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Office of the President

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Our ref: CrL-KS

John Robertson
Chair
Queensland Sentencing Advisory Council
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By email: submissions@sentencingcouncil.qld.gov.au

Dear Judge Robertson,

Penalties for assaults on public officers review

Thank you for the opportunity to provide feedback on the Penalties for assaults on public officers review. The Queensland Law Society (**QLS/the Society**) appreciates being consulted on these issues. QLS also appreciated the opportunity to meet with Queensland Sentencing Advisory Council (**QSAC**) representatives on 16 June 2020 to discuss these matters on a preliminary basis.

The following responses to the questions contained in the issues paper have been compiled by the QLS Criminal Law Committee, whose members have substantial expertise in this area.

1. **Should an assault on a person while at work be treated by the law as more serious, less serious, or as equally serious as if the same act is committed against someone who is not at work, and why?**

   AND

2. **If an assault is committed on a public officer performing a public duty, should this be treated as more serious, less serious, or as equally serious as if the same act is committed on a person employed in a private capacity (e.g. as a private security officer, or taxi driver) and why?**

As discussed below, QLS does not support special offences for assault based only on the occupational status of the victim. That a person is working at the time of the assault does not necessarily make the assault more serious than if the victim was not at work. Some of the absurdities that can arise from such an approach are addressed in this submission. For the purpose of sentencing, all circumstances should, and are, taken into account by the judge or magistrate.

The law is already applied in a manner that takes into account different 'categories' of victim and the specific vulnerabilities of the victim. In our view, determining the severity of an offence by a strict delineation of 'public officer performing a public duty' would be unhelpful and potentially problematic. For example, the COVID-19 pandemic has altered the perception of what roles may constitute 'frontline' roles during a health crisis. Further, as discussed in more detail in response to question 6 below, identifying special categories of victims necessarily excludes other categories and there is the potential that continual amendment of legislation will be called for to include additional categories in response to particular cases or outcomes.

In our submission, variations in sentencing based on the occupational attributes of the victim are better left to judicial discretion than provided for under the legislative framework.

3. Should the law treat assaults on particular categories of public officers as being more serious than other categories of public officer, and why?

The Criminal Code (the Code) currently includes:

> *340 Serious assaults*
>
> *(1) Any person who—*
>
> *(a) assaults another with intent to commit a crime, or with intent to resist or prevent the lawful arrest or detention of himself or herself or of any other person; or*
>
> *(b) assaults, resists, or wilfully obstructs, a police officer while acting in the execution of the officer's duty, or any person acting in aid of a police officer while so acting; or*
>
> *(c) unlawfully assaults any person while the person is performing a duty imposed on the person by law; or*
>
> *(d) assaults any person because the person has performed a duty imposed on the person by law*
>
> *…is guilty of a crime.*
>
> and
>
> *(2AA) A person who—*
>
> *(a) unlawfully assaults, or resists or wilfully obstructs, a public officer while the officer is performing a function of the officer's office; or*
>
> *(b) assaults a public officer because the officer has performed a function of the officer's office;*
>
> *commits a crime*

The maximum penalties are 7 and 14 years imprisonment respectively for the simpliciter offence and aggravated offence. The maximum penalty for common assault pursuant to section 335 of the Code is three years imprisonment. The maximum penalty for assault occasioning bodily harm pursuant to section 339 of the Code is 7 years imprisonment and 10 years imprisonment for an aggravated offence.

The inclusion of section 340(2AA) already recognises the seriousness of assaulting a public officer by providing for the maximum penalties as outlined. Magistrates and judges may and do take into account, in the circumstances of an offence, the particular role of a public officer in formulating an appropriate penalty. Our members report cases where defendants who have assaulted 'frontline' public officers such as child safety officers have received slightly higher penalties than if the assault was committed on non-frontline public officers.

This difference in penalty falls under the discretion afforded to a sentencing court, taking into account the facts of a particular case. QLS does not consider that the law needs to be amended in such a way that different penalties are made available for different public officers. The ability to appropriately account for a victim's circumstances or specific vulnerability already exists within a court's sentencing discretion, which is the most efficient and effective way for the issue to be dealt with.

4. **Does the current sentencing process in Queensland adequately meet the needs of public officer victims?**

AND

5. **Should any changes be considered to the current approach to better respond to victim needs? If so, what reforms should be considered?**

QLS does not consider that wholesale change is needed from the point of view of victims' needs. However, a process that may be considered is a pre-sentence conference between the victim and defendant, though the availability and utility of such a conference will depend on the victim's willingness to participate and the defendant's remorse. Where adopted, the process could be therapeutic for both the victim and the defendant, allowing the victim to confront the defendant and the defendant to express their remorse.

