PART D — Reforms to offences, penalties and sentencing for assaults on public officers and other vulnerable workers

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 **Section 340 (Serious assaults) — as originally enacted**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

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

---

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]

---

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.

---

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).

---

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]

---

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

---

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]

---

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:

---

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]

---

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

---

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]

---

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

---

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?

---

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]

---

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

---

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

---

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.

---

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).

---

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

---

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.

---

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]

---

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*

---

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.

---

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

---

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

---

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;

---

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]

---

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]

---

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]

---

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]

---

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]

---

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

---

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.

---

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.

---

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]

---

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),

---

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

---

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.

---

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)];

---

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:

---

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

---

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.

---

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]

---

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

---

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.

---

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,

---

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).

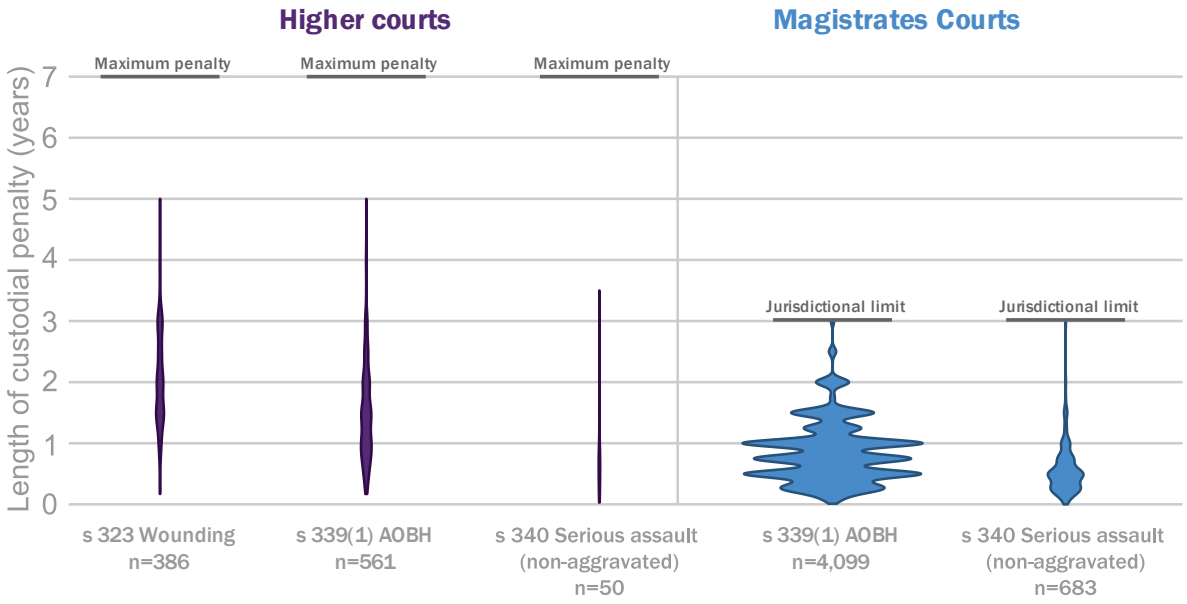
In the Magistrates Courts (which cannot sentence above 3 years, nor for wounding), outcomes of note were:

- 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.

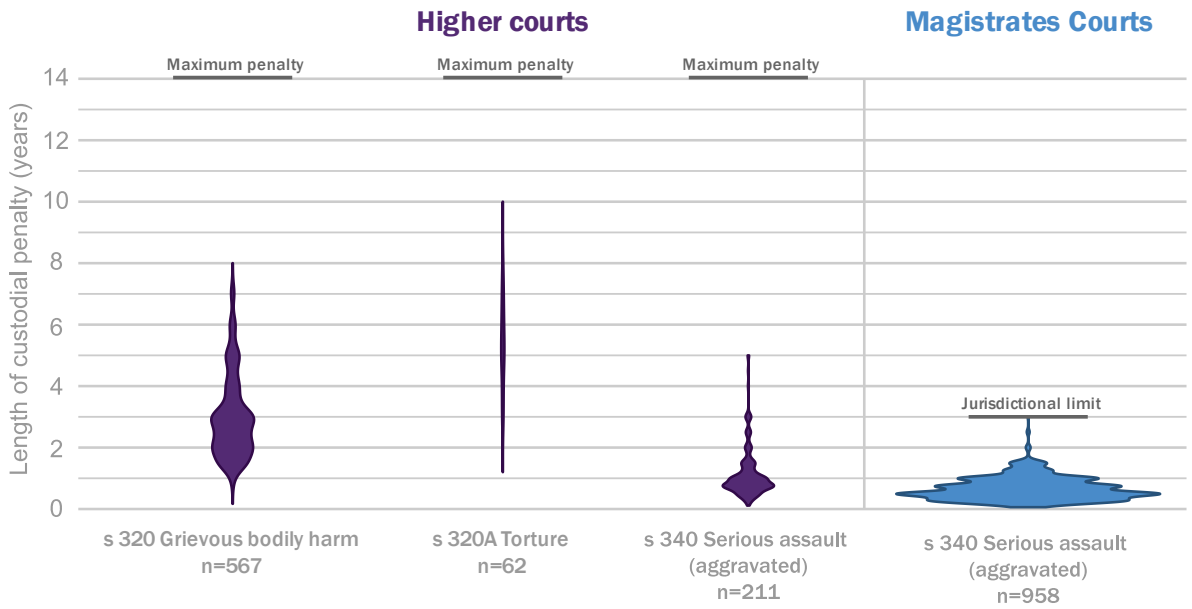
Aggravated serious assaults can only be dealt with in the Magistrates Courts on prosecution election. The majority of aggravated serious assaults (84.9%; n=1,280/1,507) were sentenced in the Magistrates Courts with three-quarters (74.8%) resulting in a custodial sentence being imposed. Those cases dealt 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.

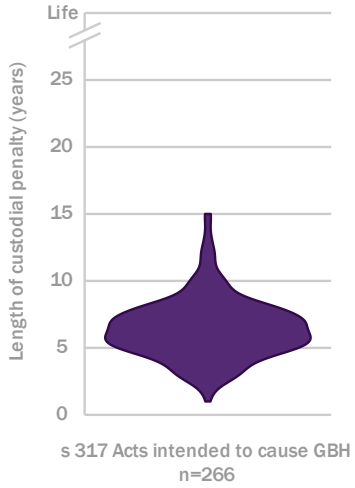
307 *R v Patrick (a pseudonym)* [2020] QCA 51.
308 *R v Mulholland* [2001] QCA 480, *R v Treptow* [1995] QCA 582.
309 *R v Williams* [1997] QCA 476.
310 *R v Kolb* [2007] QCA 180.

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]

---

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.

---

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).

---

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.

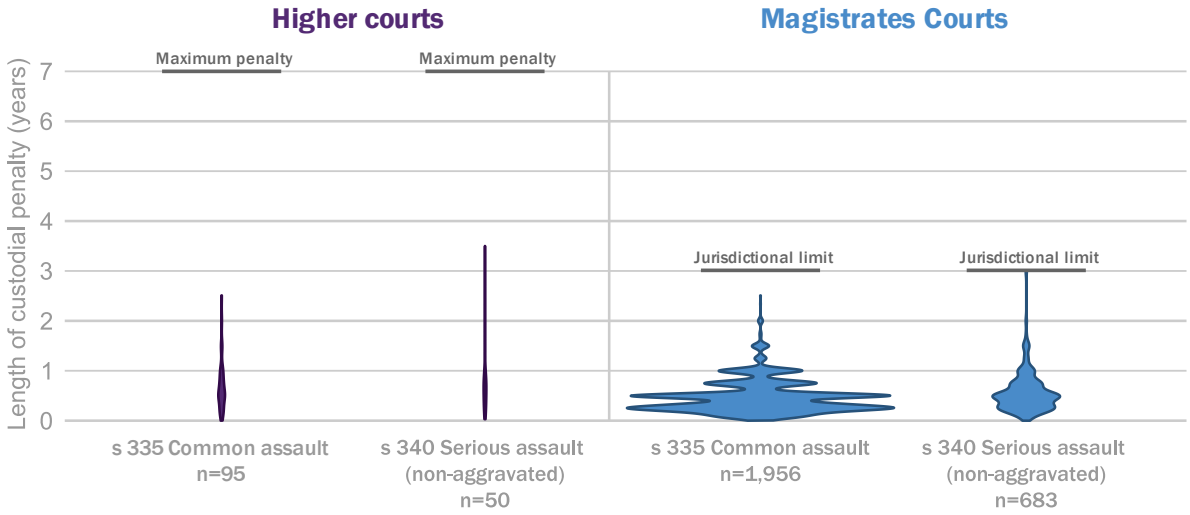
- Non-aggravated serious assault offences are much more likely to attract a custodial sentence. In the higher courts, 82.0 per cent attracted a custodial penalty, compared to 41.7 per cent for common assault. In the Magistrates Courts the difference was even greater (54.5% and 21.5%, respectively).
- 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.

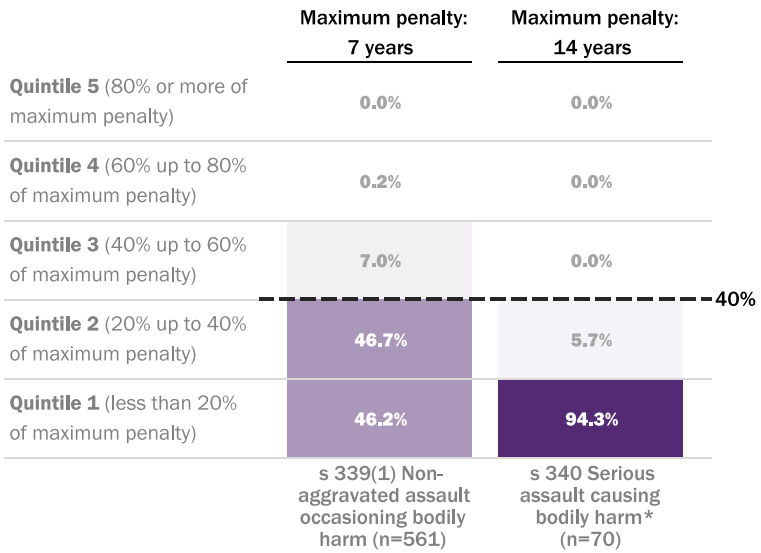
Table 8-3: Summary of penalty types for non-aggravated AOBH (MSO) and serious of a public officer causing bodily harm (MSO)

	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

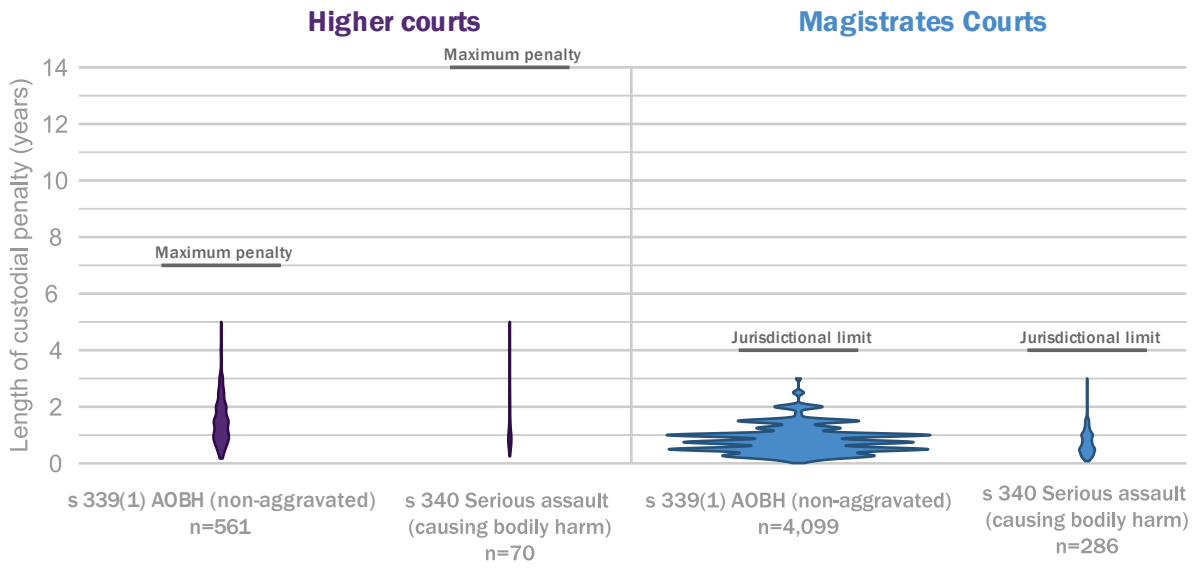


Data include MSO, adult offenders, higher courts, offences occurring on or after 5 September 2014, sentenced 2014–15 to 2018–19.
Source: QGSO, Queensland Treasury — Courts Database, extracted November 2019.
Note: (*) Includes offences under ss 340(1)(a)(ii) and 340(2AA)(a)(ii).

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

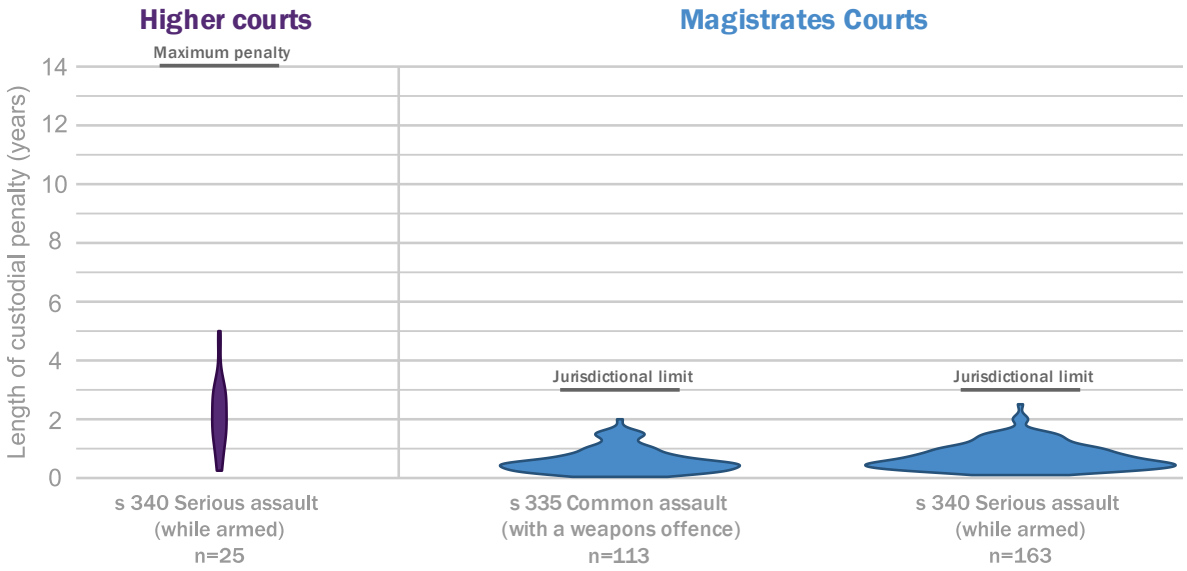
		Length of custodial penalty (years)			
Offence	**Cases with custodial penalties (%)**	**Average**	**Median**	**Minimum**	**Maximum**
Higher Courts					
Common assault (with a weapons offence) (n=2*)	100.0	-	-	-	-
Serious assault while armed^ (n=27*)	92.6	2.2	2	0.3	5
Magistrates Courts					
Common assault (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.

---

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

---

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]

---

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]

---

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]

---

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.

---

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.

Chapter 9 Summary assault and obstruct offences

9.1 Introduction

This chapter presents the Council's recommendations regarding simple, or 'summary' offences that can be charged for less serious examples of assaults and obstructions of a public officer, such as assault or obstruct a police officer in the performance of their duties under section 790 of the *Police Powers and Responsibilities Act 2000* (Qld) (PPRA) and assault by a prisoner of a corrective services staff member under section 124(b) of the *Corrective Services Act 2006* (Qld) (CSA). The advice provided responds to the requirement under the Terms of Reference for the Council to review these provisions and 'assess the suitability of providing for separate offences in different Acts targeting the same offending', as well as advising on options for reform to the current offence framework.

In presenting the Council's advice, the chapter also considers current guidelines that support prosecution agencies in determining if a summary charge of assault should be preferred over a charge of serious assault under section 340 of the *Criminal Code*, and the potential need for additional guidance.

9.2 Assault and obstruct offences

9.2.1 Current position in Queensland

Assault or obstruct a police officer in the performance of the officer's duties: PPRA s 790

The offence of assault or obstruct a police officer in the performance of the officer's duties under section 790 of the PPRA carries a maximum penalty of a $5,338 fine (40 penalty units) or 6 months' imprisonment. This is increased to a fine of $8,007 (60 penalty units) or 12 months' imprisonment if the offence is committed within, or in the vicinity of, licensed premises. The definition of assault in the *Criminal Code* applies to this section, while 'obstruct' includes hinder, resist and attempt to obstruct.

Over 80 per cent of assault or obstruct offences committed against police officers (82.4%) involve a charge brought under section 790, in cases where this is the most serious offence (MSO) sentenced. Looking solely at acts of assault (i.e. excluding acts of obstruction), just over half (51.7%) of assaults on police officers are prosecuted under section 790 of the PPRA, rather than as a serious assault under section 340 of the *Criminal Code*.. See Table 7-1 in Chapter 7 for more information.

Assault or obstruct a watch-house officer in the performance of the officer's duties: PPRA s 655A

The offence of assault or obstruct a watch-house officer in the performance of the officer's duties was introduced into the PPRA relatively recently in September 2018.[1] The maximum penalty is consistent with that which applies to the non-aggravated form of assault or obstruct a police officer under section 790 — that is, 40 penalty units, or 6 months' imprisonment.

In 2018–19, there were 10 cases sentenced involving this charge and in six, this was the most serious offence sentenced.[2] Three assaults on a watch-house officer committed after the commencement of the new PPRA offence provision were charged and sentenced as a serious assault under section 340(1)(c)–(d) or (2AA) of the *Criminal Code*. None of these sentenced charges was the MSO.

CSA ss 124(b) and 127

Section 124(b) of the CSA creates the offence of a prisoner assaulting or obstructing a staff member who is performing a function or exercising a power under this Act or is in a corrective services facility. It has a maximum penalty of 2 years' imprisonment. For this offence, 'prisoner' does not include a person who is released on parole.[3]

---

1 *Police Powers and Responsibilities and Other Legislation Amendment Act 2018* (Qld) s 33. This provision commenced on 20 September 2018.

2 See Table 2-3: Frequency of summary offences sentenced in Queensland courts in Chapter 2 for more information.

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

Over the 10-year data period, there were 147 sentenced cases involving a charge under this section. In 81 cases, this charge was the MSO. This compares to the 202 charges (MSO) sentenced under the more serious charge of serious assault under section 340(2) of the *Criminal Code*.[4]

The lower proportion of matters proceeded with under section 124(b) of the CSA, compared with those sentenced as a section 340 charge, may be explained both by the fact that section 340(2) applies the broader definition of a 'prisoner', which includes a prisoner released on parole, and that assaults by prisoners who are in custody can be dealt with as a breach of discipline rather than by way of a criminal charge. The sanctions that can be applied to a prisoner administratively on being found to have committed what is determined to be a 'major breach of discipline'[5] can include:

- a reprimand without further punishment;
- an order that the privileges the prisoner might have otherwise received be forfeited; or
- an order that the prisoner undergo a period of separate/solitary confinement[6] for not more than 7 days.[7]

A prisoner must not be charged with an offence because of an act (such as an assault) or omission if already punished for that act or omission as a breach of discipline.[8] In its submission, Queensland Corrective Services (QCS) notes that dealing with assaults as a breach of discipline is the case for 'a significant number of cases' where a corrective services officer does not progress a formal complaint.[9]

Under section 127, it is an offence for a person to obstruct (which includes to hinder, resist and attempt to obstruct) a staff member performing a function or exercising a power under that Act, or the proper officer of a court who is performing a function or exercising a power under that Act, without a reasonable excuse. The maximum penalty is a fine of $5,338 (40 penalty units) or one year's imprisonment. For this offence, 'person' does not include a prisoner, other than a prisoner who is released on parole.[10]

Prosecutions under section 127 are far less common than those under section 124(b), with 26 sentenced cases involving a charge under this section over the 10-year data period. This offence was the MSO in only 11 cases over this period (see Chapter 2, Table 2-5 for more information). In comparison, there were 18 sentenced charges involving a corrective services officer prosecuted under the more serious offence of serious assault under sections 340(1)(c)–(d) and (2AA) of the *Criminal Code*.[11]

Other miscellaneous Acts

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

The offences for which a sentence was imposed over the 10-year data period examined, and associated sentencing outcomes, are reported in Chapter 2 of this report. Excluding offences charged under section 790 of the PPRA or under sections 124(b) or 127 of the CSA, the most commonly sentenced offences with 40 cases or more involving these charges over the relevant period, from the most to the least commonly charged, were:

- resisting authorised person after being refused entry to premises (*Liquor Act 1992* (Qld), s 165A(4));
- obstruction generally under section 166 of the *Liquor Act 1992* (Qld);

---

4 Some of the 202 offences sentenced under s 340(2) may have involved an assault by a prisoner released on parole due to the definition of 'prisoner' that applies for the purposes of s 340(2). These figures therefore are not directly comparable.

5 Defined to mean 'a breach of discipline decided under section 113 [of the Act] to be proceeded with as a major breach of discipline': *Corrective Services Act 2006* (Qld) sch 4. Specific acts that constitute breaches of discipline for the purposes of section 113 are set out in s 5 of the *Corrective Services Regulations 2017* (Qld) and include a range of actions, including contravening a lawful direction of a corrective services officer, and acting in a way that is contrary to the security or good order of a corrective services facility.

6 *Corrective Services Act 2006* (Qld) s 118(2).

7 Ibid s 121(2).

8 Ibid s 115(2). Conversely, a prisoner must not be punished for an act or omission as a breach of discipline if the prisoner has been convicted or acquitted of an offence for the same act or omission: s 115(1).

9 Submission 21 (Queensland Corrective Services) 11.

10 *Corrective Services Act 2006* (Qld) s 125.

11 See n 4. It is likely some of those prosecuted under section 340(2) may have been prisoners released on parole. For this reason, the comparable s 340 figures are likely to be higher.

- obstruct/hinder an ambulance officer under section 46 of the *Ambulance Service Act 1991* (Qld);
- obstruction of Commonwealth public officials under section 149 of the Commonwealth *Criminal Code Act 1995;*
- removal of a prohibited person under section 173ED(3) of the *Liquor Act 1992* (Qld);
- obstruction of an authorised person in the exercise of a power under section 135(1) of the *Transport Operations (Passenger Transport) Act 1994* (Qld); and
- obstruction of an inspector under section 182 of the *Fisheries Act 1957* (Qld).

Many victims of such offences would be classed as 'compliance officers' for the purposes of the Council's section 340 analysis. There were 31 charges of serious assault sentenced under sections 340(1)(c)–(d), (2AA) involving this class of officer, suggesting summary charges are more likely to be preferred in the case of acts of assault or obstructions of these officers.

Reviewing sentencing outcomes for the above listed offences, the majority of sentences imposed involve the imposition of a monetary penalty. The maximum penalties for these offences vary significantly from 16 penalty units for obstruct or hinder a person acting under the *Ambulance Service Act*, 50 penalty units for resisting an authorised person under section 165A(4) of the *Liquor Act* (or 100 penalty units for other acts of obstruction under section 166 of that Act), 60 penalty units for obstructing an authorised person under the *Transport Operations (Passenger Transport) Act*, and 1,000 penalty units for obstruction of an inspector under the *Fisheries Act*. The Commonwealth *Criminal Code* offence of obstruction of Commonwealth public officials carries a maximum penalty of 2 years' imprisonment.

Obstruct/hinder an ambulance officer was the offence most likely to attract a custodial or community-based order, although proportionally, some offences with a small number of people charged were more likely to result in these types of penalties:

- obstruction of a person performing functions under section 150C(1) of the *Fire and Emergency Services Act 1990*, which carries a maximum penalty of 100 penalty units or 6 months imprisonment; and
- assault or resist a security officer under the *State Buildings Protective Security Act 1983*, which carries a maximum penalty of 10 penalty units or 6 months imprisonment.

9.2.2 Position in other jurisdictions

It was not possible for the Council to undertake a comprehensive review of all assault and obstruct offences in other jurisdictions. However, based on a limited cross-jurisdictional review, it is clear that some jurisdictions have retained a number of summary assault and obstruct offences, while others have established a more streamlined approach, meaning the choice of charges may be more limited (e.g. in Western Australia, a decision between prosecuting a charge under the offence of serious assault or obstruction of a public officer under the WA's *Criminal Code*, or preferring a charge of common assault or some other criminal offence of general application).

In New Zealand, an offence of assault on a police, prison, or traffic officer is established under section 10 of the *Summary Offences Act 1981* (NZ), which carries a maximum penalty of a $4,000 fine or 6 months' imprisonment. A separate offence of resist or obstruct these same classes of officer exists under section 23 of that Act, which carries a lower maximum penalty of a $2,000 fine or 3 months' imprisonment. The fact that the victim of an offence is a constable, or a prison officer acting in the course of his or her duty, or an emergency health or fire services provider acting in the course of his or her duty at the scene of an emergency is also an aggravating factor under the *Sentencing Act 2002* (NZ), which applies to courts when sentencing for any offence where it can be reasonably treated as such, including offences such as common assault, aggravated assault and wounding under the *Crimes Act 1961* (NZ).

9.2.3 Issues

Co-existence of summary and indictable charges

Queensland's *Criminal Code* was established to codify Queensland's criminal law. The current *Queensland Legislation Handbook's* primary purpose is to assist departmental policy or instructing officers in working with the Office of the Queensland Parliamentary Counsel in drafting legislation. It provides: 'if the Criminal Code provides for an offence, it is undesirable that another Act should erode its nature as a comprehensive code by providing for the same or essentially the same offence'.[12]

12 Department of the Premier and Cabinet, *Queensland Legislation Handbook* (6th ed, 2019) 10 [2.12.4].

In practice, there are a number of offences that have been introduced over time that essentially replicate offences in the *Criminal Code*, while existing as summary offences — meaning they can only be dealt with by a Magistrates Court. One example is the offence of assaulting, resisting or wilfully obstructing a police officer, which has existed in section 340 since the Code's commencement on 1 January 1901. The PPRA (s 790, and its precursors) deals with this same conduct. This offence also appeared in the earlier 1997 PPRA,[13] and as section 10.20A of the 1990 PPRA, in which it was inserted in 1993 due to the repeal of the *Police Act 1937* (Qld) in which this offence also appeared.[14]

Even within the *Criminal Code* itself, as illustrated in the discussion in Chapter 8, there is some overlap between conduct that could either fall within section 340 (which is classified as a crime) and section 199 (which is classified as a misdemeanour).

A charge under section 199 must be dealt with summarily (by a Magistrates Court),[15] whereas in the case of a charge under section 340 of the Code, the prosecution has the power to elect if the charge is to be dealt with in this way.[16] As discussed further in Chapter 10, the Council recommends that the current arrangements for summary disposition should be retained.

There are other practical procedural differences between offence types, such as whether a warrant is generally required for arrest,[17] and whether there is a limitation on commencing prosecutions after a defined period.[18]

A recent example that provides some explanation for why summary offences may be introduced, even when there is an existing *Criminal Code* offence that deals with the same conduct, is the introduction of the new offences of assaulting and obstructing a watch-house officer. The Explanatory Note to the Bill introducing these new offences noted:

> Currently, if a watch-house officer is assaulted or obstructed in the course of their duties, the only option for charging an offender is under the *Criminal Code*. This may result in the watch-house officer not making any complaint of assault, or result in a disproportionate charge against a person as there is no simple offence alternative.
>
> … the new offences will ensure that any penalty issued by the courts and any consequent criminal history is reflective of the offence being a simple offence and not indictable.[19]

The existence of a discretion by police to charge a person with the summary offence of 'assault police' under the PPRA, rather than with the offence of 'serious assault' under section 340 of the *Criminal Code* — although section 340 can also be dealt with summarily — could be argued, therefore, to provide an important protection against more minor criminal conduct being dealt with under the more serious form of criminal offence, which carries a higher maximum penalty. This might be important not only from the perspective of ensuring proportionate sentences, but that the person's criminal history reflects the fact the assault was of a more minor nature than had the person been charged under section 340.

In the case of other summary assault offences, the justification for introducing these offences has included the visibility of establishing this form of conduct as an offence under legislation targeting specific matters, and the ability for an offence to be prosecuted by an agency other than police. For example, section 190 of the *Work Health and Safety Act 2011* (Qld) establishes an offence of assaulting, threatening or intimidating an inspector or person assisting an inspector (or attempting to do so). The Explanatory Notes to the Bill that introduced this new section justify this on the basis that:

> Although this is also an offence at general criminal law, the inclusion of this provision is intended to ensure greater deterrence by giving it more prominence and allowing its prosecution by the regulator.[20]

---

13 *Police Powers and Responsibilities Act 1997* (Qld) (repealed) s 120.

14 *Police Act 1937 (*Qld) (repealed) s 59.

15 See *Criminal Code* (Qld) s 552BA and definition therein of a 'relevant offence', which includes an offence against the Code if the maximum term of imprisonment to which the defendant is liable is not more than 3 years.

16 See *Criminal Code* (Qld) s 552A.

17 An offender may generally be arrested without a warrant for a crime, but ordinarily a warrant is required in the case of a misdemeanour. See *Criminal Code* (Qld) s 5.

18 *Justices Act 1886* (Qld) s 52 sets out time limits for proceedings provides that, unless some other time is limited for making the complaint by the law relating to the particular case, the complaint must be made within one year from the time when the matter of complaint arose. In contrast, indictable offences are not subject to a time limit for bringing prosecutions, even if they are dealt with summarily: *Criminal Code* (Qld) s 552F.

