Chapter 6 The approach in other jurisdictions

6.1 Introduction

There are differences between jurisdictions as to:

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

In this chapter we explore the offence and sentencing frameworks that exist in other Australian jurisdictions, and select international jurisdictions (Canada, New Zealand and England and Wales).

6.2 Specific offences targeting workplace assaults

Offences committed against police and other public officers are one example of a category of aggravated assault committed on a particular class of victim. Other forms of aggravated assaults have been described as falling within three classes:

- assaults accompanied by an intention of a specific kind (for example, to resist or prevent arrest);
- assaults resulting in harm of a particular kind; and
- assaults aggravated by the means or circumstances by which they are committed.[290]

6.2.1 Offences against police

Most Australian jurisdictions have specific offences of assault of a police officer in the execution of their duties. The maximum penalty that applies to these offences varies by jurisdiction. Examples of these assault offences (excluding circumstances where serious harm or death has resulted) and applicable maximum and (where applicable) minimum penalties are summarised in Appendix 5, Table A5-1.

Penalties for assault range from a fine or 6 months' imprisonment for summary offences of assault or obstruct police,[291] to 15 years' imprisonment in South Australia for the offence of causing harm to, or assaulting, certain emergency workers (including police) in circumstances where the harm caused was intentional.[292] 'Harm' in the context of the South Australian provision is defined to mean 'physical or mental harm (whether temporary or permanent)'.[293]

The Commonwealth offence that applies in these circumstances is the offence under section 147.1 of the Commonwealth *Criminal Code* of causing harm intentionally to a public officer and the person engaged in the conduct which caused harm because the victim was a public official or their actions as a public official. Where committed against a Commonwealth law enforcement

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290 Jennifer Wheeler, '130 — Criminal Law — II Assault and Related Offences — (1) Assault', *Halsbury's Laws of Australia* (Last updated 4 December 2017) [130-1030].

291 See, for example, *Police Administration Act 1978* (NT) s 158; *Police Powers and Responsibilities Act 2000* (Qld) s 790(1)(a) (where no circumstance of aggravation); *Summary Offences Act 1966* (Vic) s 51(2) (which applies to assaults on emergency workers (including police) on duty or custodial officers on duty); *Police Act 1996* (UK); and *Summary Offences Act 1981* (NZ) s 10 (which applies also to assaults on prison officers and traffic officers).

292 *Criminal Law Consolidation Act 1935* (SA) s 20AA(1).

293 Ibid ss 20AA(9) applying the definition in Div 7A of the Act (s 21).

officer (the definition of which includes a member or special member of the Australian Federal Police, as well as public servants employed in the Australian Border Force and members of the Board of the Australian Crime Commission and its staff),[294] the maximum penalty is 13 years' imprisonment.[295]The introduction of mandatory minimum sentences, and minimum non-parole periods in some jurisdictions which apply to assaults on police and other emergency service workers is discussed below in section 6.5 of this chapter.

6.2.2 Offences against other public officers and occupational groups

As discussed in Chapter 3, the current scope of the offence of serious assault under section 340 of the Queensland *Criminal Code* goes beyond police officers, and includes:

- any person, where the offender assaulted that person with the intent to commit a crime, or to resist or prevent the lawful arrest or detention of himself or herself or another person;[296]
- a person acting in aid of a police officer acting in the execution of the officer's duty;[297]
- any person because the person has performed a duty imposed on the person by law;[298]
- any person who is 60 years or older;[299]
- any person who relies on a guide, hearing or assistance dog, wheelchair or other remedial device;[300]
- a working corrective services officer present at a correctional services facility;[301] and
- a public officer while the officer is performing a function of the officer's office.[302]

The current reference is concerned with offences committed against public officers, rather than other categories of victims falling within section 340. The definition of 'public officer', and the need to clarify its scope, is discussed in Chapter 9 of this paper.

In addition to offences that may be charged under the *Criminal Code*, there are a number of summary offences that may be charged in circumstances where an assault has been committed against specific categories of public officer. The relevant offences often apply to actions other than assault, such as hindering or obstructing, threatening, abusing or intimidating officers performing public functions, or a failure to comply with lawful instructions or directions. The maximum penalties for these offences vary — from 10 penalty units[303] to 500 penalty units or 2 years' imprisonment.[304]

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

295 Ibid s 147.1(1)(f).

296 *Criminal Code* (Qld) s 340(1)(a).

297 Ibid s 340(1)(b).

298 Ibid s 340(1)(c).

299 Ibid s 340(1)(g).

300 Ibid s 340 (1)(h).

301 Ibid s 340(2).

302 Ibid s 340(2AA).

303 *Pastoral Workers' Accommodation Act 1980* (Qld) s 26(1).

304 *Electrical Safety Act 2002* (Qld) s 145B; *Mineral Resources Act 1989* (Qld) s 397B(1); *Work Health and Safety Act 2011* (Qld) s 190; *Racing Integrity Act 2016* (Qld) s 208(1). An assault against an inspector, or person acting in aid of an inspector who is exercising powers or performing functions under the *Gaming Machine Act 1991* (Qld), or who is attempting to exercise such powers, also carries a maximum penalty of 2 years, but the maximum fine that can be ordered for this offence is 400 penalty units: s 330.

The position in other jurisdictions varies, although a number have introduced specific offence provisions that apply both to assaults of police officers and other public officers. Examples of some of these provisions (excluding circumstances where serious harm or death has resulted) are listed in Appendix 5, Table A5-2.