In terms of victim's needs regarding sentence, presumably the primary needs of victims are safety from the offender and deterrence of the offender and others from committing offences against public officers in the future.

QLS considers that the current sentencing process adequately meets the victim's needs given that the maximum penalty can be up to 14 years imprisonment where the defendant has spat on, bitten or caused bodily harm etc. to the public officer or police officer.

Upon considering the cases, our committee members observe that the courts have been far from lenient when sentencing offenders for this offence. Most cases have led to the offender receiving a term of imprisonment. Anecdotally, it appears most offenders receive an actual period of imprisonment for serious assaults with circumstances of aggravation, particularly in cases where the offender has spat upon or bitten the public officer. Even when the offender is a youth or has mental health issues at the time of the offence, most offenders are sentenced to a period of imprisonment, though generally suspended or with immediate parole.

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

transport drivers (e.g. bus drivers and train drivers) and public transport workers?

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

Judges are capable of taking into account both the special vulnerability of a victim of assault, and also any important public role the victim was performing at the time of the assault. In the experience of the Society's members, these factors are always given prominence in the sentencing process. No statutory directive is required to direct a judge's attention to what are obviously important features of the case.

A trend has emerged in the more recent legislation about sentencing of directing judges' attention to specific features of the case. The statutes mandate that certain factors must be treated as aggravating factors.[1] Offences against particular categories of victim are sometimes classified as attracting a higher maximum penalty.[2]

In practice, such statutory directions tell the courts to do what the courts have always done, and would probably do regardless. 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. A demonstration, if one is needed, can be found in the submissions on behalf of several occupations cited in section 9.2.3 of the Issues Paper.[3] If the police officer is included, why not a licensed security guard? If the ambulance officer is included, why not a member of public rendering first aid? If the bus driver is included, why not the Uber driver? Why not the service station cashier working alone through the quietest hours? Why not the duty lawyer alone in a room with a defendant?

On this point about scope, the submission of Sisters Inside, cited in the Issues Paper, is compelling.[4] The example given is that of an offender who spits on the driver of a council bus. Her liability is to a maximum sentence of 14 years. Had she instead spat upon the driver of a courtesy bus from a local club, the maximum sentence would be 3 years. Such extreme differences in the importance placed by the law upon the health of different categories of people cannot be justified.

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. Not every assault of a police officer is more serious than

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[1] For example, since 5 May 2016 section 9(10A) of the *Penalties and Sentences Act 1992* has provided that domestic violence is an aggravating factor. Since 7 May 2019, section 9(9B) has provided that the defencelessness and vulnerability of a child under 12 is an aggravating factor in a sentence for manslaughter.

[2] For example, in 2005 the scope of section 340 was expressly extended to Corrective Services Officers.

[3] Issues Paper, section 9.2.3, page 152

[4] Issues Paper, section 7.4, page 126, and footnotes 476 & 477

every assault of a member of the public. The label "serious assault" is confusing, particularly to a potential employer considering the results of a criminal history check. These difficult questions of gradation of harm are more appropriately and most efficiently suited to determination through the careful exercise of informed judicial discretion, weighing all the facts and circumstances of the particular case.

Deterrence is the main rationale used in support of classifying harm to some victims as more serious than harm to others. QLS recognises the important role of deterrence in the criminal justice system. In particular, a high likelihood of detection and accountability is essential to effective deterrence. That said, it is readily apparent to our members with long experience in the criminal justice system that increasing maximum sentences to effect deterrence in this area is a policy tool that delivers ever diminishing returns.

Why that is so is not difficult to understand. Intent is not an element of the offence of assault. Assaults on public officers are almost never pre-meditated. Characteristically, they occur in the heat of the moment. Very often, the offender is disinhibited by alcohol or other intoxicants. Frequently, the judgement of the offender is impaired by the effects of mental illness. For all these reasons, the typical offender gives no thought to the potential consequences to themselves. The idea, therefore, that offenders acting in the spur of the moment and who are not deterred by a maximum penalty of 3 years will somehow be deterred by a potential maximum of 14 years is fanciful.

QLS advocates for the repeal of offence provisions which classify harm to victims engaged in some occupations as more serious than harm to other victims. The Society strongly recommends that the assessment of the seriousness of an assault, and the weight to be given to the victim's occupation, be matters left to the informed consideration of judges and magistrates.

Having said that, section 340 presently classifies offending against specified victims, and sometimes causing specified harms to specified victims, as requiring special treatment. One such classification is "public officer". The Code includes two definitions of that term.