19 Explanatory Notes, Police Powers and Responsibilities and Other Legislation Amendment Bill 2018 (Qld) 24–25.

20 Explanatory Notes, Work Health and Safety Bill 2011 (Qld) 8.

Charging discretion

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

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

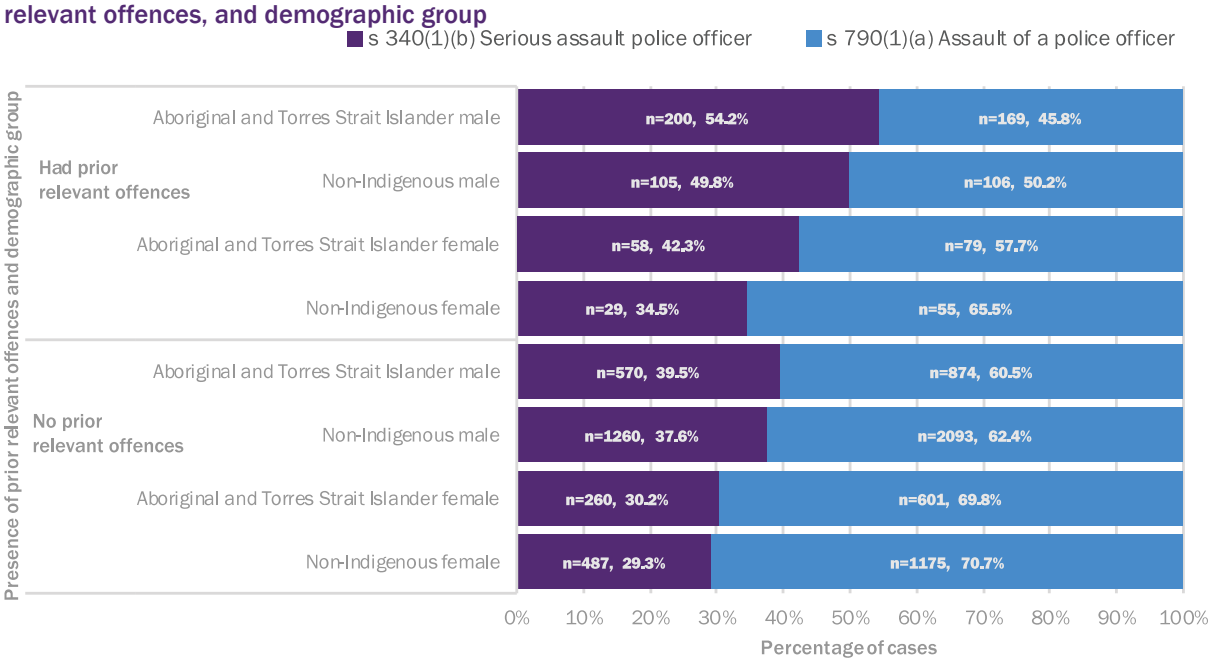
The ODPP publishes the *Director's Guidelines*, 'designed to assist the exercise of prosecutorial decisions to achieve consistency and efficiency, effectiveness and transparency'. They are issued to ODPP staff, others acting on the ODPP's behalf, and to police.[21]

If a summary charge (dealt with in the Magistrates Courts) is an option, the *Director's Guidelines* state it should be preferred when choosing what to charge or which court to sentence in, unless this would not provide adequate punishment taking into account the maximum penalty of the summary charge, the circumstances of the offence and the antecedents of the offender, or there is some relevant connection with an offence that must be dealt with in a higher court.[22] Further guidance on jurisdictional decisions mentions the gravity of the injury, whether it involved spitting, biting or a needle-stick injury and the risk of contracting an infectious disease is a factor, and the importance in every case of considering all circumstances, including the nature of the assault, its context, and the accused's criminal history.[23]

The Council tested the application of one of these factors — an accused's relevant criminal history[24] — to determine if this showed any differences in patterns as to whether a charge of assault police is more likely to be charged under section 790 of the PPRA rather than serious assault under section 340 of the Code. This analysis is very limited as it does not take into account the seriousness and circumstances of the offence, or the existence of other charges that must be dealt with in a higher court.

With these significant limitations in mind, the analysis tends to show that the existence of relevant prior convictions means a charge under section 340 of the *Criminal Code* is more likely to be preferred than a charge of assault or obstruct police under section 790 of the PPRA, which suggests the *Director's Guidelines* are being applied as intended to guide decision-making. The differences observed, in particular, between male and female offenders may be attributable to one of a number of factors, including the nature and seriousness of the conduct involved, whether any bodily injury was caused and, if so, the extent of this injury.

Figure 9-1: Proportion of sentenced cases involving the assault of a police officer, by the presence of prior relevant offences, and demographic group

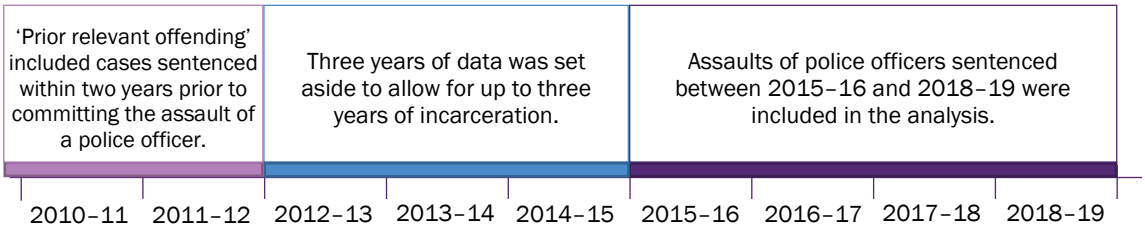


Data include adult and juvenile cases sentenced between 2015–16 and 2018–19.
Source: QGSO, Queensland Treasury — Courts Database, extracted November 2019.

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

Offences sentenced from 2015–15 to 2018–19 provided the basis for this analysis. A similar methodology was applied to that discussed earlier in this report, albeit in reverse — see Figure 9-2 and compare with Table A4-5 in Appendix 4. A prior offence was operationalised as any sentenced offence where the offender was released from custody prior to (and within two years of) the date that the offender committed a new offence.

Figure 9-2: Prior relevant offences methodology



In cases where an Aboriginal or Torres Strait Islander male offender had prior relevant offences and assaulted a police officer, 54.2 per cent of cases resulted in a sentenced charge of serious assault, and 45.8 per cent in the lesser summary charge under the PPRA of assaulting a police officer. This was slightly higher than the proportion of non-Indigenous males. Of those who had committed relevant prior offences, 49.8 per cent were sentenced for a charge of serious assault, compared to 50.2 per cent who received a sentence for the lesser summary charge.

Female offenders with relevant prior convictions were less likely to be sentenced for serious assault (as opposed to the equivalent summary charge), compared to male offenders. Aboriginal and Torres Strait Islander women were more likely to be sentenced for a charge of serious assault (42.3%) compared to non-Indigenous females (34.5%).

Those offenders sentenced who did not have any relevant prior convictions were more likely to be sentenced for the summary charge of assaulting a police officer under the PPRA rather than for an offence of serious assault. Aboriginal and Torres Strait Islander male offenders were the most likely to be sentenced for a charge of serious assault in these circumstances (39.5%), closely followed by non-Indigenous males (37.6%). Non-Indigenous women were the least likely to be sentenced for serious assault (29.3%), followed by Aboriginal and Torres Strait Islander female offenders (30.2%).

Disease test orders

In the case of serious assault — involving the offender biting, spitting on or throwing at or applying a bodily fluid or faeces to a public officer — the arrest of an alleged offender for this offence triggers the ability for police to apply to a Magistrates or Childrens Court for a disease test order. If a bodily fluid may have been transmitted to a person during or soon after the commission of a 'chapter 18 offence', this order allows an officer to ask a doctor or prescribed nurse to take blood and urine samples from a relevant person under chapter 18 of the PPRA to determine if the person may have transmitted a relevant disease to the victim, or another person.[25]

The ability to seek this testing order is limited to only certain listed offences (referred to as 'chapter 18 offences'), which include a serious assault if: (i) blood, saliva or another bodily fluid has penetrated, or may have penetrated, the victim's skin' or (ii) blood, saliva or another bodily fluid has entered, or may have entered, a mucous membrane

---

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

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

24 A 'relevant' prior offence was defined to include any offence classified as an act intended to cause injury by the Australian and New Zealand Standard Offence Classification (ANZSOC). In addition, a selection of other violent offences were also included, these were robbery, going armed so as to cause fear, threatening violence, deprivation of liberty, assault with intent to steal, demanding property with menaces with intent to steal, affray, riot, and assaults of public officers and justice officials. Although some homicide offences involve direct acts of violence, they were not included in this analysis due to the small number of cases and because the circumstances of these offences are typically very different from those in which assaults on public officers are committed.

25 *Police Powers and Responsibilities Act 2000* (Qld) ss 538(1), (2). The next chapter in that Act, chapter 18A, deals with breath, saliva, blood and urine testing of persons suspected of committing particular assault offences (grievous bodily harm, wounding and serious assaults carrying the maximum 14-year penalty). It was introduced by the *Safe Night Out Legislation Amendment Act 2014* (Qld). It is not concerned with disease testing, but with proving an offender's intoxication. It applies testing powers under the *Transport Operations (Road Use Management) Act 1995* (Qld), s 80 for this purpose. It works in conjunction with chapter 35A of the *Criminal Code* (Qld) (proof) and *Penalties and Sentences Act 1992* (Qld), pt 5 div 2 sub-div 2 (circumstance of aggravation). It is a circumstance of aggravation for a prescribed offence that the offender committed the offence in a public place while the offender was adversely affected by an intoxicating substance. This carries a mandatory penalty of a community service order.

of the victim.[26] It does not apply to an assault that involves spitting saliva onto intact skin,[27] or to other less serious forms of assault, such as an assault under the PPRA. For this reason, an alleged offender may initially be charged with serious assault, even if the charges are later downgraded to an offence under the PPRA.

The Queensland Law Society commented on disease test order provisions in its submission:

> As to the availability of disease test orders as a matter of course for certain serious assault offences, it is accepted that this might inappropriately motivate police to charge with this offence in certain cases. Given the court has discretion in other cases on application to make such an order, and in our committee members' experience uniformly will do so absent cogent reasons not to (ie. there having been no risk of transmission whatsoever), standardising the basis on which such an order can be obtained for *all offences* is desirable — perhaps on application only.[28]

The purpose of chapter 18 'is to help ensure victims of particular sexual offences and serious assault offences, and certain other persons receive appropriate medical, physical and psychological treatment'.[29] In a submission to the Council, Queensland Advocacy Incorporated (QAI) suggested that 'police, correctional and emergency services personnel need more information about disease transmission' and pointed to a lack of medical evidence of disease transmission through spitting.[30] QAI was further concerned:

> These laws share the false premise that appropriate care and support to police or others can be meaningfully informed by the status of the alleged accused. The rationale for testing is to alleviate any distress police or other emergency service personnel may experience following an incident. Nevertheless, test results will likely be misleading and where a positive result is returned, only cause additional but baseless anxiety, given that there is no risk of transmission.[31]

In terms of weighing the objective statistical risk of disease transmission against a complainant's subjective concern, note Derrington J's comment in *R v Kalinin*:[32]

> The first [alleged sentencing error was that the offender] had subjected the complainants to a 'very high risk' whereas [the officer] had been advised by a doctor that the risk was low. This error, however, is not of great consequence because even after advice by the doctor, [the officer] has indicated that the possibilities of infection to himself and his family had a very serious impact on his life and his family relationships.[33]

Recent amendments inserting a new chapter 18B into the PPRA provide for a special COVID-19 test order to be made for a person who coughs, sneezes or spits on or at a police officer or another person in the suspected commission of a 'relevant offence' — defined as an offence against either section 317, section 335 or section 340 of the *Criminal Code*.[34] This is a temporary provision, allowing for a respiratory tract sample to be taken,[35] which expires on the day the COVID-19 emergency ends or 31 December 2020 (whichever is later).[36]

Table 9-1 (below) shows the number of cases in which a disease test order was issued by Queensland courts from 2005–06 to 2018–19. The data analysed did not identify the specific offence the disease test order applied to and so the data presented show all offences that were before the court for that offender on the day the disease test order was made.

There were 235 unique disease test orders issued by Queensland courts from 2005–06 to 2018–19. Over three-quarters of the cases where a disease test was ordered involved at least one section 340 serious assault offence (77.4%, n=182) and nearly half were for section 340 offences involving the aggravating circumstance of biting, spitting or other bodily fluids (48.1%, n=113).

---

26 *Police Powers and Responsibilities Act 2000* (Qld) s 538(1)(g). The offences, other than serious assault, that constitute a chapter 18 offence are listed in s 538(1). They are all sexual offences and must be committed in the same context regarding blood, saliva or another bodily fluid.

27 Ibid s 538(3)(c).

28 Submission 30 (Queensland Law Society) 13 (emphasis added).

29 *Police Powers and Responsibilities Act 2000* (Qld) s 537.

30 Preliminary submission 35 (Queensland Advocacy Incorporated) 9–10.

31 Ibid 10.

32 [1998] QCA 261, 5.

33 Ibid (Derrington J). A more recent example of emotional harm regarding testing, without reference to statistical risks of transmission, is *R v Cooney* [2019] QCA 166 (which QAI noted).

34 *Police Powers and Responsibilities Act 2000* (Qld) ss 548I (When application for order may be made), s 548H (Definition of 'relevant offence').

35 Ibid s 548O.

36 Ibid s 548U.

Cases involving serious assault of a police officer made up the largest proportion of cases at 65.1 per cent (n=153) and the majority of those cases involved the aggravating circumstance of biting, spitting or other bodily fluids (n=100). Cases involving the offence of assault or obstruction of a police officer under the PPRA (s 790) was the next most common at 17.0 per cent (n=40).

A much smaller proportion of cases in which a disease test order was made involved a serious assault of a public officer offence (7.7%, n=18); however the vast majority of these involved the aggravating circumstance of biting, spitting or other bodily fluids (n=13).

Table 9-1: Disease test orders under Chapter 18 of the *Police Powers and Responsibilities Act 2000* (Qld)

Offence	Number of cases (n)	Proportion of all cases involving a disease test order (%)
Cases involving a disease test order	235	100.0
Cases involving s 340 offence	182	77.4
Cases involving s 340 offence with bodily fluid	113	48.1
Cases involving s 340(1)(a) intent assault police offence	8	3.4
Cases involving s 340(1)(b) assault police offence	153	65.1
Cases involving s 340(1)(b)(i) assault police offence with bodily fluid	100	42.6
Cases involving s 340(1)(c) assault performing duty	3	1.3
Cases involving s 340(1)(d) assault performed duty	4	1.7
Cases involving s 340(1)(g) assault person over 60	2	0.9
Cases involving s 340(2) assault corrections officer	2	0.9
Cases involving s 340(2AA) assault public officer offence	18	7.7
Cases involving s 340(2AA)(i) assault public officer offence with bodily fluid	13	5.5
Cases involving PPRA s 790 assault or obstruct police officer offence	40	17.0

Data include higher and lower courts, cases from 2005–06 to 2018–19.
Source: QGSO, Queensland Treasury — Courts Database, extracted November 2019.
Notes: (1) The data applied disease test orders to all offences heard within the court event; therefore, where there was more than one offence heard in the court event, it was not possible to identify which offence the order applied to.
(2) As the analysis looked at all offences within the court event, the total number of cases is greater than the total number of unique disease test orders issued and percentages sum to more than 100%.

It was not possible for the Council to determine to what extent the ability to apply for a disease test order for serious assault may, or may not, influence the initial charging decision by police, and whether the charge of serious assault, which allowed for the order to be made, was the offence for which the offender was ultimately convicted.

A 'catch all' assault and obstruct offence under the *Summary Offences Act 2005* (Qld)

The Council identified a number of options in its Issues Paper to address issues with the current level of overlap in conduct captured under sections 340 and 199 of the *Criminal Code*, and in conduct that can be charged as summary offences under other legislation.

The Council identified that if section 199 were to be recast as a summary offence, 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 of the *Criminal Code*.

Alternatively, it is suggested that section 199 could be retained in its current form, either retaining the same or a higher penalty, and sections 340(1)(b) and 340(2AA) amended to limit the criminal conduct captured to assaults, rather than extending to acts of resistance or wilful obstruction. This is ultimately the option favoured by the Council.

This still leaves open the question, however, of whether it would be preferable to formulate a summary offence that might replace the multitude of offences introduced across the Queensland statute book that are ultimately aimed at the same form of criminal conduct — assault and obstruction of a public officer in the performance of their duties.

9.2.4 Stakeholder views

There was strong support for the retention of summary offences as an alternative to charging the more serious offence of serious assault under the *Criminal Code*.

In its submission to the Council, the QPS stated that the current legislative framework is appropriate.[37] In supporting the current approach, it referred to the broad range of conduct that can be involved and level of harm:

> Unfortunately, police officers may be unlawfully assaulted in a myriad of ways with differing degrees of severity. Having different offence provisions allow an offence to be preferred that carries and appropriate maximum penalty that addresses the alleged behaviour. For example, it may be considered appropriate to prefer the simple offence under s 790 of the PPRA in circumstances where a police officer was lightly slapped causing no injury. In contrast, if a police officer was seriously injured as a consequence of an assault, an indictable offence with a greater maximum penalty may be considered to be more appropriate.[38]

Sisters Inside also supported the current two-tiered approach as having the advantage of enabling people to be charged with a lesser offence, where appropriate:

> We contend that it is desirable to maintain this duality [of offences in both the *Criminal Code* and PPRA] so that people have the benefit of being charged with the lesser, summary offence contained in s 790 of the PPRA, when that is appropriate.[39]

However, it raised concerns that 'currently the requirements for establishing whether an action should be charged as a summary or indictable offence are not clear'.[40] This means that 'too much discretion is afforded to police. In our experience police misuse this discretionary power and always elect to charge a person with the indictable offence'.[41]

Similar concerns about the lack of a clear rationale for some assaults being charged under the *Criminal Code* rather than as a section 790 PPRA offence were expressed at a roundtable hosted by the Council, the focus of which was on understanding the drivers of Aboriginal and Torres Strait Islander overrepresentation and issues for people in circumstances of vulnerability. A view was expressed that charges of assault under the Code seemed to be more commonly preferred where the person charged was an Aboriginal or Torres Strait Islander person.

Sisters Inside was further concerned:

> There is a relatively low threshold for satisfying serious assault under the Criminal Code and there is no explicit delineation between acts occasioning bodily harm and those that do not. This means that the police and prosecuting authority lack clear guidelines for determining whether to charge the person with a summary or indictable offence.[42]

It suggested that 'the legislation requires clarification to ensure that less serious assaults and obstructions are not punished disproportionately'.[43]

The broad nature of section 340 was also criticised by Sisters Inside on the basis it:

> captures low-level behaviour from unwell, vulnerable people and criminalises them instead of diverting them to mental health services and rehabilitation centres. Legislation and police guidelines should be drafted to recognise that actions on the lower end of the spectrum that do not cause bodily harm should rightly remain summary offences.[44]

It raised similar issues in relation to the decision to charge an offender for assaulting a corrective services officer under section 124(b) of the CSA or section 340 of the *Criminal Code*.[45]

Sisters Inside contrasted the Queensland approach to structuring the serious assault offence with the method in NSW, the Northern Territory, Victoria, the ACT, Tasmania and South Australia, where the legislation explicitly differentiates penalties based on whether bodily harm was caused:

> For example, the New South Wales legislation specifies that where no actual bodily harm is caused to the officer (or specified person) the maximum penalty is 5 years, whereas assaults that cause bodily harm attract a maximum penalty of 7 years and assaults amounting to grievous bodily harm have a maximum penalty of 12 years.
>
> In Victoria the legislation provides that assaulting, threatening, resisting or obstructing a police officer carries a maximum penalty of 5 years.... In Victoria, if a person commits a more serious assault they are charged under the

37 Submission 25 (Queensland Police Service) 2.

38 Ibid.

39 Preliminary submission 21 (Sisters Inside) 4.

40 Ibid.

41 Submission 17 (Sisters Inside) 3.

42 Preliminary submission 21 (Sisters Inside) 5.

43 Ibid 4–5 and Submission 17 (Sisters Inside) 6.

44 Submission 17 (Sisters Inside) 4.

45 Preliminary submission 21 (Sisters Inside) 6.

> serious injury and gross violence provisions elsewhere in the Act, which apply equally to civilians and police or public officers. We submit that the Queensland Acts should incorporate greater specificity, as in other Australian jurisdictions, in order to reduce the occurrence of unwarranted criminalisation.[46]

QAI referred to the graduation of penalties in NSW under section 60 of the *Crimes Act 1900* (NSW), and in the Northern Territory under section 188A of the *Criminal Code* (NT), noting that in the ACT, charges are brought under general offence provisions and the fact that the complainant is a police officer is taken into account as an aggravating feature.[47]

Legal Aid Queensland (LAQ) stated that 'the various offences set out in the *Criminal Code* and PPRA adequately cover a multitude of circumstances'[48] and argued that 'there is no evidence to support a change' in penalties for relevant summary offences:[49]

> There is a benefit in retaining multiple offences that can be charged both under the Criminal Code and summarily. The reason for this is that it allows prosecution discretion to proceed with a charge that best fits the factual circumstances of each case.[50]

Similarly, the Aboriginal and Torres Strait Islander Legal Service (ATSILS) supported the two-tiered approach:

> It is appropriate that there are a range of offences which reflect the range of circumstances in which these incidents occur. There is a very large spectrum of fact situations which involve serious assault charges but an even greater spectrum of fact situations in objectively less serious circumstances where it is not in the interests of justice to bring the more serious charges.
>
> That great variety of circumstances in which serious assault charges can arise is both explicitly and implicitly recognised in *The Director's Guidelines*.[51]

The Bar Association of Queensland (BAQ) identified two broad categories of benefit in retaining 'multiple offences targeting the same or similar behaviour':[52]

> Firstly, it allows flexibility in prosecutorial authorities in charging an offence that most adequately reflects the criminality in a particular case…
>
> Secondly, offending, and particularly assaults, occur in many different circumstances. As such, the subtle differences in elements may target or capture particular acts not as suitably reflected through a different offence. That is so in concepts of "obstruct" as opposed to "assault".[53]

BAQ was 'not aware of any amendments necessary to the available summary offences. For each summary offence with a lower maximum penalty there is an indictable alternative that can be, and often is, charged when the offence is factually more serious'.[54]

The Queensland Law Society (QLS) stated that generally, 'a restrictive approach to substantive criminal provisions is preferable. The prospect of multiple offences in respect of similar conduct can cause confusion and lead to overcharging'.[55] However, the QLS noted that section 340 is arguably 'artificial' in that its purpose, derived from victim status and not assault outcome, can cause 'peculiar outcomes' such as 'a higher sentence for touching a public officer without consent where no injury is caused than if an ordinary citizen is more seriously harmed'.[56] The QLS stated that if section 340 is retained:

> there is benefit in having different levels of offence to reflect the very broad range of circumstances the offences cover and the fact that the vast majority of cases involve minor assaults finalised at the Magistrates Court level.[57]

---

46 Ibid.

47 Preliminary submission 35 (Queensland Advocacy Incorporated) 10.

48 Submission 29 (Legal Aid Queensland) 2.

49 Ibid 7.

50 Ibid 6.

51 Submission 22 (ATSILS) 4

52 Submission 27 (Bar Association of Queensland) 7.

53 Ibid.

54 Ibid 10.

55 Submission 30 (Queensland Law Society) 11.

56 Ibid 11.

57 Ibid 11.

Its position in respect of current penalties applicable to relevant summary offences was that 'the penalties that apply for such matters when charged summarily are appropriate generally and provide adequate scope for sentencing in such cases'.[58]

QCS supported the retention of all offences, with an apparent preference for section 340 prosecutions:

> The behaviour that constitutes an offender obstructing a CSO in the exercise of their power (sections 124(b) and 127 of the CS Act) may not rise to the level of assault captured by section 340 of the Criminal Code appropriately captures the assault behaviour. The maximum penalties for sections 124(b) and 127 do not reflect the seriousness of an assault and are often charged in conjunction with section 340 of the Criminal Code. Therefore, it is useful to retain these offences in the CS Act and section 199 of the Criminal Code for the instances where prosecution of a defendant under section 340 of the Criminal Code fails.[59]

The Department of Environment and Science (DES) noted a lack of consistency across the Acts administered by DES as to whether the definition of 'obstruct' included acts of 'assault' and supported consistency across Acts administered by the department to include acts of 'assault'.[60] It further viewed provisions that create an offence of obstruction only in circumstances where an officer is acting as a statutory power as too limited, and preferred a formulation that would include obstruct/assault in circumstances where an authorised officer is executing powers or duties to ensure assaults against DES officers are caught by the relevant offence provisions.[61]

Another concern of the DES was the lack of consistency in maximum penalties across Acts administered by the department 'ranging from a modest fine to imprisonment' with the department being of the view that 'the maximum penalty for these offences should be broadly consistent across the existing obstruct/assault provisions', and that maximum penalties should be increased.[62] It specifically supported the availability of imprisonment to 'increase the deterrence value of these offences'.[63]

9.2.5 Council's view

As discussed above, existing legislative drafting guidelines in Queensland provide: 'if the Criminal Code provides for an offence, it is undesirable that another Act should erode its nature as a comprehensive code by providing for the same or essentially the same offence'.[64]

In practice, there are a number of offences that have been introduced over time that essentially replicate offences in the *Criminal Code*, while existing as summary offences — meaning they can only be dealt with by a Magistrates Court.

A number of submissions were made in support of retaining these summary offences, in addition to those that exist under the *Criminal Code,* to allow the lower seriousness of these offences to be reflected in the charges brought.

The Council agrees that it is important to retain separate levels of offences in this case, even if these offences ostensibly capture the same forms of criminal behaviour, to ensure that people who commit these offences are not exposed to the possibility of a more severe penalty being imposed for actions that are relatively minor — for example, in the case of an assault, a light push where no injury has been caused.

Retaining these offence distinctions not only means that a different penalty framework is applied, but also ensures that criminal histories present a more accurate reflection of the seriousness of charges of which an offender has been convicted and sentenced than would be the case should all assaults be dealt with under section 340 of the *Criminal Code*, and all acts of obstruction be charged under section 199 of the Code.

However, taking into account the proliferation of summary assault and obstruct offences in Queensland over time, adding to the general complexity of the criminal law, the Council's preference is for a new summary offence to be created under the *Summary Offences Act 2005* (Qld) to replace the existing offences of assault and obstruct, which it recommends should be repealed over time. The offence should be drafted in such a way as to allow for separate analysis of outcomes for assaults of a public officer and acts of obstruction, allowing these different forms of conduct to be separately identified on an offender's criminal history.

The Council recommends this new summary offence should carry a maximum penalty of 6 months' imprisonment or 100 penalty units. The maximum fine recommended is consistent with a number of existing assault and obstruct provisions, and also the maximum fine that can be imposed by law by a Magistrates Court for an indictable offence

---

58 Ibid 15

59 Submission 21 (Queensland Corrective Services) 15.

60 Submission 26 (Department of Environment and Science) 2–3.

61 Ibid.

62 Ibid 3–4.

63 Ibid 4 [33].

64 Department of the Premier and Cabinet, *Queensland Legislation Handbook* (6th ed, 2019) 10 [2.12.4].

dealt with summarily. By providing for imprisonment as an option to a court in sentencing, it should more than sufficiently provide for these less serious forms of assault and obstruct offences, and there should be few provisions that need to be retained on the basis that a higher maximum penalty is warranted.

The requirement to review and consider repealing existing provisions over time should not apply to national laws or national scheme legislation, given that the objective in that case is to achieve national consistency rather than consistency with Queensland laws and drafting practices.

Retention of the existing discrete assault and obstruct offences for police and corrective services officers is supported as another exception, with no change to the current penalties that apply. This recommendation is made on the basis that these are the most frequently charged forms of assault and obstruct offences, and that the penalties set take into account the specific contexts in which this offending occurs. Any new offence of assault or obstruct established under the *Summary Offences Act* should therefore expressly exclude police and corrective services officers from its scope.

To address identified stakeholder concerns regarding when the charging of an assault under section 340 of the *Criminal Code* is preferred over an alternative summary charge, the Council recommends that the QPS should develop internal guidelines to supplement the existing ODPP's *Director's Guidelines*, which advise charging officers about what factors might influence the charging discretion — such as the level of injury caused.

Recommendation 9–1: Section 790 of the PPRA and sections 124(b) and 127 of the CSA

The separate summary offences of assault or obstruct a police officer under section 790 of the *Police Powers and Responsibilities Act 2000* (Qld) and assault or obstruct a corrective services staff member under section 124(b) or 127 of the *Corrective Services Act 2006* (Qld) should be retained to provide an option to prosecution agencies to charge an offender with a less serious form of offence in circumstances where the seriousness of the assault or obstruction falls below that which would justify a prosecution proceeding as a section 340 serious assault or section 199 obstruct public officer charge under the *Criminal Code*.

Recommendation 9–2: Maximum penalties for section 790 of the PPRA and sections 124(b) and 127 of the CSA

The current maximum penalties that apply to assaults charged under section 790 of the *Police Powers and Responsibilities Act 2000* (40 penalty units or 6 months' imprisonment, or 60 penalty units or 12 months' imprisonment if the assault or obstruction happens within, or in the vicinity of, licensed premises) and sections 124(b) (2 years' imprisonment) and 127 (40 penalty units or one year's imprisonment) of the *Corrective Services Act 2006* should be retained.

Recommendation 9–3: New summary offence of assault or obstruct under the *Summary Offences Act 2005*

A new summary offence should be introduced under *the Summary Offences Act 2005* (Qld), which establishes an offence of assault or obstruct a public officer (other than officers to which sections 790 of the *Police Powers and Responsibilities Act 2000* and 124(b) and 127 of the *Corrective Services Act 2006* apply) as a summary offence alternative to an offence being charged under sections 340 or 199 of the *Criminal Code*. The objective of introducing this offence should be, over time, to replace the myriad summary offences that exist across the Queensland statute book that effectively target the same behaviour — assault and obstruct a public officer — many of which carry significantly different penalties despite the behaviour involving the same acts of assault and/or obstruction.

The maximum penalty that should apply to this new offence should be 100 penalty units, which is also the maximum fine that can be issued by a Magistrates Court under section 552H of the *Criminal Code*, or 6 months' imprisonment.

Recommendation 9–4: Repeal of other assault and obstruct offences

Existing summary offences of assault and obstruct should be repealed over time as relevant legislation is reviewed and/or amended. Offences established under national laws or national scheme legislation should be exempted from this requirement.

Recommendation 9–5: Development of internal QPS guidelines to guide exercise of charging discretion

The Queensland Police Service should develop internal guidelines — to supplement the existing *Director's Guidelines* of the Office of the Director of Public Prosecutions — that will advise officers about what factors might influence the charging discretion when deciding whether to prefer a section 340 offence or a summary charge. This could also address any matters that should not be taken into account in exercising this discretion. The intention of these guidelines should be to support the consistent and appropriate exercise of discretion across the state.

9.3 Failure to comply with a public health direction under the *Public Health Act 2005*

In addition to criminal laws, governments have responded to the COVID-19 pandemic by widening powers under health legislation. Quasi-criminal health directives (carrying fines for breaches and, more recently, imprisonment) were created.

In Queensland, a new Part 7A of chapter 8 of the *Public Health Act 2005* (Qld) ('Particular powers for COVID-19 emergency, applicable during that period')[65] gives the Chief Health Officer power[66] to make public health directions restricting movement and contact, requiring people to stay at or in a stated place or not to enter or stay at or in a stated place, and to make any other direction the Chief Health Officer considers necessary to protect public health.

The legislation also extends powers to emergency officers ('general' and 'medical')[67] to give a person a written direction if the emergency officer reasonably believes it is necessary to assist in containing, or to respond to, the spread of COVID-19 within the community.[68]

It is an offence to fail to comply with a public health direction[69] or direction from an emergency officer,[70] unless the person has a reasonable excuse.

There is a particular public health direction relevant to the Council's review. The Chief Health Officer issued the *Protecting Public Officials and Workers (Spitting, Coughing and Sneezing) Direction* on 27 April 2020. It was effective from that date and has been updated since.[71] It prohibits a person 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 class of person it 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, 'health worker' and 'public official' are widely defined and 'worker includes, without limitation', a retail worker, a person who works at an airport, for an electricity, gas, water or other utility company or in the transport industry or a transport-related industry, and a member of the Australian Defence Force. Further 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 or the Commonwealth Government).