The NT appears to be unique in introducing a separate stand-alone criminal offence which applies to assaults committed on *any* worker who is working in the performance of his or her duties, without the need to establish any specific intention.[305] The same maximum penalties apply as for assaults against police and emergency workers (5 years if no harm suffered, or 7 years in circumstances where the assault has resulted in the victim being harmed).[306] The definition of 'worker' under the NT offence includes employees, contractors and subcontractors, apprentices and trainees, work experience students, volunteers and self-employed people, as well as a person appointed by law to carry out functions or to hold an office, excluding police officers and emergency workers who are covered in a separate offence provision.[307]

In introducing the Bill inserting this new section into the NT *Criminal Code*, the Attorney-General and Minister for Justice explained that the definition of worker 'extends further than people who provide a service to the public, such as taxi drivers, paramedics and hospital workers' and that it 'extends protection to all types of lawful workers, recognising that many workers are faced with situations where they are at the mercy of violent people'.[308] The creation of such an offence was considered justified on the basis that: 'Work is a fundamental cornerstone of many people's lives, and all Territorians should be assured when they go to work they will be protected by the law'.[309]

The question of what categories of worker (including public officers) should be afforded special protection at law against being assaulted at work and on what basis is discussed in Chapter 7 of this paper.

6.3 Aggravated forms of offences

Yet another approach to the special treatment of some categories of assault has been to create specific circumstances of aggravation for offences of general application that carry higher maximum penalties, or mandatory minimum penalties when committed against certain classes of victim, including police and other public officers. These are also sometimes called 'penalty enhancement' provisions.

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305 *Criminal Code Act 1983* (NT) sch 1 ('*Criminal Code* (NT)') s 188A, inserted by *Criminal Code Amendment (Assaults on Workers) Act 2013* (NT). An offence exists under the Queensland *Criminal Code* of assault in interference with freedom or trade or work (s 346), which is constituted by the act of hindering or preventing a person from working at or exercising their lawful trade, business or occupation, or from buying, selling or otherwise dealing with any property intended for sale, but in this case it must be proven the accused person acted with the requisite intention. The closest equivalent to the NT offence may therefore be the categories of serious assault that fall within sections 340(1)(b) and 340(1)(c) of the *Criminal Code* which are constituted by an unlawful assault on 'any person while the person is performing a duty imposed on the person by law' or 'because the person has performed a duty imposed on the person by law'. The definition of a 'public officer', who are also expressly protected under section 340(2AA), further extends the provisions of section 340 to a person 'discharging a duty … of a public nature'. To the extent the duties imposed on a worker are 'imposed by law' and/or 'of a public nature', the same protections that apply to police, corrections officers and other named categories of 'public officer' apply to other workers.

306 Ibid.

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

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

309 Ibid.

Section 1 of the Queensland *Criminal Code* defines a 'circumstance of aggravation' as: 'any circumstance by reason whereof an offender is liable to a greater punishment than that to which the offender would be liable if the offence were committed without the existence of that circumstance'.

If the prosecution intends to seek a higher penalty based on there being circumstances of aggravation, these generally must be contained in the charge, with the prosecution carrying the burden of proof of establishing such circumstances existed.[310]

A Queensland example of a circumstance of aggravation is section 161Q of the *Penalties and Sentence Act 1992* ('PSA'), which creates a 'serious organised crime circumstance of aggravation' for certain prescribed offences if, at the time the offence was committed, or any time during the commission of the offence, the offender:

> (1) Was a participant in a criminal organisation; and
>
> (2) Knew, or ought to reasonably to have known, the offence was being committed—
>
> (i) at the direction of a criminal organisation or a participant in a criminal organisation; or
>
> (ii) in association with 1 or more persons who were, at the time the offence was committed, or at any time during the course of the commission of the offence, participants in a criminal organisation; or
>
> (iii) for the benefit of a criminal organisation.

In the case of offenders convicted of prescribed offences with this circumstance of aggravation, the court *must* impose a term of imprisonment comprised of the sentence of imprisonment for the offence that would, apart from the application of this law, have been imposed (called 'the 'base component'), and then an additional 'mandatory component' for the lesser of 7 years, or the maximum penalty for the offence (unless a life sentence is imposed) which must be ordered to be served cumulatively with the base component and be served wholly in a corrective services facility.[311] The mandatory nature of the sentence can only be avoided if the offender provides significant cooperation to a law enforcement agency.[312]

A number of jurisdictions have introduced circumstances of aggravation that apply in circumstances where police and other public officers have been assaulted or exposed to the risk of harm including the NT, South Australia, Victoria and WA.[313] England and Wales has also introduced an aggravated form of offence where committed against an emergency worker (defined widely to include police, prison officers, people providing fire and rescue services and health services, among others) that applies solely to common assault and battery.[314]

As an example, section 5AA of the South Australian *Criminal Law Consolidation Act 1935* provides for aggravated forms of specified general criminal offences where committed against:

- a police officer, prison officer, employee in a (youth justice) training centre or other law enforcement officer knowing the victim to be acting in the course of his or her official duty,

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

311 *Penalties and Sentences Act 1992* (Qld) s 161R.

312 Ibid s 161S.

313 See Appendix 5, Table A5-4 for further information.

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

or in retribution for something the offender knows or believes to have been done in the course of his or her official duty (s 5AA(1)(c));

- a community corrections officer or community youth justice officer knowing the victim to be acting in the course of their official duties (s 5AA(1)(ca);
- in the case of an offence against the person, the victim was engaged in a prescribed occupation or employment (includes work carried out by or on behalf of an emergency service provider (such as by the Country or Metropolitan Fire Service, State Emergency Service, Ambulance Service, Surf Life Saving organisation, Volunteer Coast Guard and the accident or emergency department of a hospital), the employment of a person performing duties in a hospital or in the course of retrieval medicine,[315] passenger transport work, court security officer and animal welfare inspector)[316] whether paid or volunteer, knowing the victim to be acting in the course of their official duties (s5AA(1)(ka)).