The general definition in section 1 provides as follows:

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

The definition for the specific purposes of section 340 provides:

> ***public officer*** includes—
>
> (a) a member, officer or employee of a service established for a public purpose under an Act; and
>
> Example of a service—Queensland Ambulance Service established under the *Ambulance Service Act 1991*
>
> (b) a health service employee under the *Hospital and Health Boards Act 2011*; and
>
> (c) an authorised officer under the *Child Protection Act 1999*; and
>
> (d) a transit officer under the *Transport Operations (Passenger Transport) Act 1994*.

A significant feature of the general definition in section 1 is the use of the word "means", whereas the definition for section 340 uses the word "includes". It seems likely that a court would construe the general definition as applying to section 340, and the definition in section 340 as expanding the scope of the general definition.[5] *Carter's Criminal Law of Queensland* contains no commentary on the interaction of the two definitions, and our research has not identified any case in which this aspect of the scope of "public officer" has been considered by a court.

It is not clear whether there are people who, in practice, fall within the definition in section 340 but not within the definition in section 1. A detailed familiarity with the four Acts listed in section 340 would be required to answer that question. For the purposes of this submission we proceed on the assumption that section 340 may extend the scope of "public officer" beyond that of the general definition.

The use of two definitions creates needless uncertainty about the roles and people who may or may not be victims of an offence for the purposes of section 340.

The provision directed towards offending against public officers, subsection (2AA), could have been better included as a paragraph under subsection (1), expressed as something such as:

> *unlawfully assaults, or wilfully obstructs, a public officer while the officer is performing a function of the officer's office or because the officer has performed a function of the officer's office.*

The maximum penalty provision under subsection (1) could then simply have application to this new subsection as well.

In summary, the Society's answer to question 6(a) in the Issues Paper is that the role and vulnerability of the victim are matters best left to the discretion of the sentencing judge or magistrate. If special classification of offending against public officers is to be retained, some amendment of the definition of that term is desirable for the sake of certainty. QLS takes no position on where the line of inclusion and exclusion should be drawn between categories of victim. It is essentially a political exercise.

In answer to the second part of question 6 in the Issues Paper, 6(b), it would seem logical to extend the scope of "public officer" to include officers from another state when they are performing their function in Queensland. It is unnecessary to include Commonwealth officers as Commonwealth legislation applies to them.

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[5] Issues Paper at page 146

The alternative offence regimes contemplated by the issues paper are valid means of restructuring the offences applicable here. The suggested amendments would be an improvement from the current state of the law. The Society's preference would be for any special categories of victims to be listed as aggravating factors in section 9 of the *Penalties and Sentences Act 1992*. Averments in the wording of the offence, for example, "and the offence was committed against a police officer in the execution of their duty", would mark a relevant circumstance of the offence on the offender's criminal history, in much the same way as a "domestic violence offence" is presently entered or recorded.[6]

If section 340 is retained, what is particularly desirable is an increase in the threshold for the section 340 offence to one requiring at least 'bodily harm'. Otherwise, as Sisters Inside and others have observed, there is little if any practical delineation between this offence and the *Police Powers and Responsibilities Act* (**PPRA**) counterpart. Similarly, resisting and obstructing should be removed from section 340, and charged under the *PPRA* or section 199 of the Code.

7. **Should assaults on people employed in other occupations in a private capacity, working in particular environments (e.g. hospitals, schools or aged care facilities) or providing specific types of services (e.g. health care providers or teachers) also be recognised as aggravated forms of assault? For example:**
    a. **by recognising a separate category of victim under section 340 of the Criminal Code – either with, or without, providing for additional aggravating circumstances (e.g. spitting, biting, throwing bodily fluids, causing bodily harm, being armed) carrying a higher maximum penalty;**
    b. **by stating this as a circumstance of aggravation for sentencing purposes under section 9 of the Penalties and Sentences Act 1992 (Qld);**
    c. **other?**

Our answer to this question is formulated in the context the Society's views about statutes classifying harm to some categories of victim as more serious than harm to others based on their occupation or, in fact, who they are employed by. These views are set out at length in our answer to question 6(a) above.

> *Judges are capable of taking into account both the special vulnerability of a victim of assault, and also any important public role the victim was performing at the time of the assault. In the experience of the Society's members, these factors are always given prominence in the sentencing process. No statutory directive is required to direct a judge's attention to what are obviously important features of the case.*
>
> *A trend has emerged in the more recent legislation about sentencing of directing judges' attention to specific features of the case. The statutes mandate that certain factors must be treated as aggravating factors.[7] Offences against particular categories of victim are sometimes classified as attracting a higher maximum penalty.[8]*

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[6] Section 12A of the *Penalties and Sentences Act 1992*

[7] For example, since 5 May 2016 section 9(10A) of the *Penalties and Sentences Act 1992* has provided that domestic violence is an aggravating factor. Since 7 May 2019, section 9(9B) has provided that the defencelessness and vulnerability of a child under 12 is an aggravating factor in a sentence for manslaughter.