The maximum fine for breaching both public health and emergency officer directions is 100 penalty units ($13,345).

An amendment introducing a maximum penalty of 6 months' imprisonment for breaching public health directions issued under section 362B commenced on 21 July 2020 (the fine remains in place).[72] Imprisonment would only be open if court proceedings for a breach were instituted, as opposed to the issuing of a penalty infringement notice. Health directions, including the *Protecting Public Officials and Workers (Spitting, Coughing and Sneezing) Direction*, have been updated to reflect the term of imprisonment.

The infringement notice amount for breaching a health direction varies depending on the nature of the direction. It is 30 penalty units ($4,003) for an individual or 50 penalty units ($6,672) for a corporation in respect of failure to comply with a public health direction restricting entry into Queensland from another state by:

---

65 Inserted by the *Public Health and Other Legislation (Public Health Emergency) Amendment Act 2020* (Qld).

66 *Public Health Act 2005* (Qld) s 362B.

67 See *Public Health Act 2005* (Qld) ss 333, 335.

68 Ibid s 362G.

69 Ibid 362D.

70 Ibid s 362J.

71 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>.

72 Section 362D of *Public Health Act 2005* (Qld), as amended by the *Corrective Services and Other Legislation Amendment Act 2020* (Qld) s 55X.

- entering Queensland in contravention of the direction;
- giving information about a matter that is not true and correct in contravention of the direction; and
- failing to stay at or in a stated place in contravention of the direction.[73]

For all other breaches of health direction (such as that regarding spitting and coughing) and all breaches of emergency officer directions, the infringement notice amount is 10 penalty units for individuals ($1,334) or 50 penalty units ($6,672) for corporations.[74]

A person who is given an infringement notice in Queensland can elect to pay the fine in full to the administering authority or request that the matter be determined by a Magistrates Court.[75]

The QPS advised the Council[76] that during the period 27 April to 31 July 2020, six penalty infringement notices were issued by the QPS relating to the *Protecting Public Officials and Workers (Spitting, Coughing and Sneezing) Direction* (there are many other directions not relevant to the Council's review).

Four notices to appear in court were issued for alleged breaches of this same direction during the same period. A further notice to appear was issued for an alleged offence against section 143(1) of the *Public Health Act 2005* (Qld) (Person must not recklessly put someone else at risk of contracting a controlled notifiable condition).[77]

The health directions do not displace the criminal law and the police charging discretion is not changed. Therefore, criminal offences, which can attract the entire range of sentencing options, could be preferred to prosecuting a breach of health directions. The QPS *Operational Procedures Manual* notes:

> Arresting officers should select an offence which accurately reflects the nature and extent of the criminal behaviour under investigation and which is supported by the admissible evidence. Where the circumstances of a particular case indicate two or more alternative charges may be made out, the offence carrying the greater penalty should be preferred, subject to the Director of Public Prosecutions (State) Guidelines.[78]

The maximum fine of 100 penalty units is the same as the highest fine a Magistrates Court can impose for any indictable offence dealt with summarily.[79] The maximum for the District Court is 4,175 penalty units for an individual, or $557,153.[80] A court can generally issue a fine in addition to other penalties.

The statutory maximum fine for a charge of assault or obstruct police under the PPRA varies from 40 penalty units ($5,338) or 6 months' imprisonment to 60 penalty units ($8,007) or 12 months' imprisonment (within or in vicinity of licensed premises). An offence of obstruction can be dealt with via infringement notice (3 penalty units/$400 or 6 penalty units/$800 if within or in vicinity of licensed premises), but an assault offence cannot.[81]

From 2009–10 to 2018–19, for serious assault of a police officer involving bodily fluids (s 340(1)(b)(i)), the average fine amount was $1,320 (n=35). Similarly, for assaults of public officers involving bodily fluids (s 340(2AA)(i)), the average fine amount was $1,125 (n=6).[82] However, as discussed in Chapter 7, the much more usual penalty applied to these types of offences is a custodial penalty.

---

73 *State Penalties Enforcement Regulation 2014 (Qld)* sch 1.

74 Ibid.

75 *State Penalties Enforcement Act 1999* (Qld) s 15.

76 Emails from Strategic Policy Branch, Queensland Police Service to Manager, Research and Statistics, Queensland Sentencing Advisory Council, 17 June 2020 and 12 August 2020.

77 Maximum penalty: 200 penalty units ($26,690) or 18 months' imprisonment. Subsection 2 of that section is an offence of recklessly transmitting a controlled notifiable condition to someone else — Maximum penalty: 400 penalty units ($53,380) or 2 years' imprisonment. A note to this section acknowledges that 'the Criminal Code, section 317 provides for the crime of intentionally transmitting a serious disease to a person'. COVID-19 is a controlled notifiable condition — see *Public Health Act 2005* (Qld) s 63 and *Public Health Regulation 2018* (Qld) sch 1.

78 Queensland Police Service, 'Chapter 3 — Prosecution Process', *Operational Procedures Manual* (31 July 2020, Issue 77, Public Edition) 13 [3.4.2] 'The decision to institute proceedings'.

79 *Criminal Code* s 552H. Otherwise, if an Act creates an offence and does not provide a sentence, the maximum fine that a Magistrates Court may impose for a single offence is 165 penalty units ($22,019) for an individual: *Penalties and Sentences Act 1992* (Qld) s 46(1).

80 *Penalties and Sentences Act 1992* (Qld) ss 5A and 46(1)(b). At the time of this report, the prescribed dollar value of a penalty unit was $133.45: *Penalties and Sentences Regulation 2015* (Qld) s 3. The same provisions place no limit on the amount of fines the Supreme Court can impose. The Supreme Court would deal with assault-type offences only in unusual circumstances.

81 *State Penalties Enforcement Regulation 2014 (Qld)* sch 1.

82 Note: small sample size.

Chapter 10 Reforms to the sentencing framework

10.1 Introduction

The findings and recommendations in this chapter respond to the request under the Terms of Reference for the Council to review the current penalty and sentencing framework 'to ensure it provides an appropriate response to this form of offending' and to provide advice on options for reform.

The most significant of the reforms recommended is to amend the statutory principles that guide the sentencing of adult offenders in Queensland under section 9 of the *Penalties and Sentences Act 1992* (Qld) (PSA). The objective of these reforms is to ensure that where an assault is perpetrated on an emergency worker or any other worker who is at increased risk of assault due to the nature of their work, courts have specific regard to this in sentencing. The reforms proposed extend beyond public officers, to the number of workers who also perform essential roles in the community but who may be at increased risk of assault — such as bus drivers and other public transport workers, taxi drivers, rideshare drivers, healthcare workers not otherwise captured within the scope of the new section 340 of the *Criminal Code* (Qld), service station attendants, and private security officers. This approach will have the flexibility to respond to changes in local conditions. For example, with the emergence of the COVID-19 pandemic, it would be broad enough to recognise pharmacists, supermarket workers and other retail staff. Importantly, the new aggravating factor will apply to all offences of violence rather than being limited in its application to particular forms of assault.

The chapter also presents the Council's findings on specific matters raised not addressed in earlier chapters of this report.

In responding to the issue of appropriate sentencing options for this form of offending, it also revisits a number of recommendations made by the Council in its July 2019 report on community-based sentencing orders, imprisonment and parole options.

10.2 New aggravating factor under section 9 of the PSA

Questions 9(a) and (b) of the Council's Issues Paper asked whether assaults against public officers should continue to be captured within a specific substantive offence provision (serious assault) or, alternatively, whether consideration should be given to creating:

(a) a statutory circumstance of aggravation (meaning a higher maximum penalty would apply); or

(b) an aggravating factor in section 9 of the PSA to recognise the fact the victim was a public officer or worker as an aggravating sentencing factor (signalling the more serious nature of the offence, without impacting the maximum penalty).

In Chapter 8, section 8.5.2, the Council discussed the option of introducing statutory circumstances of aggravation, which it does not support, and has recommended against. The following discussion relates to the alternative approach of introducing an aggravating factor for the purposes of sentencing, which is preferred by the Council for the reasons set out below.

The significance of an aggravating factor for sentencing purposes is:

> to bring into existence a factor in aggravation of penalty in the common law sense. It is a factor that a sentencing judge *may* take into account in imposing a more severe sentence than might be imposed in the absence of that factor.[1]

Aggravated sentencing factors can provide even more flexibility than statutory circumstances of aggravation (question 9(b)). These, too, can apply to any existing offence by virtue of a factual link (i.e. victim occupation). There is no requirement for the aggravating factors to be specifically charged.

---

1 *R v O'Sullivan; Ex parte A-G (Qld)* [2019] QCA 300, 26 [91] (Sofronoff P, Gotterson JA and Lyons SJA) (emphasis in original).

10.2.1 Queensland's current statutory sentencing factors — section 9 of the PSA

In sentencing for Queensland offences, imprisonment must generally only be imposed as a last resort and a sentence allowing an offender to stay in the community is preferable (section 9(2)(a) of the PSA). However, these two principles do not apply in certain factual circumstances, including sections 9(2A) and (3), which apply for sentencing of any offence:[2]

> (2A) …
>
> (a) that involved the use of, or counselling or procuring the use of, or attempting or conspiring to use, violence against another person; or
>
> (b) that resulted in physical harm to another person.
>
> (3) In sentencing an offender to whom subsection (2A) applies, the court must have regard primarily to the following—
>
> (a) the risk of physical harm to any members of the community if a custodial sentence were not imposed;
>
> (b) the need to protect any members of the community from that risk;
>
> (c) the personal circumstances of any victim of the offence;
>
> (d) the circumstances of the offence, including the death of or any injury to a member of the public or any loss or damage resulting from the offence;
>
> (e) the nature or extent of the violence used, or intended to be used, in the commission of the offence;
>
> (f) any disregard by the offender for the interests of public safety;
>
> (g) the past record of the offender, including any attempted rehabilitation and the number of previous offences of any type committed;
>
> (h) the antecedents, age and character of the offender;
>
> (i) any remorse or lack of remorse of the offender;
>
> (j) any medical, psychiatric, prison or other relevant report in relation to the offender;
>
> (k) anything else about the safety of members of the community that the sentencing court considers relevant.

There is a similar model employed for any offence of a sexual nature committed in relation to a child under 16 years (ss 9(4) and (6)) and child exploitation material offences (ss (6A) and (7)). A difference, however, is that sexual offences against children must result in an actual term of imprisonment, unless there are exceptional circumstances (s 9(4)(b)).

Section 9 also houses provisions that require specific factual circumstances to be treated as aggravating factors on sentence, in relation to:

- manslaughter of children:

  > (9B) In determining the appropriate sentence for an offender convicted of the manslaughter of a child under 12 years, the court must treat the child's defencelessness and vulnerability, having regard to the child's age, as an aggravating factor.

- and domestic violence offences (section 9(10A) is discussed in detail below):

  > (10A) In determining the appropriate sentence for an offender convicted of a domestic violence offence, the court must treat the fact that it is a domestic violence offence as an aggravating factor, unless the court considers it is not reasonable because of the exceptional circumstances of the case.
  >
  > Examples of exceptional circumstances—
  >
  > 1. the victim of the offence has previously committed an act of serious domestic violence, or several acts of domestic violence, against the offender
  >
  > 2. the offence is manslaughter under the Criminal Code, section 304B

A 'domestic violence offence' is defined by the existing definitions in the *Criminal Code* and the *Domestic and Family Violence Protection Act 2012* (Qld).

---

2 *Penalties and Sentences Act 1992* (Qld) ss 9(2)(a) and 9(2A). See also *R v McLean* (2011) 212 A Crim R 199, 203 [15] (White JA, Fraser JA and Philippides J agreeing). See pages 35–7 of the Council's Issues Paper.

As discussed in Chapter 8, section 8.5.2, reviews of the *Criminal Code* in the 1990s revealed disparate views regarding whether specific victim cohorts should be identified in offence provisions. These identify cogent arguments against adding further aggravating factors and have ultimately influenced the Council in determining its final preference for the approach of a broader aggravating sentencing factor (Recommendation 10–1) over statutory circumstances of aggravation in offence provisions (Recommendation 2).

10.2.2 Other jurisdictions

In providing its advice, the Council has been asked to examine relevant offence, penalty and sentencing provisions in place in other Australian and international jurisdiction to address assaults on public officers.

As noted below, there are examples in other jurisdictions of the use of either or both of the methods in questions 9(a) and (b). They show different approaches regarding how a complainant's occupational status is recognised and how an aggravating factor is triggered. This could be because the worker:

- is working (meaning that an offender knows of the relevant role and its exercise);
- is a worker (this could apply when they hold that role but are not working); or
- has done something as part of that role (i.e. the offending could be an act of retribution).

England and Wales

England and Wales have introduced examples of both a 'statutory aggravating factor' tied to specific offences and a much wider 'general aggravating factor' that applies to offences on those working in the public sector or providing a service to the public.

The general aggravating factor that applies for sentencing purposes is established under sentencing guidelines issued by the Sentencing Council for England and Wales. Definitive sentencing guidelines issued by the Sentencing Council[3] must be followed by courts unless it would be contrary to the interests of justice to do so.[4]

The guideline for assault occasioning bodily harm (AOBH) treats the fact that an offence was committed against those working in the public sector or providing a service to the public as aggravated on the basis of:

- the fact that people in public facing roles are more exposed to the possibility of harm and consequently more vulnerable and/or
- the fact that someone is working in the public interest merits the additional protection of the courts.[5]

This aggravating factor applies whether the victim is a public or private sector employee or is acting in a voluntary capacity, although the guideline notes that 'care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence,' and further cautions against double counting in circumstances where the statutory aggravating factor relating to emergency workers applies.[6]

The statutory aggravating factor to which the guideline refers was introduced under the *Assaults on Emergency Workers (Offences) Act 2018* (UK). It applies in circumstances where the 'offence was committed against an emergency worker acting in the exercise of functions as such a worker'.[7] Courts must treat that fact 'as an aggravating factor (that is to say, a factor that increases the seriousness of the offence)' and 'state [this] in open court'.[8]

The aggravating factor applies to a list of 10 offences (or related ancillary offences). These are threats to kill, wounding with intent to cause grievous bodily harm (GBH), malicious wounding, administering poison etc., causing bodily injury by gunpowder etc., using explosive substances etc. with intent to cause GBH, AOBH, sexual assault, manslaughter, and kidnapping.[9]

---

3 Issued under the *Coroners and Justice Act 2009* (UK) s 120.

4 Ibid s 125(1). See also See *Crime and Disorder Act 1998* (UK) s 29.

5 Sentencing Council for England and Wales, *Assault occasioning actual bodily harm / Racially or religiously aggravated ABH* (Crown and Magistrates Court versions) <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/assault-occasioning-actual-bodily-harm-racially-religiously-aggravated-abh/>. This is listed under 'Other aggravating factors'.

6 Ibid.

7 *Assaults on Emergency Workers (Offences) Act 2018* (UK) s 2(1)(b).

8 Ibid ss 2(2)(a) and (b).

9 Ibid ss 2(3)(a)–(e).

The legislation explicitly recognises that it does not oust a court's discretion to apply the aggravating factor to offences other than the 10 specified within it (its application and the associated procedural points are mandatory for those 10).[10]

Examples are given of when 'an offence is to be taken as committed against a person acting in the exercise of functions as an emergency worker'. These include:

> circumstances where the offence takes place at a time when the person is not at work but is carrying out functions which, if done in work time, would have been in the exercise of functions as an emergency worker.[11]

'Emergency worker' is defined to mean a constable (or analogue), National Crime Agency officer, prison officer (or analogue in a custodial institution),[12] prisoner custody (as legislatively defined) or custody officer (as legislatively defined) exercising escort functions (as legislatively defined) and persons 'employed for the purposes of providing, or engaged to provide' services in:

- fire/fire and rescue;
- search and/or rescue;
- National Health Service (NHS) health services (as legislatively defined); and
- 'support of the provision of NHS health services, and whose general activities in doing so involve face to face interaction with individuals receiving the services or with other members of the public'.[13]

It covers volunteers: it is 'immaterial … whether the employment or engagement is paid or unpaid',[14] and there is a requirement to state in open court that the offence is so aggravated.[15]

During debate of the amendment Bill introducing these reforms, there was some concern that such reforms were unnecessary, given the existence of the broader aggravating factor that applied under the UK Sentencing Guidelines.[16] In the Second Reading speech, the sponsoring Member of Parliament submitted: 'Part of the fury that 999 [emergency services] workers feel is caused by the fact that that element is never stated in open court, but now it will be'.[17] By placing this aggravating factor on a statutory footing, it was argued, and requiring the court to state this as an aggravating element of the offence, it will give victims of these offences 'a sense that justice is being done'.[18]

In addition to these two different forms of aggravating factors (one that exists under sentencing guidelines, and the other with a statutory basis), the Act introducing these changes created a new form of offence of common assault or battery where committed against an emergency worker in the exercise of their functions.[19] This offence is discussed in section 8.4.9 of Chapter 8.

New South Wales

The NSW model involves specific offences targeting assaults against specific occupations (such as assault police, other law enforcement officers, school students/staff members) in its *Crimes Act 1900* (NSW),[20] together with a very broad set of general circumstances of aggravation in its *Crimes (Sentencing Procedure) Act 1999* (NSW) section 21A(2). That section states that 'the aggravating factors to be taken into account in determining the appropriate sentence for an offence are as follows' and includes two tiers regarding employment:

---

10 Ibid s 2(6).

11 Ibid s 2(4).

12 'Custodial institution' is defined as a prison; young offender institution, secure training centre, secure college or remand centre; removal centre, a short-term holding facility or pre-departure accommodation (as defined), or services custody premises (as defined).

13 Ibid s 3(1).

14 Ibid s 3(2).

15 Ibid s 2(2)(b).

16 United Kingdom, *Parliamentary Debates*, House of Commons, 20 October 2017, 1113 (Chris Bryant, Member for Rhondda) referring to comments made by others.

17 United Kingdom, *Parliamentary Debates*, House of Commons, 20 October 2017, 1113 (Chris Bryant, Member for Rhondda). This was a Private Members' Bill sponsored by Chris Bryant and Baroness Donaghy, Labour members of Parliament.

18 Ibid.

19 *Assaults on Emergency Workers (Offences) Act 2018* (UK) s 1.

20 See *Crimes Act 1900* (NSW) ss 60, 60A, 60E.

(a) the victim was a police officer, emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation or voluntary work

...

(l) the victim was vulnerable, for example, because the victim was very young or very old or had a disability, because of the geographical isolation of the victim or because of the victim's occupation (such as a person working at a hospital (other than a health worker), taxi driver, bus driver or other public transport worker, bank teller or service station attendant).

The section expressly provides: 'The fact that any such aggravating or mitigating factor is relevant and known to the court does not require the court to increase or reduce the sentence for the offence'.[21]

The aggravating factor cannot be applied to the aforementioned specific offences that apply to police, other law enforcement officers and school staff because 'the court is not to have additional regard to any such aggravating factor in sentencing if it is an element of the offence' (s 21A(2)).

The *Crimes Act* offence regarding police officers refers to assaults of an officer 'while in the execution of the officer's duty':

> An action is taken to be carried out in relation to a police officer while in the execution of the officer's duty, even though the police officer is not on duty at the time, if it is carried out ... as a consequence of, or in retaliation for, actions undertaken by that police officer in the execution of the officer's duty, or ... because the officer is a police officer.[22]

A specific provision exists regarding assaults of school students or members of staff of a school while attending a school.[23] Such people are taken to be attending a school while on school premises for the purposes of school work or duty (even if not engaged in it at the time) or before-school or after-school child care; or while entering or leaving school premises in connection with school work or duty or before-school or after-school care.[24]

These offences are discussed in section 8.4.3 of Chapter 8.

New Zealand

New Zealand's *Sentencing Act 2002* (NZ) has an aggravating and mitigating factors provision,[25] which states sentencing courts 'must take into account the following aggravating factors to the extent that they are applicable in the case'. Included are facts that the victim was:

- a constable or prison officer acting in the course of his or her duty;
- an emergency health or fire services provider acting in the course of his or her duty at the scene of an emergency — this means someone with 'a legal duty (under any enactment, employment contract, other binding agreement or arrangement, or other source) to, at the scene of an emergency, provide services that are either or both (a) ambulance services, first aid, or medical or paramedical care; (b) services provided by or on behalf of Fire and Emergency New Zealand to save life, prevent serious injury, or avoid damage to property); and[26]
- particularly vulnerable because of his or her age or health or because of any other factor known to the offender.

The provision makes plain that no listed aggravating or mitigating factor 'prevents the court from taking into account any other aggravating or mitigating factor that the court thinks fit' or 'implies that a factor referred to in those subsections must be given greater weight than any other factor that the court might take into account'.[27]

---

21 *Crimes (Sentencing Procedure) Act 1999* s 21A(5).

22 *Crimes Act 1900* (NSW) s 60. Similar language is used in s 60A regarding law enforcement officers.

23 Ibid s 60E.

24 Ibid s 60D.

25 *Sentencing Act 2002* (NZ) s 9.

26 Ibid s 9(4A).

27 Ibid s 9(4).

Canada

Canada's *Criminal Code* recognises victim occupation and directs sentencing courts:

- For five offences[28] (largely against the person), courts 'shall consider as an aggravating circumstance the fact that the victim of the offence was, at the time of the commission of the offence, a public transit operator engaged in the performance of his or her duty'.[29]
- For offences of assaulting a peace officer, assaulting peace officer with weapon or causing bodily harm, aggravated assault of peace officer or intimidation of a justice system participant,[30] courts 'shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence'.[31]

10.2.3 The current approach in Queensland

Sentencing courts have always taken relevant common law circumstances of aggravation into account, unless legislation displaces their ability to do so. Given the broad features of section 9(2) (which still applies to any sentence)[32] and judicial discretion, the fact that a complainant was doing his or her job when assaulted will, if relevant, be considered.

The Bar Association of Queensland (BAQ) in its submission to the Council noted that:

> the fact that the victim of an assault was assaulted in the course of their employment and any consequences of that are, at present, circumstances that are routinely taken into account in the determination of penalty by the courts. The circumstances of such assaults are considered as aggravating features of the offender's conduct.[33]

Another integral factor is 'the actual harm caused … [being] an important factor in the sentencing process and of course the relative lack of harm is a factor that must be reflected in the sentence'.[34] As discussed in Chapter 6, section 6.5.1, there are numerous examples of Court of Appeal judgments noting the relevance of the extent of injuries caused by assaults — both physical and psychological.

The Court of Appeal has made repeated statements over many years about sentencing principles regarding violence against police, public officers and other occupations. It denounced spitting on police as 'especially an aggravating feature' on which it took an extremely serious view' in 1992 — before the PSA was enacted.[35] It has continued stating the need for deterrence, denunciation and a salutary penalty, protecting police and their authority and reflecting community support for them.[36] It has made similar comments in relation to offences against specific classes of victim including railway guards,[37] court clerks,[38] corrections officers[39] and local council officers.[40]

---

28 *Criminal Code (R.S.C., 1985, c. C-46)* ss 264.1(1) (Uttering threats to cause death or bodily harm), 266 (Assault), 267 (Assault with a weapon or causing bodily harm), 268 (Aggravated assault), 269 (Unlawfully causing bodily harm).

29 Ibid s 269.01(1). 'Public transit officer', defined in subsection 269.01(2): an individual who operates a vehicle used in the provision of passenger transportation services to the public, and includes an individual who operates a school bus. 'Vehicle' is defined to include a bus, paratransit vehicle, licensed taxi, train, subway, tram and ferry.

30 Ibid ss 270(1), 270.01, 270.02, 423.1(1)(b).

31 Ibid s 718.02.

32 See, for instance, *R v Carlton* [2010] 2 Qd R 340, 364–5 [106] (Mullins J).

33 Submission 27 (Bar Association of Queensland) 1.

34 *R v Elliott* [2000] QCA 267, 4 [10] (Davies and Thomas JJA, McPherson JA agreeing), citing *Amituanai* (1995) 78 A Crim R 588. See also *R v Mitchell* [2010] QCA 20, 5 [16] (Muir JA, McMurdo P and Fraser JA agreeing).

35 *R v Miekle* [1992] QCA 250, 4 (Macrossan CJ, McPherson and Davies JJA agreeing).

36 *R v Williams* [1997] QCA 476, 6–7 (Dowsett J, McPherson JA and Thomas J agreeing); *R v Kazakoff* [1998] QCA 459, 6 (Ambrose J, McPherson JA and Byrne J agreeing) citing *R v Howard* (1968) 2 NSWR 429; *Queensland Police Service v Terare* (2014) 245 A Crim R 211, 221–222 [38] (McMurdo P, Fraser and Gotterson JJA agreeing); *R v King* (2008) 179 A Crim R 600, 601–2 [6] (de Jersey CJ, Keane and Holmes JJA agreeing); *R v MCL* [2017] QCA 114, 6 [16] Fraser JA, McMurdo JA and Mullins J agreeing); *R v Reuben* [2001] QCA 322, 5 and 7 (Davies JA, Williams JA and Byrne J agreeing); *R v Wotton; Ex parte A-G (Qld)* [1999] QCA 382 [1999] QCA 382, 4–5 (Chesterman J); *R v Marshall* [2001] QCA 372, 5 (Davies JA, Williams JA and Wilson J agreeing); *R v Bidmade* [2003] QCA 422, 3 [9] (Muir J); *R v Braithwaite* [2004] QCA 82, 5 [19] (Jerrard JA, McMurdo P and Philippides J agreeing); *R v Nagy* [2004] 1 Qd R 63, 74–5 [47] (Williams JA, Jerrard JA agreeing); *R v Conway* [2005] QCA 194, 17 [54] (McMurdo P, Atkinson and Mullins JJ agreeing); *R v Mathieson* [2005] QCA 313, 3 [9] (McPherson JA, Jerrard JA agreeing); *R v Devlyn* [2014] QCA 96, 8 [32] (Ann Lyons J, Holmes and Morrison JJA agreeing).

37 *R v Nagy* [2004] 1 Qd R 63, 74–5 [47] (Williams JA, Jerrard JA agreeing).

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

39 *R v Hope* [1993] QCA 299, 4 (Fitzgerald P, Davies JA and Moynihan SJA).

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

The Court has also long recognised that taxi drivers are members of the public performing a valuable community service that makes them vulnerable. Salutary deterrent penalties are required for charges of AOBH and GBH against them.[41]

Another victim cohort given similar recognition is service station attendants and convenience or takeaway store staff in the context of robbery (which has statutory circumstances of aggravation applying to any offender and complainant).[42] The Court has recognised such workers (often working night shifts, sometimes alone) as a vulnerable cohort, serving the convenience of the community while at risk of attack causing physical and psychological harm. It has confirmed the importance of deterrence in sentencing and made strong statements repeatedly and early, for instance in 1994,[43] 1996[44] and 1999.[45]

These examples demonstrate that courts already take this factor into account in the absence of specific statutory guidance under the PSA.

10.2.4 The purpose and history of section 9(2A)

Sections 9(2A) and (3) were introduced (although numbered differently) in 1997 alongside the serious violence offence scheme, which occupies a later and separate part of the PSA.[46] The relevant terms within these sections are not further defined. Other 1997 amendments included changing some of the sentencing purposes in section 9(1) (replacing 'discourage' with 'deter' and 'does not approve of' with 'denounces'). The amendments were described as fulfilling this election commitment by the then Liberal National Government: 'in determining the appropriate length of a custodial sentence for a serious violent offender, a court will take into account the protection of the community as a primary sentencing consideration'.[47]

The Attorney-General at the time, Denver Beanland, explained that 'this Bill delivers that promise by amendments to the purposes section and the sentencing guidelines of the Act'.[48] He stated:

> While the Act currently mentions protection of the community among the purposes of sentencing, section 9(1), there is nothing in section 9(2), the sentencing principles, requiring the court to actually have regard to the protection of the community as a sentencing consideration. Significantly, the sentencing criteria which might arguably be said to be paramount are those of section 9(2)(a), that prison is a last resort and that a non-custodial sentence is preferable to one of imprisonment. This logically cannot always be the case, and certainly not in the case of serious violent offenders.[49]

However, section 9(2A) applies to any offence involving violence or physical harm, thereby reaching beyond the very serious offences to which the serious violent offence scheme applies.

The Queensland Court of Appeal has noted:

> the intent of the amendments was to have the matters listed in s 9(3) regarded as 'primary'. In aid of this legislative purpose, the existing s 9(4), which obliged the court to impose a sentence of imprisonment upon an offender aged under 25 years only when satisfied that no other sentence would be appropriate, was also repealed. Successive governments since 1997 have left these provisions in place. Consequently, these provisions cannot be regarded as being merely declaratory of the pre-existing law and as having no effect upon the legislative status quo. They were expressly intended to result in sentences that were more severe than those which had been imposed in the

---

41 See *R v Levy; Ex parte A-G (Qld)* [2014] QCA 205, 9–10 [32], [35] and [37] (Morrison JA, Holmes JA and Philip McMurdo J agreeing), discussing *R v Wilkins; Ex parte A-G (Qld)* [2008] QCA 272 at 10 [37] and *R v Hamilton* [2009] QCA 391, 15–16 [61]. See also 11 [39], 18 [75], 19 [77] and 20 [80].

42 See for instance Submission 27 (Bar Association of Queensland) 2.

43 *R v Dunn* [1994] QCA 147, 4 (Pincus and McPherson JJA and Mackenzie J). See also *R v Suey* [2005] QCA 27, 4 (Mackenzie J, McMurdo P and Chesterman J agreeing) and *R v Dullroy; Ex parte A-G (Qld)* [2005] QCA 219, 6 [18] (de Jersey CJ, dissenting as to the result).

44 *R v Hammond* [1996] QCA 508, 23 (Thomas, Dowsett and White JJ).

45 *R v Taylor; Ex parte A-G (Qld)* (1999) 106 A Crim R 578, 587 [25] (McPherson JA).

46 *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld) s 6. For more on serious violent offence provisions, see Queensland Sentencing Advisory Council, Queensland Sentencing Guide (2nd ed, 2019) 25.

47 Queensland, Parliamentary Debates, Legislative Assembly, 19 March 1997, 'Penalties and Sentences (Serious Violent Offences) Amendment Bill — Second Reading', 595 (Denver Beanland, Attorney-General and Minister for Justice).

