a clearer definition 'to differentiate it from the offences under the PPRA and CSA and to correspond to the seriousness of the maximum penalty';
- strict police guidelines for charging;
- specifying different maximum penalties depending on whether or not bodily harm was caused (and its seriousness);
- facilitation of greater judicial discretion by requiring that decisions be made on a case-by-case basis, with a non-exhaustive list of relevant sentencing considerations including 'Aboriginal or Torres Strait Islander identity, mental health, disability, drug and/or alcohol intoxication, history of trauma, intergenerational trauma, language barriers etc';
- reconsidering the aggravating circumstances contained in sections 340(1)(b)(i)–(iii) and 340(2AA) (with the comment made that 'no other Australian jurisdiction specifies spitting as an aggravating feature of an assault on a police or public officer');[362]
- eliminating mandatory sentencing (s 340(1C) and the intoxication in a public place aggravating circumstance.

The Aboriginal and Torres Strait Islander Legal Service (ATSILS) advocated for the starting point to be that 'everyone is equal under the law'.[363] It discussed the four key criticisms directed against the amendment that first introduced the 14-year maximum and aggravated circumstances to section 340 in 2012[364] and argued that 'in an ideal world such considerations could even result in the abolition of a separate offence as an unnecessary addition to the existing range of offences which are already available'.[365]

It was concerned that the amendments made to create aggravated forms of serious assault with a higher 14-year maximum penalty 'elevated the protection of some types of official above the need to protect all other categories of persons engaged in potentially dangerous contact with members of the public'.[366]

While expressing its 'admiration for the very difficult and challenging role that so many police officers undertake on a daily basis', it suggested 'in an ideal world such considerations could even result in the abolition of a separate offence as an unnecessary addition to the existing range of offences which are already available'.[367]

It raised concerns with use of police chokeholds in the context of excessive use of force, stating that the flicking of 'foaming spittle which results from choking' after use of a choke-hold:

> is radically different from and should be distinguished from a deliberate spit. In the context of sentencing for serious assault, we would argue that more serious penalties should expressly not be available when a chokehold has been applied to a person.[368]

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359 Ibid 2.

360 Ibid 2.

361 Ibid 6.

362 The Council notes, however, Western Australian legislative reforms to serious assault regarding risk of transmitting COVID-19. Further, in some jurisdictions, such as in South Australia, spitting is recognised as a way a person can cause harm to an emergency worker, which attracts higher penalties.

363 Submission 22 (ATSILS) 2

364 Ibid.

365 Ibid.

366 Ibid.

367 Ibid.

368 Ibid 5.

ATSILS also raised concerns about incarceration of 'so many people suffering intellectual disability, cognitive development issues, mental health issues and behavioural issues' for this offending.[369] A 'primary answer' to this:

> is the lack of suitable sentencing alternatives because they are almost inevitable regarded as unsuitable for the present community based sentencing options. For those who are sentenced to actual terms of imprisonment, many leave jail more damaged than they arrived. For those who are sentenced to parole release dates or suspended sentences, their inability to self-regulate can see those jail sentences triggered for even low level behaviour. Jail should not end up being a default option when some sort of community based intervention would be cheaper and more effective and provide a greater long term contribution to frontline safety.[370]

Queensland Advocacy Incorporated (QAI) recognised 'the vulnerability of people working in high risk jobs' but submitted inherent vocational risk should be 'separated from a consideration of the severity of sentencing that should be applied to an offender for an offence against a high risk worker'. It submitted that a 'more punitive sentencing response' solely on this basis 'would be to disregard the innate vulnerability of the majority of perpetrators … and the drivers for their offending. Linking the occupation of the victim with the seriousness of the offence is inappropriate and can have serious implications [e.g. jurisdiction/indictment]'.[371]

The QAI noted in its initial feedback 'that the current maximum sentences for serious assault provide adequate scope for courts to impose sentences of appropriate length' and its support for 'the removal of the maximum penalty provision contained in s 340(a)(i)'.[372]

The Bar Association of Queensland (BAQ) stated 'the current legislative framework adequately and effectively provides for assaults against public officers as provided for in section 340 of the *Criminal Code*'[373] and 'generally, existing offences, penalties and sentencing practices in Queensland do adequately and appropriately respond to assaults against police'.[374]

The BAQ made specific observations about penalties for serious assaults:

- 'Assaults against police, other frontline emergency service officers and public officers will ordinarily attract sentences of imprisonment. The structure of such sentences varies depending on the circumstances of the offence and the offender and is most appropriately left to the proper exercise of sentencing discretion by a judicial officer'.[375]
- 'The current maximum penalty for an un-aggravated serious assault is appropriate to reflect the fact that an assault that does not cause an injury which amounts to bodily harm is more serious than other common assaults if the person assaulted is deserving of or in need of greater protection under the law'.[376]
- 'A circumstance of aggravation under section 340 doubles that maximum penalty. This is at odds with the approach taken to aggravated assaults that occasion bodily harm where the maximum penalty increases from 7 years to 10 years'.[377]
- 'It is difficult to reconcile a maximum penalty of 14 years imprisonment for an assault (in specific circumstances), when the same maximum penalty is available for a person who causes very serious bodily injuries amounting to grievous bodily harm'.[378]

LAQ stated that 'there does not need to be any change to the current legislation' given 'how courts currently deal with the issues of acts of violence against public officers and workers in certain circumstances'.[379] LAQ submitted that 'the issues paper has not demonstrated any evidence-based reasons to enact legislative reforms to the provisions that apply to public officer victims in the criminal law and sentencing process'.[380]

> The various offences set out in the *Criminal Code* and *Police Powers and Responsibilities Act 2000* adequately cover a multitude of circumstances. The existing sentencing framework outlined in the *Penalties and Sentences*

369 Ibid 6.
370 Ibid 6.
371 Ibid 3.
372 Ibid 3.
373 Submission 27 (Bar Association of Queensland) 6.
374 Ibid 8.
375 Ibid 9.
376 Ibid 9.
377 Ibid 9.
378 Ibid 10.
379 Submission 29 (Legal Aid Queensland) 2.
380 Ibid 6.

> *Act 1992* and through the common law provide adequate scope for a court to take into account the serious nature of offending against public officers and sentence accordingly.[381]

LAQ believed that any change 'needs to be consistent and ensure that the discretion of the court is maintained in the sentencing process'.[382] After reviewing the common law, LAQ concluded that:

> i. It is clear the courts when given the opportunity to take into account all the circumstances of the case, do so;
>
> ii. The sentiment regarding aggravating features where the complainant is at work and where the complainant is performing public duty, is taken into account, and;
>
> iii. Consistent with the research outlined in the issues paper, Imprisonment whether suspended or actual as the penalty imposed, is unexceptional.[383]

LAQ noted amendments to the original section 340 which 'specified particular classes of persons, and voiced its 'concerns about creating classes of victims':[384]

> As demonstrated in the issues paper, there are an array of offences and sentencing methods currently available to courts to allow them to adequately punish for a variety of circumstances. The statistics in the issues paper demonstrate that the courts across all jurisdictions take these matters seriously but also impose a variety of penalties. This is entirely appropriate. We are concerned about a law that treats assaults on particular categories of public officers being more serious than other categories, because it creates classes of victims without due regard to the particular vulnerabilities of each case.[385]

Like other stakeholders, LAQ criticised the doubled aggravated maximum penalty:

> Apart from the inclusion of a maximum penalty of 14 years in the aggravated cases, we submit to the maximum penalties that apply to each offence are appropriate. The 14-year maximum is out of step with other categories of offences. It is clear the courts deal with these matters seriously and have done so for some time prior to the amendment.[386]

LAQ also provided a reform option regarding the Victims Assist Scheme, suggesting:

> consideration could be given to amending the categories of special assistance payable under section 39(h) and Schedule 2 of the *Victims of Crime Assistance Act 2009* (VOCAA) and the special assistance payable to public officers who are the victims of acts of violence.[387]

The Queensland Human Rights Commission, while acknowledging the importance of the two overarching objectives of sentencing responses — to denounce assaults on frontline public officers and to prevent future attacks from occurring — cautioned:

> it is arguable that there are ways of achieving either or both with less limitations on human rights than imposing higher penalties. Certainly, any law reform imposing such changes would have to be accompanied by evidence-based justification for why it is the least restrictive way of achieving one or both of these goals.[388]

The Commission was also concerned that, given overcrowding of prisons had been identified as a particular issue in prisoner-on-staff assaults, 'If higher penalties lead to higher incarceration rates, such reforms may inadvertently increase the risk of assault for corrections officers'.[389]

The QTU stated in its submission that 'as a matter of principle [it] does not support differentiated penalties associated with a category of employment or other distinguishing characteristic of individuals' but that it recognised:

> that a similar response involving differentiated penalties may be appropriate for other categories of employees engaged in contact with the public where similar concerns exist regarding escalating safety fears arising from patterns of offending.[390]

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381 Ibid 2.