[8] For example, in 2005 the scope of section 340 was expressly extended to Corrective Services Officers.

In practice, such statutory directions tell the courts to do what the courts have always done, and would probably do regardless. 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. A demonstration, if one is needed, can be found in the submissions on behalf of several occupations cited in section 9.2.3 of the Issues Paper.[9] If the police officer is included, why not a licensed security guard? If the ambulance officer is included, why not a member of public rendering first aid? If the bus driver is included, why not the Uber driver? Why not the service station cashier working alone through the quietest hours? Why not the duty lawyer alone in a room with a defendant?

On this point about scope, the submission of Sisters Inside, cited in the Issues Paper, is compelling.[10] The example given is that of an offender who spits on the driver of a council bus. Her liability is to a maximum sentence of 14 years. Had she instead spat upon the driver of a courtesy bus from a local club, the maximum sentence would be 3 years. Such extreme differences in the importance placed by the law upon the health of different categories of people cannot be justified.

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. Not every assault of a police officer is more serious than every assault of a member of the public. The label "serious assault" is confusing, particularly to a potential employer considering the results of a criminal history check. These difficult questions of gradation of harm are more appropriately and most efficiently suited to determination through the careful exercise of informed judicial discretion, weighing all the facts and circumstances of the particular case.

Deterrence is the main rationale used in support of classifying harm to some victims as more serious than harm to others. QLS recognises the important role of deterrence in the criminal justice system. In particular, a high likelihood of detection and accountability is essential to effective deterrence. That said, it is readily apparent to our members with long experience in the criminal justice system that increasing maximum sentences to effect deterrence in this area is a policy tool that delivers ever diminishing returns.

Why that is so is not difficult to understand. Intent is not an element of the offence of assault. Assaults on public officers are almost never pre-meditated. Characteristically, they occur in the heat of the moment. Very often, the offender is disinhibited by alcohol or other intoxicants. Frequently, the judgement of the offender is impaired by the effects of mental illness. For all these reasons, the typical offender gives no thought to the potential consequences to themselves. The idea, therefore, that offenders acting in

[9] Issues Paper, section 9.2.3, page 152
[10] Issues Paper, section 7.4, page 126, and footnotes 476 & 477

> *the spur of the moment and who are not deterred by a maximum penalty of 3 years will somehow be deterred by a potential maximum of 14 years is fanciful.*
>
> *QLS advocates for the repeal of offence provisions which classify harm to victims engaged in some occupations as more serious than harm to other victims. The Society strongly recommends that the assessment of the seriousness of an assault, and the weight to be given to the victim's occupation, be matters left to the informed consideration of judges and magistrates.*

To illustrate the point as a specific response to question 7, an assault by spitting on a nurse in a public hospital is deemed to be a "serious assault" punishable by up to 14 years in prison. The same attack on a nurse in a private clinic would be charged as a "common assault" with a maximum penalty of 3 years. QLS considers the absurdity of the differing treatment self-evidence and unjustifiable.

At first thought, the solution might seem to be to include all nurses, and all people employed in a healthcare facility. Absurd results would still follow. Why should an assault on the chiropractor's receptionist be more serious than on the financial advisor's? Is the receptionist at the Crown Law office in a materially different position to the receptionist at a private law firm instructed to act for the State of Queensland? Should harm to a lawyer acting against the State be regarded as less serious than harm to a lawyer employed by the State? Are public servants in any materially different position to any other person whose position of employment requires them to offer assistance to the offender?

Accordingly, the Society's answer to question 7, as has been stated, is simply that the role and vulnerability of the victim are matters best left to the discretion of the sentencing judge or magistrate. No new categories of occupation based special victims ought to be enacted. The existing categories would be best repealed.

If special categories of victim based on occupation/employment status are to be retained, the Society's preference is for recognition of those categories to be included as aggravating factors in section 9 of the *Penalties and Sentences Act 1992*. The Society takes no position on where the line of inclusion and exclusion should be drawn between categories of victim. As we have stated this is essentially a political exercise.

QLS takes 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, the uncertainty whether disease has been transmitted, and the inherently disgusting nature of the conduct, are all matters which a judge or magistrate will take into account in fashioning an appropriate sentence. The maximum penalties available are sufficient for the courts to deal appropriately with such offenders: 3 years for common assault,[15] 7 years for doing bodily harm,[16] 14 years for doing grievous bodily harm,[17] and imprisonment for life for transmitting a serious disease with intent to transmit a serious disease.[18]

Consistent with the Society's already stated position, if it is decided that some specific provision should be retained for assaults by spitting or with bodily fluids, then it would be reasonable to extend its operation to all people assaulted in that way, not only "public officers".