48 Ibid.

49 Ibid.

> past and must be regarded as statutory amendments that were the result of Parliament's judgment about current community values.[50]

The Court of Appeal had earlier stated that these section 9 amendments:

> reflect a legislative conviction that less hesitation by the courts in requiring a violent offender to undergo the rigours of imprisonment conduces to the protection of the community from the offender and from others who might be tempted to commit similar offences. Nonetheless youth remains a material consideration; for the rehabilitation of youthful, even violent, offenders, especially those without prior, relevant convictions, also serves to protect the community. And among the matters to which the court is required by s. 9(4) to pay primary regard are 'the past record of the offender, including any attempted rehabilitation and the number of previous offences of any type committed' (g), and 'the antecedents, age and character of the offender' (h).[51]

The Court has noted that 'the exercise of the sentencing discretion was affected by amendments to section 9, so as to distinguish offences involving violence from other offences':[52]

> Prior to these 1997 amendments, sentencing courts placed great importance upon the factors, where they existed, of the youth of the offender, the absence of a significant criminal history, the absence of any experience of imprisonment, and the risk that a term of actual imprisonment would make the offender more likely to reoffend.
>
> The dominant consideration is now expressed to be the protection of the safety of the community from any risk of further offences of violence being committed by that offender.[53]

It has observed that while some of the principles in section 9(3) have analogues in the general provision in section 9(2),[54] others are unique to subsection (3)[55] regarding risk of physical harm to any members of the community, the need to protect them, the nature and extent of the violence used or intended and any disregard for public safety. While these could be taken into account for an offence to which section 9(2) still applies by virtue of the catch-all 'any other relevant circumstance' in section 9(2)(r), 'their express articulation in s 9(3) and the absence in s 9(3) of any requirement that imprisonment be considered a sentence of last resort makes s 9(3) an entirely different sentencing regime'.[56] Thus:

> At the forefront of a sentencing judge's consideration of an offender who falls within s 9(2A) must be the risk to the community on the one hand and the interests of the victim of the offender on the other hand. No longer is the sentence to be seen, in the first instance, from the perspective of the offender who should not, except as a last resort, be sentenced to an actual term of imprisonment. Instead, a judge must place at the forefront of the sentencing process the question whether the risk to the public and to the victim, as well as the circumstances of the victim, point to the need for prison.
>
> This is a large difference from s 9(2). It is justified by the community's abhorrence of the use of violence and the community's expectation that the courts will protect the community when necessary from the risk of further violence by incarcerating the offender. That will deter the particular offender, will deter others from offending and will satisfy a justified need for a sense of retribution.
>
> These considerations are not at the forefront of sentencing nonviolent offenders.
>
> Because of this large difference, it is important to be clear about the class of offenders to which this different regime will apply. That class is defined by s 9(2A) of the Act. The subsection distinguishes between two categories of offence. The first category consists of offences that involve "the use of violence". The second category of offences consists of offences in which violence might not actually have been used but in which it was the plain intention of the offender that it should be used.[57]

---

50 *R v O'Sullivan; Ex parte A-G (Qld)* [2019] QCA 300, 27 [97] (Sofronoff P, Gotterson JA and Lyons SJA). This paragraph followed a discussion of a broader range of amendments since 1997 relating to violence against children in a domestic context.

51 *R v Lovell* [1999] 2 Qd R 79, 83 (Byrne J, Davies JA agreeing and Pincus JA generally agreeing). This passage was cited with approval in *R v Dullroy; Ex parte A-G (Qld)* [2005] QCA 219, 10 [33] (White J, McMurdo J agreeing). The comment that 'youthfulness remains a material consideration' was noted with approval by de Jersey CJ: *R v Dullroy; Ex parte A-G (Qld)* [2005] QCA 219, 6 [16].

52 *R v Dullroy; Ex parte A-G (Qld)* [2005] QCA 219, 17 [57] (McMurdo P).

53 Ibid 17–18 [58]–[59].

54 Sections 9(3)(d), 9(3)(g), 9(3)(h), 9(3)(i) and 9(3)(j): *R v Oliver* [2019] 3 Qd R 221, 226 [25] (Sofronoff P, Fraser and Philippides JJA agreeing).

55 Sections 9(3)(a), 9(3)(b), 9(3)(e), 9(3)(f) and 9(3)(k): *R v Oliver* [2019] 3 Qd R 221, 226 [25] (Sofronoff P, Fraser and Philippides JJA agreeing).

56 *R v Oliver* [2019] 3 Qd R 221, 226–7 [25] (Sofronoff P, Fraser and Philippides JJA agreeing).

57 Ibid 227 [26]–[29].

10.2.5 The meaning of 'physical harm' in section 9(2A)

Sections 9(2A) and (3) are limited to 'violence' and 'physical harm'. The latter is narrower than other terms present in, or applied by, section 9(2)(c)(i), namely:

- the words 'any physical, mental or emotional harm done to a victim, including harm mentioned in information relating to the victim given to the court under section 179K [victim impact statement]'; and
- the broader term 'suffered harm' in the definition of 'victim' in the *Victims of Crime Assistance Act 2009* (Qld) section 5, itself described as casting 'a broader causal net than the aggravating circumstances in s 340' in *R v Cooney*.[58]

In *R v Barling*,[59] the Court of Appeal held that the arson of a caravan was not violence or physical harm in the section 9(2A) sense. The sentencing judge had held that it applied apparently on the basis of emotional harm because the 'complainant's mother was distraught, believing her daughter was inside the burning van'.[60] On appeal, McMurdo P wrote that:

> I cannot accept … that [section 9(2A)] refers to property offences which result in psychological or emotional distress to complainants. The section is not intended to be so wide. In my view it is intended to refer only to offences against the person.[61]

De Jersey CJ agreed with McMurdo P and confirmed that neither limb of section 9(2A) applied:

> [The prosecution] sought to widen what I would see as the natural meanings of those terms 'violence' and 'physical harm' to include emotional disturbance and the like, or the possibility of it.
>
> I do not think that that would accord with the ordinary construction of the subsection. There is no reason to depart from that natural construction, and especially because the provision potentially affects the level of punishment there is particular reason not to adopt an unnecessarily broad construction.[62]

The harm in cases involving contact with bodily fluids also presents challenges: no bodily harm (a 'bodily injury' that interferes with health or comfort)[63] is caused, yet there is a prolonged and anxious wait for disease test results (emotional harm).

In such cases, section 9(2)(c)(i) may become the most important sentencing factor, whether or not 9(2A) and (3) apply. Those require the sentencing judge's primary regard, yet the judge is not required 'to disregard the factors that are otherwise listed in paras (b) to (r) of s 9(2)'.[64]

Assaults and related provisions do not contain emotional harm as elements (if they did, it would have to be charged and proved). It can therefore be considered under section 9(2)(c)(i).[65]

In *R v Cooney,* the Court of Appeal discussed how emotional harm could be weighed and applied in sentencing for a simpliciter serious assault (based on swinging punches, which did not connect). There, fear of infection resulted from contact with blood, being the unintended consequence of close physical proximity of the police and offender (rather than causation by direct application as would have been required for aggravated serious assault).[66]

Ultimately, the court took into account the emotional harm as evidenced in the officer's victim impact statement, but in the particular circumstances of that case, the sentence for that charge was the same as a second charge that did not involve such emotional harm.[67]

The Court also discussed the test for causation in such scenarios:

---

58 *R v Cooney* [2019] QCA 166, 7–8 [38] (Henry J, Gotterson JA and Bradley J agreeing). See further 7–8 [36]–[39].

59 *R v Barling* [1999] QCA 16. This case was also discussed by the Court of Appeal in *Breeze v The Queen* (1999) 106 A Crim R 441, 445 [15]–[16] (Pincus and Davies JJA, Demack J).

60 *R v Barling* [1999] QCA 16, 3 (McMurdo P).

61 Ibid 6 (McMurdo P, de Jersey CJ agreeing).

62 Ibid 8 (de Jersey CJ, McPherson JA agreeing).

63 *Criminal Code* (Qld) s 1.

64 *R v Carlton* [2010] 2 Qd R 340, 364–5 [106] (Mullins J). This case related to analogue sections 9(6A) and (7) which relate to child exploitation material offences.

65 However, in some scenarios, an aggravated form of s 340 would need to be charged so that *De Simoni* issues do not arise and the spitting etc., which is the causal link connecting the emotional harm, can be taken into account. See *R v Cooney* [2019] QCA 166, 6–7 [29]–[35]. This was not required in *Cooney* due to the particular facts of that case.

66 Section 340(1) penalty provision (a)(i) ('applies'): *R v Cooney* [2019] QCA 166, 6–7 [30]–[35] (Henry J, Gotterson JA and Bradley J agreeing). Sections 9(2A) and (3) of the PSA were not discussed.

67 Ibid 12 [60].

> The depositing of blood and consequential emotional harm would not have occurred 'but for' the applicant's offending against both officers necessitating such proximity. The events are sufficiently causally linked for it to be said those outcomes occurred 'because' of that offending.[68]

10.2.6 The meaning of 'violence' in section 9(2A)

The Court of Appeal has considered what 'violence' in sections 9(2A) and (3) means. It has held that section 9(2A)(a) applied to robbery constituted by threatening the victim by gesturing with an implement, without applying direct physical force.[69] The Court commented that this expression is not so broad as to mean 'any act, whether violent in the ordinary sense or not, to which the user of the word strongly objects'.[70]

A recent judgment described that case as an example of threats to do violence 'made under circumstances in which it appeared that the threatened violence would be, or could be, inflicted suddenly',[71] and stated that 'in some circumstances, a threat may be accompanied by actions so that the threat and the actions together may be regarded as violence although no touching has occurred.[72]

10.2.7 Section 9(10A) — a template for assaults on workers?

Section 9(10A), its development and application, are relevant to this review because:

- it is a recent amendment creating an aggravating factor regarding conduct that can span various different offences and result in physical and emotional harm;
- it is analogous in terms of potential challenges with definitions, drafting and duplication of existing aggravating factors in section 9 and common law aggravating circumstances;
- there is Court of Appeal jurisprudence and some data analysis of its impact;
- it was developed alongside a new discrete offence of strangulation, conduct also potentially covered by existing offences against the person in the *Criminal Code*; and
- its development from a policy recommendation involved stakeholder consultation and the alternative option of creating a statutory circumstance of aggravation.

The Special Taskforce Report

The genesis of section 9(10A), which commenced on 5 May 2016, was the 2015 Special Taskforce on Domestic and Family Violence in Queensland report.[73] It acknowledged that domestic and family violence (DFV) behaviours could constitute offences such as assault but noted there was 'no specific criminal offence in Queensland for committing an act of domestic and family violence' and 'where abuse is emotional, psychological or financial it will often not constitute a currently defined crime under the Criminal Code'.[74]

The Taskforce recommended 'that the Queensland Government introduces a circumstance of aggravation of domestic and family violence to be applied to all criminal offences'.[75]

It had also considered, as an alternative 'less intrusive measure', making 'domestic and family violence an aggravating factor' that 'would not place an additional penalty on a perpetrator but would require a sentencing judicial officer to give heavier weight to the severity of the offence if it were committed within the context of domestic and family violence'.[76]

The Queensland Government response

The Queensland Government accepted the recommendation and ultimately proceeded with introducing the aggravated sentencing factor (s 9(10A) into the PSA, on the basis that:

---

68 Ibid 8 [41] citing *Royall v The Queen* (1990) 172 CLR 378, 440 as supporting this at 8 [40].

69 *Breeze v The Queen* (1999) 106 A Crim R 441, 445 [14], 447 [22] (Pincus and Davies JJA, Demack J). See the discussion in *R v Oliver* [2019] 3 Qd R 221, 228 [32]–[34] (Sofronoff P, Fraser and Philippides JJA agreeing).

70 *Breeze v The Queen* (1999) 106 A Crim R 441, 445 [17]–[18] (Pincus and Davies JJA, Demack J).

71 *R v Oliver* [2019] 3 Qd R 221, 229 [39] (Sofronoff P, Fraser and Philippides JJA agreeing).

72 Ibid 228 [31].

73 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).

74 Ibid 300.

75 Ibid 305 Recommendation 118.

76 Ibid 304.

> 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 … there was wide support from stakeholders … 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.[77]

The Opposition (who, when in government, established the Taskforce) supported this, noting 'the commentary from key stakeholders during debate on this issue'.[78]

Section 9(10A) does not apply when sentencing children

The Attorney-General also addressed concerns raised in her second reading speech as to why the section 9(10A) aggravating factor was not extended to juvenile offenders:

> The sentencing framework for juvenile offenders is quite distinct from the framework applied to adult offenders in the Penalties and Sentences Act … Given the imperatives of the juvenile sentencing framework, an amendment to recognise domestic and family violence as an aggravating factor on sentence would be incongruous with the principles underpinning the Youth Justice Act.[79]

The intent and effect of section 9(10A) — an increase in penalties?

The Government's justification for the amendments was that 'the aggravating factor increases the culpability of the offender which means that the offender should receive a higher sentence within the existing sentencing range up to the maximum penalty for the offence'. This was 'reflective of community attitudes about the seriousness of criminal offences that occur in a domestic and family context and will make these offenders more accountable'.[80]

The explanatory notes to the relevant Bill stated, 'the provision will allow the court to impose a penalty at the higher end of the range of appropriate sentences while retaining their judicial discretion' and justified 'increasing sentences' because it would protect vulnerable community members, denounce relevant offending and 'provide adequate deterrence to perpetrators'.[81]

The Court of Appeal's analysis of section 9(10A)

The Court of Appeal has noted that section 9(10A) is likely to have an effect on sentencing for domestic violence offences over time.[82] For instance, general deterrence may now be a more significant factor.[83] However, 'the effect in any particular case will depend on the balancing of all the relevant factors related to that offending and offender'.[84]

In *R v Hutchinson*[85] in 2018, the Court of Appeal held that section 9(10A) is a procedural, rather than a substantive, provision.[86] This means it is not subject to a presumption against retrospective operation — it applies 'to all

---

77 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).

78 Queensland, Parliamentary Debates, Legislative Assembly, 19 April 2016, 1031 (Ian Walker).

79 Queensland, Parliamentary Debates, Legislative Assembly, 19 April 2016, 'Criminal Law (Domestic Violence) Amendment Bill (No. 2) — Second Reading', 1030 (Yvette D'Ath, Attorney-General and Minister for Justice and Minister for Training and Skills).

80 Ibid 1028. This reflects Explanatory Notes, Criminal Law (Domestic Violence) Amendment Bill (No. 2) 2015 (Qld) 2.

81 Explanatory Notes, Criminal Law (Domestic Violence) Amendment Bill (No. 2) 2015 (Qld) 3.

82 *R v Hutchinson* [2018] 3 Qd R 505, 515 [40] (Mullins J, Fraser and Morrison JJA agreeing), following *R v Pham* (2009) 197 A Crim R 246, 247–8 [5]–[7] (Keane JA).

83 *R v Castel* [2020] QCA 91, 9 [37] (Mullins JA, Sofronoff P agreeing): 'the enactment of s 9(10A) … necessarily makes general deterrence now a more significant factor for sentencing for the killing of a domestic partner'.

84 *R v Hutchinson* [2018] 3 Qd R 505, 515 [40] (Mullins J, Fraser and Morrison JJA agreeing), following *R v Pham* (2009) 197 A Crim R 246, 24–8 [5]–[7] (Keane JA). See also *R v Castel* [2020] QCA 91, 8 [35] (Mullins JA, Sofronoff P agreeing).

85 *R v Hutchinson* [2018] 3 Qd R 505, 511 [23]. The Court referred to *R v Truong* [2000] 1 Qd R 663, *R v Carlton* [2010] 2 Qd R 340, *R v Pham* (2009) 197 A Crim R 246. It was also noted that *Rodway v The Queen* (1990) 169 CLR 515 was applied in *Truong*.

86 As to the difference between procedural and substantive provisions, the Court of Appeal had earlier stated that 'procedural law is the body of rules setting out the manner, form and order in which matters may be dealt with and enforced in a court. It includes the formal steps in an action including pleadings, process, evidence and practice. On the other hand, substantive law creates, defines and regulates people's rights, duties, powers and liabilities, and contains the

sentencing from its commencement, whether or not the offending was committed before or after the commencement'.[87] The unsuccessful argument against this was based on the presence of the words 'must' and 'aggravating'.[88]

Mullins J wrote that 'the sentencing judge's sentencing discretion remains intact. It is the approach to the exercise of the discretion that is affected … rather than a mandated outcome by following that approach'.[89] She made mention, twice in two successive paragraphs, of the fact that section 9(10A) is but one factor to be considered when assessing '*all the relevant factors'* and repeated this in a different judgment in 2020: 'It is an aggravating factor … added to the other aggravating factors … that has to be balanced with any mitigating factors that relate to the offending and the offender'.[90]

The Court of Appeal also noted the reference to higher sentences within the existing sentencing range up to the maximum penalty, in the explanatory notes to the Bill. It noted that it was not necessary to have regard to them because 's 9(10A) of the Act is neither ambiguous nor obscure' and described them as 'not particularly helpful' because they:[91]

> describe an 'aggravating factor' by reference to 'the existing sentencing range' in a way that does not reflect the sentencing task. … the reference to an 'available range' of sentences for an offender is a 'negative' concept that is applied on an appeal to ascertain whether the discretionary judgment exercised by the sentencing judge resulted in a sentence that was 'so wrong that there must have been some misapplication of principle in fixing it' … that does not translate into 'any positive statement of the upper and lower limits within which a sentence could properly have been imposed'.[92]

The Court noted the previous judgment of *R v Pham,*[93] which dealt with analogous provisions in section 9, was 'apt to describe the effect of s 9(10A) on the sentencing process'.[94] In *Pham*, Keane JA wrote that such sections:

> lay down the principles to be applied by the Court in sentencing an offender. These provisions inform the exercise of the sentencing discretion: they are not concerned to authorise the imposition on an offender of punishment to any particular extent, much less 'to any greater extent than was authorised by the former law'. The extent of the punishment authorised for a given offence is determined by legislation other than s 9 of the PSA.
>
> The application of the sentencing principles in s 9 as amended will not result in the imposition of punishment to a greater extent than might have been imposed prior to the amendment in question. The most that can be said is that the application of the amending sentencing principles may have that effect. That this is so can be understood more clearly when one reflects upon the nature of the sentencing process, described in the High Court in *Markarian v The Queen*, as a process of 'instinctive synthesis'.
>
> In such a process, some of the principles prescribed by s 9 of the PSA may have great weight and others little weight, depending on the circumstances of each offence and each offender. In some cases, some of these principles will have little or no effect upon the outcome of the process because, in the particular circumstances, other principles have an almost overwhelming claim on the sentencing discretion.[95]

The Council data analysis regarding section 9(10A)

The Council examined data for common assaults and AOBH in both simpliciter and aggravated forms dealt with as the most serious offence (MSO) in the Magistrates and higher courts, to determine the effect of the circumstance of aggravation on these offences. Some of the findings (around custodial orders and imprisonment) are discussed here, while the full analysis is at Appendix 6**.**

---

actual rules and principles administered by courts, both under statute law and common law': *R v Carlton* [2010] 2 Qd R 340, 350 [35] (McMurdo P, dissenting as to the result).

87 *R v Hutchinson* [2018] 3 Qd R 505, 516 [44] (Mullins J, Fraser and Morrison JJA agreeing).

88 Ibid 511 [24].

89 Ibid 515 [39].

90 *R v Castel* [2020] QCA 91, 8 [35] (Mullins JA, Sofronoff P agreeing).

91 *R v Hutchinson* [2018] 3 Qd R 505, 515 [41] (Mullins J, Fraser and Morrison JJA agreeing), citing s 14B of the *Acts Interpretation Act 1954* (Qld) — Use of extrinsic material in interpretation.

92 *R v Hutchinson* [2018] 3 Qd R 505, 515–6 [41] (Mullins J, Fraser and Morrison JJA agreeing), citing *Barbaro v The Queen* (2014) 253 CLR 58, [24]–[28].

93 *R v Pham* (2009) 197 A Crim R 246. This case concerned sections 9(6A) and (6B) of the PSA, which are analogues of section 9(2A) and (3) regarding sentencing child exploitation material offences.

94 *R v Hutchinson* [2018] 3 Qd R 505, 515 [40].

95 *R v Pham* (2009) 197 A Crim R 246, 247–8 [5]–[7] (Keane JA) citing *Markarian v The Queen* (2005) 228 CLR 357, 383–90 [64]–[84] (McHugh J) (and later 405–6 [133] (Kirby J)).

The analysis involved a comparison of sentencing outcomes for forms of these offences that did, and did not, involve the section 9(10A) aggravating factor ('with DFV').[96]

The data include offences sentenced from 5 May 2016, when section 9(10A) commenced, to 30 June 2019. This analysis does not assess whether sentencing courts were already sentencing assaults that involved DFV to higher sentences prior to the introduction of section 9(10A).

For each offence in each court, custodial penalties were more common for assaults with DFV than without. While this was not always maintained when custodial penalties where broken down into penalty types (e.g. suspended sentences), it remained the case in respect of imprisonment, which was more common for all offences with DFV.

Common assault and section 9(10A)

In the higher courts, nearly half (49.0%) of common assault offences with DFV received a custodial penalty, compared to just over one-third (36.2%) for the same offences without DFV.

In the Magistrates Courts, over one-third (35.7%) of common assaults with DFV (MSO) received a custodial sentence, compared with less than two in five (18.2%) without DFV.

In the higher courts, imprisonment (31.6%) was the most common penalty where the DFV aggravating factor applied, while monetary orders (23.1%) were most common if DFV was not present.

In the Magistrates Courts, probation was the most common penalty type (26.2%), closely followed by imprisonment (24.3%) and monetary orders (23.9%) where DFV was present, while monetary orders (40.4%) were the most common penalty type if DFV was not present.

AOBH and section 9(10A)

In the higher courts, a custodial penalty was the most common penalty for all forms of AOBH, although the impact of the DFV aggravating factor was less pronounced than in Magistrates Courts' sentences.

For non-aggravated AOBH sentences, custodial outcomes comprised 86.7 per cent of sentences for AOBH simpliciter with DFV and 72.4 per cent of sentences for AOBH simpliciter.

For aggravated AOBH, custodial penalties comprised 84.1 per cent of sentences with DFV and 80.1 per cent of sentences without DFV.

In the Magistrates Courts, the percentage of custodial penalties imposed for both aggravated and simpliciter forms of AOBH markedly increased when the DFV aggravating factor was present.

For non-aggravated AOBH, custodial penalties made up 68.3 per cent of non-aggravated AOBH with DFV sentences, and 42.5 per cent of sentences without DFV.

For aggravated AOBH, the result was 80.7 per cent for aggravated AOBH with DFV but 60.9 per cent without.

As to use of imprisonment for non-aggravated AOBH, it was imposed by higher courts in 62.5 per cent of non-aggravated AOBH offences with DFV sentences, as against 47.8 per cent of those without DFV.

In the Magistrates Courts, imprisonment was imposed in 51.3 per cent of non-aggravated AOBH with DFV sentences, as against 25.7 per cent of those without DFV.

Imprisonment for aggravated AOBH, in the higher courts, was imposed in 65.9 per cent of aggravated AOBH offences with DFV as against 53.5 per cent for those without DFV. In the Magistrates Courts, it was imposed in 61.1 per cent of aggravated AOBH offence with DFV sentences, as against 38.9 per cent of those without DFV.

10.2.8 Stakeholder views

Legal stakeholder and advocacy bodies generally supported retaining (or curtailing) the current form of section 340, without the need for separate additional offences or circumstances of aggravation to be introduced. However, several stated that an aggravating factor would be the preferred approach if further recognition of occupation was to be legislated, even though this was described as redundant because courts already take this into account.

---

96 It remains possible that some 'non-DFV' offences were in fact sentences for offences that involved domestic and family violence but were not identified as such.

The BAQ emphasised that the aggravating effect of assaults on persons who are working is already taken into account in sentencing, under sections 9(3) (d), (e), (f) and (k) of the PSA (unless the assault is by way of threats only).[97] The BAQ recognised three ways in which specific recognition of 'this present practice' could occur:

1. Amending PSA section 9(3), which the BAQ did not oppose 'as a way of providing a legislative intention as to the sentencing approach. It is assumed any form would be similar to s9(10A) of the PSA'.[98]
2. Enacting circumstances of aggravation to common assault and assault occasioning bodily harm creating higher maximum penalties for those who are assaulted in the course of specified fields of employment or while providing specified services 'that may place them at some risk over and above that of the general public'.[99]
3. Adding categories within the provisions of section 340 of the *Criminal Code*.[100]

The BAQ noted that 'such matters are principally ones of policy and a matter for the legislature'.[101]

Legal Aid Queensland (LAQ) stated that 'in light of how courts currently deal with the issues of acts of violence against public officers and workers in certain circumstances, there does not need to be any change to the current legislation'.[102] LAQ noted the PSA's 'existing sentencing framework' and 'the common law provide adequate scope for a court to take into account the serious nature of offending against public officers and sentence accordingly'.[103] LAQ provided an annexure of cases demonstrating this, concluding: 'consistent with the research outlined in the issues paper, imprisonment whether suspended or actual … is unexceptional'.[104]

LAQ had concerns about creating classes of victims and submitted that 'courts are in an ideal place to assess the circumstances of each case and place weight on particular victim vulnerabilities'.[105] It noted that 'section 9 already allows the court to take into account the particular circumstances of each offence. The purpose of the amendment would therefore be more of a communication exercise than effecting change'.[106]

LAQ concluded that the Council's 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'.[107]

The Queensland Law Society (QLS) noted a more recent legislative trend of directing judicial attention to specific features of the case, mandating aggravating factors and sometimes setting higher maximum penalties for certain victim types. The QLS criticised such statutory directions as telling courts to do what they have always done:[108]

> They fill no gap. Other than to indicate to the courts the seriousness with which the legislature views particular types of offending, they perform no practical function. Some amendments appear designed more to appease the grievances of a particular class of people, rather than to effect any substantive change to the procedures and decisions of the courts.
>
> A problem soon arises with any attempt to classify harm to some categories of victim as more serious than others; it is the sense of grievance aroused in the people excluded.
>
> … Any attempt to make statutory rules classifying harm to a class of victims as more serious than harm to another class is bound to produce ungainly, awkward and troublesome results, inapt to the circumstances of particular cases.[109]

However, the QLS stated that the suggested amendments in the Issues Paper would be an improvement from the current state of the law. It preferred recognition of those categories through aggravating factors in section 9. It took

---

97 Submission 27 (Bar Association of Queensland) 5, 7. These sections relate to circumstances of the offence (including death/injury/loss), nature or extent of violence used or intended, disregard for the interests of public safety, anything else about community safety considered relevant.

98 Ibid 7.

99 Ibid 5.

100 Ibid.

101 Ibid.

102 Submission 29 (Legal Aid Queensland) 2.

103 Ibid.

104 Ibid 2–3.

105 Ibid 3.

106 Ibid 5.

107 Ibid 6.

108 Submission 30 (Queensland Law Society) 4.

109 Ibid 4.

no position on where the line of inclusion and exclusion should be drawn between categories of victim: 'this is essentially a political exercise'.[110]

The QLS took no position on whether specific provision is required to deal with offending by spitting or the use of other bodily fluids. The risk of transmitting disease, associated uncertainty of transmission and inherently disgusting nature of the conduct are all matters taken into account on sentence. The maximum penalties available are sufficient: 3 years for common assault, 7 years for doing AOBH, 14 years for GBH, and life for transmitting a serious disease with intent to do so. If it is decided that some specific provision should be retained for assaults by spitting or with bodily fluids, it would be reasonable to extend its operation to all people assaulted in that way, not only 'public officers'.[111]

The Department of Agriculture and Fisheries stated that within the spectrum of public service there likely exists variation in risk and related preparation, expectation/vigilance, and training. All assaults should be treated on their merits rather than by categorisation, because the latter may be too prescriptive in that it may not offer a court dealing with an assault offence sufficient scope to ensure the sentence imposed properly reflects the case's nuances and individual circumstances and facts.[112] The department argued that assaults on private occupations and public officers were best dealt with by a circumstance of aggravation and/or an aggravating factor for sentencing purposes — rather than by special categories of victims or special offence provisions.[113]

The department submitted that 'the category of officer does not necessarily reflect the level of vulnerability existing at the time of an assault':[114]

> The situation in which the assault occurs may be more relevant than the category of public officer. For example, officers of the Queensland Boating and Fisheries Patrol are often required to interact with members of the public in confined spaces such as on a fishing vessel. This affords them limited opportunity to leave in order to escape a dangerous situation. This particular vulnerability is relevant to the sentencing exercise if they are assaulted, more so than the fact they are a particular type of public officer.[115]

Queensland Corrective Services (QCS) supported 'an aggravating circumstance due to the victim being a public officer across Criminal Code offences, in addition to the existing standalone offence', but not an aggravating sentencing factor:[116]

> Amending the PSA to statutorily recognise the fact the victim was a public officer as an aggravating factor for sentencing purposes does not achieve the denouncement and symbolic representation of a standalone offence. Further, it does not achieve the purpose of higher-level aggravating circumstances for certain kinds of assault against public officers which should be considered especially heinous.[117]

The Queensland Catholic Education Commission noted that if an aggravating factor were introduced, its preferred approach would be to ensure appropriate flexibility still be provided for at sentencing, allowing a sentence to be 'judged on the circumstances of each particular case … rather than having an assault of this nature defined by a specific mandatory offence provision'.[118]

The Transport Workers' Union (TWU), in calling for transport industry workers to 'be afforded extra protections in the form of harsher penalties',[119] referred to a number of models operating in other jurisdictions, including section 21A(2)(a) of the *Crimes (Sentencing Procedure) Act* (NSW), which 'provides a further separately listed aggravating factor that the victim was vulnerable, for example, because of the victim's occupation such as a taxi driver, bus driver or other public transport worker'.[120]

The TWU referred to a number of studies, including research in Canada reporting on data from workers' compensation claims that found: 'despite the risk of workplace violence for police and health care workers being more than double the risk of violence in other occupations, bus drivers and taxi drivers, amongst others, are also

---

110 Ibid 7 and 9.

111 Ibid.

112 Submission 7 (Department of Agriculture and Fisheries) 3.

113 Ibid 5.

114 Ibid 8 and see 2–3 and 6.

115 Ibid.

116 Submission 21 (Queensland Corrective Services) 15.

117 Ibid.

118 Submission 2 (Queensland Catholic Education Commission) 2.

119 Submission 12 (Transport Workers' Union) 8.

120 Ibid 11.

subject to much higher levels of risk than the general population'.[121] It reported that a state-wide survey of Queensland bus drivers undertaken by the Queensland branch of the TWU in 2016 found a high incidence of abuse, including 27 per cent of the more than 1,000 bus drivers surveyed reporting having been spat on, and 21.2 per cent reporting having been physically assaulted while at the wheel.[122] A NSW survey of 1,100 rideshare operators also found 10 per cent reported being physically assaulted, and 6 per cent sexually assaulted.[123]

10.2.9 Children

The tempered stakeholder acceptance of an aggravating sentencing factor did not extend to applying it to children. Most stakeholders who commented on sentencing of children pointed to the different considerations applying to sentencing of children in the *Youth Justice Act 1992* (Qld) (YJA).[124] For instance, the Queensland Human Rights Commission stated:

> The current sentencing principles acknowledge the vulnerability and specific protections required for children, as reflected in their rights under the [*Human Rights Act 2019* (Qld), sections 26 and 33]. This includes principles under the *Youth Justice Act 1992* (Qld), in particular, that a detention order should be imposed only as a last resort and for the shortest appropriate period. The Commission strongly supports the retention of these principles.[125]

Section 9 (and therefore, sections 9(2A) and (3)) of the PSA, do not apply to children. The Council does not contend this should be otherwise. If an aggravating factor of the nature recommended were to apply to children, it would have to be inserted separately into the YJA.[126] The Council does not recommend or support this in respect of this review.

