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.

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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;
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> (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).

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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]

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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:

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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]

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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]

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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

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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]

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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:

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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:

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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

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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**.**

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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.

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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

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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

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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.

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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.

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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

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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

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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.

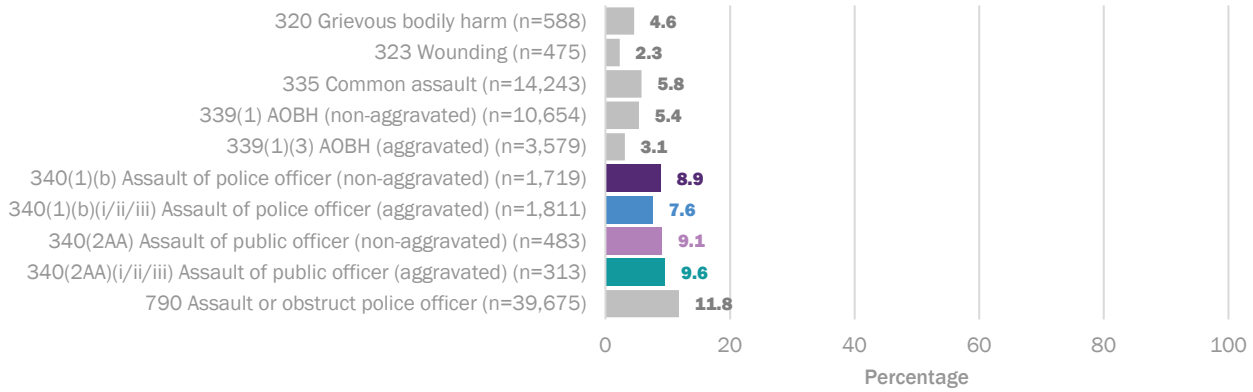
Intoxication in a public place as a circumstance of aggravation (PSA, s 108B)

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

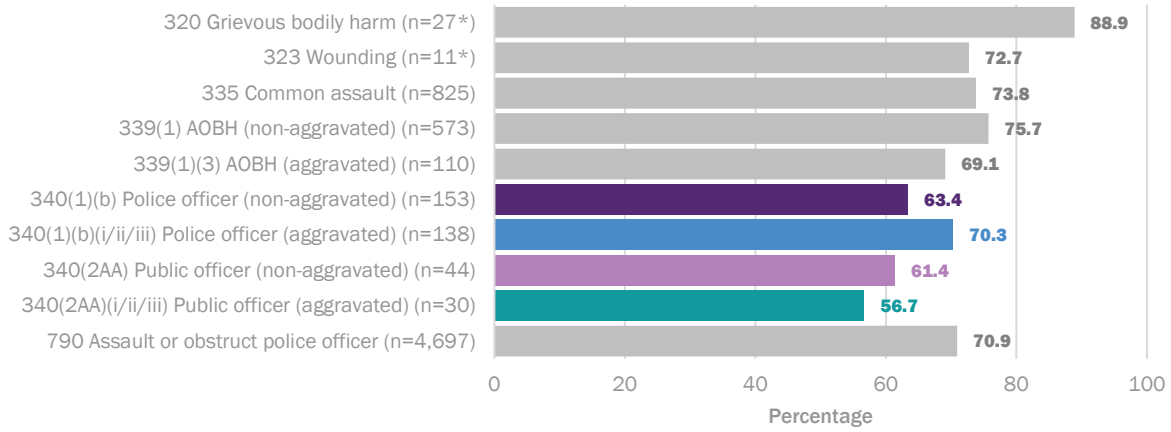


Data include adult offenders, lower and higher courts, offences on or after 1 December 2014, sentenced 2014–15 to 2018–19.
Source: QGSO, Queensland Treasury — Courts Database, extracted November 2019.
Note: All numbered references are to sections of the *Criminal Code*, with the exception of '790' which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

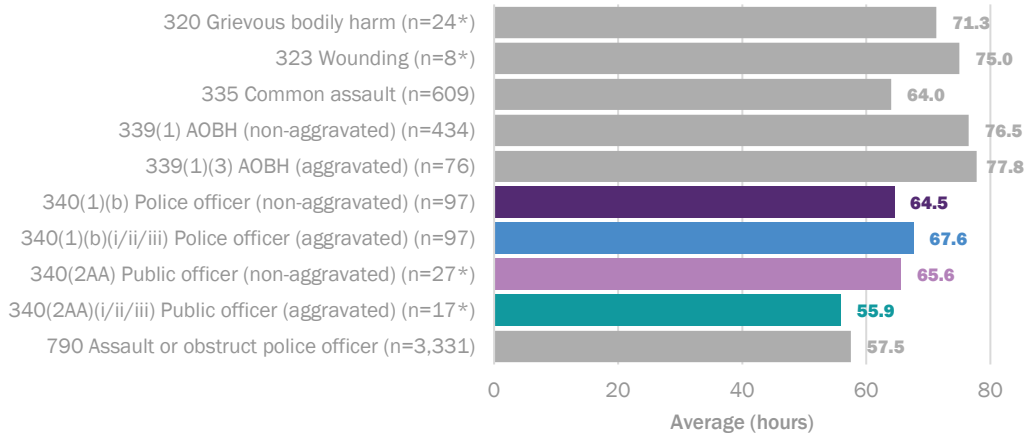
Figure 10-2: Proportion of sentenced offences with section 108B PSA intoxication circumstance of aggravation charged that received a community service order



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]

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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]

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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

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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

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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

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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

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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.

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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

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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

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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]

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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.

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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,

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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]

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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.

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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]

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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]

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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:-

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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

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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]

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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]

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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]

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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.