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[15] Section 335 *Criminal Code 1899*
[16] Section 339 *Criminal Code 1899*
[17] Section 320 *Criminal Code 1899*
[18] Section 317 *Criminal Code 1899*.

8. **If section 340 of the Criminal Code is retained in its current form or amended form, is there a need to retain subsection (2) which applies to assaults by prisoners on working corrective services officers (as defined for the purposes of that section), or can this type of conduct be captured sufficiently within subsection (2AA)? What are the benefits of retaining subsection (2)?**

In its current form, section 340 (1)(a) of the Code provides that an offender may be punished by 7 years imprisonment unless the following circumstances apply (where a penalty of 14 years imprisonment may be imposed):

(a) the offender spits, throws or in any way applies a bodily fluid or faeces to a *police officer*
(b) causes bodily harm to a *police officer*; or
(c) is armed, or pretends to be armed with a dangerous or offensive weapon or instrument.

Subsection (2) currently provides that a prisoner who unlawfully assaults a working corrective services officer is guilty of a crime and is liable to imprisonment for 7 years.

Subsection (2AA) provides for penalties mirroring those in section 340(1)(a) albeit for unlawful assaults upon public officers rather than police officers.

Subsection (2) need not be retained as the conduct of unlawfully assaulting a working corrective services officer is sufficiently captured within subsection (2AA). The retention of subsection (2) is therefore unnecessary.

9. **Should assaults against public officers continue to be captured within a specific substantive offence provision (serious assault) or, alternatively, should consideration be given to:**
   a. **making the fact the victim was a public officer performing a function of their office, or the offence was committed against the person because the person was performing a function of their office an aggravating factor that applies to specific offences as a statutory circumstance of aggravation (meaning a higher maximum penalty would apply); and/or**
   b. **amending section 9 of the Penalties and Sentences Act 1992 (Qld) to statutorily recognise the fact the victim was a public officer an aggravating factor for sentencing purposes (in which case it would signal the more serious nature of the offence, but would not impact the upper limit of the sentence that could be imposed)?**

As mentioned in our responses to questions 6 and 7, the better approach would be to amend section 9 of the *Penalties and Sentences Act* to statutorily recognise the aggravating feature of the victim being a public officer. This approach preserves judicial discretion and will minimise the prospect of perverse outcomes stemming from the combination of a broad definition of "public officer" and higher maximum penalty.

10. **What benefits are there in retaining multiple offences that can be charged targeting the same or similar behaviour (e.g. sections 199 and 340 of the Criminal Code as well as sections 655A and 790 of the Police Powers and Responsibilities Act 2000 (Qld), sections 124(b) and 127 of the Corrective Services Act 2006 (Qld), and other summary offences)?**

As a general principle, QLS is of the view that a restrictive approach to substantive criminal provisions is preferable. The prospect of multiple offences in respect of similar conduct can cause confusion and lead to overcharging.

It is arguable that the section 340 offence is artificial, in that its purpose derives from the status of the victim rather than the outcome of the assault. This can cause peculiar outcomes: a person may well receive a higher sentence for touching a public officer without consent where no injury is caused than if an ordinary citizen is more seriously harmed.

That said, if section 340 is to be retained, there is benefit in having different levels of offence to reflect the very broad range of circumstances the offences cover and the fact that the vast majority of cases involve minor assaults finalised at the Magistrates Court level.

11. Should any reforms to existing offence provisions that apply to public officer victims be considered and if so, on what basis?

As stated in our response to earlier questions, QLS is of the view that separate offence provisions for different types of assault victims based on occupation is not appropriate and is apt to deliver peculiar results. QLS is not in favour of the creation of any additional offences related to public officer victims. The current position is sufficient to deal with the issue if the legislature is minded to continue with assaults against public officers being categories in a different way to other assaults. This is so having regard to the recent amendments as a response to covid-19.

If section 340 is to be retained, however, it ought to be amended as set out in our responses to questions 6, 8 and 10 above and 14(a) below.

In terms of any potential reform on the election for a jury trial for serious assault (currently governed by section 552A of the Code), QLS submits that 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.

This position preserves 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.

12. What sentencing purpose/s are most important in sentencing people who commit assaults against police and other frontline emergency service workers, corrective services officers and other public officers? Does this vary by the type of officer or context in which the assault occurs, and in what way?