The section also captures, in the case of an offence against the person that the victim was, to the knowledge of the offender, in a position of particular vulnerability at the time of the offence because of the nature of his or her occupation or employment.[317] This might apply, for example, to a shop attendant working at a 24-hour convenience store or service station.

Other circumstances which can result in an aggravated form of an offence being charged include that:

- the offender committed the offence in the course of deliberately and systematically inflicting severe pain on the victim (s 5AA(1)(a));
- the offender used or threatened to use an offensive weapon to commit, or when committing the offence (s 5AA(1)(b));
- the offender committed the offence knowing the victim of the offence was at the time under the age of 12 years (or in the case of certain categories of offending, including child exploitation material offences, was under 14 years) (s 5AA(1)(e));
- the offender committed the offence knowing that the victim was, at the time of the offence, over the age of 60 years (s 5AA(1)(f));
- the offender committed the offence knowing the victim was a person with whom the offender was, or was formerly, in a relationship (s 5AA(1)(g));
- the offender committed the offence in company with one or more other people (excluding offences relating to public order – which are generally committed in this context) (s 5AA(1)(h));
- the offender abused a position of authority, or a position of trust, in committing the offence (s 5AA(1)(i)); and
- the offender committed the offence knowing that the victim was, at the time of the offence, in a position of particular vulnerability because of physical disability or cognitive impairment (s 5AA(1)(j)).

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315 'Retrieval medicine means the assessment, stabilisation and transportation to hospital of patients with severe injury or critical illness (other than by a member of SA Ambulance Service Inc)': *Criminal Law Consolidation (General) Regulations 2006* (SA) r 3A(2).

316 *Criminal Law Consolidation (General) Regulations 2006* (SA) s 3A (Prescribed occupations and employment—aggravated offences).

317 *Criminal Law Consolidation Act 1935* (SA) s 5AA(1)(k)(i).

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

- For an assault where no harm has been caused to another person:
  (a) for a non-aggravated offence (called a 'basic offence'): 2 years' imprisonment;
  (b) for an aggravated offence (except one to which (c) or (d) applies): 3 years' imprisonment;
  (c) for an offence aggravated by the use of, or threatened 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.[318]
- For an assault causing harm to another person (an offence which replaced the South Australian offence of assault occasioning actual bodily harm):
  (a) for a non-aggravated offence: 3 years' imprisonment;
  (b) for an aggravated offence (except one to which paragraph (c) or (d) applies): 4 years' imprisonment;
  (c) for an offence aggravated by the use of, or a threat to use, an offensive weapon: 5 years' imprisonment;
  (d) for an offence aggravated by the circumstances referred to in section 5AA(1)(c), (ca) or (ka) (committed against victims in particular occupations): 7 years' imprisonment.[319]

6.4 Aggravating factors for sentencing purposes

Instead of, or in addition to aggravated forms of offences, some jurisdictions have introduced statutory circumstances of aggravation that apply for sentencing purposes when an offence is committed against a particular class of person — but without providing for a higher maximum penalty to be imposed and/or mandatory or presumptive minimum penalty to be applied.

The inclusion of aggravating factors in sentencing legislation is typically more flexible than one which establishes aggravated forms of offences as there is generally no need for the aggravating circumstances to be expressly charged — thereby avoiding what has been described by a Justice of the Supreme Court of South Australia as having the effect, in the context of assaults on police officers, of: 'adding a trial of "assault a police officer in the execution of his duty" to be heard by a jury in tandem with the trial of the substantive offence'.[320]

The presence of an aggravating factor is intended to signal the increased overall seriousness of an offence sharing these characteristics, which in turn may justify a more significant penalty that might otherwise have been considered appropriate. In contrast to aggravated forms of offences, this form of penalty enhancement occurs within the confines of the existing maximum penalties that apply to the relevant offences being sentenced, and often reflects factors already taken into account by courts as being aggravating under the existing common law. It also maintains the

318 Ibid s 20(3).

319 Ibid s 20(4).

320 *R v Tipping* [2019] SASCFC 41 [106] (Peek J).

discretion of the court to take into account the individual circumstances involved when setting the sentence.

The discretionary nature of these types of provisions was confirmed by a 2018 decision of the Queensland Court of Appeal which found that a new circumstance of aggravation inserted into section 9 of the PSA (that an offence being sentenced is a domestic violence offence) is a procedural rather than substantive provision, affecting the 'approach to the exercise of the [sentencing] discretion … rather than a mandated outcome by following that approach'.[321] As a consequence, it was found this new statutory aggravating factor 'applies to all sentencing from its commencement, whether or not the offending was committed before or after the commencement'.[322]

The legislative recognition of a victim's occupation as an aggravating factor for sentencing purposes has occurred to a greater or lesser extent in each of the three international jurisdictions examined (Canada, England and Wales and New Zealand) as well as in NSW. These provisions are summarised in Appendix 5, Table A5-4.