BAQ noted with approval the 'emphasis on rehabilitation of young offenders' in the YJA:

> Nonetheless, protection of the community and to the extent that general deterrence is required to achieve that remain important sentencing principles. These principles exist within the present legislation and sentencing practices.[127]

The QLS stated that 'the importance of rehabilitation and minimising the risk of further interactions with the criminal justice system must be at the forefront of sentencing considerations' for children or young offenders.[128]

The Office of the Public Guardian recommended that 'specific consideration be given to the impact any changes would have on children and young people who engage with the justice system'.[129]

The Department of Child Safety, Youth and Women noted that:

> the trauma, disability and/or mental health history of some children and young people, particularly those with a care experience, may result in complex behavioural issues which are not appropriately addressed through strong sentencing. Further, data shows children and young people in contact with the child protection system are over-represented in the Youth Justice system, compounding their likelihood to experience poor life outcomes.[130]

10.2.10 Council's view

The Council considers that, on balance, and in conjunction with the recommendations designed to simplify and sharpen sections 199 and 340 of the *Criminal Code*, an aggravating factor linked to section 9(3) of the PSA is the best way to explicitly acknowledge occupation as a sentencing factor across all offences against the person.

---

121 Ibid 5 citing Neil Boyd, 'Violence in the Workplace in British Columbia: A Preliminary Investigation' (1995) 37(4) *Canadian Journal of Criminology* 491, 503.

122 Ibid 6.

123 Ibid 7.

124 The relevant YJA provisions are sections 2, 3, 150 and Schedule 1 Charter of youth justice principles. These include special considerations that a non-custodial order is better than detention in promoting a child's ability to reintegrate into the community (s 150(2)(b)), a detention order should be imposed only as a last resort and for the shortest appropriate period (s 150(2)(e)), and a child should be detained in custody for an offence, whether on arrest, remand or sentence, only as a last resort and for the least time that is justified in the circumstances (Schedule 1, Principle 17).

125 Submission 18 (Queensland Human Rights Commission) 14 [51]. See also Submission 5 (Department of Child Safety, Youth and Women) 4.

126 For example, this was done in relation to PSA section 9(9B) and YJA section 150(3), regarding manslaughter of children under 12, where courts must treat the child victim's defencelessness and vulnerability, having regard to the child's age, as an aggravating factor in determining the appropriate sentence.

127 Submission 27 (Bar Association of Queensland) 8.

128 Submission 30 (Queensland Law Society) 12.

129 Submission 24 (Office of the Public Guardian) 4.

130 Submission 5 (Department of Child Safety, Youth and Women) 3.

Importantly, it is an option that can simultaneously achieve symbolic recognition, limit complexity, and maximise judicial discretion and legislative consistency. It would operate independently of, yet complement, a revised section 340.

Discretion, in the context of the weight given to an aggravating factor, remains essential. It allows for the fair application of an otherwise blanket approach. Different workplaces expose people to different levels of risk, and even the same workplace could expose people to different levels of risk based on particular circumstances, at different times.

It does this at the cost of further entrenching specific victim classes and padding out section 9 of the PSA. It directs courts to do what they already do. However, the aggravating factor, as recommended by the Council, would be very broad yet based on a threshold foundation of vulnerability, with court discretion as to whether the particular circumstances of the case merit its application.

By avoiding the alternative of placing statutory circumstances of aggravation to similar effect in offence provisions themselves, this option avoids introducing added complexity into the operation of the *Criminal Code* and related evidentiary challenges for the Crown. While it does not increase maximum penalties, the aggravating factor would operate in existing circumstances where the ordinary statutory presumption against imprisonment is disengaged.

It is designed with the remainder of PSA section 9, and historical expert analysis of the *Criminal Code*, in mind.

This recommendation would complement existing section 9(3), while serving as a more specific guide. It would apply to all offences against the person,[131] provided that the specific facts of the particular case, as proven or admitted, met the threshold regarding violence or physical harm in section 9(2A). It would therefore probably not apply to:

- obstruct or resist offences (or at least to most of these);
- section 340 (provided that the aggravating factor covered the same elements that comprised any reformed version of section 340).

There are potential gaps in this approach.

It does not specifically cover emotional or psychological harm. However, this is covered by section 9(2), which is clearly still relevant despite being inferior to section 9(3) in terms of legislative priority. Emotional harm is often particularly significant in cases involving spitting, biting and application of bodily fluids where bodily harm is not caused. Judicial discretion permits properly thorough consideration and weight to be given to this factor. As with any aggravating factor, the degree of weight to be given to it rests on the quality of evidence establishing it.

Another gap that this option might leave is that the most immediately recognisable maximum penalty for spitting, biting or throwing fluids etc. is markedly different for public officers under section 340 (14 years) and everyone else (from a base of common assault, 3 years). However, the analysis shows that sentences for such conduct under aggravated forms of section 340 do not approach the 14-year maximum, nor regularly exceed the maximum for common assault. Stakeholder warnings of incongruous results at the time of the relevant amendment appear to have been borne out.

This is not to suggest that head sentences for such conduct are too low, but that 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.

This recommendation would apply to sexual assaults in workplaces, which extends beyond the scope of the Council's Terms of Reference but is consistent in any event with both logic and existing sentencing practice (i.e. that sexually assaulting a person who is performing their job is likely to be an aggravating feature in most cases of that nature).

The Council has traced the evolution of analogous section 9(10A) of the PSA, from the initial recommendation as a statutory circumstance of aggravation to its enactment as an aggravating factor on sentencing. It has analysed judicial commentary and application of it. This provision had bipartisan parliamentary and stakeholder support when introduced.

The Council has also carried out data analysis of relevant sentencing outcomes showing that custodial penalties are more common for common assault and AOBH where the aggravating factor was present — irrespective of sentencing court.

---

131 For instance, ss 317, 320, 320A, 323, 335, 339 of the *Criminal Code* (Qld).

This recommendation has stakeholder acceptance (even if they also describe it as unnecessary).

Each of these two options avoids a more complicated and lengthy definition (often requiring further sub-definitions or references to other legislation).

Further issues to consider when discussing this option go to the goal of striking the right balance in crafting a provision that is as broad, clear and simple as possible. These are:

- Where to place the provision — in section 9(3) or with the other aggravating factor provisions (9B)-(10A) — and whether to emulate existing language.
- Whether to split the provision into two separate parts in order to specifically recognise emergency workers or workers with a public-facing role, or keep as a simple, single whole.
- What language to use in defining the scope of the provision.

Each of these is discussed further below.

1 – Placement within section 9 and emulating existing language

While drafting regarding any recommendation, if accepted, would be a matter for the Queensland Government and the Office of the Queensland Parliamentary Counsel, consideration as to placement of any new provision within section 9 needs to contemplate its interaction with the rest of the section.

The use of the word 'must' is universal throughout section 9, except that 'may' is used twice: first in section 9(1) regarding the overarching purposes of sentence; second in section 9(5) regarding a discretion to consider the closeness in age between offender and victim in the case of child sexual offences (unique in this context because actual imprisonment is mandated for these). It is therefore not suggested that the aggravating factor be applied in a discretionary way through the use of the word 'may'.

The weight to give to the aggravating factor would still remain at the court's discretion and a partial ouster reflecting language present in two other subsections is also recommended.

As to where the factor would sit in section 9, one option is to insert it directly into section 9(3). It would be a factor to which the sentencing court 'must' have 'primary regard'. It would, perhaps curiously, be the only express 'aggravating factor' in section 9(3).

Another option, which the Council prefers, is to form an entirely new subsection modelled on, and placed as part of, existing sections 9(9B) (regarding manslaughter of a child under 12), 9(10) (previous convictions), and 9(10A) (domestic violence offences). Each of these commence with the words 'in determining the appropriate sentence for an offender convicted of' (the relevant offence type), followed by 'the court must treat [the applicable stated factual issue] as an aggravating factor'.

If this were to occur, the phrase 'the court must have regard primarily to the following' in section 9(3) may need to be amended to something in the nature of 'the court must have regard primarily to [section 9 (new aggravating factor) and] the following'. Otherwise, the separately-housed new aggravating provision would purport to link back to sections 9(2) and (3), yet section 9(3) would simultaneously exclude it from being of primary application to the only cases to which it could apply.

Subsections 9(10) and (10A) contain further language that might be useful to emulate in an occupational aggravating factor. Section 9(10) requires previous convictions to be treated 'as an aggravating factor if the court considers that it can be reasonably treated as such', having regard to two factors. Section 9(10A) ends with a potential ouster: 'unless the court considers it is not reasonable because of the exceptional circumstances of the case' (it then provides two non-exhaustive examples).

The Council considers that language such as that used in section 9(10) would be useful in avoiding unintended consequences if too rigid a structure was used (no matter where the factor was housed within section 9). For example, it could include the phrase '… as an aggravating factor if the court considers that it can be reasonably treated as such having regard to particular circumstances of the individual case'. It would be expected that in the majority of cases, such a section would achieve the result of aggravating the sentence.

Furthermore, the Council considers that the new provision should have an example of when it may not be reasonable to apply the aggravating factor (as was done with 'exceptional circumstances' in section 9(10A)) — namely, when the offender's behaviour giving rise to the charge was affected by his or her mental illness. The effect of mental illness on criminal culpability, in particular in respect of its potential to diminish the importance of specific and general deterrence in such cases, is discussed in Chapter 6, section 6.5.3.

This would protect against the risk of perverse outcomes flowing from a universal mandatory application of the provision. Another factual scenario where the aggravating factor may not apply (discussed here for completeness

but not suggested as an example in the section), is where a worker assaults a colleague at their workplace as a result of an argument leading to a consensual fight ending in a disproportionate response from the offender, having no link to any pre-existing bullying or power imbalance. This is criminal, but not the kind of behaviour reflecting workplace risk or vulnerability that this aggravating factor is designed to address.

2 – A single or split provision

The approach taken in NSW is to distinguish between statutory aggravating factors that:

- the victim was a police officer or emergency services worker or other identified category of worker 'exercising public or community functions' and the offence arose because of this; and
- 'the victim was vulnerable' for reasons including their occupation (with the examples provided being a person working at a hospital, other than a health worker captured in the aggravating factor above, taxi driver, bus driver, or other public transport worker, bank teller or service station attendant.[132]

Creating two limbs of a new aggravating factor focused on vulnerability due to victim occupation risks duplication and complicating the wider provision. However, as is the case in NSW, the Council does not propose that these would be identical limbs.

Reflecting in broad terms the NSW approach, the Council suggests that the same terminology (and definition) of 'frontline and emergency worker' be adopted in the first limb of the new aggravating factor as is to apply to the reformed version of section 340. This will ensure consistency and clarity of application.

The second limb, the Council recommends, should be built on the concept of vulnerability due to occupation based on the NSW model. As discussed above, that model uses a non-exhaustive list of examples that includes jobs in private industry with public-facing aspects. It can be extremely wide and cover volunteers.

The alternative approach — to capture both frontline and emergency workers, as well as other workers who are at increased risk due to their occupation — would have the benefit of simplicity of expression. However, it could lose declarative force in terms of the frontline and emergency worker cohort covered by an amended section 340.

Separate identification of victims who are frontline and emergency workers for the purposes of this statutory aggravating factor makes clear that this provision is intended to complement the section 340 reforms. It would apply in the sentencing of an offender for an offence against frontline and emergency workers other than an offence under section 340 — for example, where an offender is charged with assault occasioning bodily harm, wounding and grievous bodily harm. To make the application of this aggravating factor clear the Council supports including an explicit statement that a court is not to have additional regard to this factor in sentencing if it is an element of the offence, consistent with the approach in NSW.[133]

By way of analogy, the section 9(10A) aggravating factor has been held to not apply to the specific offence of choking, suffocation or strangulation in a domestic setting in section 315 of the *Criminal Code*.[134]

3 – Language to define the scope and applicability of the aggravating factor

The examples from the other jurisdictions show the diverse ways in which occupation can be scoped into an aggravating factor — e.g. a reference to a 'working worker', one with a public-facing role, one identifiable by reason of a uniform, listed in a schedule, as part of an exhaustive list and in relation to an assault in the course of the work, because the worker was a worker whether they were working or not, or because of something the worker did while working.

The NSW model simply uses the language, in the first limb: 'the victim was a police officer … exercising public or community functions and the offence arose because of the victim's occupation or voluntary work'.[135] The second limb states 'the victim was vulnerable, for example … because of the victim's occupation' (and lists, inter alia, occupation examples).[136]

The Council is of the view that both limbs of the aggravating factor should be wide enough to cover the scenarios in the revised section 340 as recommended — namely, that they capture assaults committed either while the person

---

132 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 21A(2)(a) and (l).

133 Ibid s 21A(2).

134 *R v MCW* [2019] 2 Qd R 344, 352–3 [35] (Mullins J, Philippides JA and Boddice J agreeing).

135 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(a).

136 Ibid s 21A(2)(l).

is acting in the execution of that person's duty or employment, or because of any act done in the execution of these duties or employment.

Other relevant sections of the *Criminal Code* deal only with conduct committed 'while engaged in the discharge or attempted discharge of the duties' (s 199) or acts done 'to resist or prevent a public officer from acting in accordance with lawful authority' (s 317). That this is not as wide as section 340 or the proposed aggravating factor is not of concern, as the conduct required for sections 199 and 317 is more specific — resisting or obstructing would not ordinarily be done because of a past-tense victim attribute or behaviour.

The Council suggests this could include a non-exhaustive list of examples, such as bus drivers or other public transport workers, taxi drivers, rideshare drivers, health workers, or security officers, but should not be limited to public sector employees and should include volunteers. It might also include volunteers who undertake emergency management roles who are not captured under the proposed amendments to section 340, such as surf lifesavers and members of volunteer marine rescue groups.

The Council notes that, in respect of children as offenders, section 9(2A) of the PSA is the foundation for the recommended aggravating factor. The contents of that provision are inconsistent with the YJA, which has different sentencing purposes and principles and comprises a separate and distinct 'code for dealing with children who have, or are alleged to have, committed offences'.[137] The YJA contains alternative sentencing options not available when sentencing adults. These recommendations should not apply to children.

Recommendation 10–1: New aggravating factor for assaults on public officers and other workers

(a) A new subsection, modelled on, and placed as part of, existing sections 9(9B) (regarding manslaughter of a child under 12 years), 9(10) (offender who has one or more previous convictions) and 9(10A) (domestic violence offences), should be added to section 9 of the *Penalties and Sentences Act 1992* requiring that when determining the appropriate sentence for an offender convicted of an offence to which subsections (2A) and (3) apply, a court must treat as an aggravating factor the fact that the offence occurred in the performance of the functions of the victim's office or employment, or because of the performance of those functions or employment.

(b) The aggravating factor should apply to two classes of victim within the provision, reflecting the NSW model in the *Crimes (Sentencing Procedure) Act 1999* section 21A(2):

  i. frontline and emergency workers victims adopting the same definition as under the revised section 340 as set out in Recommendation 3–1; and

  ii. other victims who are vulnerable because of their occupation. It could contain a non-exhaustive list of examples, such as bus drivers or other public transport workers, taxi drivers, rideshare drivers, health workers, or security officers, but should not be limited to public sector employees and should include volunteers.

(c) The new section should also have words to the effect that its subject matter must be treated as an aggravating factor if the court considers that it can be reasonably treated as such, having regard to particular circumstances of the individual case. This is consistent with the effect of sections 9(10) and (10A).

  It should also have an example of when it may not be reasonable to apply the aggravating factor — as was done with 'exceptional circumstances' in section 9(10A) — namely, when the offender's behaviour giving rise to the charge was affected by his or her mental illness.

(d) It should be made clear in drafting this new section that the court is not to have additional regard to the victim's occupation in sentencing if that factor is an element of the offence. For example, such an offence would not apply to assaults charged under section 340 of the *Criminal Code*.

Recommendation 10–2: Relationship between new aggravating factor and section 9(3) of the PSA

A complementary amendment should be made to section 9(3) of the *Penalties and Sentences Act 1992* to recognise the new section as being a matter to which 'the court must have regard primarily to' equally with the other matters present in section 9(3).

Recommendation 10–3: No change to be made to principles under YJA

The amendments set out in Recommendations 10–1 to 10–2 above should not be mirrored in section 150 of the *Youth Justice Act 1992,* which sets out sentencing principles that apply in sentencing a child for an offence in recognition of the very different principles that apply to the sentencing of children, and their generally lower level of psychosocial maturity and capacity to regulate their behaviour.

137 *Youth Justice Act 1992* (Qld) s 2(b).

10.3 Mandatory and presumptive or 'statutory' penalties

This section discusses forms of mandatory and presumptive penalties. It does so on the basis that some stakeholders were supportive of stronger penalties on particular types of workers, and that it was identified by some as a way to achieve this outcome.[138]

10.3.1 What are mandatory minimum and presumptive penalties?

A number of jurisdictions have introduced mandatory minimum penalties or presumptive penalties that apply to assault offences committed against specific types of public officers in specific circumstances.

Mandatory sentences generally involve Parliament prescribing 'a minimum or fixed penalty for an offence'.[139] The Australian Law Reform Commission (ALRC) has identified, '[m]andatory sentencing can take various forms, the chief characteristic being that it either removes or severely restricts the exercise of judicial discretion in sentencing'.[140]

Presumptive sentences are slightly different in that they retain judicial discretion in sentencing, but generally by reference to specific criteria — 'which may be broadly or narrowly defined'.[141]

Another type of presumptive sentencing scheme is that introduced in Victoria for assaults committed on emergency workers, custodial officers, and youth justice custodial officers who are on duty. It applies statutory minimum non-parole periods and terms of imprisonment to certain types of assault offences. This is discussed below in section 10.3.3 'Victoria'.

10.3.2 Mandatory penalties in Queensland for assaults of public officers

There are three circumstances of aggravation that apply mandatory sentencing to specified serious assault sentences.

The first is a mandatory community service order for a prescribed offence if committed with a circumstance of aggravation (committed in a public place while adversely affected by an intoxicating substance).[142] A 'prescribed offence' includes common assault, wounding, AOBH, GBH, serious assault against police and public officers under sections 340(1)(b) and (2AA), and the PPRA section 790 offence.

This does not apply if the court is satisfied the offender is incapable of complying with a community service order because of any physical, intellectual or psychiatric disability.[143]

If it does apply and the person is detained on remand or imprisoned during the period of the community service order, that order is suspended until the person is released, and the period for completing the order is extended by the period the offender was detained or imprisoned.[144]

The second mandatory sentencing circumstance of aggravation is the 'serious organised crime circumstance of aggravation', applicable where the offence is committed as part of the offender's involvement in a criminal organisation.[145] It applies to a prescribed offence (which includes GBH, malicious acts, torture, AOBH if the applicable maximum penalty is 10 years' imprisonment, and serious assault against police if the applicable maximum penalty is 14 years' imprisonment). The sentence must include an extra, mandatory 7 years' imprisonment (which must be served wholly in custody) in addition to, and cumulatively (one after the other) upon, the sentence for the prescribed offence itself.

A third form of mandatory sentencing applies where an offender is convicted of a listed offence (or of counselling, procuring, attempting or conspiring to commit it) while the offender was a prisoner serving a term of imprisonment, or was released on parole.[146] Any sentence of imprisonment imposed for the offence must be served cumulatively

---

138 For example, this position was supported by the Queensland Police Union of Employees in its preliminary submission, discussed in section 10.3.5 below.

139 Law Council of Australia, *Mandatory Sentencing: Factsheet 1* (undated).

140 Australian Law Reform Commission, *Same Crime: Same Time: Sentencing of Federal Offenders* (Report No. 103, 2006) 539 [21.54] (citations omitted).

141 Adrian Hoel and Karen Gelb, *Sentencing Matters: Mandatory Sentencing* (Sentencing Advisory Council (Victoria), August 2008) 2.

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

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

144 Ibid s 108D.

145 See ibid Part 9D (ss 161N–S) and Schedule 1C.

146 Ibid s 156A and Schedule 1.

(one after the other) with any other term of imprisonment the person is liable to serve. Relevant offences include wounding, AOBH, serious assault, GBH, torture and malicious acts. Data on the use of cumulative sentences are presented in section 7.4 of Chapter 7.

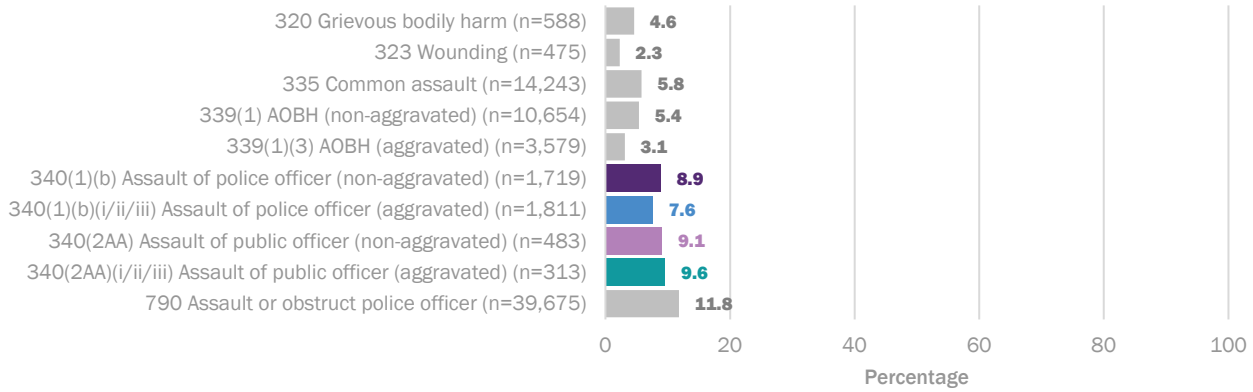
Intoxication in a public place as a circumstance of aggravation (PSA, s 108B)

The circumstance of aggravation under section 108B of the PSA came into operation on 1 December 2014.[147] This circumstance applies to section 340(1)(b) serious assault of a police officer and section 340(2AA) serious assault of a public officer, as well as other prescribed offences, presented in Figure 10-1 below.

The number of juvenile offenders sentenced with the 108B circumstance of aggravation was small (n=245), with three-quarters of those offences being under PPRA 790 assault or obstruct police officer (75.9%). The analysis below includes only offenders sentenced as adults. Due to the small sample sizes, particularly in the higher courts, higher and lower courts have been combined; however, results split by court level are shown in Table A4-11 in Appendix 4.

Of the prescribed offences presented in Figure 10-1, the offence of assault or obstruct a police officer under section 790 of the PPRA had the highest proportion of offences with 108B circumstance of aggravation applied in 11.8 per cent of cases. The serious assault of a public officer was the next highest, with 9.6 per cent of aggravated cases, and 9.1 per cent of non-aggravated cases involving a section 108 circumstance of aggravation. Serious assaults of police officers were also high, with 8.9 per cent of non-aggravated cases and 7.6 per cent of aggravated cases involving this circumstance of aggravation.

Figure 10-1: Proportion of sentenced offences with section 108B PSA intoxication circumstance of aggravation applied

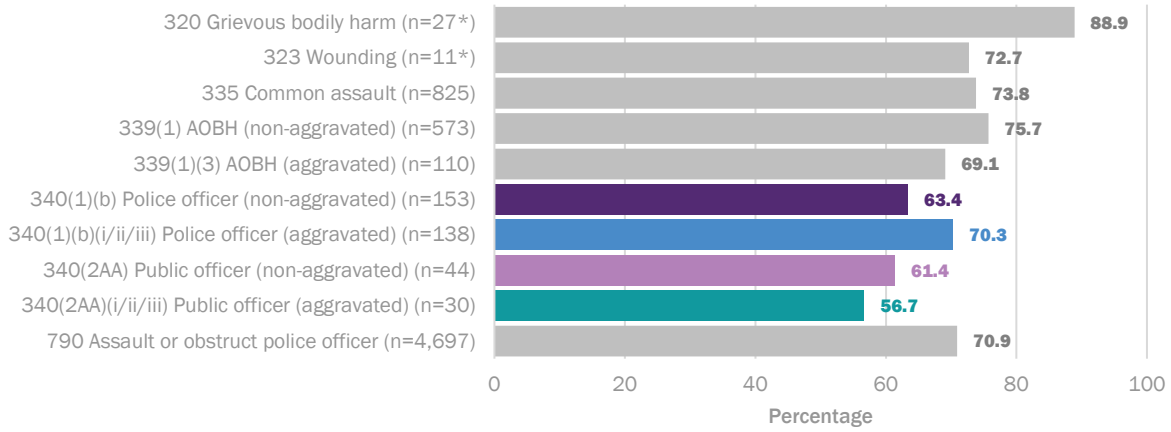


Data include adult offenders, lower and higher courts, offences on or after 1 December 2014, sentenced 2014–15 to 2018–19.
Source: QGSO, Queensland Treasury — Courts Database, extracted November 2019.
Note: All numbered references are to sections of the *Criminal Code*, with the exception of '790' which refers to the offence of assault or obstruct police under s 790 of the PPRA.

147 *Safe Night Out Legislation Amendment Act 2013* (Qld) s 92 inserting new pt 5, div 2, sub-div 2 into the *Penalties and Sentences Act 1992* (Qld).

While there is a presumption that a court must make a community service order if the intoxication circumstance of aggravation is applied to the sentenced offence, it is not always imposed. Figure 10-2 shows the proportion of offences with section 108B circumstances of aggravation charged that had a community service order imposed by the offence type. It ranges from 88.9 per cent for GBH down to 56.7 per cent for aggravated serious assault of a public officer. The most likely reason for this is that the sentencing court was satisfied that because of any physical, intellectual or psychiatric disability of the offender, the offender was not capable of complying with a community service order — which provides courts with a discretion not to make such an order.

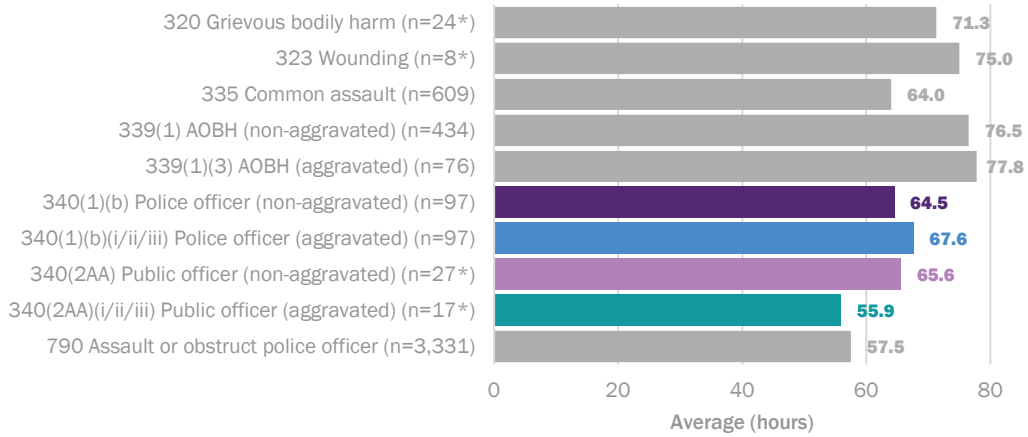
Figure 10-2: Proportion of sentenced offences with section 108B PSA intoxication circumstance of aggravation charged that received a community service order



Data include adult offenders, lower and higher courts, offences on or after 1 December 2014, sentenced 2014–15 to 2018–2019.
Source: QGSO, Queensland Treasury — Courts Database, extracted November 2019.
Notes: (1) All numbered references are to sections of the *Criminal Code*, with the exception of '790', which refers to the offence of assault or obstruct police under s 790 of the PPRA.
(*) Small sample size

Figure 10-2 shows the average length of community service orders that are made for offences that are charged with section 108B circumstance of aggravation. The average community service order length ranged from 55.9 hours for aggravated assault of a public officer to 77.8 hours for aggravated AOBH. Assault of a police officer offences (non-aggravated) received an average community service order of 64.5 hours.

Figure 10-3: Average community service order sentence (hours) for an offence with 108B



Data include adult offenders, lower and higher courts, offences on or after 1 December 2014, sentenced 2014-15 to 2018-19.
Source: QGSO, Queensland Treasury — Courts Database, extracted November 2019.
Notes: (1) All numbered references are to sections of the *Criminal Code*, with the exception of '790', which refers to the offence of assault or obstruct police under s 790 of the PPRA.
(*) Small sample size

While a community service order must be ordered for offences with a section 108B circumstance of aggravation, unless one of the exclusionary criteria are met, other penalties can also be imposed for the same offence, meaning the community service order may not be the most serious penalty for the offence.

An imprisonment sentence was the most serious penalty imposed most frequently for the following offences with 108B: aggravated AOBH, GBH, non-aggravated assault of a police officer, aggravated assault of a police officer, non-aggravated assault of a public officer, aggravated assault of a public officer, and wounding (see Table A4-12 in Appendix 4). A community service order was most commonly the most serious penalty for the offences of non-aggravated AOBH, assault or obstruct police officer and common assault.

Considering each of the prescribed offences for the purposes of section 108B, the proportion of offenders sentenced with the circumstance of aggravation varies by demographic group. For Aboriginal and Torres Strait Islander female offenders, the largest proportion of offences sentenced with a section 108B circumstance of aggravation was assault of a police officer (non-aggravated) for which 16.1 per cent of offenders had the circumstance of aggravation applied, followed by assault or obstruct police officer (14.7%) and aggravated assault of a police officer (10.6%). Comparatively, non-Indigenous female offenders had the highest proportion of section 108B circumstances of aggravation for assault or obstruct police officer (10.3%) followed by aggravated assault of a public officer (9.6%).

Both Aboriginal and Torres Strait Islander and non-Indigenous male offenders had the highest proportion of a section 108B circumstance of aggravation applied for assault or obstruct police officer (12.8% and 11.6%, respectively), followed by aggravated assault of a public officer (9.6% and 11.0%, respectively).

Table 10-1: Proportion of offences with 108B circumstance of aggravation by demographic group

	Aboriginal and Torres Strait Islander		Non-Indigenous		Aboriginal and Torres Strait Islander		Non-Indigenous	
	Female	Male	Female	Male	Female	Male	Female	Male
Offence	**Number of sentenced offences**				**Proportion with 108B (%)**			
320 Grievous bodily harm	29*	176	22*	356	6.9	2.3	0	5.3
323 Wounding	124	114	68	168	3.2	2.6	0	2.4
335 Common assault	1,261	3,162	1,929	7804	6.2	6.2	5	6
339(1) AOBH (non-aggravated)	642	2,836	1,020	6101	5.8	5.3	6	5.4
339(1)(3) AOBH (aggravated)	372	1,065	320	1795	4	3.2	2	3.1
340(1)(b) Police officer (non-aggravated)	124	441	232	915	16.1	9.5	7.8	8
340(1)(b)(i/ii/iii) Police officer (aggravated)	198	494	313	801	10.6	8.9	6.7	6.5
340(2AA) Public officer (non-aggravated)	56	96	107	222	8.9	9.4	7.5	9.9
340(2AA)(i/ii/iii) Public officer (aggravated)	36	77	73	127	5.6	9.1	9.6	11
790 Assault or obstruct police officer	3,010	8,064	6,316	22109	14.7	12.8	10	11.6

Data include adult offenders, lower and higher courts, offences on or after 1 December 2014, sentenced 2014–15 to 2018–19.
Source: QGSO, Queensland Treasury — Courts Database, extracted November 2019.
Notes:
(1) Count is offence based so offenders may be counted more than once if they were sentenced for more than one offence with 108B circumstances of aggravation within the time period.
(2) If the gender and/or Aboriginal or Torres Strait Islander status of an offender is unknown, they have been included in the calculations but not presented.
(3) All numbered references are to sections of the *Criminal Code*, with the exception of '790', which refers to the offence of assault or obstruct police under s 790 of the PPRA.
(*) Small sample size

Table 10-2 shows the number and proportion of cases involving serious assault of a public officer (s 340(2AA)) offences with a section 108B intoxication circumstance of aggravation by the occupation of the victim. It shows that, proportionally, paramedics are the most likely to be assaulted by an intoxicated person in a public place (16.9%), followed by police officers (9.1%). Given the nature of the work of paramedics and police officers, this is not an unexpected result.