As stated in our response to question 6 above, QLS understands that deterrence is the main rationale used in support of classifying harm to some victims as more serious than harm to others. QLS recognises the important role of deterrence in the criminal justice system. In particular, a high likelihood of detection and accountability is essential to effective deterrence. As stated earlier, the Society has concerns that increasing maximum sentences to effect

deterrence is a policy tool that delivers ever diminishing returns. The factors that influence this have been set out earlier and include the absence of pre-mediated intent in these offences.

The Society's preferred position is as stated earlier: offence provisions which classify harm to some victims as more serious than harm to others ought to be repealed because the assessment of the seriousness of an assault, and the weight to be given to the victim's occupation, should be left to be determined by judges and magistrates.

13. Does your answer to Question 12 change when applied specifically to children/young offenders?

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.

14. Do existing offences, penalties and sentencing practices in Queensland provide an adequate and appropriate response to assaults against police and other frontline emergency service workers, corrective services officers and other public officers?

As a preliminary observation, we note that the fundamental objective of considering assaults on public officers is to reduce the incidence of such assaults. As noted in the Griffith Criminology Institute's literature review, prevention strategies may be a more effective means of reducing the incidence of assaults against public officers than increasing penalties for relevant offences.

In particular:

a. Is the current form of section 340 of the Criminal Code as it applies to public officers supported, or should changes be made to the structure of this section?

As set out in question 6 above, the definition of 'public officer' in section 340 is inclusive and, given its interplay with the definition of public officer in section 1 of the Code, this seems to needlessly create uncertainty about the roles and persons who may or may not be caught by the section.

An exhaustive definition in the section itself would be preferable, and one which either states the particular functions a person must be performing to be a 'public officer' or ideally lists the Acts which a person must be employed under to avoid any ambiguity. The following, at subsection (3)(a), is particularly unhelpful "*a member, officer or employee of a service established for a public purpose under an Act*".

Further, subsection (2AA) could be included as a single point under subsection (1) expressed as something such as:

> *unlawfully assaults, or wilfully obstructs, a public officer while the officer is performing a function of the officer's office or because the officer has performed a function of the officer's office.*

The maximum penalty provision under subsection (1) could then simply have application to this new subsection as well as for (1)(b) as it presently does.

The alternative offence regimes contemplated by the issues paper are valid means of restructuring the offences applicable here. What is particularly desirable is the increase in threshold for the section 340 offence to one requiring at least 'bodily harm', otherwise as Sister's Inside has observed there is little if any practical delineation between this offence and the *Police Powers and Responsibilities Act* counterpart.

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

Whilst the Human Rights Commission observes fairly in its submission referred to in the Issues Paper that for there to be justification (in the sense of evidence of risk) for aggravated offences and penalties for offences against any particular class of victim, an alternative approach is to accept that offending of a similar kind against any person should be treated the same way, to do otherwise indicates a greater value being placed on certain people or their roles.

Perhaps the more balanced approach would be, as referred to by the QHRC, that in order to justify special provisions, evidence should be not only of additional risk but also demonstrate that differences in penalties can achieve the change in behaviour sought towards frontline workers. Absent such evidence, it is difficult to see the justification for a differential offence or sentencing regime to be sustained.

b. Are the current maximum penalties for serious assault (7 years, or 14 years with aggravating circumstances) appropriate in the context of penalties that apply to other assault-based offences such as:
- **common assault (3 years);**
- **assault occasioning bodily harm (7 years, or 10 years with aggravating circumstances);**
- **wounding (7 years);**
- **grievous bodily harm (14 years)?**

In the Society's view the maximum penalties are appropriate for the most serious type of conduct that may be encompassed by the offence, noting however that there are other offence provisions that could respond to conduct of that severity.

The sentencing outcomes as detailed in the Issues Paper identify that the sentencing trends presently place a non-aggravated serious assault charge on a similar level to assault occasioning bodily harm offences. Just over 50% of both received custodial terms, compared to just over 20% for common assault offences.

Whilst the duration of the terms of imprisonment involved was on average somewhat higher for assault occasioning bodily harm offences, that is understandable in view of the breadth of conduct they encompass.

In effect, this means that by virtue of the status of the victim a more serious penalty is generally being imposed that makes the offence akin to a more serious assault (one where bodily harm was sustained).

When aggravated serious assaults (with a maximum penalty of 14 years) are compared with the alternative offences only able to be dealt with on indictment, a larger gap in outcomes does arise. Whilst similar high proportions of both types of offences resulted in terms of imprisonment, the duration of imprisonment on average was markedly higher for grievous bodily harm (average of 3 years), and there was a wider range for torture (average around 5 years), with aggravated serious assaults as high as 5 years but averaging under one.