In NSW, section 21A(2)(a) of the *Crimes (Sentencing Procedure) Act 1999* provides that the fact the victim was a police officer, emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation or voluntary work is an aggravating factor. A further separately listed aggravating factor is that:

> the victim was vulnerable, for example, because the victim was very young or very old or had a disability, because of the geographical isolation of the victim or because of the victim's occupation (such as a person working at a hospital (other than a health worker), taxi driver, bus driver or other public transport worker, bank teller or service station attendant.[323]

The section expressly provides: 'The fact that any such aggravating or mitigating factor is relevant and known to the court does not require the court to increase or reduce the sentence for the offence'.[324]

Reforms in England and Wales were introduced under the *Assaults on Emergency Workers (Offences) Act 2018* (UK) (*'Assaults on Emergency Workers Act'*) which provides as an aggravating factor that an offence was committed against an 'emergency worker' acting in the exercise of functions as such a worker.[325] The definition of 'emergency worker' includes police, prison officers, custody officers, and people employed or engaged to provide fire services or fire and rescue services, search and/or rescue services and health services.[326] The application of this provision is limited to specific listed offences, including assault occasioning actual bodily harm, malicious wounding, sexual assault and manslaughter. There is a requirement to state in open court that the offence is so aggravated.[327]

The justification for the introduction of these reforms put forward at the time of introduction was that by placing this aggravating factor on a statutory footing, and requiring the court to state this as an aggravating element of the offence, it would give victims of these offences 'a sense that

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321 *R v Hutchinson* [2018] QCA 29, [39] (Mullins J, Fraser and Morrison JJA agreeing).

322 Ibid [43].

323 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(l).

324 Ibid s 21A(5).

325 *Assaults on Emergency Workers (Offences) Act 2018* (UK) s 2.

326 Ibid s 3.

327 Ibid s 2(2)(b).

justice is being done'.[328] In the Second Reading speech, the sponsoring Member of Parliament submitted: 'Part of the fury that 999 [emergency services] workers feel is caused by the fact that element is never stated in open court, but now it will be'.[329]

Sentencing guidelines, which pre-dated the reforms under the *Assaults on Emergency Workers Act*, further identify the fact an offence has been committed against those working in the public sector or providing a service to the public (whether as a public or private employee or acting in a voluntary capacity) as a general aggravating factor that applies to all offences,[330] which is also reflected in specific sentencing guidelines, such as those issued for common assault[331] and assault occasioning actual bodily harm.[332] Unlike the legislative reforms, the guidelines are not limited to emergency workers and the general guideline applies to all offences.

The stated rationale for including the fact the offence is committed against those working in the public sector or providing a public service in the guidelines is:

- the fact that people in public-facing roles are more exposed to the possibility of harm and consequently more vulnerable; and/or
- the fact that someone is working in the public interest merits the additional protection of the courts.[333]

Sentencing guidelines are issued by the Sentencing Council for England and Wales[334] and when issued as definitive guidelines, courts are required to follow them unless satisfied that to do so would be contrary to the interest of justice.[335]

In New Zealand, the inclusion of the victim's status as a police or prison officer as a statutory aggravating factor was based on concerns that: 'attacks on police and corrections officers, who are upholders of the law and protectors of the public, should be explicitly denounced in legislation'.[336] In introducing the amendment Bill, the Minister for Police remarked that such reforms: 'will ensure that the courts take the status of police officers and corrections officers into account as an aggravating factor at sentencing for crimes committed against them while acting in

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

329 Ibid.

330 Sentencing Council for England and Wales, General Guideline: Overarching Principles (effective from 1 October 2019) under 'other aggravating factors', <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/general-guideline-overarching-principles/>. While the current guideline came into effect from October 2019, this factor also appeared in an earlier issued guideline on offence seriousness which this guideline superseded: Overarching Principles – Seriousness: Definitive Guideline, [1.23] 'Factors indicating a more than unusually serious degree of harm' (issued on 16 December 2004).

331 Sentencing Council for England and Wales, Common Assault/Racially or Religiously Aggravated Common Assault: Definitive Guideline (effective from 13 June 2011) under 'other aggravating factors', <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/common-assault-racially-religiously-aggravated-common-assault/>.

332 Sentencing Council for England and Wales, Assault Occasioning Bodily Harm/Racially or Religiously Aggravated ABH: Definitive Guideline (effective from 13 June 2011) under 'other aggravating factors', <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/assault-occasioning-actual-bodily-harm-racially-religiously-aggravated-abh/>.

333 Ibid, text under 'Offence committed against those working in the public sector or providing a service to the public'.

334 *Coroners and Justice Act 2009* (UK) s 120.

335 Ibid s 125(1).

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

the course of their duties',[337] with such attacks described as representing 'an attack on the community and on the rule of law'.[338]

The Minister identified the unique position of police and corrective services officers as justifying differential treatment:

> Police and corrections officers have a legal obligation to deal with dangerous people in dangerous situations. This obligation is unlike that applicable to any other occupation. Where staff in other occupations can walk away, police and corrections officers must move forward to deal with dangerous situations on behalf of the community, as our front line of defence. Our police and corrections officers are responsible for keeping our communities safe from the most dangerous people in society, so it is important that the Government reciprocates by taking a firm stance on assaults against our front-line officers and that the Government expressly denounces this abhorrent behaviour.
>
> This bill demonstrates this firm stance. This bill shows that the Government is taking assaults against our police and corrections officers seriously, by requiring the courts to specifically consider this as an aggravating factor in sentencing offenders.[339]

The Government supported an amendment extending the same aggravating factor to emergency service providers on the basis that these frontline emergency workers attending emergency situations 'deserve special protection in a similar way to police and corrections officers acting in the course of their duties'.[340] In contrast to other workers and members of the public, it was submitted:

> These front-line officers and emergency workers cannot leave when a situation gets too dangerous or risky, because their jobs require them to protect and to save the lives of others. These workers are the first and last port of call, and for that reason we are making sure that the law recognises the importance of the contribution they make to society.[341]

During the debate of the Bill, questions were raised by the Labour member who had proposed the extension of the amendment to other workers about whether sentencing has much of a deterrent effect on offending.[342] The introduction of the proposed measure, however, was supported on other grounds including 'that, it sends a signal that the New Zealand Parliament supports the work, values the work, and recognises the work that these people do on all our behalf in New Zealand'.[343]

There are current examples in Queensland of circumstances set out in legislation that a court must treat as aggravating, but these do not currently extend to the fact the victim of the offence was a public officer. These aggravating factors include:

- in the case of domestic violence offences,[344] the fact that the offence is a domestic violence offence, unless the court considers this is not reasonable because of the

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337 Ibid.