Table 10-2: Proportion of offences with 108B circumstance of aggravation by occupational group of victim

Victim category	Sentenced offences (n)	Proportion with s 108B intoxication circumstance of aggravation (%)
Paramedic	319	16.9
Police officer	33	9.1
Compliance officer	18	5.6
Medical/ hospital worker (excluding security)	236	5.1
Security guard	77	3.9
Watch-house officer	51	2
Child safety officer	9	0
Corrective services officer	14	0
Detention centre worker	9	0
Other	15	0
Transport officer (excluding security)	16	0
TOTAL	**797**	**9.3**

Data include adult offenders, lower and higher courts, offences on or after 1 December 2014, sentenced 2014–15 to 2018–19.
Source: QGSO, Queensland Treasury — Courts Database, extracted November 2019.
Notes: (1) Count is by charge (i.e. victim); therefore the victim may not be unique.
(*) Small sample size

10.3.3 The approach in other jurisdictions

New South Wales

Sentencing discretion in NSW has largely been retained, but a presumptive sentencing scheme applies to some offences in the form of the standard non-parole period (SNPP) scheme.

The SNPP has been in operation in NSW since February 2003. In its current legislative form it 'represents the non-parole period for an offence [as listed in the relevant Table to Division setting these out] that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness'.[148] The relevant legislation provides the SNPP for an offence is a matter to be taken into account by a court in determining the appropriate sentence for an offender, but without limiting the matters that are otherwise required or permitted to be taken into account in determining the appropriate sentence for an offender.[149] While the court must make a record of its reasons for setting a non-parole period that is longer or shorter than the non-parole period and each factor it took into account,[150] it is not required to identify the extent to which the seriousness of the offence for which the non-parole period is set differs from an offence to which the SNPP is referable.[151]

The current SNPP scheme in NSW operates consistently with the High Court's determination in *Muldrock v The Queen*.[152] In this case, the High Court considered the nature of SNPPs and found that the court is obliged to take

148 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54A(2).

149 Ibid s 54B(2).

150 Ibid 54B(3). This also applies to aggregate sentences — in which case, a court must first indicate and make a written record of the offences to which a SNPP applies and the non-parole period that it would have set for each offence to which the aggregate sentence relates had it set a separate sentence of imprisonment for that offence, and then record the reasons it would have set a non-parole period that is longer or shorter than the non-parole period for each offence to which a SNPP applies: ss 54B(4)–(5).

151 Ibid s 54B(6).

152 (2011) 244 CLR 120.

into account the full range of factors in determining the appropriate sentence for the offence, with the SNPP, together with the maximum sentence, operating as 'legislative guideposts'.[153]

SNPPs apply to two types of offence relevant to this reference: assault of a police officer while in the execution of that officer's' duty in circumstances where bodily harm is caused (3 years),[154] and wounding or causing GBH to a police officer, being reckless as to whether actual bodily harm will be caused to that officer or another person (5 years).[155]

The NSW scheme does not apply to the sentencing of offenders under the age of 18 years at the time of the commission of the offence,[156] or to matters heard and determined summarily.[157]

Northern Territory and Western Australia

The NT and WA have introduced mandatory minimum terms of imprisonment that apply to assaults on police and some other occupational categories in circumstances where the victim has suffered physical or bodily harm as a result of the assault. The same form of assault if committed in Queensland would constitute aggravated serious assault under section 340 of the *Criminal Code*.

The mandatory minimum penalties that apply in the NT range from a minimum of 3 months' actual imprisonment if physical harm is caused[158] to 12 months' actual imprisonment if the offence involved the actual or threatened use of an offensive weapon, the victim suffered physical harm, and the offender has previously been convicted of a violent offence.[159]

In WA, the penalties for adult offenders range from 6 months' actual imprisonment[160] to 9 months if committed while armed or in company.[161] A mandatory minimum 3-month sentence, to be served by way of imprisonment or in youth detention, also applies to young offenders who committed the offence when aged 16 or 17 years to be served by way of imprisonment or in youth detention.[162]

In WA, a mandatory minimum penalty of 12 months (or 3 months for young offenders) also applies to offenders convicted of GBH committed in 'prescribed circumstances', which includes where the victim of the offence is a police officer.[163]

In the NT, an 'exceptional circumstances' exemption applies to mandatory minimum sentences that, when met, require the court to impose a term of actual imprisonment, but allows the court to order that part be suspended or served by way of home detention.[164] The relevant section providing for this exception states that the following do not constitute exceptional circumstances:

> (a) that the offender was voluntarily intoxicated by alcohol, drugs or a combination of alcohol and drugs at the time the offender committed the offence;
>
> (b) that another person:
>
> (i) was involved in the commission of the offence; or
>
> (ii) coerced the person to commit the offence.[165]

---

153 Ibid 132 [27].

154 *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4, div 1A, Table — Standard non-parole periods — item 5 (applying to offences committed under s 60(2) of the *Crimes Act 1900*).

155 Ibid — item 6 (applying to offences committed under s 60(3) of the *Crimes Act 1900* (NSW)).

156 Ibid s 54D(3).

157 Ibid s 54D(2).

158 *Criminal Code* (NT) s 189A; and *Sentencing Act 1995* (NT) ss 78CA(2) (offence is a level 4 offence if the victim suffers physical harm, and the offence is not a level 5 offence), 78DB (mandatory penalty for a Level 4 offence), 78CA(1)(b), 78D.

159 *Sentencing Act 1995* (NT) s 78DA.

160 *Criminal Code* (WA) ss 318(1)(d)–(e), (1)(h)(i), (j) and (k), 318(4)(b) and 318(5) (definition of 'prescribed circumstances, which includes where the offence is committed against a police officer and the officer suffers bodily harm).

161 Ibid ss 318(1)(l) and 318(4)(a) and 318(5) regarding offences committed in 'prescribed circumstances'.

162 Ibid s 318(2). This applies to offences committed in 'prescribed circumstances' (defined in s 318(5)), which includes where the offence is committed against a police officer and the officer suffers bodily harm.

163 *Criminal Code* (WA) ss 297(4)(a)–(b), (d)(i), (f) and (g), 297(5)(b) (adults) and 297(6)(b) (juveniles) and 297(8) (prescribed circumstances).

164 *Sentencing Act 1995* (NT) s 78DI (exceptional circumstances exemption). This requires a court to comply with s 78DG where the court is satisfied the circumstances of the case are exceptional.

165 Ibid s 78DI(4).

The mandatory minimum sentencing reforms in the NT, as they apply to assaults on police (s 189A of the *Criminal Code* (NT)), were introduced by the *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013* (NT). Section 189A was subsequently amended, in 2019, to apply to other frontline emergency workers. As a result of these changes, the current mandatory minimum sentences that apply to assaults on police where the victim suffered physical harm now apply to assaults against other frontline workers.[166]

The justification for the original form of the WA reforms, when introduced in 2009 under the *Criminal Code Amendment Act 2009* (WA), simply stated, was to implement an election commitment of the then government. Its broader objective, as described by then Attorney-General Christian Porter in introducing the Bill, was 'to take strong and decisive action to ensure that offenders are severely punished' and to 'clearly indicate to others who may contemplate such crimes that the law's response will be swift and firm', serving the purposes of general deterrence.[167]

The amendment Act, as introduced, confined the application of the mandatory minimum penalty to assaults committed against police causing bodily harm. In limiting its scope in this way, the Attorney-General suggested:

> Mandatory sentencing is a tool of criminal law that should be used very cautiously. Only in situations in which there are problems of undeniably crucial public significance and in which other alternatives are or would be ineffective should mandatory sentences be contemplated. However, this government considers this legislation to be the only way to ensure that the sentencing in this area reflects the expectations of the Parliament and our community.[168]

The Bill was subsequently expanded during its debate to include ambulance officers, prison officers and some security officers.

South Australia

The South Australia offence of causing harm to, or assaulting, certain emergency workers introduced in 2019 into the *Criminal Law Consolidation Act 1935* (SA) is discussed in Chapter 8.

The new offence under sections 20AA(1), (2) and (4) is a 'designated offence' under section 96 of the *Sentencing Act 2017* (SA). This has the effect of limiting the availability of wholly suspended sentences in particular circumstances, including where the person is being sentenced as an adult for a designated offence and in the 5 years immediately prior to the new offence date, they had received a suspended sentence of imprisonment or period of detention for another designated offence, or for a specified offence against police, unless there are exceptional circumstances.[169] Where a person has been sentenced for a designated offence the sentencing court may order that the person serve a 'specified period of imprisonment in prison (which, if a non-parole period has been fixed in respect of the defendant, must be a period that is one-fifth of the non-parole period fixed)'.[170]

When considering whether the court must set the period of imprisonment to be at least or exactly one-fifth of the non-parole period, the South Australian Court of Appeal has determined:

> Section 96(5)(a) of the *Sentencing Act* requires a court suspending a sentence of two years or more for a prescribed designated offence to fix a specified period of imprisonment to be served which, if the non-parole period has been fixed, must be a minimum of one-fifth of that non-parole period.[171]

The Court of Appeal, in considering the application of these non-parole period requirements, noted that Parliament's intention when introducing the Criminal Law (Sentencing) (Suspended Sentences) Amendment Bill, was to address the 'total suspension of sentences of serious, violent offenders', and that it would be 'counterintuitive' to require the court to 'fix a specified period at such a low proportion of the non-parole period'.[172]

---

166 *Criminal Code Amendment Act 2019* (NT) s 7.

167 Western Australia, *Parliamentary Debates*, Legislative Assembly, 4 December 2008, 965 (C Porter, Attorney-General). Evaluations of this legislation are discussed in Appendix 7.

168 Ibid.

169 *Sentencing Act 2017* (SA) ss 96(3)(c)–(d).

170 Ibid s 96(5)(a).

171 *R v Hayles* [2018] SASCFC 141 (Vanstone J, Kelly and Peek JJ agreeing).

172 Ibid [12].

Tasmania

In Tasmania, by operation of section 16A of the *Sentencing Act 1997* (Tas), a mandatory minimum sentence of 6 months' imprisonment applies to any offence committed against a police officer while the police officer was on duty and the officer suffered serious bodily harm caused by, or arising from, the offence unless there are exceptional circumstances. This minimum sentence applies regardless of whether the offence is punishable by imprisonment, or the maximum penalty is a term of imprisonment less than 6 months.[173]

There is a Bill currently before the Tasmanian Parliament, introduced by the Liberal Government, that, if passed, will introduce the same minimum penalty in circumstances where serious bodily harm has been caused to other frontline workers.[174] During the House of Assembly's debate of the Bill, the Shadow Attorney-General indicated that while the mandatory minimum sentence for serious bodily harm to a police officer has been in place since 2014, only one person has been charged under those mandatory provisions.[175]

Victoria

In 2014, Victoria introduced a statutory (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.[176] 'Injury' is defined for this purpose to mean any physical injury, or harm to mental health, whether of a temporary or permanent nature.[177]

A youth justice centre order for a term not less than six months may be made if the person is 18 years or over but under 21, in circumstances where the court has received a pre-sentence report and believes there are reasonable prospects for rehabilitation; or that the young person is particularly impressionable, immature or likely to be subjected to undesirable influences in an adult prison.[178]

Minimum non-parole periods also apply when sentencing an offender for the following offences under the *Crimes Act 1958* (Vic) in circumstances where the offence is committed against an emergency worker on duty, a custodial officer on duty, or a youth justice custodial officer on duty:

- causing injury intentionally or recklessly in circumstances of gross violence[179] (not less than 5 years);
- causing serious injury recklessly under section 17 of the *Crimes Act 1958* (Vic) (not less than 2 years);
- causing serious injury intentionally under section 16 of the *Crimes Act 1958* (Vic) (not less than 3 years).[180]

As for the offence of causing injury intentionally or recklessly, there are special provisions that apply to young offenders (18 years or over but under 21) that, in this instance, enable the court to make a youth justice centre

---

173 *Sentencing Act 1997* (Tas) s 16A(3).

174 Justice Legislation (Mandatory Sentencing) Bill 2019 (Tas) passed by the House of Assembly on 26 November 2019 and introduced that same day into the Legislative Council.

175 Tasmania, *Parliamentary Debates*, House of Assembly, 26 November 2019, 70 (Ella Haddad, Shadow Attorney-General).

176 *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).

177 *Crimes Act 1958* (Vic) s 15 — definition of 'injury'. In the same section, 'physical injury' is defined to include unconsciousness, disfigurement, substantial pain, infection with a disease and an impairment of bodily function, while 'harm to mental health' is defined to include psychological harm, but not an emotional reaction such as distress, grief, fear or anger unless it results in psychological harm.

178 *Sentencing Act 1991* (Vic) ss 10AA(2)–(3). This does not apply if the court makes a finding under section 10A, in which case the court has full sentencing discretion.

179 *Crimes Act 1958* (Vic) ss 15A (Causing serious injury intentionally in circumstances of gross violence) and 15B (Causing serious injury recklessly in circumstances of gross violence). Circumstances of gross violence are constituted by any one of the following: (a) the offender planned in advance to engage in conduct and at the time of planning intended the conduct would cause a serious injury, was reckless as to whether the conduct would cause a serious injury, or a reasonable person would have foreseen the conduct would be likely to result in a serious injury; (b) the offender was in company with two or more other persons; (c) the offender entered into an agreement, arrangement or understanding with two or more other persons to cause a serious injury; (d) the offender planned in advance to have with him or her and to use an offensive weapon, firearm or imitation firearm and used one of these to cause the serious injury; (e) the offender continued to cause injury to the other person after the other person was incapacitated; (f) the offender caused the serious injury to the other person while the other person was incapacitated: *Crimes Act 1958* (Vic) ss 15A(2) and 15B(2).

180 *Sentencing Act 1991* (Vic) ss 10AA(1)–(2).

order for the same minimum term as the minimum non-parole period that would have applied had a prison sentence been imposed.[181]

In the second reading speech introducing these reforms, then Attorney-General Robert Clark described the reforms as recognising 'the very special role played by Victoria's emergency workers, and the need to ensure they receive the full protection of the law when treating, caring for and protecting Victorians at times of emergency'.[182] Longer sentences were said to 'reflect the opprobrium that the community attaches to acts of violence against emergency workers who put themselves on the line in emergency situations on behalf of the community' and to send 'a clear message to perpetrators of these acts that violence against emergency workers will not be tolerated and will be met with strong penalties'.[183]

In 2018, the offences of causing serious injury intentionally or recklessly, and causing injury intentionally or recklessly if the victim was an emergency worker on duty, a custodial officer on duty or a youth justice custodial worker on duty, and the offender knew or was reckless as to this, were categorised as 'category 1 offences' for the purposes of the *Sentencing Act 1991* (Vic). This means that in sentencing an offender for one of these offences committed in these circumstances, a court must make a custodial order (but excluding a sentence of imprisonment imposed with a community correction order).[184]

Importantly, the requirements under the Victorian sentencing provisions discussed above do not apply if a court makes a finding under section 10A of the *Sentencing Act 1991* (Vic) that a special reason exists. This legislative exemption has led some to question whether these provisions should be characterised as mandatory sentencing provisions.[185]

If a court makes a finding that a special reason exists justifying departure from the mandatory sentencing provisions, it must state in writing the special reasons and cause this to be entered in the records of the court.[186]

Section 10A(2) sets out specific guidance about the circumstances in which a court may make a finding that a special reason exists, being that:

> (a) the offender has assisted or has given an undertaking to assist, after sentencing, law enforcement authorities in the investigation or prosecution of an offence; or
>
> (c) the offender proves on the balance of probabilities that—
>
> (i) … at the time of the commission of the offence, he or she had impaired mental functioning[187] [not caused solely by self-induced intoxication] that is causally linked to the commission of the offence and substantially and materially reduces the offender's culpability;[188] or
>
> (ii) he or she has impaired mental functioning that would result in the offender being subject to substantially and materially greater than the ordinary burden or risks of imprisonment;[189] or

---

181 *Sentencing Act 1991* (Vic) s 10AA(2).

182 Victoria, *Parliamentary Debates*, Legislative Assembly, 26 June 2014, 2397 (Robert Clark, Attorney-General).

183 Ibid.

184 *Sentencing Act 1991* (Vic) ss 3(1) (definition of 'category 1 offence'), paras (ca), (cb) and (cc) and 5(2G) (requirement to impose custodial order). The amending Act was the *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 73.

185 See, for example, Simone Fox Koob, 'The Community Has Been Misled': Chief Judge Slams Commentary Around 'Mandatory' Sentencing Laws', *The Age* (online, 19 February 2020) <https://www.theage.com.au/national/victoria/the-community-has-been-misled-chief-judge-slams-commentary-around-mandatory-sentencing-laws-20200219-p5428u.html>; *DPP v Haberfield* [2019] VCC 2082, 34 [91] (Tinney J); and questions posed to the Victorian Premier, Daniel Andrews, in response to a Question without Notice by the Leader of the Opposition, Michael O'Brien in the Victorian Parliament: Victoria, *Parliamentary Debates*, Legislative Assembly, 20 February 2020, 499–50.

186 *Sentencing Act 1991* (Vic) s 10A(4).

187 Ibid s 10A(1) defined to mean: (a) a mental illness within the meaning of the *Mental Health Act 2014 (Vic)*; (b) an intellectual disability within the meaning of the *Disability Act 2006 (Vic)*; (c) an acquired brain injury; (d) an autism spectrum disorder'; or (e) a neurological impairment, including but not limited to dementia.

188 For a recent judgment in which this finding was made, see *DPP v Haberfield* [2019] VCC 2082.

189 Ibid.

(d) the court proposes to make a Court Secure Treatment Order[190] or a residential treatment order[191] in respect of the offender; or

(e) there are substantial and compelling circumstances that are exceptional and rare and that justify doing so.

In deciding if there are substantial and compelling circumstances, the court is required to:

(a) regard general deterrence and denunciation of the offender's conduct as having greater importance than the other sentencing purposes [under the Act (just punishment, special deterrence, rehabilitation and community protection)]; and

(b) give less weight to the personal circumstances of the offender than to other matters such as the nature and gravity of the offence; and

(c) not have regard to—

(i) the offender's previous good character (other than an absence of previous convictions or findings of guilt); or

(ii) an early guilty plea; or

(iii) prospects of rehabilitation; or

(iv) parity with other sentences.[192]

Further guidance to courts in deciding if there are substantial and compelling circumstances is contained in section 10A(3) requiring courts to have regard to Parliament's intention that:

- a sentence of imprisonment should ordinarily be imposed for the offences of causing serious injury recklessly and causing serious injury intentionally where committed against an emergency worker on duty, a custodial officer on duty or a youth justice custodial worker on duty, and that a non-parole period of not less than the length specified should ordinarily be fixed in respect of that sentence;[193] and
- a sentence of imprisonment of not less than 6 months should ordinarily be imposed for the offence of intentionally or recklessly causing injury committed against an emergency worker on duty, a custodial officer on duty or a youth justice custodial officer on duty.[194]

At the time of introducing the 2014 statutory minimum sentencing provisions, the then Attorney-General indicated that the provisions for departure from the scheme would avoid limiting protection from cruel, inhuman or degrading punishment, consistent with section 10 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), because where a court is satisfied a special reason exists, it has full sentencing discretion.[195] Later amendments in 2018, which narrowed 'special reasons' exceptions (reflecting their current form), were defended by the then government on the basis that these provisions remained compatible with human rights, targeting 'a narrow and well-defined class of victims' and providing a proportionate response to this form of offending.[196] However, they attracted strong criticism from stakeholders, including the Federation of Community Legal Centres and the Law Institute of Victoria

---

190 A court secure treatment order is a sentencing order requiring an offender to be compulsorily taken to, and detained and treated, at a designated mental health service: *Sentencing Act 1991* (Vic) ss 94A and 94B(1). Criteria for the making of the order include: (a) but for the person having a mental illness, the court would have sentenced the person to a term of imprisonment; (b) the court has considered the person's current mental condition, his or her medical, mental health and forensic history and social circumstances; and (c) the court is satisfied based on a psychiatrist's report and other evidence that the person has a mental illness, and needs treatment to prevent serious deterioration in their mental or physical health, or serious harm to the person or another person, and there is no less restrictive means readily available to enable the person to receive the treatment they need: Ibid s 94B(1).

191 Residential treatment orders are orders directing that an offender be detained for a period of up to 5 years in a residential treatment facility: *Sentencing Act 1991* (Vic) s 82AA. These orders can only be made for certain sexual offences, or if an offender has been found guilty of a 'serious offence' as defined in section 3(1) of the Act — which includes a number of offences, including causing serious injury intentionally in circumstances of gross violence (*Crimes Act 1958* (Vic) s 15A), causing serious injury recklessly in circumstances of gross violence (*Crimes Act 1958* (Vic) s 15B), and causing serious injury intentionally (*Crimes Act 1958* (Vic) s 16). The Secretary to the Department of Health and Human Services must first specify that the person is suitable for admission to a residential treatment facility; and specify in the plan of available services, that services are available in a residential treatment facility.

192 *Sentencing Act 1991* (Vic) s 10A(2B).

193 Ibid s 10A(3)(a).

194 Ibid s 10A(3)(ab).

195 Victoria, *Parliamentary Debates*, Legislative Assembly, 26 June 2014, 2395 (Robert Clark, Attorney-General).

196 Victoria, *Parliamentary Debates*, Legislative Assembly, 21 June 2018, 2134 (Martin Pakula, Attorney-General).

in their joint submission to the Victorian Parliamentary Scrutiny of Acts and Regulations Committee. The same justifications were repeated regarding further proposed narrowing of 'special reasons' exceptions in 2020.[197]

The options available to courts as a result of the 2018 Victorian sentencing amendments mean that even where the court has found that a special reason exists for a Category 1 offence, a court's sentencing options are limited. In these circumstances, a court must make either:

- a custodial order (under pt 3, div 2 of the Act), which includes imprisonment, drug treatment orders, youth justice centre and youth residential centre orders; or
- a mandatory treatment and monitoring order[198] (whether or not a sentence of imprisonment is imposed under 44 in combination with a community correction order), a residential treatment order[199] or a court secure treatment order[200] if:

  (a) the offender proves on the balance of probabilities that, at the time of the commission of the offence, the offender had impaired mental functioning [excluding that solely caused by self-induced intoxication] causally linked to the commission of the offence which substantially and materially reduced the offender's culpability; and

  (b) the court is satisfied [one of these orders] is appropriate.[201]

The presumption to impose custodial sentences in Victoria also applies to the offence of common assault in circumstances where the person assaulted is a police officer or protective services officer on duty and involves an offensive weapon, firearm or an imitation firearm if the assault consisted of, or included, the direct application of force.[202] There are stated exceptions to this.[203]

The combined effect of these new provisions has been described by a judge of the County Court of Victoria in the recent appeal decision of *DPP v Haberfield*[204] in the following terms:

> Under these provisions, undoubtedly more people will be sent to prison for these offences, even people who would not be imprisoned in the absence of these laws. That is plainly the intention of Parliament.
>
> The message sent by Parliament could not be clearer. Do not assault emergency services workers. If you do, don't say you have not been warned. Prison will ordinarily be the outcome, whoever you are, whatever your character, whatever the reasons for you so acting, whatever damage may be caused to you in prison.[205]

DPP v Haberfield[206] was the first case applying this complex legislation. At first instance, a magistrate found that the offender had impaired mental functioning caused solely by drug use, yet erroneously found that, on this factual basis, the legislation still permitted the imposition of a non-custodial penalty. The prosecution appealed to the County Court [District Court equivalent], which reheard the matter. The County Court would have had to imprison the offender if the same factual finding was made. However, the judge had a new medical report and evidence from an expert, who had the benefit of information about the offender between the first sentence and the appeal. This led to the judge finding, contrary to the magistrate, that there was an underlying, enduring mental illness, not just a drug-induced psychosis — meaning that the impaired mental functioning was not, in fact, caused solely by drug use (although drugs did play a 'sizeable' role).[207] The offender had (unknown to him) underlying, developing schizophrenia (triggered by drug use). This opened the door to a special reason finding, which permitted

---

197 These justifications were repeated for the Sentencing Amendment (Emergency Worker Harm) Bill 2020 — see Victoria, *Parliamentary Debates*, Legislative Council, 19 March 2020, 1254 (Jaala Pulford, Minister for Roads, Minister for Road Safety and the TAC, Minister for Fishing and Boating).

198 Mandatory treatment and monitoring orders are a form of community correction order with mandatory conditions attached, being a judicial monitoring condition and either a treatment and rehabilitation condition, or a justice plan condition, and can also have other conditions attached: *Sentencing Act 1991* (Vic) s 44A.

199 See (n 191).

200 See (n 190).

201 *Sentencing Act 1991* (Vic) ss 3(1) (definition of 'category 1 offence'), paras (ca), (cb) and (cc); and 5(2GA).

202 This requirement arises from the classification of common assault committed in the relevant circumstances and consisting of or including the direct application of force as a 'category 2 offence' for the purposes of the *Sentencing Act 1991* (Vic): see *Sentencing Act 1991* (Vic) ss 3(1)(m) and 5(2H).

203 See *Sentencing Act 1991* (Vic) s 5(2H) (a) to (e). The sentence must, unless otherwise directed by the court, be served cumulatively on any uncompleted sentence or sentences of imprisonment imposed on that offender, whether before or at the same time as that term: s 16(3E).

204 [2019] VCC 2082.

205 Ibid 36–37 [98]–[99] (Tinney J).

206 Ibid.

207 Ibid 26 [72]–[73], 40 [112].

consideration of one form of non-custodial penalty. The County Court judge, being careful to convey that the comments were not intended to criticise Parliament,[208] noted the complexity of the legislation:

> I had great difficulty myself following the legislative framework and ascertaining the consequences of finding the existence of a special reason. Those consequences are not described in section 10A which is the provision setting out the special reasons. Those consequences can only be discovered by going to the definition section of the Act (section 3) and then to a number of further provisions including s 5 ss (2G), s 5 ss (2GA), s 5 ss (2GB) and s 5 ss (2GC). It is a bit cumbersome.[209]

The special reasons provisions are not, in truth, mandatory sentencing provisions:

> A mandatory provision would say that if 'crime X' is committed, 'sentence Y' is the invariable, the only result. No ifs. No buts … That is not the position here at all and never has been. There are a very limited number of special reasons deliberately inserted into section 10A [and if one is] established by an offender on the balance of probabilities, then there is no requirement to impose a 6 month term at all, and in one particular setting contemplated by the legislation, there is no requirement to imprison at all.[210]

Amendments that came into effect on 1 July 2020[211] now require courts to have regard to the fact that a sentence of at least the length of the statutory minimum sentence should ordinarily be imposed, unless the cumulative impact of the circumstances of the case (including the special reason) justifies departure from that sentence.[212] They also narrow the application of special reasons to exclude mental functioning caused 'substantially' rather than 'solely' by self-induced intoxication and direct courts where the 'burden of imprisonment' due to impaired mental functioning is high — a basis for finding 'special reasons' exist when sentencing for a category 2 offence under section 3(2H)(c) — to have regard to Parliament's intent as to the length of sentence that should ordinarily be imposed. This would possibly alter the outcome of a case like *Haberfield* in future: It 'will narrow the range of circumstances in which self-induced intoxication will be able to constitute special reasons for not imposing any applicable statutory minimum sentence'.[213]

Following amendments moved by a Member of Derryn Hinch's Justice Party, supported by the Victorian Government, there is a requirement that the effectiveness of these recent amendments be reviewed after 12 months of operation and that a report on the outcome of the review be laid before both Houses of Parliament on the outcome.[214]

10.3.4 Evidence of the effectiveness of statutory and mandatory minimum sentences for assaults of public officers

The Council commissioned the Griffith Criminology Institute, Griffith University to undertake a literature review focusing on the causes, frequency, and seriousness of assaults on public officers, as well as the impact of sentencing reforms aimed at addressing these types of assaults. Below is a direct extract of the executive summary of this report,[215] which can be found in full on the Council's website.

> **What do we know about the sentencing of assaults on public officers?**
>
> Penalty enhancements or mandatory minimum sentencing schemes for assaults against public officers are not unusual in common law jurisdictions. These types of sentencing frameworks generally mean that perpetrators convicted of assaults against public officers will be sentenced more harshly than those convicted of similar assaults against other individuals. The justification for treating public officers differently is based on arguments that their willingness to provide a service to others, often at risk to themselves, aggravates the seriousness of the offence.
>
> The effectiveness of these penalty enhancements or mandatory minimum sentences depends on the outcome that these sentences are designed to achieve. In general, there are two purposes that are expressed in debate around legislation proposing these sentencing regimes: deterrence, and condemnation and denunciation.
>
> Do penalty enhancements or mandatory minimum sentencing schemes deter future assaults against public officers? There is almost no evidence of the impact of these types of sentences on future assaults on public officers. Since 2009, there have been declines in recorded assaults against police in Western Australia. With the introduction of an amendment to provide mandatory sentences for assaults against police, this trend suggests

208 Ibid 7 [16].

209 Ibid 7 [15].

210 Ibid 5 [13].

211 *Sentencing Amendment (Emergency Worker Harm) Act 2020* (Vic) s 2.

212 Ibid.

213 Explanatory Memorandum, Sentencing Amendment (Emergency Worker Harm) Bill 2020 (Vic) 2, 4.

214 *Sentencing Act 1991* (Vic) s 116A.

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

that such sentencing enhancements may have a deterrent effect. However, there were other significant changes over the same period which could equally explain the reduction in assaults against police, such as the change in policy away from single officer patrols, and a general decline in assaults overall.

Further, if we look at the broader field of sentencing, there is no reliable evidence that these types of offences have a deterrent effect. For example:

- imprisonment, on average, does not achieve the goal of deterrence in studies of general criminal offending. We would not anticipate that this would be different for this type of offending.
- mandatory sentencing has not been found to have a deterrent effect. Harsher penalties have not shown any significant impact on future offending.

Thus, although amendments to sentencing frameworks can clearly communicate the unacceptability of the behaviour, prevention strategies may be a better strategy for reducing the incidence of assaults against public officers. In other words, well-targeted interventions may achieve more in terms of reducing the incidence of these assaults.

