



sentencing
ADVISORY
COUNCIL

ASSAULTS ON EMERGENCY SERVICE WORKERS

FINAL REPORT NO.2

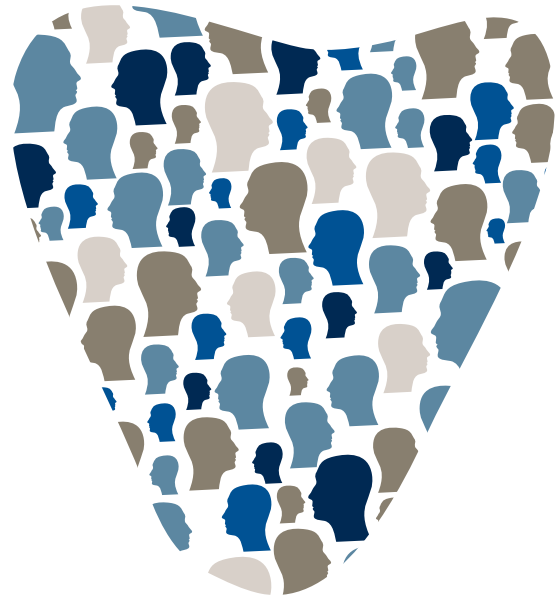
March 2013

About This Final Advice

This report makes recommendations to the Attorney-General in relation to the issue of assault on emergency service workers in Tasmania.

This report was one of the initial referrals to the Sentencing Advisory Council at its inception in June 2010. The publication of this report follows the release of a Consultation Paper in June 2012. The purpose of the Consultation Paper was to assist in the discussion about the capacity of Tasmania's sentencing structure to deal with the sentencing of persons found guilty of assaults on emergency service workers in Tasmania. The Consultation Paper reviewed the current Tasmanian provisions applying to assaults on emergency service workers and the various measures taken in other jurisdictions in Australia and overseas. It considered the sentencing practices for offenders who assault emergency service workers and reviewed the nature and extent of assaults in Tasmania. The Consultation Paper posed seven questions, including:

- who should be included in the definition of an emergency service worker
- the adequacy of the existing laws and sentencing practices in Tasmania
- a proposal for additional penalties within the existing penalty ranges
- a proposal for an aggravation provision into the sentencing legislation
- mandatory fines, penalties and sentences of imprisonment for assaults on emergency service workers.



Consultation

Responses to the Consultation Paper were received from:

- Mr D L Hine, Secretary, Department of Police and Emergency Management, Tasmania
- Mr G Freeman, Acting Chief Officer, Tasmania Fire Service
- Mr A Lea, Director, State Emergency Service, Department of Police and Emergency Management, Tasmania
- Mr D Morgan, Chief Executive Officer, Ambulance Tasmania, Department of Health and Human Services, Tasmania
- Mr T Ellis SC, Director of Public Prosecutions, Tasmania
- Mr L Rheinberger, Deputy Executive Director, the Law Society of Tasmania
- Mr B Bartl, Policy Officer, Tasmanian Association of Community Legal Centres
- Mr G Katos, community member, Tasmania
- Confidential submission, community member, Tasmania.

Information on the Sentencing Advisory Council

The Sentencing Advisory Council was established in June 2010 by the then Attorney-General and Minister for Justice, the Hon Lara Giddings MP. The Council was established, in part, as an advisory body to the Attorney-General. Its other functions are to bridge the gap between the community, the courts and the Government by informing, educating and advising on sentencing issues in Tasmania. At the time this reference was concluded, the Council members were Mr Peter Tree SC (Chair), Professor Kate Warner, Dr Jeremy Prichard, Mr Phil Wilkinson, Ms Kim Baumeler, Mr Norman Reaburn, Mr Chris Gunson and Mr Tony Jacobs.

Acknowledgments

This Final Advice was written by Ms Lisa Gregg. The Council would like to thank the Victorian Sentencing Advisory Council, especially Dr Catherine Jeffreys, for assistance with copyediting and typesetting.

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Abbreviations

ABS	Australian Bureau of Statistics
ANZSCO	Australian and New Zealand Standard Classification of Occupations
DPEM	Department of Police and Emergency Management
DPP	Director of Public Prosecutions
POA	<i>Police Offences Act 1935 (Tas)</i>
SES	State Emergency Service
TACLCL	Tasmanian Association of Community Legal Centres
TFS	Tasmania Fire Service
VCS	Victims of Crime Service
VSS	Victims Support Services

Executive Summary

One of the inaugural referrals to the Sentencing Advisory Council (the Council) from the Attorney-General was a request to provide advice in relation to assaults on emergency service workers in Tasmania. The request for this advice was prompted by ongoing calls for mandatory terms of imprisonment for offenders who assault emergency service workers. The calls relate to a perceived increase in the incidence and severity of assaults on emergency service workers and a perceived leniency in the sentences imposed on those who commit the assaults.

Research by the Drug and Crime Prevention Committee of the Parliament of Victoria notes that 'media reporting tends to sensationalise the issue of violent crime, generating fear among the general population that does not match the actual level of risk faced'.¹

The Council considered it was important that part of the research in the Consultation Paper should assess the actual level of risk to emergency service workers. It also considered that reform to the penalty provisions or the sentencing structure for any assaults on emergency service workers enacted for the purpose of general deterrence should be consistent with the actual level of risk encountered in this State. It was also considered necessary to address the issue of perceived leniency in the sentences imposed on offenders who assault emergency service workers. The June 2012 Consultation Paper into this referral addressed the current Tasmanian provisions, the provisions in other jurisdictions, the sentencing practices for assaults on emergency service workers and the actual number of workplace assaults on all members of the community.

A brief summary of the most relevant findings in the Consultation Paper is as follows:

- Despite provisions in other jurisdictions in Australia, there are no specific provisions in the offence structure or in the sentencing structure for assaults on emergency service workers in Tasmania.
- Without any legislative provisions directing it to do so, when sentencing a person for an assault the Supreme Court considers it an aggravating factor if the victim was at his or her workplace at the time of the offence.
- Available data from the Magistrates Court indicates that a person who assaults a police officer will be more likely to receive an immediate prison sentence, but the length of imprisonment will be no longer than if the person had been charged with common assault.
- There are very few serious assaults on emergency service workers in Tasmania.
- In the last five years, there has been no significant increase in assaults on police officers in Tasmania.

The final chapter in the Consultation Paper, 'Options for Reform', posed seven questions regarding the suitability, or otherwise, of the sentencing structure for assaults on emergency workers in Tasmania. The Council invited responses from Government, independent agencies, the judiciary and the community to assist in the Final Advice to the Attorney-General.

The Council derived its final recommendations from the evidence in the Consultation Paper, the submissions received and further research and consultation resulting from the submissions.

¹ Drugs and Crime Prevention Committee, Parliament of Victoria, *Inquiry into Strategies to Reduce Assaults in Public Places in Victoria: Final Report* (DCPC, Parliament of Victoria, 2010) | <http://www.parliament.vic.gov.au/images/stories/committees/dpc/assaults/Final_assault_report.pdf>.

The Consultation Paper indicated very few serious assaults on emergency service workers in Tasmania and no significant increase in assaults on police officers over time. The 2010–2011 annual figures for assaults on police officers, finalised by Tasmania Police after the release of the Consultation Paper, indicate a continuation of this trend. These figures do not suggest an amendment to the *Criminal Code Act 1924* (Tas) (the Code) to include a specific offence for an assault on an emergency service worker is justified.

While the Council's research indicates that there are very few serious assaults on emergency service workers, the submission from Ambulance Tasmania expresses concern over continuing and increasing verbal and physical aggression and threatening behaviour, although this rarely results in injury or lost time. The Council is of the view that this behaviour is reprehensible despite the fact that these assaults are not serious in nature.

The submission from the Department of Police and Emergency Management (DPEM) drew reference to the statistical analysis provided in the Consultation Paper indicating that, in the Magistrates Court, there is no significant difference between the length of imprisonment when sentencing an offender for an assault on a police officer and when sentencing an offender for common assault. The DPEM noted that the current penalties for assaulting a police officer in the *Police Offences Act 1935* (Tas) (POA) are double the penalties for common assault and concluded that there is no consistent evidence of this differentiation being reflected in sentencing practice.