The point that arises from this is that the likelihood of a custodial sentence for a serious assault offence is generally high, particularly so in cases where if charged as a corresponding serious offence (grievous bodily harm, torture, wounding) it would also likely arise in a term of imprisonment. Whilst there is a difference in the duration of imprisonment imposed on average, that likely reflects the broad range of conduct encompassed by those offences.

For instance, an aggravated serious assault can be as 'minor' as a person pretending to be armed with a knife before being arrested by a police officer, where no physical harm is caused to the victim. The threshold however for a grievous bodily harm offence for instance is markedly higher, in that for the offence to be made out a particular degree of harm to the victim is required.

c. 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?

The above summary of the penalties in practice being imposed demonstrates that in the vast majority of cases the Magistrates Court would have adequate jurisdiction to appropriately sentence offenders for offences under section 340 – so on the current sentencing regime there is no need to exclude from the Magistrates Court charges of aggravated serious assault.

Further, section 552D enables a magistrate to determine (of their own volition or on application by a party) that they are unable to appropriately deal with a matter due to the scope of sentences likely to apply exceeding their jurisdiction. In other words, there is an appropriate check and balance in that process, which will remain even where the election is given to the defendant as proposed in our response to question 11 above.

d. Are the 2012 and 2014 reforms to section 340 (introduction of aggravating circumstances which carry a higher 14 year maximum penalty) achieving their objectives?

Criticisms were made of these increases in penalty when they were introduced, as noted in the Issues Paper (chapter 3, page 29) including as to:

- The adequacy of the then 7 year maximum penalty;

- The incongruity of a 14 year maximum penalty for offences not requiring any actual harm with offences such as grievous bodily harm and the much greater conduct necessarily involved;
- The principal that all lives, regardless of occupation, should be treated equally under the law; and
- The frequently observed seriously disadvantaged circumstances of many offenders who commit section 340 offences – meaning such persons were less likely to be cognisant of any increase in penalty making its reported deterrent effect less likely to be effective.

Given the sentencing trends observed since these increases, the observations about the adequacy of the prior maximum of 7 years seem to have been accurate. It would appear that the courts have recognised also the accuracy of the second observation about the maximum penalty applying being incongruous in its comparison to objectively more serious (in terms of impacts on victims) offences such as grievous bodily harm – in that the sentences imposed for those more serious offences remain lengthier on average.

The data provided in the Issues Paper appears to demonstrate that there has not been a significant change in the rate of offences of this kind against any of the categories of victim groups as observed. Whilst the number of cases sentenced has increased, when analysed as a rate of offences per number of frontline workers this is much less significant.

In summary, given the rates of offences of this kind have not decreased since the 2012 and 2014 reforms, it seems those reforms have not achieved their assumed objective, of effecting a decrease in offending of this kind. Again, the Literature Review's observation about the likely more effective measures such as prevention strategies seems a helpful consideration in reference to this question.

e. Are the current penalties that apply to summary offences that can be charged in circumstances where a public officer has been assaulted appropriate or should any changes be considered?

The Director of Public Prosecution's guidelines sets out at point 13 the principle that where the same conduct could be charged as a summary or indictable offence the summary offence should be preferred unless the conduct could only be adequately punished if charged as the indictable offence or if there is some particular connection between the incident offence and another matter necessarily proceeding on indictment.

In our view, this regime reflects that it will only be in appropriate cases that such a matter would proceed on the basis of a relevant summary offence, that is where the criminality involved is such that in the view of the Director the person could be adequately punished in the Magistrates Court by a penalty not exceeding 3 years imprisonment.

Whilst it might be desirable that such a decision is not solely vested in the Director or that of Police Prosecutions, in answer to the question asked, the penalties that apply for such matters when charged summarily are appropriate generally and provide adequate scope for sentencing in such cases.

In terms of changes that could be considered, we note the Society's long standing position against mandatory sentencing. This remains our position with respect to any proposal that may be considered here with respect to reform of these offences. Mandatory sentencing will

inevitably disproportionately impact disadvantaged persons (noting the Issues Paper's data regarding the demographics of those charged with these offences and the high proportion, relative to their proportion of the community generally, of Indigenous People convicted of these offences) and will likely lead to higher rates of not guilty pleas to these offences as offenders are more likely to dispute such matters where there is less discretion vested in the court to account for the circumstances of the offending in question and matters in mitigation.

The mandatory community service orders which apply to certain offences under section 340 – those against police and public officers when they are committed in a public place whilst the person is affected by an intoxicating substance – are problematic in this regard for various reasons.

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.

f. Do the current range of sentencing options (e.g. imprisonment, suspended sentences, intensive correction orders, community service orders, probation, fines, good behaviour bonds) provide an appropriate response to offenders who commit assaults against public officers, or should any alternative forms of orders be considered?