The literature review also found that, 'based on the evidence to date, mandatory minimum sentences are unlikely to reduce future incidents of assault against public officers. The problem lies, in part, with the issue that sentencing itself does not address the causes of the assaults'.[216]

Looking to the broader field of sentencing, regardless of offence type, revealed the following:

- More severe penalties, compared to less severe penalties, have not been shown to produce a greater deterrent impact on further offending.[217]
- Shorter terms of imprisonment are associated with higher re-offending rates … although this might be explained by the lack of programs and support generally available to offenders serving short prison terms.[218]
- It is not clear whether penalty enhancements substantially shift sentencing practice.[219]

The literature review acknowledged that sentencing framework amendments can clearly communicate the unacceptability of the targeted behaviour. However, prevention strategies were suggested as a 'better strategy for reducing the incidence of assaults against public officers. In other words, well-targeted interventions may achieve more in terms of reducing the incidence of these assaults'.[220]

In its Issues Paper, the Council also documented in some detail the experience of the WA mandatory sentencing scheme, which demonstrates the difficulty in determining whether legislative change can be categorically shown to have reduced offending by deterrence. It also provides an example of how mandatory sentencing risks transferring decision-making from courts, which operate in an open and transparent way, to prosecution agencies, whose processes are by their nature more opaque (especially where there are not as many charge alternatives of lesser seriousness, as exist in Queensland).

The Council analysed this experience at some length, because it is a recently evaluated Australian example of a relevant legislative scheme, and because it was relied on by some stakeholders as supporting an increase in penalties in Queensland.[221]

In summary, the Council found that the evidence for mandatory sentences contributing to a reduction in assaults to be inconclusive and, more recently, that the evidence for assaults on police and other public officers in that jurisdiction has been rising.

A summary of these findings is at Appendix 7.

10.3.5 Stakeholder views

Views on mandatory and presumptive sentencing approaches

A number of legal associations and professional bodies that made submissions, including the Australian Lawyers Alliance (ALA), the BAQ, LAQ, Sisters Inside, and QLS, expressed concern about the potential for mandatory minimum

216 Ibid 21.

217 Ibid 20.

218 Ibid.

219 Ibid 23.

220 Ibid v.

221 Preliminary submission 5 (Australasian Railway Association and ors), attachment, Letter from Australasian Railway Association and ors to The Hon Cameron Dick MP, Minister for State Development, Manufacturing Infrastructure and Planning, 22 July 2019.

sentences to be recommended as an outcome of the review based on the experience in other jurisdictions and stated their opposition to such penalties.

The Queensland Human Rights Commission was concerned that mandatory minimum sentences 'significantly limit rights' and indicated that 'without further evidence' it would not support this.[222]

These concerns were also reflected in submissions received from a number of employee unions[223] and industry bodies.[224] For example, the United Workers Union (UWU) commented:

> UWU members believe that a holistic and preventative, as opposed to a punitive sentencing, approach is key to successfully addressing the root causes of this issue. UWU members advocate for a sentencing approach that builds on the following guiding principles and veers away from mandatory sentencing as a solution:
>
> - Understand and address the root causes of occupational violence including investments in public campaigns and systemic reforms that address the complexity of occupational violence;
> - Record and unpack every incident of occupational violence to identify the precursors and situations that lead to incidents;
> - Invest in interventions that are research-based, responsive and allowed to evolve, for example the use of the latest drugs in sedation in paramedic and health settings and best practice design, systems, strategies and reporting in schools to prevent incidents of occupational violence in the first place.[225]

Referring to a literature review commissioned by the Queensland Ambulance Service's Paramedic Task Force, the UWU notes that that review cited 'a number of studies that identify the importance of forensically unpacking paramedics' experiences of occupational violence'.[226] This process, it suggests, 'reveals the complexity inherent in emergency situations' and 'calls for reform that simply cannot be realised by sentencing, in particular mandatory sentencing'.[227]

The Queensland Nurses and Midwives' Union, noting the existence of these provisions in some other Australian jurisdictions, voiced concerns that 'there may be unintended consequences including a one-size-fits-all approach that may not suit all cases'.[228]

Reflecting views generally held by legal stakeholders, the ALA indicated its strong opposition to mandatory minimum sentences on the basis 'they are inconsistent with the rule of law, breach international human rights standards and undermine the separation of powers 'by detracting from the independence of the judiciary'.[229] Objections included that mandatory sentences:

- remove courts' ability to 'consider relevant factors such as the offender's criminal history, individual circumstances, or whether there are any mitigating factors' that 'can result in sentencing outcomes that are disproportionately harsh, unjust and anomalous';
- 'tend to transfer decision-making powers in relation to the sentence from the judiciary to the prosecution, and the police given the choice of charge will determine the sentencing outcome';
- are contrary to Australia's international human rights obligations, as set out in the International Covenant on Civil and Political Rights including the right to be free from arbitrary detention, the right to a fair trial, and the right to have one's sentence reviewed by a higher court (given a court on review cannot reduce a mandatory minimum sentence that is imposed);
- 'remove the incentives for offenders to assist authorities with investigations … and for defendants to plead guilty, thereby earning the right to a sentencing discount', in turn resulting in more contested hearings, with associated resourcing impacts;
- increase the 'use of imprisonment', and 'the length of sentences served by offenders, thus increasing the costs to the State';
- fail to provide a general deterrent to relevant offences, and in their aim of 'sending a strong message to the community', being based on 'flawed assumptions about the nature of human decision-making: that a

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

223 For example, Submission 11 (United Workers' Union) 2–7; Submission 13 (Independent Education Union); Submission 14 (Queensland Nurses and Midwives' Union) 4; Submission 20 (Queensland Teachers' Union) 5.

224 For example, Submission 2 (Queensland Catholic Education Commission) 2.

225 Submission 11 (United Workers' Union) 2–3.

226 Ibid 5.

227 Ibid 5 and 7.

228 Submission 14 (Queensland Nurses and Midwives' Union) 4.

229 Submission 8 (Australian Lawyers Alliance) 5.

> more severe sanction will deter more effectively and that imprisoning offenders will necessarily lead to a lower crime rate'.[230]

The Office of the Public Guardian (OPG) was concerned about the potential effect of mandatory sentencing laws on adults with impaired capacity if 'the legal framework designed to take into account the mental illness or impairment and culpability of accused persons is removed or reduced'.[231] It recommended that 'mandatory sentencing not be considered for assaults against public officers that are committed by people with impaired decision-making capacity',[232] and that, should mandatory sentencing be adopted in Queensland, 'clear protections are in place, without exception, for persons who lack the capacity to understand the consequences of their actions'.[233] The OPG cautioned that a failure to provide such protections 'would only further isolate adults with impaired decision-making capacity from the opportunity to lead positive and productive lives'.[234]

Similar issues were raised by Queensland Advocacy Incorporated (QAI), which further identified the high proportion of Aboriginal and Torres Strait Islander offenders who have mental health problems and/or a cognitive or intellectual impairment.[235]

The Department of Education also raised concerns regarding mandatory sentencing for Aboriginal and Torres Strait Islander offenders:

> Education as a service is delivered across all sectors of Queensland society; with many schools located in Aboriginal communities. We note that the Royal Commission into Aboriginal Deaths in custody, 28 years ago, recommended abolishing mandatory sentencing laws because they were seen to be unjust and discriminatory against Aboriginal and Torres Strait Islander people. As such, we urge that the proposed introduction of minimum sentencing of assaults against public officers would need to be reviewed giving careful consideration to the Royal Commission findings.[236]

The deterrent potential of mandatory minimum sentences was questioned by a number of those opposed to their introduction. As discussed earlier in this chapter, the effectiveness of deterrence taking into account the common context in which these assaults occur has been previously questioned.

The use of mandatory sentences for these offences was, however, supported by the Queensland Police Union (QPU) based on its view that the protection of police and emergency workers 'can only be achieved through a minimum sentencing range being imposed by statute'.[237]

To protect against the potential for injustice, the QPU recommends:

> a general provision should be enacted which allows the court to impose an alternate sentence instead of a mandatory sentence where there are exceptional circumstances and imposing the mandatory sentence would cause an actual injustice.[238]

The form of minimum sentence favoured by the QPU varies by the type of offence charged and its seriousness. While for serious assault, it suggests the offender should be required to serve actual prison time, in the case of the assaults of police charged under section 790 of the *Police Powers and Responsibilities Act 2000* (Qld), it suggests this mandatory or statutory minimum sentence might take the form of a community-based order. Although a court must make a community service order in certain circumstances, this requirement is limited to offences committed in certain contexts only.

The Transport Workers' Union also called for tougher penalties supported by a robust community service campaign to enhance community awareness. In doing so, its submission referenced the WA and South Australian schemes.[239]

Mandatory community service orders under section 108B of the PSA

Limited feedback was received on whether section 108B of the PSA is operating as intended and should continue to apply to specified serious assault offences under section 340 of the Code, and section 790 of the PPRA.

---

230 Ibid 6–8.

231 Preliminary submission 7 (Office of the Public Guardian) 3.

232 Submission 24 (Office of the Public Guardian) 4.

233 Ibid 4–5.

234 Ibid 5.

235 Submission 23 (Queensland Advocacy Incorporated) 3–4.

236 Submission 4 (Department of Education) 2.

237 Preliminary Submission (Queensland Police Union of Employees) 1.

238 Preliminary Submission (Queensland Police Union of Employees) cover letter, 1–2.

239 Submission 12 (Transport Workers' Union) 8–9.

The Aboriginal and Torres Strait Islander Legal Service (ATSILS) identified what it considered were broader problems with the application of this provision, suggesting:

> there is always an internal inconsistency where the aggravating factor which triggers the imposition of here, a community services order, is that the offender was adversely affected by an intoxicating substance at the material time. If such an order is specifically designed to assist the offender address his or her challenges relating to 'intoxicating substances' — then such should be made clear in the legislation itself. Failing which, it can in effect result in an additional penalty where logically one could argue that an offender who commits the same act, but whilst sober and rational — is actually more culpable for their actions.[240]

The BAQ suggested that the nature of the offence having been committed in a public place while intoxicated 'means that such offences will often be committed by those who are homeless and therefore forced to live in public spaces'.[241] It was noted that '[s]uch people are often suffering from addictions to intoxicants which their homelessness makes much more difficult to treat and can make compliance with community service orders difficult'.[242]

The QLS described these mandatory orders as 'problematic':

> One reason being that by the nature of those offences, the majority of them are committed in public places. This section also has the effect of criminalising intoxication in public. It is accepted that there are antisocial and criminal problems that can and do arise from such conduct, however, this section in effect disproportionately impacts vulnerable and at risk people - those who for instance may be homeless or face other disadvantages, making them more likely to be intoxicated in public rather than in private premises.[243]

10.3.6 Council's view

After reviewing developments in other Australian jurisdictions, the Council's view is that reforms to expand the range of available sentencing options are far preferable to the introduction of mandatory minimum sentencing or presumptive sentencing models — as they avoid the adoption of a 'one size fits all' approach (or 'one size fits most' in the case of presumptive sentences) and retain courts' discretion to set an appropriate sentence that takes into account the individual circumstances of the case.

Further, given the context in which many assaults on public officers occur — involving offenders who are drug and/or alcohol affected, have mental health problems and are in a highly emotional state — the Council is concerned that mandatory penalties are unlikely to deliver on their promise of offering an effective deterrent. This concern is in addition to other risks identified by previous reviews, including that such penalties displace discretion to other parts of the system and increase the risks of reoffending through the more frequent use of imprisonment.

In the Council's view, the fact that Aboriginal and Torres Strait Islander peoples are particularly overrepresented among those charged with assaults on public officers in Queensland (38.7% of those sentenced for serious assault) also risks adopting a reform that is likely to disproportionately impact on First Nations peoples.

In light of the criminogenic impacts of imprisonment, the Council is concerned that any mandatory sentence involving minimum periods of imprisonment may serve to increase, rather than decrease, the likelihood of those convicted of serious assault committing further assaults on public officers.

The complexity of provisions developed in some jurisdictions, such as Victoria, aptly demonstrate the difficulties of balancing the need to retain judicial discretion to avoid injustice in individual cases, with the clear expectation by many that statutory penalties will be applied in all cases. The narrowing of the Victorian provisions and amendments made over time has now made the statutory minimum sentencing scheme as this applies to offences against emergency workers so complex that the Victorian Government has decided that, from 1 March 2021, they will have to be prosecuted by the Office of Public Prosecutions and will only be able to be dealt with on indictment.[244]

In its *Community-Based Sentencing Orders, Imprisonment and Parole: Final Report* released last year, the Council recommended the Queensland Government should initiate a review of mandatory sentencing provisions in Queensland with a view to clarifying the operation of these provisions and considering their modification or repeal, as appropriate, taking into account:

(a) the original objectives of these provisions and whether these objectives are being met;

(b) the importance of judicial discretion in the sentencing process; and

---

240 Submission 22 (ATSILS) 7.

241 Submission 27 (Bar Association of Queensland) 11.

242 Ibid.

243 Submission 30 (Queensland Law Society) 16.

244 *Sentencing Amendment (Emergency Worker Harm) Act 2020* (Vic), s 7. This is discussed below in section 10.6.2.

(c) the need to provide courts with flexible sentencing options that enable the imposition of sentences that accord with the principles and purposes of sentencing as outlined in the PSA.

The Council recommended this review should give particular attention to the disproportionate impact of mandatory sentencing provisions on Aboriginal and Torres Strait Islander peoples, as highlighted by the ALRC in its 2017 report *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, and other people experiencing disadvantage, as highlighted by stakeholders during its review.

Subject to the outcomes of the proposed review, the Council recommends the mandatory community service order provisions (Part 5, Division 2, Subdivision 2) under the PSA should be repealed with the introduction of a new form of community-based order, called a 'community correction order'.

The Queensland Productivity Commission (QPC) in its 2019 final report on its inquiry into imprisonment and recidivism similarly recommended: 'The Queensland Government should review legislated restrictions on judicial discretion, to ensure they are serving their intended purpose', with a suggestion made the review should be undertaken by an independent body, such as the Council, and be completed within 24 months.[245] The Queensland Government response to the QPC's report does not state a position regarding this recommendation.[246]

The Council continues to support its earlier recommendation for mandatory sentencing provisions to be reviewed and considers the continued application of section 108B to the offences under examination as part of the current review, together with other mandatory provisions, are best undertaken as part of any broader review.

10.4 Increasing range of sentencing options

A question asked in the Council's Issues Paper was whether the current range of sentencing options (e.g. imprisonment, suspended sentences, intensive correction orders, community service orders, probation, fines, good behaviour bonds) provides an appropriate response to offenders who commit assaults against public officers, or if any alternative forms of orders should be considered.

In Chapter 7, we presented the Council's findings on the range of sentencing outcomes imposed for assaults on public officers in some detail. Findings included:

- In the Magistrates Courts, across all years examined, a custodial penalty was issued in 64.8 per cent of cases where serious assault of a public officer was the MSO (n=1,641).
- In the higher courts, a custodial penalty was issued in 90.6 per cent of cases where serious assault was the MSO (n=261);
- Across both the higher courts and the lower courts, imprisonment was the most common penalty for adult offenders who committed a serious assault. The proportion was highest for the serious assault of a corrective services officer, where 92.9 per cent of cases in the higher courts, and 85.6 per cent of cases in the lower courts resulted in an unsuspended term of imprisonment being imposed. The next most common penalty type was a suspended sentence of imprisonment — which ranged from 7.1 per cent to 31.5 per cent of sentences imposed depending on the type of offence. The serious assault of a public officer or a police officer with circumstances of aggravation was the most common offence to result in a suspended sentence — in many cases these were partially suspended sentences, with time served in prison.
- Average prison sentence lengths ranged from 6.4 months for non-aggravated assaults of public officers to just under 2.5 years for serious assaults of a police officer while armed.
- In the case of the less serious summary offences that can be charged in place of a serious assault, a custodial penalty was imposed in 83.8 per cent of assault or obstruct a corrective services officer offences dealt with by the lower courts under section 124(b) (MSO), and only 5.8 per cent of offences of assault or obstruct a police officer under section 790 of the PPRA (MSO).
- The most common sentencing outcome for the summary offence of assault of a police officer under section 790 of the PPRA was a monetary penalty (48.7%), with an average amount ordered to be paid of $680.80, followed by a community-based order (either a probation order or community service order).

The Council also reported on sentences of imprisonment that involved 'immediate release' — including immediate release on court-ordered parole, where the entirety of the sentence was fully served as declared pre-sentence

---

245 Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism* (Final Report, 2019) 303, Recommendation 12.

246 Queensland Government, *Queensland Productivity Commission Inquiry into Imprisonment and Recidivism: Queensland Government Response* (2020). The Queensland Government's response to the recommendations falling under the general category of increasing sentencing options, including the recommendation to review legislated restrictions on judicial discretion, is set out at page 8.

custody, or where the person was sentenced to the 'rising of the court'. Figure 7-5 in Chapter 7 shows that these types of sentences represent a substantial percentage of all sentences — ranging from 18.4 per cent of non-aggravated assaults of a public officer sentenced in the Magistrates Court to between 44.8 per cent and 50.0 per cent of certain types of aggravated serious assaults sentenced in the higher courts.

The relevance of immediate release is that an offender may have very little opportunity to be supervised or to address their offending behaviour if they have already served the majority of their sentence while awaiting sentence on remand. There are a number of known factors associated with risks of reoffending, including anti-social/criminal thinking and peer groups, family and relationship factors, drug and alcohol misuse and education and employment issues. These factors, by their nature, are very challenging to address in the case of those sentenced to short periods of imprisonment, or who may, under current arrangements, serve only a short period of post-sentence supervision due to the period of time spent in prison on remand prior to being sentenced.

The statistics presented in this report highlight that reoffending is a significant concern for offenders convicted of assaults on public officers. This provides further support for the value of developing sentencing orders and options that are more effective in reducing rates of reoffending to enhance community safety.

The Council has found that close to 40 per cent of people convicted of serious assault of a police officer go on to commit another offence involving some form of assault or assault-related offence within two years of being sentenced and in the community, and an even higher proportion of those convicted of serious assault of a public officer (44.8%) go on to do so. This compares to about a third of those sentenced for common assault (31.3%), 28.3 per cent of those sentenced for AOBH, and just over one in five (22.1%) of those sentenced for wounding.

Recidivism trends for those convicted of assault or obstruct police under section 790 of the PPRA were similar to those convicted of common assault. In this case, trends may not be comparable, given that a large proportion of the PPRA offences are likely to have involved acts of obstruction rather than an assault.

10.4.1 Stakeholder views

Limited stakeholder feedback was provided on whether there was a need to expand existing sentencing options.

The QCEC recognised the value of sentencing options in these cases, noting it 'supports the use of a range of flexible sentencing options to appropriately address relevant cases where a student may commit assault against a public officer'.[247]

QCS noted 'there are a range of sentencing options available to the courts and that ultimately, the sentence imposed on a defendant is a matter of judicial discretion'.[248] While repeating its concern that prisoners might be sentenced to shorter orders of imprisonment to take into account the requirement that this be served cumulatively on any sentence already being served, it concluded that it 'does not consider there is a need to explore alternative options'.[249]

Others supported changes to existing sentencing options, but without providing specific suggestions for reform.

QAI submitted that 'the current range of sentencing options do not provide an adequate or appropriate response to offenders who commit assaults on public officers' and that 'there is a pressing need for sentencing reforms'.[250] In doing so, it noted:

> Prison has a widely-recognised criminogenic effect: time spent in prison increases the probability that a person will commit another offence upon release, so any policy consideration that anticipates an increased use of prison would need to factor in the likely increases in risk to the community in the medium to longer term. Longer sentences may improve community safety in the very short term, but the trade-off is institutionalisation, recidivism, wasted lives, broken families and generational trauma. This is particularly so for offenders with [an] intellectual or cognitive disability who may have impaired capacity to be criminally responsible yet become caught in a perpetuating cycle of criminology.[251]

The Public Advocate, with reference to people with impaired decision-making capacity who exhibit challenging behaviours, suggested 'potentially maintaining the range of sentencing options currently available to courts in this area, as opposed to the narrowing of alternatives and/or the introduction of mandatory sentencing'.[252]

---

247 Submission 2 (Queensland Catholic Education Commission) 2.

248 Submission 21 (Queensland Corrective Services) 18.

249 Ibid.

250 Submission 23 (Queensland Advocacy Incorporated) 6.

251 Ibid 6.

252 Submission 1 (Public Advocate) 2.

The BAQ was supportive of any moves to expand the range of sentencing options available to courts, suggesting: 'The more sentencing options that are available, the better equipped judicial officers are to tailor an appropriate sentence to a particular offence and an individual offender'.[253]

10.4.2 Council's view

The Council is concerned that the current rate of recidivism for those sentenced for serious assault is higher than for those sentenced for other assault and assault-related offences. This suggests there may be a need to better target interventions to address the factors associated with offending.

In its *Community-Based Sentencing Orders, Imprisonment and Parole Options: Final Report* released last year, the Council identified a number of reforms to improve the range of sentencing dispositions available to courts and allow for more tailored orders to be applied in response to the individual circumstances of the offender and the offence.

These recommendations included:

- The introduction of a new intermediation sanction — a 'community correction order' ('CCO') — which would subsume probation and community service as conditions of a CCO, rather than as existing as separate forms of sentencing orders (Recommendation 9);
- The availability of a wide range of additional conditions to be ordered as part of a CCO, in conjunction with core conditions, which might include:
  - to perform unpaid community service in the community (minimum of 40 hours up to 300 hours) (community service condition);
  - to submit to supervision by an authorised corrective services officer (supervision condition);
  - to comply with any reasonable directions given by an authorised corrective services officer to attend appointments and/or to participate in activities with a view to promoting the offender's rehabilitation (rehabilitation condition);
  - to submit to assessment and treatment (including testing) for alcohol or drug abuse or dependency, medical assessment or treatment, mental health assessment and treatment, or other treatment, as directed by an authorised corrective services officer (treatment condition);
  - to abstain from consuming alcohol, or not to consume alcohol so as to exceed a specified level of alcohol and submit to monitoring (where alcohol consumption is an element of the offence, or has contributed to the commission of the offence and the person is not alcohol dependent) (alcohol abstinence and monitoring condition);
  - to abstain from drugs, except those prescribed for the person by a medical practitioner (drug abstinence condition);
  - not to contact or associate with a person specified in the order, or a particular class of person specified (for the period of the order or lesser period) (non-association condition);
  - to live at a place specified in the order, or not at a place specified (for the period of the order or lesser period) (residence restriction and exclusion condition);
  - not to enter or remain in a specified place or area (for the period of the order or lesser period) (place or area exclusion condition);
  - to remain at a specified place between specified hours of each day (with ability to specify different places or periods for different days) (for limited number of hours and period) (curfew condition);
  - to pay an amount of money as a bond, whole or part of which is subject to be forfeited for noncompliance (bond condition);
  - to reappear at a time or times directed before the court for a review of compliance with the order (for the period of the order or lesser period) (judicial monitoring condition);
  - to be subject to electronic monitoring for the purpose of monitoring compliance with curfew and/or a place or area exclusion condition (for the period of that condition or lesser period) (electronic monitoring condition); and
  - any other condition the court considers is necessary (Recommendation 22).
- The ability to sentence an offender in respect of one, or more than one, offence to:
  1. a term of imprisonment — including a sentence that is partially suspended but excluding an intensive correction order (ICO) — with a CCO, provided any period of imprisonment to be served (excluding any

[253] Submission 27 (Bar Association of Queensland) 10.

time declared as time served) is no more than 12 months from the date of sentence, in which case the requirements of the CCO should commence on the person's release from custody;

2. a wholly suspended sentence of any length with a CCO; and
3. a fine with a CCO (Recommendation 17).

- Until such time as the CCO is fully operational, the ability of courts to have a power under the PSA to sentence an offender to a wholly suspended sentence or a partially suspended sentence in combination with a probation order or community service order when sentencing an offender for a single offence (Recommendation 37);
- Subject to the implementation of the Council's proposed reforms to community-based sentencing orders and parole, and the outcomes of a review of the effectiveness of parole, amending Part 9, Division 3 of the PSA to remove any form of parole being applicable to sentences of imprisonment of 6 months or less for any offence. Such sentences would instead be served in full, as wholly or partially suspended sentences (with, or without, a community-based order also being made), or by way of intensive correction in the community under an ICO (Recommendation 51).

The Council considers these reforms also have potential to improve sentencing responses to assaults on public officers including:

- providing courts with a broader range of options, including combining the use of imprisonment with community-based orders when sentencing for a single offence;
- encouraging the use of more targeted community-based orders to address the underlying causes of offending — including mental health issues and drug and alcohol issues;
- avoiding the use of parole for short sentences of imprisonment where this might not be appropriate and lead to an increased risk of offenders reoffending.

The Council has not made specific recommendations regarding sentencing options that should be available for assaults on public officers, given that these proposed reforms, set out in its earlier report, already address substantially the same issues.

There is no legislative requirement for the Attorney-General or the Queensland Government to formally respond to the Council's reports. However, the Queensland Government's response to the QPC's report on its inquiry into imprisonment and recidivism acknowledged the Government's commitment to:

> broadening the capacity of Queensland's justice system to deliver the most effective and appropriate sanctions to offenders through an expanded range of sentencing options that:
>
> - Provide meaningful and proportionate sanctions
> - Target the causes of offending
> - Support community safety.[254]

In doing so, it indicated that: '[o]pportunities to expand sentencing options will be explored in the context of QSAC's [report]'.[255]

Consistent with the Council's recommendations, the QPC proposed that a community correction order be established and that restrictions on the use of community-based orders, or on the combination of these orders with other sentences, should be removed.[256]

The Council recognises that the implementation of these reforms is likely to prove challenging in the current fiscal environment. However, it continues to support such investment to reduce the longer-term costs to the community of reoffending and crime victimisation.

---

254 Queensland Government, *Queensland Productivity Commission Inquiry into Imprisonment and Recidivism: Queensland Government Response* (2020) 8.

255 Ibid.

256 Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism* (Final Report, 2019) 303, Recommendation 9.

10.5 Other issues raised by stakeholders

10.5.1 Children and young people: a different system

While several stakeholders recognised that different sentencing legislation applies to children, they did not call for reform relating directly to sentencing. There was no concrete suggestion regarding alternative sentencing factors or tools.[257]

The Queensland Human Rights Commission (QHRC) strongly supported the 'current sentencing principles [which] acknowledge the vulnerability and specific protections required for children' including those 'under the *Youth Justice Act 1992* (Qld) [YJA], in particular, that a detention order should be imposed only as a last resort and for the shortest appropriate period'.[258]

The Department of Child Safety, Youth and Women also supported the youth justice sentencing principles as 'important factors to be taken into consideration when sentencing children/young people who commit assaults against police, public officers and other frontline workers'[259] and as noted in [10.2.9] that a child's 'trauma, disability and/or mental health history … may result in complex behavioural issues which are not appropriately addressed through strong sentencing'.[260]

The Queensland Teachers' Union supported the current YJA and noted that:

> There are limitations, as there should be, captured within the [YJA] as to what can be actioned in relation to a student who has assaulted a teacher. The act of charging a child with assault has complex ramifications for the community as a whole and for the education system.[261]

The BAQ expressed its support for 'any efforts to expand the sentencing tools available to judicial officers'[262] and stressed that 'any new sentencing options introduced for sentencing children be evidence-based and formulated around the Charter of Youth Justice Principles found in Schedule 1 of the [YJA] and the objectives of that Act as set out in section 2'.[263]

LAQ stated that 'the options currently available for the sentencing or diversion of children are appropriate'[264] and added:

> The [YJA] places emphasis on the need to divert children from the criminal justice system. A significant percentage of children who commit offences against public officials have been affected by trauma or have significant cognitive deficits. Most children who enter the youth justice system have been deprived of childhoods where parents have taught them how to appropriately regulate their emotions or deal with stressful situations. The availability of conferencing for offending against any public officers assists children in understanding the perspective of victims and allows youth justice to work with children in dealing with anger or aggression.[265]

Similarly, the QLS stated that:

> when sentencing children or young offenders the importance of rehabilitation and minimising the risk of further interactions with the criminal justice system must be at the forefront of sentencing considerations.[266]

The OPG stated that a discussion of penalties:

> must include targeted consideration of the issues with the current penalties and sentencing system as it relates to children and young people as well as diversionary strategies that, if implemented in childhood, could prevent any such assaults against public officers occurring in adulthood…[267]

True protection of the community from criminal behaviour, including public officers, relies on the community recognising the value of investment in early interventions that promote children and young people's education,

---

257 Some stakeholders raised the issue of raising the age of criminal responsibility for children from 10 years of age, to 14 (Submission 18 (Queensland Human Rights Commission) 15 [54] and Submission 24 (Office of the Public Guardian) 5). This issue is not within scope of the review.

258 Submission 18 (Queensland Human Rights Commission) 14 [51].

259 Submission 5 (Department of Child Safety, Youth and Women) 4.

260 Ibid 3.

261 Submission 20 (Queensland Teachers' Union) 4.

262 Submission 27 (Bar Association of Queensland) 11 and see 8.

263 Ibid.

264 Submission 29 (Legal Aid Queensland) 7.

265 Ibid 6.

266 Submission 30 (Queensland Law Society) 12.

267 Submission 24 (Office of the Public Guardian) 5.

health and wellbeing and prevent them from engaging in offending behaviour from the outset.[268] As noted above in Recommendation 10–3, the Council opposes the replication of the recommended aggravating sentencing factor regarding victim vulnerability due to occupational status in the YJA sentencing principles, in recognition of the very different principles that apply to the sentencing of children, and their generally lower level of psychosocial maturity and capacity to regulate their behaviour. As noted by the Court of Appeal (in a judgment extract reproduced in greater detail at the end of Chapter 6):

> Immaturity in thinking that hampers a child's judgment, as well as a child's lack of experience, means that children often commit offences without being conscious of the potential consequences. For this reason, the moral blameworthiness of a child for the consequences of offending cannot always be the same as that of an adult. The [YJA] embodies this as a fundamental premise and requires judges to sentence accordingly.[269]

10.5.2 Cognitive impairment and mental health issues — answers beyond the scope of this review

Another strong theme in stakeholder feedback was put as follows by ATSILS:

> The group of people most over-represented in the criminal justice system and in custody are those suffering intellectual disability, cognitive development issues, mental health issues and behavioural issues. There is a significant proportion who suffer from the effects of trauma, including intergenerational trauma … Inevitably in times of severe distress, including attempted suicide, they are going to have increased interactions with police and medical frontline services, often disastrously. For those who are charged for assault or serious assault, their sentencing options are limited.[270]

The OPG recommended that the:

> offence, penalty and sentencing framework require the context of offending behaviour by a person with impaired decision-making capacity against a public officer to be considered at each stage of the process in addressing the offence.
>
> That information on a person's capacity, trauma history, and previous engagement in therapeutic and rehabilitative programs, be formally reported on prior to sentencing.[271]

The Department of Education noted that:

> any proposed reform in relation to penalties for assaults on public officers needs to be considered and balanced against the complex needs of people with disabilities, and the complexity of other socio-economic factors across Queensland communities.[272]

Many of the submissions explained why the difficulties experienced by such members of the community can increase the likelihood of their interacting with public officers, and the likelihood that those interactions can be volatile. There are, as the Independent Education Union put it, 'systemic inequalities that give rise to conflict in the first instance'.[273]

The Public Advocate noted that 'people reporting a history of mental illness, in particular, are between twice and four and a half times more likely than the average Australian to be in police custody, on remand, before courts or in prison'[274] and explained that challenging behaviours may not be what they seem:

> Many people with impaired decision-making capacity can exhibit challenging behaviours when they have difficulty communicating things like pain or discomfort. This behaviour has the potential to be interpreted as aggression by people not fully trained or attuned to the needs of people with disability (and particular cognitive impairments), which can include front-line workers … any reforms made potentially need to consider the communication difficulties some people with impaired decision-making capacity may face and the resulting behaviours that may be interpreted as aggression.[275]

---

268 Ibid 5.

269 *R v Patrick (a pseudonym)* [2020] QCA 51, 10 [45]–[46] (Sofronoff P, Fraser JA and Boddice J agreeing).