The Council considered that the submissions from Ambulance Tasmania and the DPEM had some merit, so further research and consultation were conducted to consider whether an amendment to either the legislative or the sentencing provisions could be justified on the basis of these concerns.

The Council concluded that there is a need to protect emergency service workers from continued and increasing minor assaults and threatening behaviour, as described by Ambulance Tasmania. In relation to the DPEM's concerns, further analysis indicated that while the sentencing practices for an assault on a police officer

are not strictly double the sentence for a common assault, the Magistrates Court in Tasmania does treat assaults on police more seriously than common assaults. Notwithstanding, the Council has recommended legislative amendments to further emphasise the seriousness of an assault on a police officer.

The Council is of the view that an amendment to the POA to include a new, specific offence for an assault on an emergency service worker (including police officers), while giving protection to emergency service workers, will not specifically address the concerns in relation to the sentencing practices for assaults on police officers.

As a result, the Council has recommended amendments to the existing assault provisions contained in sections 34B(1) and (2) of the POA. The recommendations are to increase the penalty for an assault on a police officer, to increase the penalty for an assault on a public officer and to broaden the definition of a public officer to include an emergency service worker. The proposed definition of an emergency service worker excludes police officers, as it is the Council's view that police officers should stand alone in their own category. The current penalty for a common assault contained in s 35 of the POA should remain the same.

The outcome of the proposed amendments is, in effect, a graduation of penalties. The proposed graduation clearly indicates the gravity of an assault on a police officer; it acknowledges that an assault on an emergency service worker should have attached to it severe consequences; however, these should be less severe than for an assault on a police officer but more severe than for a common assault. It is expected that the judiciary will acknowledge these amendments – the judiciary has, in the past, interpreted legislative increases in the potential for punishment as a clear indication that the 'Parliament has demonstrated its concern in this respect'.²

The Council has not recommended sentence aggravation provisions, mandatory minimum fines or mandatory minimum sentences.

From the seven questions posed in the Consultation Paper, the Final Advice to the Attorney-General contains one recommendation and a definition of an emergency service worker:

² *Shipton v R* [2003] TASSC 23.

List of Recommendations

<i>Definition</i>	<i>page 37</i>	<i>Recommendation 1</i>	<i>page 47</i>
The definition of an emergency service worker:		(1) Increase the penalty in s 34B(1) of the <i>Police Offences Act 1935</i> (Tas) (assault a police officer) to a maximum penalty of 75 penalty units or imprisonment for a term of 3 years or both; ³ and	
(1) (a) A person employed or appointed under the <i>Fire Service Act 1979</i> (Tas); or		(2) That s 34B(2) of the <i>Police Offences Act 1935</i> (Tas) (assault a public officer) be broadened to include an emergency service worker and to increase the maximum penalty to 50 penalty units or to imprisonment for a term of 2 years or both; and	
(b) A person employed or appointed under the <i>Ambulance Act 1982</i> (Tas); or		(3) That s 35 of the <i>Police Offences Act 1935</i> (Tas) (common assault) should remain at the existing maximum penalty of 20 penalty units or imprisonment for a term of 12 months.	
(c) An emergency management worker as defined in subsections (a), (b), (c) and (d) of the definition contained in the <i>Emergency Management Act 2006</i> (Tas); or			
(d) An emergency management worker as defined in subsection (e) of the definition contained in the <i>Emergency Management Act 2006</i> (Tas) where there is:			
(i) An authorised use of emergency powers under s 40 of the <i>Emergency Management Act 2006</i> (Tas); or			
(ii) A declared state of emergency under s 42 of the <i>Emergency Management Act 2006</i> (Tas); or			
(e) A person employed within a department of emergency medicine, or its equivalent.			
(2) This does not include a police officer under the <i>Police Service Act 2003</i> (Tas).			

³ The recommended amendments to the POA include the words 'or both' despite the discussions at 2.2, 'Legislation Relating to Assaults on Police Officers', stating that the *Acts Interpretation Act 1931* (Tas) s 37(5A) interprets a penalty that includes a fine or a term of imprisonment as meaning 'or both'. In the decision in *Rosevear v Bonde* (2005) 15 Tas R 153, Crawford J stated that an offender could not be sentenced to both a fine and a term of imprisonment under the assault provisions. The inclusion of the words 'or both' in this recommendation serves to clarify the intention of the penalty provision proposed.

Questions Posed in the Consultation Paper

Definition

How should 'emergency service worker' be defined?

Question 1

Do the existing laws and current sentencing practices in Tasmania provide an adequate response to assaults on emergency service workers?

Question 2

Should Tasmania introduce further offences for an assault on an 'emergency service worker' in the Code or the *Police Offences Act 1935*?

Question 3

- (a) Should s 34B(1) of the *Police Offences Act 1935* (Tas) have a graduation of penalties so that, in addition to a maximum penalty of 50 penalty units or imprisonment for a term of 2 years for assaulting a police officer, there is a maximum penalty of 75 penalty units and/or imprisonment for a term of 3 years if the police officer assaulted suffers harm?
- (b) Should s 34B(2) be amended to provide that, where a public officer is an emergency worker, there is a maximum penalty of 50 penalty units and/or imprisonment for a term of 2 years?
- (c) Should s 34B(2) have a graduation of penalties so that, in addition to a maximum penalty of 50 penalty units or imprisonment for a term of 2 years for assaulting an emergency worker, there is a maximum penalty of 75 penalty units and/or imprisonment for 3 years if the emergency service worker assaulted suffers harm?
- (d) Should s 35 be amended to provide that where an assault is committed on an emergency service worker there is a maximum penalty of a fine not exceeding 50 penalty units and/or imprisonment for a term not exceeding 2 years?
- (e) Should s 35 have a graduation of penalties so that, in addition to a maximum penalty of 50 penalty units or imprisonment for 2 years for assaulting an emergency service worker, there is a maximum penalty of 75 penalty units and/or imprisonment for 3 years if the emergency service worker assaulted suffers harm?

Question 4

Should a special sentence aggravation provision be inserted into the *Sentencing Act 1997* to make an assault on an emergency service worker an aggravating factor in sentencing?

Question 5

Should mandatory fines be considered in Tasmania for offenders who assault emergency service workers?

Question 6

Should any other type of mandatory penalty be considered in Tasmania for offenders who assault emergency service workers?

Question 7

Should mandatory minimum sentences be considered in Tasmania for offenders who assault emergency service workers?

1.

Introduction

1.1 TERMS OF REFERENCE

In November 2010, the then Attorney-General, Lara Giddings, sought advice from the Sentencing Advisory Council into assaults on emergency service workers. The terms of reference for this research project were agreed between the Council and the current Attorney-General, Brian Wightman, in September 2011:

The Council is asked to research and advise on the various measures taken in other jurisdictions to address assaults on emergency service workers having regard to the general offences and laws on sentencing for assaults; the creation of targeted offences; sentencing criteria; and any mandatory or minimum sentences.

The research should encompass:

- the current Tasmanian provisions applying to assaults on emergency workers;
- the relevant provisions introduced in other jurisdictions in Australia and relevant overseas jurisdictions; and
- the findings of any assessments as to the effectiveness of provisions in other jurisdictions which are aimed specifically at emergency workers (or similar target groups).

Your advice should also cover whether there is a need for reform in Tasmania with a summary of the options for reform with arguments both for and against the various options presented.

1.2 BACKGROUND

Police officers and emergency service workers work tirelessly in the community with the aim of protecting it and making it a safer place. Unfortunately, the risk of being the victim of an assault is becoming inherent in the role of police officers, paramedics, ambulance workers and hospital staff. The Drug and Crime Prevention Committee of the Parliament of Victoria⁴ has published information showing that there is an increased risk of assault for people working in particular professions. Those at greater risk include taxi drivers, police officers, security staff, medical staff and people working late at night. It is also stated that as many as 10 per cent of victims attending Victorian emergency departments for assault injuries are engaged in paid work at the time of the assault.⁵

In March 2010, the Opposition Leader in Tasmania, Will Hodgman, announced as part of the Liberal Party's 'tough on crime' election policy the intention to create a new crime of serious assault committed by adult offenders on police and emergency service workers. The new crime was to have a minimum of 6 months' imprisonment when the assault resulted in bodily harm to the victim. This offence was to apply to victims who were police officers, ambulance officers, fire officers, hospital workers, prison officers, child protection workers, community corrections staff and youth justice workers.⁶ The Police Association of Tasmania welcomed the minimum sentence announcement, stating that this policy, 'if it becomes law, will send a strong message that such violent assaults are unacceptable' and 'from the evidence we have seen in other states, we anticipate that this measure will reduce the rates of assaults on Police in Tasmania'.⁷

⁴ Drugs and Crime Prevention Committee, above n 1.