338 Ibid.

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

340 Ibid.

341 Ibid.

342 Ibid (Charles Chauvel, Labour Member for Ohariu and Spokesperson, Justice). See also comments by the Labour Member for Christchurch East, Lianne Dalziel, who was also Associate Spokesperson, Justice, referred to with approval by the Julie Anne Gentner, a Member of the Greens Party.

343 Ibid (Jacqui Dean, National Member for Waitaki).

344 Defined in s 1 of the *Criminal Code* (Qld) to mean: 'an offence against an Act, other than the *Domestic and Family Violence Protection Act 2012* (Qld), committed by a person where the act done, or omission made, which

exceptional circumstances of the case (for example, the victim has previously committed an act of serious domestic violence, or several acts of domestic violence, against the offender);[345]

- in the case of manslaughter of a child under 12 years, the child's defencelessness and vulnerability, having regard to the child's age;[346]
- for an offender with one or more previous convictions, each previous conviction if the court considers it can reasonably be treated as aggravating having regard to: (a) the nature of the previous conviction and its relevance to the offence for which the person is being sentenced; and (b) the time that has passed since the conviction for the earlier offence.[347]

6.5 Mandatory minimum penalties, standard sentences and standard non-parole periods

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

As discussed in Chapter 4, mandatory sentences generally involve Parliament prescribing 'a minimum or fixed penalty for an offence'.[348] The Australian Law Reform Commission (ALRC) has identified, '[m]andatory sentencing can take various forms, the chief characteristic being that it either removes or severely restricts the exercise of judicial discretion in sentencing'.[349]

Presumptive sentences are slightly different in that they retain judicial discretion in sentencing, but generally by reference to specific criteria — 'which may be broadly or narrowly defined'.[350]

An example of a presumptive sentencing scheme is the standard non-parole period (SNPP) scheme which has been operating in NSW since February 2003. The SNPP in its current legislative form 'represents the non-parole period for an offence [as listed in the relevant Table to Division setting these out] that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness'.[351] The relevant legislation provides the SNPP for an offence is a matter to be taken into account by a court in determining the appropriate sentence for an offender, but without limiting the matters that are otherwise required or permitted to be taken into account in determining the appropriate sentence for an offender.[352] While the court must make a record of its reasons for setting a non-parole period that is longer or shorter than the non-parole period and each factor it took into account,[353] it is not required to identify the

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constitutes the offence is also—(a) domestic violence or associated domestic violence, under the *Domestic and Family Violence Protection Act 2012* (Qld), committed by the person; or (b) a contravention of the *Domestic and Family Violence Protection Act 2012* (Qld), section 177 (2)' (contravention of a domestic violence order).

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

346 Ibid s 9(9B).

347 Ibid s 9(10).

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

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

350 NSW Parliamentary Research Service, *Mandatory Sentencing Laws* (2014) 2 cited in Australian Law Reform Commission, *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, Final Report* (Report No. 133, 2017) 274 [8.5].

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

352 Ibid s 54B(2).

353 Ibid 54B(3). This also applies to aggregate sentences in which case, a court must first indicate and make a written record of the offences to which a SNPP applies and the non-parole period that it would have set for each offence

extent to which the seriousness of the offence for which the non-parole period is set differs from an offence to which the SNPP is referable.[354]

The current SNPP scheme in NSW operates consistently with the High Court's determination in *Muldrock v The Queen.*[355] In this case, the High Court considered the nature of SNPPs and found that the court is obliged to take into account the full range of factors in determining the appropriate sentence for the offence, with the SNPP, together with the maximum sentence, operating as 'legislative guideposts'.[356]

A Victorian form of this type of scheme, introduced in 2017 and which came into operation on 1 February 2018, operates as a 'standard sentence scheme' and prescribes standard sentences for 12 serious crimes being: murder, rape, culpable driving causing death, trafficking in a large commercial quantity of a drug of dependence, and eight sexual offences involving children.[357]

Similar to NSW, the standard sentence in Victoria represents 'the sentence for an offence that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness'[358] — calculated in the case of the Victorian scheme, other than for offences carrying a life sentence, at 40 per cent of the maximum penalty.[359] The Victorian legislation expressly states that it 'is not intended to affect the approach to sentencing known as instinctive synthesis'[360] and, as under the NSW scheme, that consideration of the standard sentence 'does not limit the matters that a court is otherwise required or permitted to take into account in determining the appropriate sentence for a standard sentence offence'.[361] A court must refer to the standard sentence as part of its reasons and 'explain how the sentence imposed by it relates to that standard sentence'.[362] The Victorian Court of Appeal has acknowledged that the Victorian provisions explicitly preserve the instinctive synthesis approach, and do not allow for 'two-stage sentencing'.[363] A court does not determine a starting point and then adjust it up and down with reference to the specific features of the case.[364]

The NSW and Victorian schemes do not apply to the sentencing of offenders under the age of 18 years at the time of the commission of the offence,[365] or to matters heard and determined summarily.[366]

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to which the aggregate sentence relates had it set a separate sentence of imprisonment for that offence, and then record the reasons why it would have set a non-parole period that is longer or shorter than the non-parole period for each offence to which a SNPP applies: ss 54B(4)–(5).