270 Submission 22 (Aboriginal and Torres Strait Islander Legal Service) 6.

271 Submission 24 (Office of the Public Guardian) 3.

272 Submission 4 (Department of Education) 2.

273 Submission 13 (Independent Education Union) 1.

274 Submission 1 (Public Advocate) 1. On this issue see also Submission 17 (Sisters Inside) 4, Submission 21 (Queensland Corrective Services) 4 and Submission 23 (Queensland Advocacy Incorporated) 3.

275 Submission 1 (Public Advocate) 2. Note the proposed example of mental health issues as an ouster in respect of the recommended aggravating sentencing factor in Recommendation 10–1(c).

QAI stated:

> it is important to acknowledge the context which gives rise to offences. People with disability and mental illness have and continue to face significant restrictions and violations of fundamental human rights. Denials of liberty and autonomy can provoke offending behaviour.[276]

The UWU pointed to 'the need to emphasise effective, targeted methods of aggression de-escalation training rather than gaol terms' and the benefit of awareness, training and safety needs.[277] It gave real-world examples:

> A significant proportion of people who require paramedical services are those suffering from the effects of alcohol, drugs, prolonged periods of pain or an overwhelming sense of fear, and may be acting out of very basic 'fight or flight' responses that they will come to later identify and regret.
>
> … In schools, many of the instances of occupational violence reported by UWU members were perpetrated by students with special needs, who are also unlikely to have an understanding of any punitive consequences to their actions.[278]

Sisters Inside stated that in their experience: 'women charged under section 340 usually have a cognitive or psychosocial disability and/or were intoxicated at the time of the incident'.[279]

A 'heightened imbalance of power' is experienced by women who are survivors of domestic violence or sexual assault 'when dealing with male police officers, paramedics or corrective services officers'. It can be 'very triggering' for these women to be required to be restrained or strip searched.[280]

Sisters Inside said women were:

> routinely charged with a serious assault for an incident occurring after they have called the ambulance or presented to the hospital because they were experiencing a severe mental health crisis or an adverse reaction to drugs or alcohol … Criminalising people in this context undermines the integrity and purpose of our public health services and does nothing to reduce crime or increase community safety.[281]

The QHRC pointed to a recent QPC report,[282] which found that:

> many risk factors associated with imprisonment interact with one another and become compounded over time—for example, a cognitive disability may increase the risk of substance abuse, which in turn further inhibits executive function. These risk factors are exacerbated by socio-economic disadvantage.[283]

The common theme regarding change was beyond the scope of the Council's Terms of Reference, relating to the importance of a holistic response beginning before charging, let alone sentencing.[284] This includes different training for public officers and increased resources for diversionary options. This is discussed further in Chapter 11.

10.5.3 Aboriginal and Torres Strait Islander peoples

As discussed earlier in Chapters 1 and 2 of this report, the Council undertook additional work to understand the drivers of the marked overrepresentation of Aboriginal and Torres Strait Islander peoples for serious assault of a public officer. That work included: seeking an expert report from an Aboriginal and Torres Strait Islander academic; targeted consultation with key stakeholders, including the Council's Aboriginal and Torres Strait Islander Advisory Panel; and contextual analysis of sentencing remarks for these offences (see Chapter 4, section 4.2).

Key stakeholders at a roundtable meeting on 22 June 2020 identified several issues contributing to this overrepresentation in the criminal justice system, including high rates of Aboriginal and Torres Strait Islander people with a mental illness and/or acquired brain injury, intergenerational trauma and fundamental levels of social and economic disadvantage setting people on their life course, and a disconnection for many between family, culture and community.

---

276 Submission 23 (Queensland Advocacy Incorporated) 4.

277 Submission 11 (United Workers' Union) 3–6.

278 Ibid 2–3.

279 Submission 17 (Sisters Inside) 3.

280 Ibid. This point was also strongly made by ATSILS: 'The situation of those who have been sexually or physically abused in the past is especially acute … coming out of a spell of unconsciousness and being held down will lead to behaviours to escape the "aggressors" at all costs' (Submission 22 (Aboriginal and Torres Strait Islander Legal Service) 6).

281 Submission 17 (Sisters Inside) 3.

282 Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism* (Final Report, 2019) xviii.

283 Submission 18 (Queensland Human Rights Commission) 11 [38].

284 See, for example, Submission 1 (Public Advocate) 2, Submission 23 (Queensland Advocacy Incorporated) 2 and 6 and Submission 24 (Office of the Public Guardian) 3–6.

In their submissions, advocacy bodies and legal stakeholders informed the Council about the vulnerabilities of Aboriginal and Torres Strait Islander people with respect to issues of disadvantage and trauma and shared their concerns about potential legislative reforms contributing to overrepresentation.

As noted by stakeholders in section 10.5.2, people with intellectual disabilities, cognitive impairment, mental health disorders and behavioural disorders are overrepresented in the criminal justice system. QAI observed that people with multiple vulnerabilities, such as Aboriginal and Torres Strait Islander peoples with cognitive impairments or mental illness, were found to be the 'most common alleged offenders in a study of defendants at NSW country courts'.[285] QAI advised that many of its clients, particularly 'Aboriginal persons with intellectual or cognitive impairment and/or mental illness' were over-policed — noting over-policing was more common for trivial public order offences, which 'can provoke or trigger the commission of a more serious offence'.[286]

QAI was also concerned that any 'increase in penalties around assaulting police will primarily serve to disadvantage Aboriginal people, whose relations with police have historically been strained, and continue to be'.[287]

Sisters Inside expressed similar views to QAI, noting that cognitive impairments and mental illness vulnerabilities were compounded for Aboriginal and Torres Strait Islander women: 'by the systemic racism and intergenerational trauma they have experienced, which make them more likely to be targeted by police and more likely to have a negative interaction with the police'.[288]

Sisters Inside submitted that due to 'a power imbalance and intergenerational trauma and systemic racism', an Aboriginal and Torres Strait Islander person is likely to experience an interaction with a public officer very differently, even if a matter is considered benign.[289]

The Queensland Human Rights Commission (QHRC) noted in its submission that the Council had previously promoted discussion of Gladue reports in Queensland, and suggested that these reports be further considered 'as a way of promoting understanding within the justice system (and wider community) about the impacts of intergenerational poverty and trauma on Indigenous peoples'.[290] The QHRC was of the view that 'specialist Aboriginal sentencing reports to complement pre-sentence reports' may help to address the 'over-representation of Aboriginal peoples and Torres Strait Islander peoples in prison', referring to the ALRC's observations of Gladue reports:

> This context may include an examination of complex issues of an historical and cultural nature that are unique to, and prevalent in, Canadian Aboriginal communities, including intergenerational trauma, alcohol and drug addiction, family violence and abuse, and institutionalisation.[291]

In its report *Community-based sentencing orders, imprisonment and parole options: Final report*, released in July 2019, the Council considered the existing use of cultural reports to the Murri Court and mainstream courts, prepared by Community Justice Groups (CJG) in addition to sentencing submissions by legal practitioners.[292] Where an offender is an Aboriginal or Torres Strait Islander person, section 9(2)(p) of the PSA requires a sentencing court to have regard to, among other matters, submissions made by a representative of a CJG in the offender's community relevant to sentencing, including:

- the offender's relationship to their community;
- any cultural considerations; or
- any considerations relating to programs and services established for offenders in which the CJG participates.[293]

---

285 Submission 23 (Queensland Advocacy Incorporated) 3–4 citing Susan Hayes, 'Prevalence of Intellectual Disability in Local Courts' (1997) 22(2) *Journal of Intellectual and Developmental Disability* 71.

286 Ibid 5.

287 Ibid 4.

288 Submission 17 (Sisters Inside) 3. See also Submission 18 (Queensland Human Rights Commission) 10 [37], citing Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism* (Report, 2019) 76: 'Aboriginal and Torres Strait Islander women had 14 times more frequent contact with police than non-Indigenous women'.

289 Ibid.

290 Submission 18 (Queensland Human Rights Commission) 16.

291 Ibid, citing Australian Law Reform Commission, *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report 133, December 2017) 203.

292 Queensland Sentencing Advisory Council, *Community-based Sentencing Orders, Imprisonment and Parole Options (*Final Report, July 2019) 428.

293 Ibid 427.

In its report, the Council noted 'the use and impact of cultural reports is … an important area for future research'. The Council continues to support further work in this area to ensure sentencing is informed by the full range of considerations that may help explain the context in which this form of offending may occur, and how specific experiences of disadvantage impact at an individual level. For example, as highlighted by the Council's Advisory Panel, a fear of police due to past interactions may engender a 'fight-or-flight' response (or acute stress response), which may help explain why an Aboriginal person has been apparently uncooperative and the circumstances leading up to an assault. Cultural reports and pre-sentence reports more generally are also important in supporting courts in determining how best to tailor sentencing orders to meet the needs of the offenders and to reduce the risks of reoffending.

10.6 Summary disposition of serious assault charges

The Terms of Reference for the review require the Council to 'advise on any matters relevant to this reference'. The legislative framework determining the court level that can sentence serious assault offences goes directly to the maximum penalty that can be imposed. This is also relevant to the time and cost required to resolve matters. Hence, the Council asked in its Issues Paper: 'Should any changes be made to the ability of section 340 charges to be dealt with summarily on prosecution election? For example, to exclude charges that include a circumstance of aggravation?' (question 14(c)).

10.6.1 The current position

Queensland's three courts — the Magistrates, District and Supreme Courts — all have criminal jurisdiction.

The Magistrates Courts have power to impose a prison sentence of up to, and including, 3 years' imprisonment, even if the legislated maximum penalty is greater.[294] This means that while different maximum penalties apply, the maximum penalty that can be imposed by those courts is the same for common assault, serious assault and AOBH. (During consultation, it became clear that some stakeholder groups were not aware of this, even though the vast majority of such cases are finalised in the Magistrates Courts.)

However, this does not mean that the higher 7-year and 14-year maximum penalties are ignored by sentencing magistrates. A sentencing court, including a Magistrates Court, must have regard to the maximum penalty prescribed for the offence.[295]

The *Criminal Code* offences of common assault and resisting public officers, as well as the non-Code offences (all of which do not have maximum penalties exceeding 3 years' imprisonment) must be finalised (by trial or sentence, or both) in Magistrates Courts.[296] These charges can be joined with more serious charges for sentence in either of the higher courts for sentence, in certain circumstances.[297]

For two of the offences key to the Council's review, one of the parties to the case has the right to decide which court determines the charge:

- Serious assault (including aggravated serious assault) must be dealt with in the Magistrates Courts if the prosecution so chooses.[298]
- AOBH without a circumstance of aggravation must be dealt with in the Magistrates Courts, unless the defendant elects for jury trial (which means the charge would ultimately be heard in the District Court).[299] However, case law confirms that AOBH with a circumstance of aggravation can be dealt with summarily if the defendant so elects.[300]

---

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

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

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

297 See *Criminal Code* ss 651 and 652.

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

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

300 See *Fullard v Vera* [2007] QSC 050 (Cullinane J).

These options are subject to the overriding rule that a Magistrates Court must not deal with such charges if satisfied that the defendant, if convicted, may not be adequately punished in that court, given its three-year imprisonment ceiling.[301]

The District Court of Queensland deals with the remainder of the offences discussed in this section.[302]

The Council found that over the data period (2009–10 to 2018–19), the overwhelming majority of relevant offences (as the MSO), which could potentially be dealt with in the Magistrates Courts, were finalised there. These were:

- 95.4 per cent (n=1,253) of non-aggravated serious assaults;
- 84.9 per cent (n=1,280) of aggravated serious assaults; and
- 92.1 per cent (n=8,144) of AOBH offences with no circumstances of aggravation.

As noted in Chapter 2,[303] most cases involving a serious assault are heard in the Magistrates Courts (with over 80% of seven of the eight public officer categories assessed, being sentenced summarily — the eighth still recording 73.9% summary sentences). Serious assaults of working corrective services officer by prisoners who are either in prison or on parole are the most likely type of serious assault to be sentenced in the higher courts (26.1%). The non-aggravated assault of a public officer is the least likely type of serious assault to be dealt with by the higher courts, with 90.4 per cent of these cases sentenced in the Magistrates Courts.

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

The ODPP, under a statutory power, publishes the *Director's Guidelines*, 'designed to assist the exercise of prosecutorial decisions to achieve consistency and efficiency, effectiveness and transparency'.[304] They are issued to ODPP staff, others acting on the ODPP's behalf, and to police.[305]

If a summary charge (dealt with in the Magistrates Court) is an option, the *Director's Guidelines* state it should be preferred when choosing what to charge or which court to sentence in, unless this would not provide adequate punishment, or there is some relevant connection with an offence that must be dealt with in a higher court.[306] The guidelines set further requirements regarding deciding whether to choose to deal with serious assault of police officers in the Magistrates Courts:

> Care must be taken when considering whether a summary prosecution is appropriate for an assault upon a police officer who is acting in the execution of his duty. Prosecutors should note the following:-
>
> (a) Serious injuries to police:-
>
> … Serious injuries which fall short of a grievous bodily harm or wounding should be charged as assault occasioning bodily harm under section 339(3) or serious assault under section 340(b) of the Code. The prosecution should proceed upon indictment.
>
> (b) In company of weapons used:-
>
> A charge of assault occasioning bodily harm with a circumstance of aggravation under section 339(3) can only proceed on indictment, subject to the defendant's election.
>
> (c) Spitting, biting, needle stick injury:-

---

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

302 See *District Court of Queensland Act 1967* (Qld) ss 60 and 61. The Supreme Court would only deal with the offences discussed in this paper if they were joined to more serious charges already before it (or the Court of Appeal, being a division of the Supreme Court, was dealing with an appeal against conviction or sentence: s 64).

303 Figure 2.6 in Chapter 2.

304 Office of the Director of Public Prosecutions (Queensland), *Director's Guidelines* (30 June 2019) 1. The *Director of Public Prosecutions Act 1984* (Qld) s 11 gives the director power to 'furnish guidelines in writing to—(i) crown prosecutors and other persons acting on the director's behalf; or (ii) the commissioner of the police service; or(iii) any other person; with respect to prosecutions in respect of offences'.

305 'The Director of Public Prosecutions (State) Guidelines (DPPG) should be complied with': Queensland Police Service, 'Chapter 3 — Prosecution Process', *Operational Procedures Manual* (31 July 2020, Issue 77, Public Edition) 15 [3.4.5] 'Director of Public Prosecutions (State) guidelines'.

306 Office of the Director of Public Prosecutions (Queensland) (n 304) 15, 17–18 ('13. Summary Charges').

The prosecution should elect to proceed upon indictment where the assault involves spitting, biting or a needle stick injury if the circumstances raise a real risk of the police officer contracting an infectious disease.

(d) Other cases:-

In all other cases an assessment should be made as to whether the conduct could be adequately punished upon summary prosecution.

Generally, a scuffle which results in no more than minor injuries should be dealt with summarily. However, in every case all of the circumstances should be taken into account, including the nature of the assault, its context, and the criminal history of the accused.

A charge of assault on a police officer should be prosecuted on indictment if it would otherwise be joined with other criminal charges which are proceeding on indictment.

Where the prosecution has the election to proceed with an indictable offence summarily, that offence must be dealt with summarily unless:

(a) The conduct could not be adequately punished other than upon indictment having regard to:
- The maximum penalty able to be imposed summarily;
- The circumstances of the offence; and
- The antecedents of the offender

(b) The interests of justice require that it be dealt with upon indictment having regard to:
- The exceptional circumstances of the offence/s;
- The nature and complexity of the legal or factual issues involved;
- The case involves an important point of law or is of general importance

(c) There is some relevant connection between the commission of the offence and some other offence punishable only on indictment, which would allow the two offences to be tried together (see section 552D Criminal Code).[307]

Even if a police prosecutor elects to proceed on indictment, the ODPP makes the final determination about whether or not to indict on the charge once it has been 'committed up' from the Magistrates Courts.[308]

While the *Director's Guidelines* currently only refer to assaults on police officers, it is the Council's understanding that these guidelines are currently under review.

10.6.2 The position in other jurisdictions

Victoria

Victorian amendments,[309] which are to come into operation on 1 March 2021 (if not proclaimed before), will amend 'the *Criminal Procedure Act 2009* to require all offences committed against emergency workers, custodial officers, or youth justice custodial officers, to which a statutory minimum sentence applies, to be prosecuted by the Office of Public Prosecutions in the County Court or Supreme Court'.[310]

This was said to be 'in recognition of the complexity of the law and high public interest in its application' and 'consistent with Parliament's intention that such offending be viewed as serious in nature and ensure that such cases are progressed by senior and experienced legal and judicial officers'.[311]

In a press release, the Victorian Attorney-General referred to 'the complexity of the laws and the gravity of the offences', with the stated benefit that the change 'will also facilitate the development of specialisation in the prosecution of these complex cases'.[312]

The amendment requires offences under section 18 of the *Crimes Act 1958* (Vic) of causing injury intentionally or recklessly where committed against an emergency worker, custodial officer or youth justice custodial officer on duty

---

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

308 *Criminal Code* (Qld) s 560.

309 *Sentencing Amendment (Emergency Worker Harm) Act 2020 (Vic)* s 7.

310 Explanatory Memorandum, Sentencing Amendment (Emergency Worker Harm) Bill 2020 (Vic) 5.

311 Victoria, Parliamentary Debates, Legislative Council, 19 March 2020, Sentencing Amendment (Emergency Worker Harm) Bill 2020, Second Reading Speech, 1258 (Jaala Pulford, Minister for Roads, Minister for Road Safety and the TAC, Minister for Fishing and Boating).

312 Attorney-General (Victoria), 'Protecting Emergency Workers from Harm' (Media Release 3 March 2020).

(carrying a presumptive minimum penalty of 6 months' imprisonment) to be prosecuted by the Office of Public Prosecutions in the higher courts.[313]

Such offences not alleged to have been committed against that cohort will be able to be dealt with summarily, if the court considers that it is appropriate for the charge to be determined summarily and the accused consents to a summary hearing.[314]

The maximum penalty for section 18 offences is 10 years if the injury was caused intentionally, or 5 years if it was committed recklessly.

New South Wales

A NSW inquiry into violence against emergency services personnel undertaken by the Legislative Assembly Committee on Law and Safety, which reported in August 2017, recommended that the NSW Government consider asking the NSW Sentencing Council to conduct a further review of the sentencing power of the NSW Local Court.[315] The review was recommended in the context of the Local Court's current jurisdictional limit of 2 years for a single offence, or up to 5 years if imposing a new sentence of imprisonment to be served wholly or partly consecutively with an existing sentence of imprisonment.[316] There are some exceptions to this.[317]

The NSW Government has indicated that further consideration of the recommendation is required because, while 'further examination of the sentencing powers of the NSW Local Court would be beneficial', any increase in the sentencing jurisdiction of the NSW Local Court may have broader impacts.[318]

The NSW Legislative Assembly Committee on Law and Safety was issued Terms of Reference on 23 July 2020 asking it to inquire into and report on assaults on members of the NSW Police Force.[319] As part of that inquiry, the NSW Sentencing Council has been asked to review sentencing for assault offences against police officers, correctional staff, youth justice officers, emergency service workers and health workers. It is unclear whether current sentencing powers will be explored as part of this review, but there is no explicit reference to this issue in the Terms of Reference.[320]

Western Australia

WA has indictable charges that are designated as 'either way charges',[321] which carry maximum penalties for the offence dealt with on indictment, as well as 'summary conviction penalties' applicable if the charge is sentenced summarily.[322]

There is a general statutory presumption towards summary disposition of such charges, unless the prosecution or accused apply, before a plea is entered, to the magistrate and the court decides the charge is to be tried on indictment, or another written law expressly provides to the contrary.[323]

Grounds for deciding such a charge should be tried on indictment are listed and include that summary punishment would not be adequate, given the alleged circumstances of offending and that there are links to other offences that must be tried on indictment.[324]

---

313 *Sentencing Amendment (Emergency Worker Harm) Act 2020* (Vic) s 7, amending sch 2 to the *Criminal Procedure Act 2009* (Vic).

314 Ibid, new (pending) s 4.1A in sch 2 to the *Criminal Procedure Act 2009* (Vic), read with ss 28 and 29 of that Act.

315 Committee on Law and Safety, Parliament of NSW, *Violence Against Emergency Services Personnel* (Report 1/56, 2017) Recommendation 44, xvi.

316 *Criminal Procedure Act 1986* (NSW), ss 267–8 and *Crimes (Sentencing Procedure) Act 1999* (NSW), ss 58(3) and (3A).

317 See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 58.

318 NSW Government, *NSW Government Response to Recommendations from the Legislative Assembly's Inquiry into Violence Against Emergency Services Personnel* (Tabled 8 February 2018) 13.

319 Terms of Reference are available at: <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2608#tab-termsofreference?>.

320 The Terms of Reference issued to the Council are available at: <http://www.sentencingcouncil.justice.nsw.gov.au/Pages/Assault-police-TOR.aspx>. They refer to matters including 'recent trends in assaults on these workers', sentencing options to deter this behaviour and reduce reoffending and sentencing outcomes and principles, as well as 'any other matters the Council considers relevant'.

321 See *Criminal Procedure Act 2004* (WA) s 40.

322 *Criminal Code* (WA) s 5.

323 Ibid s 5(2).

324 Ibid s 5(3).

A WA Magistrates Court that convicts an offender can still commit the offender to a higher court for sentence, where the indictable penalty applies, if the magistrate considers that any sentence the court could impose on the accused for the offence would not be commensurate with the seriousness of the offence.[325]

Relevant WA *Criminal Code* 'either way charges', and the relevant maximum penalties are:

- Section 172 Obstructing public officer — 3 years' imprisonment (summary conviction penalty: 18 months' imprisonment and $18 000 fine).
- Section 317 Assault causing bodily harm — 7 years' imprisonment (aggravated)/5 years (simpliciter) (summary conviction penalty: 3 years/ imprisonment and $36 000 fine (aggravated)/2 years' imprisonment and $24 000 fine (simpliciter).
- Section 318 Serious assault — 10 years' imprisonment (aggravated)/7 years' imprisonment (simpliciter) (summary conviction penalty — simpliciter offences only: 3 years' imprisonment and $36 000 fine).

10.6.3 Stakeholder views

The Department of Agriculture and Fisheries[326] and LAQ[327] supported the current position in respect of section 552A providing election discretion to the prosecution.

QCS also supported the existing prosecution election but added that 'if the circumstance of aggravation is introduced in subsection 340(2) for serious assaults against CSOs [as it has], QCS would question whether it is appropriate for this offence to be dealt with summarily, given the seriousness of the offending'.[328]

The BAQ position was the opposite of the current situation: 'a person being charged with an indictable offence ought to have the right to trial by jury unless they make a decision to forego that right'.[329] However, the BAQ stated that:

> If the prosecution election is to be retained … the remaining offences for which the prosecution has the election under section 552A all have a maximum penalty of no more than 7 years. It is certainly anomalous that an offence involving violence carrying a maximum penalty of 14 years imprisonment is able to be dealt with summarily at all, let alone on the election of the prosecution. Indeed, section 552B precludes summary trial on a defendant's election for any offence involving an assault if the maximum penalty is more than 7 years … aggravated charges under section 340 ought to be tried on indictment before a jury.[330]

This was a view shared by the QLS:

> Such election should be by the defendant, as it is for a charge of assault occasioning bodily harm. If the offence is not serious enough to warrant an indictment, then the prosecution have the option of charging a simple offence under the PPRA. If the offence is too serious to be adequately punished in the Magistrates Court then the prosecution can argue for committal under section 552D.[331]

The QLS noted that the current position deprives a defendant of power over whether he or she has the right to a jury trial for an indictable offence:

> That can be especially important where the credibility of police officers is in issue, or where the question is the reasonableness of force used. It also makes available to a defendant the cheaper and quicker option of summary disposition if they choose to waive their right to a jury trial. The defendant can also have regard to the fact that a conviction in the Magistrates Court becomes spent after 5 years rather than 10, as in the District Court.[332]

The QLS identified further reasons for retaining the ability for the Magistrates Courts to deal with aggravated serious assaults even if election is given to the defendant:

- '… in the vast majority of cases the Magistrates Court would have adequate jurisdiction to appropriately sentence offenders for offences under section 340'.[333]
- Section 552D is, and would remain, an appropriate check and balance in that process.[334]

---

325 Ibid ss 5(9), (10).

326 Submission 7 (Department of Agriculture and Fisheries) 7.

327 Submission 29 (Legal Aid Queensland) 7.

328 Submission 21 (Queensland Corrective Services) 17.

329 Submission 27 (Bar Association of Queensland) 10.

330 Ibid 10.

331 Submission 30 (Queensland Law Society) 11.

332 Ibid 11.

333 Ibid 14.

334 Ibid.

Sisters Inside stated that 'the requirements for establishing whether an action should be charged as a summary or indictable offence are not clear and too much discretion is afforded to police'. Sisters Inside referred to a client's case where police ordered a strip search and she threw her underwear at the officer. The woman was charged with aggravated serious assault (s 340), attracting the maximum penalty of 14 years, rather than a summary offence like section 790(1)(b) of the PPRA (maximum penalty of 6 months).[335]

10.6.4 Council's view

The Council considered the following options regarding jurisdictional election:

- No change to section 552A of the *Criminal Code* (prosecution election regarding any section 340 offence).
- Move section 340 to section 552B — require section 340 charges to be heard and decided summarily unless the defendant elects for a jury trial, aligning arrangements for summary disposition of serious assault charges with those that apply to AOBH charged under section 339(1).
- Excluding aggravated forms of serious assault from the scope of section 552A, meaning that these offences will be required to be dealt with on indictment. This would bring aggravated serious assault into line with the arrangements that apply to other offences carrying a 14-year maximum penalty, such as GBH and torture, taking into account that existing provisions under the Code generally restrict the ability to deal with an offence involving an assault summarily to offences carrying a maximum term of imprisonment of not more than 7 years.[336]
- Require all section 340 offences to be dealt with summarily, unless a magistrate decided to abstain from hearing the particular case, which should proceed on indictment (under section 552D). This would effectively require section 340 to be made a 'relevant offence' under section 552BA, although they are defined in that section as being offences with penalties of 3 years' imprisonment or less).

The Council noted that the *Review of the Civil and Criminal Justice System in Queensland* (referred to as the 'Moynihan review' after its author), in reviewing what offences should be capable of being dealt with summarily, acknowledged:

> a widely and justifiably held view that trial by jury should not be lightly dispensed with, given the serious consequences which may follow conviction of a criminal offence and the consequences for the community as a whole, in some offences or categories of offences. The constantly recurring issue is that of proportionality: are the processes and resources that are employed in response to particular offences, or categories of offences, proportionate to the seriousness of the offence from the aspect of the community and from that of the consequences for the accused if convicted? Does a matter warrant an allocation of the public resources of the District or Supreme Court, at a cost of $3988 and $5903 per finalisation, or does it warrant the allocation of the resources of the Magistrates Court at a cost of $314 per finalisation?[337]

At a time when section 340 offences attracted a 7-year maximum penalty in all cases, being prior to this section being amended to introduce circumstances of aggravation, that review noted:

> There is no clear rationale as to why certain offences attract a prosecution election and others a defence election. It is incongruous that the prosecution has the election with regard to serious assault (s 340 of the Criminal Code), yet the defence has the election for assault occasioning bodily harm (s 339).[338]

It recommended that the list of 'offences be heard and determined summarily' include (inter alia) offences with a maximum penalty of less than 3 years' imprisonment, matters currently prescribed section 552A (which included s 340), common and serious assault (not being of a sexual nature) and AOBH.[339]

---

335 Submission 17 (Sisters Inside) 4.

336 Note, making section 340 strictly indictable would have consequences for children dealt with under the *Youth Justice Act 1992* (Qld), as an aggravated serious assault will meet the definition of being a 'serious offence' under s 8 of that Act unless otherwise exempted. LAQ submitted: 'Any increase in sentencing outcomes for assaults that involve public officials must take into account the need for speedy resolution of children's matters and the desirability of children who commit such offences being able to participate in restorative justice processes. At present the categorisation of offences pursuant to the *Youth Justice Act* allows all assault matters (other than GBH) to be dealt with summarily' (Submission 29 (Legal Aid Queensland) 8).

337 Martin Moynihan, *Review of the Civil and Criminal Justice System in Queensland* (2008) 134–5, citing Productivity Commission *Report on Government Services 2008*, Table 7A.23 Real net recurrent expenditure per finalisation, criminal, 2006-07 at <www.pc.gov.au/gsp/reports/rogs/2008/justice> accessed 18 September 2008.>.

338 Ibid 142.

339 Ibid 157, Recommendation 34.

The next recommendation was that 'all serious offences continue to be dealt with on indictment'. These included (inter alia) sexual offences committed against children under the age of 14, where the prosecution will seek a custodial sentence in excess of 2 years' imprisonment and offences relating to GBH and torture.[340]

A further recommendation was that 'all other offences may be heard and determined summarily, at the election of the ODPP'.[341]

The Council considered the points raised by stakeholders as well as practical advantages of the current application of section 552A to all serious assaults, including expediency of resolution of charges (for both the defendant and the complainant) and saving of higher court resources (particularly where the reason for the amendment would be defendant election for jury trial).

As noted above in this chapter, the doubling of the maximum penalty for aggravated serious assault in section 340 was an election commitment and was not supported by any clear rationale as to the level at which it was set. It has since been replicated twice without further analysis. Not only does this impact on the provision's relationship with other Code offences, it also causes incongruities with the election provisions.

However, as the Moynihan review noted, there was incongruity in how sections 552A and B dealt with offence provisions 339 and 340 well before the aggravated circumstances were added to section 340, and its global maximum penalty stood at 7 years' imprisonment.

It would appear that the system has evolved to make this work. It is clear from the statistics that the prosecution elects summary jurisdiction on the vast majority of section 340 offences (including aggravated ones). It is also clear that the defence rarely elects a jury trial for section 340 AOBH simpliciter offences.

There are other actors who can become involved in the jurisdictional decision — magistrates can refuse to sentence an offence that would otherwise be resolved in the Magistrates Courts, and the ODPP uses its statutory power to both issue state-wide guidelines regarding how to exercise the election discretion for police and ODPP prosecutors, and to decline to indict charges committed to the District Court.

While the Council acknowledges the arguments made by the stakeholders supporting change, on balance it does not believe that change is necessary.

Recommendation 11: Arrangements for summary disposition of charges under section 340

No change should be made to the current arrangements under section 552A of the *Criminal Code*, which allows for serious assault charges under section 340, including those with aggravating factors, to be dealt with summarily on prosecution election.

340 Ibid 157–8, Recommendation 35.

341 Ibid 158, Recommendation 36.