⁵ This figure includes all workers and not just emergency service workers.

⁶ Will Hodgman, *Tough on Crime* (3 March 2010) Tasmanian Liberals <<http://tasliberal.com.au/policy/tough-on-crime>>.

⁷ Police Association of Tasmania, 'PAT Welcomes Minimum Sentence Announcement' (Media Release, 3 March 2010) <www.pat.asn.au/uploaded/62/290922_22welcomeminimumsent_patm.pdf>.

Presently in Tasmania, there are some provisions in the Code and the POA specifically aimed at the protection of people who are assaulted in their workplace. Many other Acts have provisions to protect employees from obstruction and/or assault where they are inspectors or authorised officers. However, there are no provisions that expressly cover assaults on emergency service workers.

In other Australian jurisdictions, there are assault provisions specifically in respect of emergency service workers. The scope includes ambulance and paramedic workers and people working in hospitals or otherwise providing medical care, such as doctors, nurses and allied health professionals. Some jurisdictions have further legislative provisions for occupational assaults other than on emergency service workers; these include assaults on health workers, teachers, community workers and child protection workers.

The aim of this Final Advice is to inform the question of whether Tasmania's laws adequately cover assaults on emergency service workers and to present options for reform.

1.3 OUTLINE OF THE FINAL ADVICE

The Consultation Paper into this referral, published by the Council in 2012, is incorporated into this Final Advice. Chapter 2 outlines the existing legislative provisions for assaults on police officers and assaults on emergency service workers in Tasmania. Chapter 3 gives examples of the various provisions in other jurisdictions in Australia and overseas. These provisions are explained and categorised by the different types available, that is, the offence or sentencing provisions for that particular piece of legislation.

Chapter 4 then considers at length the sentencing practices for these offences in Tasmania. It first covers assaults on police, including the charging process generally, before moving on to the sentences handed down for offences pursuant to both the Code and the POA. Sentences handed down for other workplace assaults are then summarised using an analysis of the Supreme Court database.

Chapter 5, 'The Need for Reform', considers the extent and severity of assaults on police officers, and the extent and severity of assaults on other workers who are assaulted at their place of employment or engaged in the duties of their employment when the assault

happens. The aim of this chapter is to inform the reader of the true extent of these assaults.

The final chapter, 'Options for Reform', presents a range of available options and the arguments for and against those options. This advice takes into account the submissions made in response to the Consultation Paper and presents the Sentencing Advisory Council's views to make the final recommendations to the current Attorney-General and Minister for Justice, Brian Wightman.

1.4 THE DEFINITION OF EMERGENCY SERVICE WORKER

The terms of reference for this referral do not include a definition of 'emergency service worker'.

Some jurisdictions use a restricted definition that covers police, fire officers and ambulance workers. Other jurisdictions include all those at the first point of contact in an emergency, including fire officers, ambulance workers, first aid workers and volunteers. One Australian jurisdiction simply makes it an offence to assault or hinder anyone providing rescue, resuscitation, medical treatment or first aid. This more general provision is an exception, and in most instances the provisions are not defined by a general description of activity but by a specific category of worker:

For the purposes of the Consultation Paper, the Sentencing Advisory Council used the following definition of an emergency service worker:

Any person engaged, whether for remuneration or voluntarily, in the Tasmania Police Service, the SES, TFS, Ambulance Tasmania, or any person providing rescue, resuscitation or medical treatment including, but not exclusively, people employed in hospitals.

This definition provided the parameters of the discussion in the Consultation Paper. The Council submitted that if the Final Report recommended legislative change, the advice to the Attorney-General would need an appropriate definition of an emergency service worker:

The Consultation Paper provided recent data from various agencies in Tasmania to help determine who is statistically at risk of assaults in the workplace. The aim was to inform the question posed in the Consultation Paper as to the scope of the definition of an emergency service worker, should legislative change be recommended.

2. Provisions for Assaults on Emergency Service Workers in Tasmania

2.1 TASMANIAN CRIMINAL LAW

Criminal offences are classified as indictable or summary. Indictable offences are generally more serious offences heard in the Supreme Court by a judge and jury (in cases of not guilty pleas). In Tasmania, indictable offences are included in the Code. All offences in the Code have the same maximum penalty of 21 years' imprisonment with the exception of murder and treason, which have a maximum penalty of life imprisonment.

Summary offences are less serious offences heard in Magistrates Courts. Summary offences are included in the POA, but there are also hundreds of summary offences scattered throughout other legislative instruments in Tasmania. Summary offences have their own penalty provisions for each offence. Normally the penalty is the maximum penalty that can be imposed for that offence.⁸ However, in some limited cases such as drink driving offences, the penalty provision will include a minimum penalty as well as a maximum one.

Some offences will have a summary version and an indictable version. For example, assault is an indictable offence in s 184 of the Code and a summary offence in s 35 of the POA. Assaulting a police officer or public officer is also an offence pursuant to the Code and the POA. Whether to charge a person with the indictable or summary version of the offence is at the discretion of the prosecution and is normally determined by the seriousness of the assault.

The remainder of this chapter details the specific legislation relating to police officers and describes the general assault provisions currently available for other workplace assaults in Tasmania.

2.2 LEGISLATION RELATING TO ASSAULTS ON POLICE OFFICERS

Assaulting, resisting or obstructing a police officer in the execution of his or her duty is an offence at both a summary and an indictable level in Tasmania. The difference between the offence of common assault and the specific offence of assaulting a police officer is the requirement that the prosecution prove two additional elements: first that the person assaulted was a police officer and secondly that the officer was acting in the execution of his or her duty at the time of the assault.

Any person who assaults, resists or obstructs a police officer in the execution of his or her duty (or any other person lawfully assisting him or her) is guilty of a crime pursuant to s 114 of the Code. As with all offences in the Code, the maximum penalty is 21 years' imprisonment.⁹

Section 34B(1)(a) of the POA provides a summary offence for assaulting, resisting or obstructing a police officer or a person lawfully assisting a police officer in the execution of his or her duty. This offence attracts a maximum penalty of 50 penalty units¹⁰ or two years' imprisonment or both.¹¹ Section 34B(1)(b) creates

⁸ *Acts Interpretation Act 1931* (Tas) s 37.

⁹ *Criminal Code Act 1924* (Tas) s 389(3).

¹⁰ Penalty units are calculated in accordance with a formula set out in s 4A of the *Penalty Units and Other Penalties Act 1987* (Tas). As at 1 July 2012, a penalty unit is \$130.

¹¹ *Acts Interpretation Act 1931* (Tas) s 37(5A): 'Where in an Act a penalty specified in respect of an offence against the Act or a provision of the Act is a fine or term of imprisonment, the offence is, unless the contrary is expressly provided, punishable by the fine, or by the term of imprisonment, or both'.

an offence of threatening, intimidating, or using abusive language towards any police officer. This offence also attracts a maximum penalty of 50 penalty units or two years' imprisonment. These penalties are double the penalty for the offence of common assault pursuant to s 35 of the POA.

The elements for the offence of assaulting a police officer in the Code and in the POA are the same in that the victim is a police officer and is acting in the due execution of his or her duty at the time of the assault. The decision to charge at a summary or an indictable level is generally made by the police prosecutor.¹² Kate Warner has noted that in practice assaulting a police officer is 'prosecuted summarily unless there are aggravating factors such as the use of a lethal weapon or an unusual factor is present'.¹³

2.3 LEGISLATION RELATING TO OTHER WORKPLACE ASSAULTS

Pursuant to s 34B(2) of the POA it is an offence to assault, resist, intimidate or wilfully obstruct a public officer, or to use abusive language to any such person in the execution of his or her duty. The penalty for this offence is a fine not exceeding 25 penalty units or imprisonment for a term not exceeding 12 months. This penalty is similar to that for common assault, which has a penalty of 20 penalty units or imprisonment for a term not exceeding 12 months. In s 34B of the POA, a public officer is defined as any person acting 'in good faith in the execution, or intended execution, of an Act or a public duty or authority'. At common law, a public officer has been defined as 'an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he [or she] is paid out of a fund provided by the public'.¹⁴ This section presumably covers government-employed ambulance and fire officers but excludes private ambulance services (of which there are at least two in the State) or, for example, a private security guard employed by a contract company.