In the Society's submission, yes – there is a wide range of sentencing options available, allowing sufficient judicial discretion. Where mental illness is a factor, the existing *Mental Health Act* provides for circumstances in which a treatment order can be made. Given the ramifications of such an order it is considered appropriate to continue to confine the authority to make orders of that kind to the circumstances encompassed by the *Mental Health Act* and not more broadly in circumstances where mental illness is not relied upon as a defence to the conduct charged.

In previous recent reviews, other community based sentencing orders have been contemplated in lieu of or in addition to probation and community service orders. While we have submitted that the current regime is not deficient, we acknowledge that such orders could fit well into the existing regime.

g. Similarly, do the current range of sentencing options for children provide an appropriate response to child offenders who commit assaults against public officers, or should any alternative forms of orders be considered?

As above.

h. Should the requirement to make a community service order for offences against section 340(1)(b) and (2AA) of the Criminal Code and section 790 of the Police Powers and Responsibilities Act 2000, in accordance with section 108B of the Penalties and Sentences Act 1992 (unless the court is satisfied that, because of any physical, intellectual or psychiatric disability of the

offender, they are not capable of complying) be retained and if so, on what basis?

See discussion under question 14(e) above.

15. If the Government was to introduce sentencing reforms targeting assaults on public officers in general, or specific categories of public officers, on the basis that current sentencing practices are not considered adequate or appropriate, what changes would you support or not support?

QLS does not consider that increased penalties are necessary. We oppose mandatory sentences.

Section 340 of the Code provides for a maximum penalty of 7 years imprisonment for assaulting a police officer acting in the execution of the officer's duty. However, it elevates the maximum to 14 years if the offender assaults a police officer in certain aggravating circumstances, including if:

> "(i) the offender bites or spits on the police officer or throws at, or in any way applies to, the police officer a bodily fluid or faeces;
>
> (ii) the offender causes bodily harm to the police officer; ..."

Even prior to the 2012 amendments increasing the maximum penalty to 14 years, where there was a circumstance of aggravation attached to a serious assault it was difficult to avoid actual imprisonment, particularly for spitting in light of the then Chief Justice's comments in *R v King*[19] with whom the other members of the court agreed:

> "One begins with the proposition that those who treat a police officer in this way should ordinarily expect to be imprisoned, meaning actual imprisonment. Police officers carry out duties which are usually onerous and often dangerous. It is abhorrent that a police officer responsibly going about his or her business be subject to the indignity and risk of being spat upon. ... In cases like this, it is often the fact of imprisonment rather than the particular duration of the term imposed which secures the necessary deterrence."

At present there is no mandatory sentencing provisions relating to assaults on public officers other than:

1. A mandatory community service order being made for some offences if the offence was committed in a public place whilst adversely affected; or
2. If the offence is committed as part of a serious organised crime group there is a mandatory sentence of 7 years imprisonment to actually be served; or
3. If the offence is committed whilst in custody it is mandatory that the sentence be served cumulatively.

It is the Society's view that there is no justification for any mandatory provisions in relation to sentencing for assault on public officers and that the current sentencing practices are adequate. There is such a broad range of offending in relation to serious assaults that a judge or magistrate sentencing an offender for these types of matters should continue to be guided

[19] [2008] QCA 1

by section 9 of the *Penalties and Sentences Act 1992*. Again, it is the Society's view that there should be no further occupational categories of special victims enacted.

16. What issues contribute to, or detract from, the community's understanding of penalties and sentencing for assaults on public officers?

AND

17. How can community knowledge and understanding about penalties and sentencing for assaults on public officers be enhanced?

The significant factor detracting from the community's understanding of penalties and sentencing for assaults on public officers (and all sentencing proceedings) is the media and sensationalised journalism. The media has a significant impact on community perceptions of the effectiveness of the criminal justice system and, in particular, sentencing. The media often reports on stories that elicit negative perceptions of the criminal justice system for the sake of entertainment. Often the community are not given all of the information that was before the judge or magistrate sentencing an offender. This in turn reduces the community's faith in the system. The reporting needs to provide an accurate account of the entire matter.

Other than accurate and detailed reporting, rather than sensationalism, a further issue that would contribute to the community's understanding of penalties and sentencing for assaults on public officers is education. This is being achieved through events and programs such as Judge for Yourself conducted by the Sentencing Advisory Council. Further, surveys of the true opinion of the community to a particular sentence after having been provided with all of the information are likely to confirm satisfaction in the sentence provided. This in turn would increase the public's perception of the adequacy of sentencing.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [redacted].

Yours faithfully

[redacted]

Luke Murphy
President