354 Ibid s 54B(6).

355 (2011) 244 CLR 120.

356 Ibid 132 [27].

357 Sentencing Advisory Council (Victoria), *Standard Sentences* (Web Page) <https://www.sentencingcouncil.vic.gov.au/about-sentencing/standard-sentences>.

358 *Sentencing Act 1991* (Vic) s 5A(1)(b).

359 Victoria, *Parliamentary Debates*, Legislative Assembly, 25 May 2017, 1509 (Martin Pakula, Attorney-General).

360 *Sentencing Act 1991* (Vic) s 5B(3)(b).

361 Ibid s 5B(3)(a).

362 Ibid s 5B(5).

363 *Brown v The Queen* [2019] VSCA 286, 15 [44].

364 Ibid 6 [17] citing *Markarian v The Queen* (2005) 228 CLR 357, 373–4 [37] (Gleeson CJ, Gummow, Hayne and Callinan JJ), itself quoting *Wong v The Queen* (2001) 207 CLR 584, 611 [75] (Gaudron, Gummow and Hayne JJ).

365 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D(3); *Sentencing Act 1991* (Vic) s 5B(1)(a)

366 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D(2); *Sentencing Act 1991* (Vic) s 5B(1)(b).

6.5.1 Mandatory minimum sentences and non-parole periods

The NT and WA have introduced mandatory minimum terms of imprisonment that apply to assaults on police and some other occupational categories in circumstances where the victim has suffered physical or bodily harm as a result of the assault. The mandatory minimum penalties that apply range from a minimum of 3 months' actual imprisonment (NT)[367] to 6 months' actual imprisonment (WA)[368] or 9 months if committed while armed or in company (WA).[369] A mandatory minimum 3 month sentence also applies to young offenders in WA who committed the offence when aged 16 or 17 years to be served by way of imprisonment or in youth detention.[370]

In WA, a mandatory minimum penalty of 12 months (or 3 months for young offenders) also applies to offenders convicted of grievous bodily harm (GBH) committed in 'prescribed circumstances' which includes where the victim of the offence is a police officer.[371]

In the NT, an 'exceptional circumstances' exemption applies to mandatory minimum sentences, which when met, requires the court to impose a term of actual imprisonment, but allows the court to order that part be suspended or served by way of home detention.[372] The relevant section providing for this exception states that the following do not constitute exceptional circumstances:

> (a) that the offender was voluntarily intoxicated by alcohol, drugs or a combination of alcohol and drugs at the time the offender committed the offence;
>
> (b) that another person:
>
> (i) was involved in the commission of the offence; or
>
> (ii) coerced the person to commit the offence.[373]

The mandatory minimum sentencing reforms in the NT as they apply to assaults on police (s 189A of the *Criminal Code* (NT)) were introduced by the *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013* (NT). Section 189A was subsequently amended, in 2019, to apply to other frontline emergency workers. As a result of these changes, the current mandatory minimum sentences which apply to assaults on police where the victim suffered physical harm now apply to assaults against other frontline workers workers.[374]

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

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

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

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

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

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

372 *Criminal Code* (NT) s 78DI (exceptional circumstances exemption). This requires a court to comply with s 78DG where the court is satisfied the circumstances of the case are exceptional.

373 Ibid s 78DI(4).

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

whether the victim was such a person.[375] 'Injury' is defined for this purpose to mean any physical injury, or harm to mental health, whether of a temporary or permanent nature.[376]

A youth justice centre order for a term not less than six months may be made if the person is 18 years or over, but under 21 in circumstances where the court has received a pre-sentence report and believes there are reasonable prospects for rehabilitation; or that the young person is particularly impressionable, immature or likely to be subjected to undesirable influences in an adult prison.[377]

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

- causing injury intentionally or recklessly in circumstances of gross violence[378] (not less than 5 years);
- causing serious injury recklessly under section 17 of the *Crimes Act 1958* (Vic) (not less than 2 years);
- causing serious injury intentionally under section 16 of the *Crimes Act 1958* (Vic) (not less than 3 years). [379]

As for the offence of causing injury intentionally or recklessly, there are special provisions that apply to young offenders (18 years or over, but under 21) which, in this instance, enable the court to make a youth justice centre order for the same minimum term as the minimum non-parole period that would have applied had a prison sentence been imposed.[380]

In the second reading speech introducing these reforms, the then Attorney-General, Robert Clark described the reforms as recognising 'the very special role played by Victoria's emergency workers, and the need to ensure they receive the full protection of the law when treating, caring for and protecting Victorians at times of emergency'.[381] Longer sentences were said to 'reflect the

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

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

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

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

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

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

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

opprobrium that the community attaches to acts of violence against emergency workers who put themselves on the line in emergency situations on behalf of the community' and to send 'a clear message to perpetrators of these acts that violence against emergency workers will not be tolerated and will be met with strong penalties'.[382]

In 2018, the offences of causing serious injury intentionally or recklessly, and causing injury intentionally or recklessly if the victim was an emergency worker on duty, a custodial officer on duty or a youth justice custodial worker on duty, and the offender knew or was reckless as to this, were categorised as 'category 1 offences' for the purposes of the *Sentencing Act 1991* (Vic). This means that in sentencing an offender for one of these offences committed in these circumstances, a court must make a custodial order (but excluding a sentence of imprisonment imposed with a community correction order).[383]