Most legislation providing for inspectors or authorised officers has offences available should inspectors or officers be obstructed or assaulted in the course of their duties, whether in their own workplace or at the business they are inspecting or visiting. For example, s 43 of the *Child Care Act 2001* (Tas) makes it an offence to resist, impede, obstruct, assault or use threatening, abusive or insulting language to an officer or a person assisting that officer. Other examples are found in s 76 of the *Animal Health Act 1995* (Tas) and s 45 of the *Food Act 2003* (Tas).¹⁵ Offences can also be found in specific legislation to protect certain workers exposed to risk in their line of work; for example, s 7 of the *Sex Industry Offences Act 2005* (Tas) makes it an offence to intimidate, assault or threaten to assault a sex worker.

Pursuant to s 60 of the *Emergency Management Act 2006* (Tas), it is an offence to assault, resist, impede or obstruct an emergency management worker who is participating in emergency management or a rescue and retrieval operation. The penalty is a fine not exceeding 100 penalty units or a term of imprisonment not exceeding three months. This Act provides for the protection of life, property and the environment in the event of an emergency. It provides for continuation of the State Emergency Service, administrative arrangements for effective emergency management and essential powers and means to declare a state of emergency for major emergencies.¹⁶ An emergency is defined as an event that endangers, destroys or threatens to endanger or destroy human life, property or the environment requiring a significant response from one or more of the statutory services. An 'emergency management worker' includes all who, in good faith, participate in emergency management or rescue and retrieval operations under the Act, including emergency services volunteers.

¹² The charging process is explained in full in section 4.2.1.

¹³ Kate Warner, *Sentencing in Tasmania* (Federation Press, 2002) 292.

¹⁴ *R v Whitaker* [1914] 3 KB 1283, 1296 (Lawrence J).

¹⁵ See also s 135 of the *Gaming Control Act 1993* (Tas), s 203 of the *Living Marine Resources Act 1995* (Tas) and s 101 of the *Monetary Penalties Enforcement Act 2005* (Tas).

¹⁶ Tasmania, *Parliamentary Debates*, Legislative Council, 14 June 2006 (Llewellyn MHA).

There are no provisions that specifically name emergency service workers in the general criminal legislation in Tasmania. If a person is assaulted in the workplace when providing assistance in an emergency situation and that person falls under the definition of a public officer; then s 34B(2) of the POA is an available offence provision. As mentioned, the penalty for this offence is similar to that for common assault. Normally, if the person assaulted is a fire officer; ambulance officer or hospital worker; charges are laid pursuant to the general assault provisions in the POA or the Code.

Common assault and aggravated assault can be found in s 35 of the POA. In this section, common assault has a maximum penalty of a fine not exceeding 20 penalty units or a term of imprisonment not exceeding 12 months. Pursuant to 35(2) an aggravated offence increases the penalty to a fine not exceeding 50 penalty units or imprisonment for a term not exceeding two years. In *Fletcher v Barrett*¹⁷ Nettlefold J held that 'aggravated' means 'aggravated in respect of violence or force'. The occupational status of the victim was not mentioned.

For serious assaults, charges can be laid pursuant to the Code. Section 184 covers common assault and s 183 covers aggravated assault. Pursuant to s 183(a) assault is aggravated if the offender intended to commit a crime or to resist or prevent lawful apprehension. Section 183(b) also provides for an aggravated assault if a person assaults, resists or wilfully obstructs any person in the lawful execution of any process against any lands or goods, or in the making of any lawful distress, or with intent to rescue any goods taken under such process or distress. This section is rarely used and only covers an assault on a bailiff or similar.

Pursuant to s 170 of the Code a person is guilty of a crime if he or she does certain acts such as wounding or bodily harm with the intent to disfigure or disable. Pursuant to s 172 a person is guilty of a crime if he or she causes grievous bodily harm or unlawfully wounds another.

¹⁷ *Fletcher v Barrett* (Unreported, Supreme Court of Tasmania, Nettlefold J, 2 May 1975).

Provisions for Workplace Assaults in Other Jurisdictions in Australia and Overseas

3.

3.1 INTRODUCTION

In all jurisdictions in Australia it is an offence to assault a police officer in the execution of his or her duty. There is a wide variation between jurisdictions as to the legislative protection afforded to other classes of worker and the types of provision available. Following is an explanation of some of these provisions and examples of how they are used in other jurisdictions.

3.2 SPECIFIC OFFENCE PROVISIONS

A specific offence exists where the legislation states that it is an offence to assault a particular class of worker. All jurisdictions in Australia have the specific offence of assaulting a police officer, and some jurisdictions have specific offences to cover other occupational groups. Examples of specific offences covering assaults on police officers and other occupational groups are found in Tables 1 and 2 respectively.

Table 1: Examples of offences for assaulting a police officer in other jurisdictions

AUSTRALIA			
Jurisdiction	Specific Provision	Definition	Nature of Offence and/or Penalty
New South Wales	<i>Crimes Act 1900</i> (NSW) s 58 – Assault with intent to commit a serious indictable offence on certain officers	Constable or other peace officer; custom-house officer; prison officer; sheriff's officer or bailiff, or any person in the aid of such an officer	It is an offence to assault an officer in the execution of his or her duty. The maximum penalty is 5 years' imprisonment
	<i>Crimes Act 1900</i> (NSW) s 60 – Assault and other actions against police officers	Police officer	These offences range from assault, stalking and intimidation to recklessly wounding a police officer during a public disorder. The penalties for these offences vary depending on the seriousness of the offence
Queensland	<i>Criminal Code Act 1899</i> (Qld) s 340 – Serious assaults	Police officer	Assault, resist or unlawfully obstruct a police officer; assault with intent to commit a crime, with intent to resist or prevent lawful arrest or detention of him- or herself or any other person. The circumstances in which a person assaults a police officer include, but are not limited to, where the person bites, spits on or throws a bodily fluid or faeces at a police officer. The person is liable to imprisonment of up to 7 years
Northern Territory	<i>Criminal Code Act 1983</i> (NT) s 189A – Assaults on police	Police officer	Unlawful assault of a police officer in the execution of the officer's duty. If found guilty of the offence, an offender is liable to imprisonment of 5 years or upon being found guilty summarily imprisonment of 2 years
Victoria	<i>Crimes Act 1958</i> (Vic) s 31 – Assaults	Member of the police force or a protective services officer or a person acting in aid of these officers	Assaults or threatens to assault, resist, or intentionally obstruct. Offenders are liable to imprisonment of up to 5 years
OVERSEAS JURISDICTIONS			
Country	Legislation	Definition	Nature of Offence and/or Penalty
New Zealand	<i>Summary Offences Act 1981</i> (NZ) s 10 – Assault on police, prison or traffic officer	Any constable, any prison officer or any traffic officer acting in the execution of his or her duty	Imprisonment for a term not exceeding 6 months and a fine not exceeding \$4000
	<i>The Crimes Act 1961</i> (NZ) s 192 – Aggravated assault	Any constable or any person acting in the aid of any constable or any person in the lawful execution of any process	Anyone who assaults another person with intent to commit or facilitate the commission of any crime or to avoid arrest or to facilitate the flight of him- or herself or any other person is liable to imprisonment for a term not exceeding 3 years
United Kingdom	<i>Police Act 1996</i> (UK) c 16, s 89 – Assaults on constables	Constable or a person assisting a constable in the execution of his or her duty	Liable on summary conviction to imprisonment for a term not exceeding 6 months or a fine