382 Ibid 2.

383 Ibid 2–3.

384 Ibid 3.

385 Ibid 3.

386 Ibid 7.

387 Ibid 3, with more detailed discussion from there.

388 Submission 18 (Queensland Human Rights Commission) 2 [5].

389 Ibid 8 [25].

390 Submission 20 (Queensland Teachers' Union) 4.

The QTU further submitted that 'assaults on public officers must never be treated as less significant than any other assault'.[391]

8.9.9 Council's view

The current statutory maximum penalties were identified as a significant issue or concern by stakeholders during consultation only in the context of being unduly harsh and incongruous with the rest of the *Criminal Code*. The Council notes views expressed by some that the current maximum penalty of 14 years for serious assault with aggravating circumstances appears to be poorly aligned with maximum penalties for other similar assaults and assault-related conduct, even with aggravating features — such as the 10-year maximum penalty for aggravated forms of AOBH.

The doubling of the maximum penalty was an election commitment and was not supported by any clear rationale as to the level at which it was set.

The Council notes that the WA serious assault equivalent — which is similar in many respects to that which exists in Queensland — applies a 10-year maximum penalty where there are aggravating factors present. Aggravating factors for the purposes of the WA provision are that the offender was armed, was in company, committed the act knowing they had COVID-19, or immediately before or immediately after the commission of the offence made a statement or did any other act that created a belief, suspicion or fear that they had COVID-19.

There is some risk that the current 14-year penalty creates unrealistic expectations by victims as to the likely sentence that will be imposed — particularly as the majority of offences are currently dealt with summarily, in circumstances where a court can only impose a sentence of up to 3 years' imprisonment.

Further, in cases where an offender has caused serious harm to a victim, the likely charge will be wounding, GBH or acts intended to cause GBH — all of which must be dealt with on indictment. In this context, the Council finds it difficult to conceive of a situation where the harm caused to a victim and the culpability of the offender for an offence charged as a serious assault would reach the same level as offences, such as GBH, which involve as an element of the offence the infliction of significant bodily injury.

This is not to suggest that head sentences for offences causing serious harm are too low, but these other more serious offences with maximum penalties equal to or higher than section 340 (but with more neutral and generic offender and victim descriptor language) are being utilised as harm in particular cases increases. Other offences in the *Criminal Code*, providing maximum penalties of up to life imprisonment (section 317), can instead be relied upon when the harm caused is sufficient — and this is the case regardless of victim class or categorisation.

The Council's analysis of sentencing outcomes indicates that otherwise, section 340, as a separate section targeting assaulting, obstructing and resisting particular classes of people, does make a difference in penalty outcome. In particular, it generally achieves a higher rate of custodial penalties when compared with various forms of generic assault-type offences.

It is the Council's view that the classification of offences and setting of statutory maxima — as a general proposition — is best undertaken as a holistic exercise that enables an assessment to be made of the seriousness of individual offences and conduct captured relative to other similar offences. This approach is more likely to promote a penalty framework that is internally consistent and coherent.

The Council notes extensive reviews of Queensland's *Criminal Code*, which included examination of maximum penalties, took place in 1992 and 1996.[392] A great many amendments to the Code and the PSA have taken place since.

In the absence of an opportunity to review penalties in this comprehensive way, or broad stakeholder support for the current maximum penalties that apply to section 340 to be changed, the Council recommends that the current penalty framework under section 340, which provides for an aggravated form of penalty in specified circumstances, should be retained and apply across all frontline and emergency workers as defined in a reformed section 340 offence.

While the Council makes no recommendations in respect of changing the maximum penalties for serious assaults (aggravated or simpliciter) for the same reasons, it suggests that should a broader review of maximum penalties for assaults and assault-related offences be conducted, the maximum penalty that applies to serious assault — particularly in its aggravated form — should form part of such a review.

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391 Ibid.

392 Note O'Regan, Herlihy and Quinn (n 6) and Connolly et al (n 6).

The Council's views about the need for additional guidance to courts in sentencing, including its views on mandatory and statutory minimum periods, are discussed in Chapter 10.

Recommendation 8–1: Penalty framework under section 340

The current penalty framework under section 340, which provides for an aggravated form of penalty in specified circumstances, should be retained and apply across all frontline and emergency workers as defined in a reformed section 340 offence.

Recommendation 8–2: Maximum penalties for serious assault (simpliciter and aggravated)

The current maximum penalty of 14 years for the aggravated form of assault under section 340, and 7 years otherwise, should be retained.