Importantly, the requirements under the Victorian sentencing provisions discussed above do not apply if a court makes a finding under section 10A of the *Sentencing Act 1991* (Vic) that a special reason exists. This legislative exemption has led some to question whether these provisions should be characterised as mandatory sentencing provisions.[384]

If a court makes a finding that a special reason exists justifying departure from the mandatory sentencing provisions, it must state in writing the special reasons and cause this to be entered in the records of the court.[385]

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

> (a) the offender has assisted or has given an undertaking to assist, after sentencing, law enforcement authorities in the investigation or prosecution of an offence; or
>
> (c) the offender proves on the balance of probabilities that—
>
> (i) … at the time of the commission of the offence, he or she had impaired mental functioning[386] [not caused solely by self-induced intoxication] that is causally linked to the commission of the offence and substantially reduces the offender's culpability;[387] or

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382 Ibid.

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

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

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

386 Defined in s 10A(1) of the *Sentencing Act 1991* (Vic) to mean: (a) a mental illness within the meaning of the *Mental Health Act 2014* (Vic); (b) an intellectual disability within the meaning of the *Disability Act 2006* (Vic); (c) an acquired brain injury; (d) an autism spectrum disorder'; or (e) a neurological impairment, including but not limited to dementia.

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

(ii) he or she has impaired mental functioning that would result in the offender being subject to substantially and materially greater than the ordinary burden or risks of imprisonment;[388] or

(d) the court proposes to make a Court Secure Treatment Order[389] or a residential treatment order[390] in respect of the offender; or

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

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

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

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

(c) not have regard to—

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

(ii) an early guilty plea; or

(iii) prospects of rehabilitation; or

(iv) parity with other sentences.[391]

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

- a sentence of imprisonment should ordinarily be imposed for the offences of causing serious injury recklessly and causing serious injury intentionally where committed against an emergency worker on duty, a custodial officer on duty or a youth justice custodial worker

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388 Ibid.

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

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

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

on duty, and that a non-parole period of not less than the length specified should ordinarily be fixed in respect of that sentence;[392] and

- a sentence of imprisonment should ordinarily be imposed for the offence of intentionally or recklessly causing injury committed against an emergency worker on duty, a custodial officer on duty or a youth justice custodial officer on duty.[393]

At the time of introducing the new mandatory minimum sentencing provisions, the Attorney-General indicated that the provisions for departure from the scheme avoids limiting protection from cruel, inhuman or degrading punishment, consistent with section 10 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), because where a court is satisfied a special reason exists, it has full sentencing discretion.[394] Later amendments in 2018 which narrowed 'special reasons' exceptions (reflecting their current form) were defended by the then Government on the basis these provisions remained compatible with human rights, targeting 'a narrow and well-defined class of victims' and providing a proportionate response to this form of offending.[395] However, they attracted strong criticism from stakeholders, including the Federation of Community Legal Centres and the Law Institute of Victoria in their joint submission to the Victorian Parliamentary Scrutiny of Acts and Regulations Committee. The same justifications were repeated regarding further proposed narrowing of 'special reasons' exceptions in 2020.[396]

The human rights implications of specific sentencing reforms which may be considered to current Queensland offence and sentencing frameworks are discussed in Chapter 9 of this paper.

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

- a custodial order (under pt 3, div 2 of the Act) which includes imprisonment, drug treatment orders, youth justice centre and youth residential centre orders; or
- a mandatory treatment and monitoring order[397] (whether or not a sentence of imprisonment is imposed under 44 in combination with a community correction order), a residential treatment order[398] or a Court Secure Treatment Order[399] if:

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

  (b) the court is satisfied [one of these orders] is appropriate.[400]

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

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

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

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

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

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

398 Residential treatment order (n 390).

399 Court Secure Treatment Order (n 389).

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

The presumption to impose custodial sentences in Victoria also applies to the offence of common assault in circumstances where the person assaulted is a police officer or protective services officer on duty and involves an offensive weapon, firearm or an imitation firearm if the assault consisted of, or included the direct application of force.[401] There are stated exceptions to this.[402]

The combined effect of these new provisions has been described by a judge of the County Court of Victoria in the recent appeal decision of *DPP v Haberfield*[403] in the following terms:

> Under these provisions, undoubtedly more people will be sent to prison for these offences, even people who would not be imprisoned in the absence of these laws. That is plainly the intention of Parliament.
>
> The message sent by Parliament could not be clearer. Do not assault emergency services workers. If you do, don't say you have not been warned. Prison will ordinarily be the outcome, whoever you are, whatever your character, whatever the reasons for you so acting, whatever damage may be caused to you in prison.[404]

DPP v Haberfield[405] was the first case applying this complex legislation. At first instance, a magistrate found that the offender had impaired mental functioning caused solely by drug use, yet erroneously found that on this factual basis, the legislation still permitted the imposition of a non-custodial penalty. The prosecution appealed to the County Court [District Court equivalent], which reheard the matter. The County Court would have had to imprison the offender if the same factual finding was made. However, the judge had a new medical report and evidence from an expert, who had the benefit of information about the offender between the first sentence and the appeal. This led to the judge finding, contrary to the magistrate, that there *was* an underlying, enduring mental illness, not just a drug induced psychosis — meaning that the impaired mental functioning was not, in fact, caused solely by drug use (although drugs did play a 'sizeable' role).[406] The offender had, (unknown to him) underlying, developing schizophrenia (triggered by drug use). This opened the door to a special reason finding which permitted consideration of one form of non-custodial penalty. The County Court judge, being careful to convey that the comments were not intended to criticise Parliament,[407] noted the complexity of the legislation:

> I had great difficulty myself following the legislative framework and ascertaining the consequences of finding the existence of a special reason. Those consequences are not described in section 10A which is the provision setting out the special reasons. Those consequences can only be discovered by going to the definition section of the Act (section 3) and then to a number of further provisions including s 5 ss (2G), s 5 ss (2GA), s 5 ss (2GB) and s 5 ss (2GC). It is a bit cumbersome.[408]

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

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

403 This case is further discussed in Chapter 9.

404 *DPP v Haberfield* [2019] VCC 2082, 36–37 [98]–[99] (Tinney J). This case is discussed further in Chapter 9, in the context of deterrence as a key sentencing purpose.

405 Ibid 2 [4] 2, 3 [5] 3, 6-7 [15] 6-7, 26 [72]-[3] 26, 28-9 [77] 28, 29 [79] (Tinney J).

406 Ibid 40 [112].

407 Ibid 7 [16].

408 Ibid 7 [15].

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

> A mandatory provision would say that if 'crime X' is committed, 'sentence Y' is the invariable, the only result. No ifs. No buts … That is not the position here at all and never has been. There are a very limited number of special reasons deliberately inserted into section 10A [and if one is] established by an offender on the balance of probabilities, then there is no requirement to impose a 6 month term at all, and in one particular setting contemplated by the legislation, there is no requirement to imprison at all.[409]

There is a Bill currently before the Victorian Parliament that will require courts to have regard to the fact that a sentence of at least the length of the statutory minimum sentence should ordinarily be imposed unless the cumulative impact of the circumstances of the case (including the special reason) justifies departure from that sentence.[410] It will also narrow the application of special reasons to exclude mental functioning caused 'substantially' rather than 'solely' by self-induced intoxication and direct courts where the 'burden of imprisonment' due to impaired mental functioning is high (a basis for finding 'special reasons' exist when sentencing for a category 2 offence under section 3(2H)(c)) courts must have regard to Parliament's intent as to the length of sentence that should ordinarily be imposed. This would possibly alter the outcome of a case like *Haberfield* in future: It 'will narrow the range of circumstances in which self-induced intoxication will be able to constitute special reasons for not imposing any applicable statutory minimum sentence'.[411]

The justification for the original form of the WA reforms, when introduced in 2009 under the *Criminal Code Amendment Act 2009* (WA), simply stated, was to implement an election commitment of the then Government. Its broader objective, as described by the then Attorney-General in introducing the Bill, was 'to take strong and decisive action to ensure that offenders are severely punished' and to 'clearly indicate to others who may contemplate such crimes that the law's response will be swift and firm', serving the purposes of general deterrence.[412]

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

> Mandatory sentencing is a tool of criminal law that should be used very cautiously. Only in situations in which there are problems of undeniably crucial public significance and in which other alternatives are or would be ineffective should mandatory sentences be contemplated. However, this government considers this legislation to be the only way to ensure that the sentencing in this area reflects the expectations of the Parliament and our community.[413]

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

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

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409 Ibid 5 [13].

410 Sentencing Amendment (Emergency Worker Harm) Bill 2020 (Vic) introduced into the Legislative Assembly on 3 March 2020.

411 Explanatory Notes, Sentencing Amendment (Emergency Worker Harm) Bill 2020 (Vic) 2, 4.

412 Western Australia, *Parliamentary Debates*, Legislative Assembly, 4 December 2008, 965 (C Porter, Attorney-General). Evaluations of this legislation are discussed in Chapter 9.

413 Ibid.

applies irrespective of whether the offence is punishable by imprisonment, or the maximum penalty is a term of imprisonment less than 6 months.[414]

There is a Bill currently before the Tasmanian Parliament introduced by the Liberal Government that, if passed, will introduce the same minimum penalty in circumstances where serious bodily harm has been caused to other frontline workers.[415] During the House of Assembly's debate of the Bill, the Shadow Attorney-General indicated that while the mandatory minimum sentence for serious bodily harm to a police officer had been in place since 2014, only one person had been charged under those mandatory provisions.[416]

6.5.2 Standard non-parole periods and standard sentences

While the Victorian standard sentence scheme applies only to the most serious of criminal offences, such as murder, rape and sexual offending against children, the NSW non-parole scheme extends, relevant to this review, to assault of a police officer occasioning bodily harm (3 year SNPP)[417] and wounding or inflicting GBH on a police officer (5 year SNPP).[418] Other offences to which it applies include sexual assault (7 year SNPP),[419] and aggravated sexual assault,[420] but the SNPP in these cases is not confined to offences committed on police.

6.6 Conclusion

The approach in other jurisdictions illustrates what reforms have been introduced elsewhere that might be considered for introduction in Queensland should the current approach in Queensland to the offences and sentencing framework for assaults of public officers be considered to be in need of reform.

It has also briefly considered the justification for some of these reforms, which is explored further in Chapter 9 of this paper.

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

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

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

417 Table to pt 4, div 1A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) to the Crimes Act 1900, item 5 referring to s 60(2) of the *Crimes Act 1900* (NSW).

418 Ibid item 6 referring to s 60(3) of the *Crimes Act 1900* (NSW).

419 Ibid item 7 referring to s 61I of the *Crimes Act 1900* (NSW).

420 Ibid item 8 referring to s 61J of the *Crimes Act 1900* (NSW).