Table 2: Specific offences for other occupational assaults

AUSTRALIA			
Jurisdiction	Specific Provision	Class of Worker	Nature of Offence and/or Penalty
New South Wales	<i>Crimes Act 1900</i> (NSW) s 60A – Assault and other actions against law enforcement officers (other than police officers)	'Law enforcement officer' is defined as a police officer; the Commissioner for the Independent Commission Against Corruption, the Commissioner or an officer for the Police Integrity Commission, the Commissioner or member of staff of the New South Wales Crime Commission, the Commissioner of Corrective Services, governors of Corrective Services, correctional officers, probation officers, parole officers, an officer of the Department of Juvenile Justice, a crown prosecutor or acting crown prosecutor; a legal practitioner employed as a member of staff of the Director of Public Prosecutions or a sheriff's officer	These offences range from assault, stalking and intimidation to recklessly wounding (the details and associated penalties for these offences are included in Table 3)
	<i>Crimes Act 1900</i> (NSW) s 58 – Assault with intent to commit a serious indictable offence on certain officers	Constable or other peace officer; custom-house officer; prison officer; sheriff's officer or bailiff or any person acting in aid of such an officer	Any person with intent to commit a serious indictable offence or assaults, resists or wilfully obstructs any officer while in the execution of his or her duty is liable to imprisonment for 5 years
Queensland	<i>Criminal Code Act 1899</i> (Qld) s 340 – Serious assaults	(2) Any prisoner who unlawfully assaults a working corrective services officer (2AA) A person who unlawfully assaults, or resists or wilfully obstructs a public officer 'Public officer' includes a member, officer or employee of a service established for a public purpose under any Act, e.g. the <i>Ambulance Service Act 1991</i> (Qld); a health service employee, e.g. the <i>Health Services Act 1992</i> (Qld); an authorised officer under the <i>Child Protection Act 1999</i> (Qld); or a transit officer under the <i>Transport Operations (Passenger Transport) Act 1994</i> (Qld)	Liable to imprisonment for 7 years
Northern Territory	<i>Criminal Code Act 1983</i> (NT) s 155A – Assault, obstruction, etc. of persons providing rescue, medical treatment or other aid	Any person providing rescue, resuscitation, medical treatment, first aid or succour of any kind to a third person	Unlawfully assaults, obstructs or hinders. Offenders are liable to imprisonment for 5 years. If the offender endangers the life of the third person, the offender is liable to imprisonment for 7 years
Victoria	<i>Summary Offences Act 1966</i> (Vic) s 51 – Obstructing operational staff members	'Operational staff member' within the meaning of the <i>Ambulance Service Act 1986</i> (Vic)	A person guilty of assaulting, resisting, obstructing, hindering or delaying an operational staff member is liable to a penalty of 6 months' imprisonment

Table 2: *cont.*

OVERSEAS JURISDICTIONS			
Country	Legislation	Class of Worker	Nature of Offence and/or Penalty
New Zealand	<i>Crimes Act 1961</i> (NZ) s 192 – Aggravated assault	Any constable or any person acting in the aid of any constable or any person in the lawful execution of any process	A person who intentionally assaults or obstructs is liable to 3 years' imprisonment
	<i>Crimes Act 1961</i> (NZ) s 198A(1)	Any constable, any traffic officer or any prison officer acting in the course of his or her duty	A person who uses a firearm in any manner is liable to imprisonment of 14 years
	<i>Crimes Act 1961</i> (NZ) s 198A(2)		A person who uses a firearm in any manner with intent to resist lawful arrest or detention of him- or herself or any other person is liable to imprisonment of 10 years
United Kingdom	<i>Emergency Workers (Obstruction) Act 2006</i> (UK) c 39, ss 1, 2	An emergency worker or a person assisting an emergency worker. This definition also includes persons providing services for the transport of organs, the coastguard and any crew member operating a vessel for the purpose of providing rescue, resuscitation, medical treatment or first aid	Obstructing or hindering certain emergency workers responding to emergency circumstances
	<i>Criminal Justice Act 1991</i> (UK) c 53, s 90	A prison custody officer	
	<i>County Courts Act 1984</i> (UK) c 28, s 14	An officer of the court	
	<i>Offences Against the Person Act 1861</i> , 24 and 25 Vict, c 100, s 38	Any person with intent to prevent or resist the lawful apprehension of him- or herself or any other person for an offence. This charge is available for assaults on persons other than police officers, for example, a security guard trying to apprehend a shoplifter	A person can be guilty of a summary offence and be subject to imprisonment for a term not exceeding 6 months and/or a fine, or a person can be guilty of an indictable offence and be subject to a term of imprisonment not exceeding 2 years and/or a fine
Canada	<i>Criminal Code</i> , RSC 1985, c C-46, s 270(1)*	A public officer or peace officer or a person acting in the aid of such an officer A 'peace officer' includes a member of the Correctional Service of Canada and an officer within the meaning of the <i>Customs Act</i> , <i>Immigration and Refugee Act</i> , <i>Costal Fisheries Protection Act</i> , the <i>Aeronautics Act</i> and the <i>National Defence Act</i>	A person guilty of an indictable offence is liable to imprisonment for a term not exceeding 5 years. A summary offence is punishable on summary conviction

*The full, official title is 'An Act respecting the criminal law' (RSC 1985, c C-46 as amended).

3.3 PENALTY ENHANCEMENT PROVISIONS

A penalty enhancement provision imposes an additional penalty for a specified pre-existing offence. An example of a penalty enhancement provision is found in s 35(1) of the POA where an offender guilty of common assault is liable on summary conviction to a fine not exceeding 20 penalty units or to imprisonment for a term not exceeding 12 months. Section 35(2) of the Act states that if the court considers the assault to be of an aggravated nature, the offender is liable to a fine not exceeding 50 penalty units or to imprisonment for a term not exceeding two years. Rather than having just one penalty enhancement provision, an offence

may have a series of penalty enhancement provisions attached to it. An example is the offence of assault police pursuant to s 189A of the *Criminal Code Act 1983* (NT), which has a more severe penalty if the assault causes harm and an even more severe penalty if the harm is serious. South Australia has a provision in the *Criminal Law Consolidation Act 1935* (SA) that is technically a sentence enhancement provision; however, the circumstances that make an offence aggravated are not contained within each offence but are listed in 'Part 1 – Preliminary' of the Act. Each offence contained in the Act has a maximum penalty prescribed for a basic offence and a higher penalty for an aggravated offence. Examples of penalty enhancement provisions in other jurisdictions are given in Table 3.

Table 3: Penalty enhancement provisions and graduation of penalties

AUSTRALIA			
Jurisdiction	Legislation	Offence	Enhancement Provision
New South Wales	<i>Crimes Act 1900</i> (NSW) s 60 – Assault and other actions against a police officer	Section 60(1): a person who assaults, throws missiles at, stalks, harasses or intimidates a police officer while in the execution of the officer's duty, although no actual bodily harm is occasioned to the officer	Liable to imprisonment for 5 years
		Section 60(1A): a person who, during a public disorder, assaults, throws missiles at, stalks, harasses or intimidates a police officer while in the execution of the officer's duty, although no actual bodily harm is occasioned to the officer	Liable to imprisonment for 7 years
		Section 60(2): a person who assaults a police officer while in the execution of the officer's duty and by the assault occasions actual bodily harm	Liable to imprisonment for 7 years
		Section 60(2A): a person who, during a public disorder, assaults a police officer while in the execution of the officer's duty and the assault occasions actual bodily harm	Liable to imprisonment for 9 years
		Section 60(3): a person who recklessly wounds a police officer or inflicts grievous bodily harm	Liable to imprisonment for 12 years
		Section 60(3A): a person who, during a public disorder, recklessly wounds a police officer or inflicts grievous bodily harm	Liable to imprisonment for 14 years
	<i>Crimes Act 1900</i> (NSW) s 60A – Assault and other actions against law enforcement officers (other than police officers)	Section 60A(1): a person who assaults, throws missiles at, stalks, harasses or intimidates a law enforcement officer (other than a police officer) while in the execution of the officer's duty, although no actual bodily harm is occasioned to the officer	Liable to imprisonment for 5 years
		Section 60A(2): a person who assaults a law enforcement officer (other than a police officer) and the assault occasions actual bodily harm	Liable to imprisonment for 7 years
		Section 60A(3): a person who recklessly wounds or inflicts grievous bodily harm on a law enforcement officer (other than a police officer)	Liable to imprisonment for 12 years

Table 3: *cont.*

AUSTRALIA			
Jurisdiction	Legislation	Offence	Enhancement Provision
Northern Territory	<i>Criminal Code Act 1983</i> (NT) s 189A – Assaults on police	Section 189A(1): any person who unlawfully assaults a police officer in the execution of the officer's duty	Liable to imprisonment for 5 years or, upon being found guilty summarily, to imprisonment for 2 years
		Section 189A(2): if the police officer assaulted suffers harm	Liable to imprisonment for 7 years or, upon being found guilty summarily, to imprisonment for 3 years
		Section 189A(3): if the police officer assaulted suffers serious harm	Liable to imprisonment for 16 years
South Australia	<i>Criminal Law Consolidation Act 1935</i> (SA) s 5AA – Aggravated offences	Section 5AA(1)(c): an offence is aggravated if it is committed against a police officer, prison officer or other law enforcement officer	
		Section 5AA(k)(i): the circumstances can be aggravated if the victim was of a particular vulnerability at the time of the offence because of the nature of his or her occupation or employment	
		Section 5AA(k)(ii): the circumstances can be aggravated if the victim was at the time of the offence engaged in a 'prescribed occupation' or employment and the offender knew that the victim was engaged in that occupation and knew the nature of that occupation. In the <i>Criminal Law Consolidation (General) Regulations 2006</i> (SA), a 'prescribed occupation' is defined as emergency work and includes Country Fire Service and Metropolitan Fire Service officers, State Emergency Service officers, ambulance and St John Ambulance officers, members of Surf Life Saving, a body or organisation that is a member of Volunteer Marine Rescue and those who work in the accident or emergency department of a hospital	
OVERSEAS JURISDICTIONS			
Country	Legislation	Offence	Enhancement Provision
Canada	<i>Criminal Code</i> , RSC 1985, c C-46, s 270 – Assaulting a peace officer	Section 270: assault a public officer or peace officer or a person acting in the aid of such an officer	A person guilty of an indictable offence is liable to imprisonment for a term not exceeding 5 years or for a summary offence a term of 18 months or a \$5000 fine
		Section 270.01: if the person committing the assault carries, or threatens to carry, a weapon or causes bodily harm	A person guilty of an indictable offence is liable to imprisonment for a term of not more than 10 years or for a summary offence a term of not more than 18 months
		Section 270.02: if the victim is wounded maimed, disfigured or his or her life is endangered	A person guilty of this offence is liable to imprisonment of not more than 14 years; the offence is considered indictable only

3.4 SENTENCE AGGRAVATION PROVISIONS

Sentence aggravation provisions are usually found in the general sentencing legislation and specifically state that if a victim is of a certain occupation, the sentencing court takes that fact into consideration as an aggravating factor. As an example, s 21A(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) lists occupations that constitute an aggravating factor to be taken into account when determining the appropriate sentence (see Table 4). Sentence aggravation differs from penalty enhancement in that the latter stipulates an increased maximum penalty when the aggravating element is a proven part of the offence.

3.5 MANDATORY MINIMUM SENTENCES

A mandatory minimum sentence is a minimum sentence set by the legislation whereby the court has no discretion (or very limited power) to reduce the penalty below the one prescribed (see Table 5).

Western Australia has criminal legislation providing mandatory minimum penalties for occupational assaults in prescribed circumstances. New South Wales has also enacted legislation for mandatory life sentences in the event that a police officer is murdered while on duty. Technically, this is a fixed penalty rather than a mandatory minimum penalty.

Table 4: Sentence aggravation provisions

AUSTRALIA		
Jurisdiction	Legislation	Aggravating Provision
New South Wales	<i>Crimes (Sentencing Procedure) Act 1999</i> (NSW) s 21A – Aggravating, mitigating and other factors in sentencing	Section 21A(2)(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

Table 5: Mandatory minimum sentences

AUSTRALIA			
Jurisdiction	Specific Provision	Victim and/or Definition	Nature of Offence and/or Penalty
Western Australia	<i>Criminal Code Act Compilation Act 1913 (WA)</i> s 297 – Grievous bodily harm	Section 297(4)(a): if the victim of the offence is a public officer*, a person in charge of a vehicle on a railway, ferry or passenger vehicle, an ambulance officer, a member of a FESA Unit, SES Unit, VMRS Group, a member of a private or volunteer fire brigade, a person working in a hospital or who is in the course of providing a health service to the public or a contract worker within the <i>Court Security and Custodial Services Act 1999 (WA)</i> or the <i>Prisons Act 1981 (WA)</i>	Any person who unlawfully does grievous bodily harm to another is guilty of a crime and is liable to imprisonment for 10 years Section 297(4): if the victim of the offence is a public officer who is performing a function of his or her office, the offender is liable to imprisonment for 14 years
		Section 297(8): 'prescribed circumstances' exist if the public officer is a police officer, a prison officer, a security officer, an ambulance officer, a member of a FESA Unit, SES Unit, VMRS Group, a member of a private or volunteer fire brigade, a person working in a hospital or who is in the course of providing a health service to the public or a contract worker within the <i>Court Security and Custodial Services Act 1999 (WA)</i> or the <i>Prisons Act 1981 (WA)</i>	Section 297(5): if the offence is committed in prescribed circumstances by a person who has reached 16 but not 18 years of age, the court must sentence the offender either to a term of imprisonment of at least 3 months or to a term of detention of at least 3 months, as the court thinks fit
			Section 297(7): if the offence is committed in prescribed circumstances by a person who has reached 18 years of age, the court must sentence the offender to a term of imprisonment of at least 12 months
	<i>Criminal Code Act Compilation Act 1913 (WA)</i> s 318 – Serious assaults	Section 318(1)(a)–(k): if the victim is a public officer, a person in charge of a vehicle on a railway, ferry or passenger vehicle, an ambulance officer, a member of a FESA Unit, SES Unit, VMRS Group, a member of a private or volunteer fire brigade, a person working in a hospital or who is in the course of providing a health service to the public or a contract worker within the <i>Court Security and Custodial Services Act 1999 (WA)</i> or the <i>Prisons Act 1981 (WA)</i>	Section 318(1)(m): a person guilty of this offence is liable to imprisonment for 7 years or on summary conviction 3 years and a fine of \$36,000 Section 318(1)(l): if the offender is armed with a dangerous or offensive weapon or in the company of another person or persons, the offender is liable to imprisonment for 10 years
		Section 318(5): 'prescribed circumstances' exist if the public officer is a police officer, a prison officer, a security officer, an ambulance officer, a member of a FESA Unit, SES Unit, VMRS Group, a member of a private or volunteer fire brigade, a person working in a hospital or who is in the course of providing a health service to the public or a contract worker within the <i>Court Security and Custodial Services Act 1999 (WA)</i> or the <i>Prisons Act 1981 (WA)</i> and the victim suffers bodily harm	Section 318(2): if the offence is committed in prescribed circumstances by a person who has reached 16 but not 18 years of age, the court must sentence the offender either to a term of imprisonment of at least 3 months or to a term of detention for at least 3 months, as the court thinks fit

Table 5: *cont.*

AUSTRALIA			
Jurisdiction	Specific Provision	Victim and/or Definition	Nature of Offence and/or Penalty
(Western Australia)	<i>(Criminal Code Act Compilation Act 1913 (WA) s 318 – Serious assaults)</i>		Section 318(4)(b): if the offence is committed in prescribed circumstances by a person who has reached 18 years of age, the court must sentence the offender to a term of imprisonment of at least 6 months
			Section 318(4)(a): If the offender is armed or in company with another person or persons, the court must sentence the offender to a term of imprisonment of at least 9 months
New South Wales	<i>Crimes Act 1900 (NSW) s 19B – Mandatory life sentences for murder of police officers</i>	Police officer	A court is to impose a sentence of imprisonment for life for the murder of a police officer. A person sentenced to imprisonment for life under this section is to serve the sentence for the term of the person's natural life
OVERSEAS JURISDICTIONS			
Country	Legislation	Victim and/or Definition	Nature of Offence and/or Penalty
New Zealand	<i>Sentencing Act 2002 (NZ) s 104 – Imposition of minimum period of imprisonment of 17 years or more</i>	Section 104(f): if the deceased person was a constable or a prison officer acting in the course of his or her duty	The court must make an order imposing a minimum period of imprisonment of at least 17 years unless satisfied that it would be manifestly unjust

*The term public officer means any of the following: a police officer, a Minister of the Crown, a Parliamentary Secretary, a member of the House of Parliament, a person exercising authority under a written law, a person authorised under a written law to execute or serve any process of a court or tribunal, a public service officer or employee within the meaning of the *Public Sector Management Act 1994*, a person who holds a permit to do high level security work as defined in the *Prisons Act 1981*, a member, officer or employee of any authority, board, corporation, commission, local government, council or committee or similar body, established under a written law, any person holding office under, or employed by the State of Western Australia, whether for remuneration or not.

4. *Sentencing in Tasmania*

This chapter gives an overview of the actual sentences handed down in Tasmania when offenders have assaulted police officers and other emergency service workers. It first covers the general principles that apply to sentencing. It then presents the sentences handed down for assaulting police officers; this part also includes the charging process and the relevant factors that have been taken into account when sentencing the offender. The final part of the chapter considers how the courts have dealt with other occupational assaults given there are no specific provisions to protect these workers in either the Code or the POA.

4.1 THE POWER TO IMPOSE SENTENCE

The task of imposing sentence in a particular case is incumbent on the presiding magistrate or judge hearing the matter. The judge's or magistrate's sentencing discretion is constrained by a legislative framework and by common law principles. The legislative framework includes the legislative penalty provisions that specify the maximum penalty for an offence and in some instances also a minimum penalty. The general sentencing legislation, the *Sentencing Act 1997* (Tas), also lists the sentencing options available to the court and the aims of sentencing. These aims are set out in s 3 and include punishment, deterrence, prevention, denunciation and rehabilitation.

In Tasmania, the matters relevant to sentence (aggravating and mitigating factors) are determined by the common law. The sentencing task is also constrained by common law sentencing principles, such as the principle of proportionality (a sentence must be proportionate to the harm caused and the culpability of the offender) and the principle that a sentence of imprisonment is the sentence of last resort. In imposing a sentence, the magistrate or judge is also required to have regard to the range of sentences normally imposed for the particular offence – this knowledge can derive from personal experience or from sources such as sentencing data.

Sentencing decisions are subject to appeal, and this guides the exercise of sentencing discretion by providing a review mechanism in individual cases. If the judge or magistrate misapplies a sentencing principle or imposes a sentence that is 'manifestly inadequate' or 'manifestly excessive' having regard to the range of sentences previously imposed, the sentence may be successfully appealed.

While many sentencing principles derive from case law, Parliament has the power to structure, restrict and guide judicial discretion. Parliament may restrict judicial discretion by enacting mandatory penalties and may guide it by providing penalty enhancement provisions or specifying certain aggravating or mitigating factors. Parliament may also leave the range of penalties to the courts to determine as it has done in Tasmania in the case of indictable offences.

4.2 SENTENCES FOR ASSAULTING POLICE OFFICERS

Once an assault has been investigated, the police decide which offence provision best suits the seriousness of the alleged assault having regard to the evidence that has been put together to prove the offence. The provision under which the charge is laid will affect whether it is prosecuted by police or the Director of Public Prosecutions (DPP) and the court in which the charge is heard. It is necessary to consider the charging process used by Tasmania Police and the DPP when a police officer has been assaulted or harmed in the course of his or her duty. The choice of the offence will also affect the possible sentence imposed on the offender.

4.2.1 *The Charging Process*

Indictable or Summary

Tasmania Police make the determination to charge for an assault on police at a summary or indictable level. If a charge is laid pursuant to the Code, the DPP will evaluate the evidence and determine whether it is appropriate to file an indictment. In some cases, the DPP will send a file back to the police advising that a POA charge is more appropriate than a Code indictment with a possible jury trial. In other cases, Tasmania Police may send a file to the DPP for an assessment of the appropriate offence for the charge. If an assault is serious, it can amount to the crime of causing grievous bodily harm or the crime of wounding. The crime of assault is an alternative verdict available to a jury in each case if the jury is not satisfied as to guilt on the more serious charge. If a person is charged with multiple offences, the DPP generally prefers to have all of the offences heard together. To that end, it is likely the DPP will choose to indict for relatively minor assaults if those assaults are associated with another matter, or other matters, being indicted. Section 311(2) of the Code states that 'charges of more than one crime can be joined in the same indictment, if those charges arise substantially out of the same facts'.¹⁸

Most charges of assaulting a police officer are considered relatively minor and are heard in the Magistrates Court. Very few cases are considered sufficiently serious to be indicted. The borderline decisions are normally made by appropriate senior Tasmania Police personnel.

Assaulting a Police Officer or Other Charges

Tasmania Police advise that they always prefer to charge with the specific provisions pursuant to s 114 of the Code and s 34B of the POA. They will only use the general provisions if there is doubt about the ability to prove that the police officer was acting in the execution of his or her duty. In that instance, the decision will be made to prosecute for a general offence. This can also be the practice if there is doubt that the accused knew the person being assaulted was a police officer.

The Council has attempted to ascertain how often police officers are assaulted and how often provisions other than s 114 of the Code or s 34B of the POA are used in charging the offender. It was not possible from available data to determine how often police are assaulted and how often charges are laid for offences outside the specific provision for assaulting a police officer pursuant to s 34B of the POA. The Magistrates Court does not record the occupation of the victim in assault charges; nor do Tasmania Police.

It was possible, however, to determine from the Supreme Court database how often police are assaulted and how often charges are laid for offences outside the specific provision for assaulting a police officer pursuant to s 114 of the Code. The Council reviewed the Supreme Court (Comments on Passing Sentence) database for the four-year period from 2008 to 2011. In that period, there were a total of 10 convictions pursuant to s 114 of the Code and three convictions where charges had been laid under the general provisions and not pursuant to s 114. This review shows that, for serious assaults, Tasmania Police generally use the specific provision for assaulting a police officer as opposed to the general offences, such as grievous bodily harm or wounding.

¹⁸ Section 311(2) of the Code states: 'Except as provided in section 125A(6), charges of more than one crime may be joined in the same indictment, if those charges arise substantially out of the same facts or closely related facts, or are, or form part of, a series of crimes of the same or similar character. In any other case an indictment shall charge one crime only.'

4.2.2 *Relevant Factors in Sentencing an Offender*

This section summarises the factors the court takes into account when sentencing an offender for assaulting a police officer. Before a court passes sentence, both the prosecutor and the defence may address the court with any aggravating or mitigating circumstances. The factors the court takes into account in sentencing an offender for assaulting a police officer have been summarised by Kate Warner,¹⁹ who states that the nature of the attack is an important consideration in the sentencing process. This includes the level of injury sustained, provocation, intent, the use of a weapon, whether the attack was spontaneous or premeditated, the place of the assault and the affront to the dignity of police.²⁰ The author also notes that the prior record of the offender is clearly relevant, and prior convictions of a similar nature may tip the balance in favour of a prison sentence.²¹ Factors that have been taken into consideration in the sentencing process in more recent cases are:

- a threat of violence but no actual violence, a lack of prior history and a very early guilty plea²²
- the need for personal deterrence for assaulting a female officer who was much smaller than the offender and a comment by the offender at the police station after the event that the incident was funny²³
- a lengthy record, including prior convictions for acts of violence, verbal threats and abuse done in the presence of others, indicating a strong need to reinforce the authority of police.²⁴

A recent decision in relation to assaulting a police officer was the Tasmania Court of Criminal Appeal decision in *Crosswell*.²⁵ In January 2010, Rodney Gene Crosswell was sentenced to a global sentence of 10 years and 6 months' imprisonment²⁶ for armed robbery, assaulting a police

officer and several other less serious offences.²⁷ In this instance, the appellant assaulted an officer acting in the due execution of her duty by pointing and discharging a .410 calibre single-barrel sawn-off shotgun in her direction. In January 2012, this sentence was appealed on the grounds that the sentence was manifestly excessive.²⁸ The appeal was allowed.

Their Honours Justices Evans, Blow and Tennant considered the breakdown of the global sentence into the separate sentences imposed on the appellant and reduced the sentence of three and a half years for assaulting a police officer to two and a half years. In their reasons for judgment, specifically relating to the sentence imposed for assaulting a police officer, their Honours stated:

it must be kept in mind that the form of assault involved was an assault by a threatening gesture. No force was applied ... At the time of the incident [the officer] was unaware that she had been threatened.

... the actual discharge of a firearm is an extremely grave threat of violence, and one that is fraught with danger. In this case, the danger was compounded by a number of factors. The firearm was discharged from a moving vehicle in the direction of Constable Dillon and in close proximity to her. The weapon was discharged on a public highway. Another police officer was present and there were other vehicles and persons in the vicinity. There was a real risk that the discharge of the firearm could have caused injury or death. ... By interfering with her execution of [police] duty the appellant assisted the driver ... to continue to drive in a manner that constituted a very real danger to the public and the occupants of the [vehicle]. The crime was a very public and deliberate challenge to the authority of the police.²⁹

¹⁹ Warner, above n 13, 292–293.

²⁰ *House v Johnson* [1966] Tas SR (NC 25), *Lahey v Edwards* [1967] Tas SR (NC 13).

²¹ *Gaynor v Leonard* (Unreported, Supreme Court of Tasmania, 20 August 1982), *French v Marshall* [1993] TASSC 106, *Ponsford v Wynwood* [1999] TASSC 21, *Martin v Manning* (Unreported, Supreme Court of Tasmania, 17 December 1973), *Milburn v Wynwood* [1995] TASSC 77, *Derrico v McKenna* (Unreported, Supreme Court of Tasmania, 1 August 1980).

²² *State of Tasmania v Spinks*, Tennant J, 11 March 2008 (Sentence).

²³ *State of Tasmania v Gee*, Tennant J, 1 October 2008 (Sentence).

²⁴ *State of Tasmania v Jones*, Porter J, 1 July 2009 (Sentence).

²⁵ *Crosswell v Tasmania* [2012] TASC CA 1.

²⁶ The original sentence of 11 years and 2 months was reduced by 8 months due to totality and due to the sentence of 21 months' imprisonment Crosswell was then serving.

²⁷ *State of Tasmania v Crosswell*, Wood J, 16 November 2010 (Sentence).

²⁸ *Crosswell v Tasmania* [2012] TASC CA 1.

²⁹ *Ibid* 23–24 (Evans J).

4.2.3 Sentences for Adult Offenders Pursuant to s 114 of the Code

In the five-year period from 2006 to 2011, there were 13 convictions finalised in the Supreme Court for offences pursuant to s 114 of the Code. Of the 13 convictions, all but two resulted in a term of imprisonment being imposed on the offender. One of the sentences not resulting in a term of imprisonment was that of *Hadley*.³⁰ Hadley was sentenced to 90 hours community service and a probation order for 18 months, with several special conditions, for spitting a mouthful of blood and saliva into a police officer's face. In sentencing the offender, His Honour Justice Blow stated that the defendant would be dealt with leniently, submitting that the crime would probably not have been committed but for three things:

1. the mental health problems of the offender
2. the fact that the offender had been drinking
3. the fact that the offender was suffering from a serious head injury.

The special conditions attached to the probation order included assessment and treatment for alcohol and drug dependency, medical, psychological and psychiatric assessment and treatment, and educational programs as directed by a probation officer.

Sentence lengths for the remaining 11 convictions where the offenders did receive a custodial sentence are summarised in Table 6. This data has been separated according to sentences handed down for a single count of assault police officer and global sentences handed down for two or more offences. In some instances, the court will indicate within the global sentence the sentences handed down for individual offences. If the individual sentences are not indicated in a global sentence, it is not possible to accurately determine the specific sentence for each crime.

Table 6: Assault police custodial sentences (single count and global) 2006–2011

Sentence Type	Number of Offenders	Length of Sentence (Months)				
		0–3	3–6	6–9	9–12	>12
Single count	5	0	3	1	1	0
Global	6	0	1	0	1	4

Source: Supreme Court Tasmania

³⁰ *State of Tasmania v Hadley*, Blow J, 10 January 2011 (Sentence).

4.2.4 Sentences for Adult Offenders Pursuant to the POA

This section considers the sentences handed down in the Magistrates Court in the five years between 2006–2007 and 2010–2011 for offences of assaulting police officers pursuant to the POA. For comparative reasons, this data is presented alongside the sentences handed down for offences under the common assault provisions in the same Act.

To determine the sentencing range for offences of assaulting a police officer pursuant to s 34B(1) and offences of common assault pursuant to s 35(1) of the POA, data was obtained from the Magistrates Court CRIMES database.³¹

Before presenting this data, it is important to note that court data in Tasmania (and most jurisdictions in Australia) is recorded according to principal proven offence and principal sentence.³² A principal proven offence is the most severe offence an offender has been found guilty of. For example, if a person is charged pursuant to the Code with rape, assaulting a police officer and driving while disqualified, the sentence imposed is recorded as a sentence for rape as this is the most serious offence. One of the consequences of recording sentencing data according to the principal proven offence is that some sentences can be excluded from certain classifications. Using the same example above, the charges of assaulting a police officer and driving while disqualified would not appear in the sentencing data as these were not the most serious offences sentenced. Also, if a person were to seriously assault a police officer to the extent that the person is charged with attempted murder, the sentence would be recorded as attempted murder, not as assaulting a police officer, and would therefore not be included in the assault data.

Section 34B(1)(a)(i) of the POA states: 'a person shall not assault, resist, or wilfully obstruct a police officer in the execution of his [or her] duty'. The charges that apply to this section can include one or all of these elements. For comparative reasons, the data has been separated and shows only those cases finalised where the charge for assault is included.

When making inferences from this data, it is important to note that most of the sentences finalised for assaulting a police officer pursuant to s 34B(1)(i) are global sentences, that is, two or more charges were finalised at the same time. Conversely, common assault pursuant to s 35(1) has more incidents of sentencing for a single offence. The fact that there were more global sentences handed down pursuant to 34B(1)(i) has a bearing on the number of offenders who received immediate custodial sentences. However, it is not possible to determine the extent to which this is the case.

The sentencing outcomes³³ that could be determined for the five-year period from 2006–2007 to 2010–2011 where the principal proven offence was assaulting a police officer pursuant to s 34B(1)(a)(i) of the POA are given in Table 7. The data indicates that 14 per cent of offenders received an immediate custodial sentence. Table 7 shows these sentences according to the minimum and maximum sentences handed down, the mean sentence (the average) and the median sentence (the middle value of the data). The median is useful to indicate the middle value of the data, as an extreme value will not affect the median the same way as it will affect a mean.

³¹ For this project the data was checked for any inconsistencies or abnormalities and either a satisfactory explanation was obtained or the data was discarded.

³² Principal proven offences are classified according to the Australian and New Zealand Standard Offence Classification (ANZSOC). The National Offence Index (NOI) provides a hierarchical ranking of offences based on seriousness.

³³ As mentioned, for comparative reasons, the charges for obstruct and resist pursuant to this section were excluded from this analysis.

The sentencing outcomes that could be determined for the same period for the principal proven offence of common assault pursuant to s 35(1) of the POA are also given in Table 7. The data indicates that 9 per cent of offenders received an immediate custodial sentence. Table 7 shows the minimum, maximum, mean and median of these sentences.

Statistical analysis of this data indicates that when a person is charged with assaulting a police officer pursuant to s 34B(1)(a)(i), in the Magistrates Court there is a significantly higher chance that the defendant will be found guilty than if he or she were charged with common assault pursuant to s 35(1). The analysis indicates that in the Magistrates Court when an offender is found guilty of assaulting a police officer, there is a significantly higher chance that the offender will receive an immediate custodial sentence. When an offender receives an immediate custodial sentence for assaulting a police officer, there is no significant difference between the length of custodial sentence he or she receives and the length of the custodial sentence the offender would have received had he or she been convicted of committing a common assault.

4.2.5 Sentences for Juvenile Offenders Pursuant to the POA

The sentencing outcomes that could be determined for the five years from 2006–2007 to 2010–2011 for the principal proven offence of assaulting a police officer pursuant to s 34B(1)(a)(i) of the POA are given in Table 8. The data indicates that 11 per cent of juvenile offenders received immediate detention. Table 8 shows the minimum, maximum, mean and median of these sentences.

The sentencing outcomes that could be determined for the five years from 2006–2007 to 2010–2011 for the principal proven offence of common assault pursuant to s 35(1) of the POA are also given in Table 8. The data indicates that 9 per cent of juvenile offenders received immediate detention. Table 8 also shows the minimum, maximum, mean and median of these sentences.

Table 7: Outcomes in the Magistrates Court from 2006–2007 to 2010–2011 for assaulting a police officer and common assault pursuant to the POA

Offence	Total Number Finalised	Number Found Guilty [‡]	Number Immediate Custodial Sentence	Percentage Immediate Custodial Sentence [§]	Length of Sentence (Months)			
					Min.	Mean	Med.	Max.
Assault Police Officer*	889	780	107	14.1	0.18	5.6	4	24
Common Assault [†]	8212	5097	489	9.8	0.25	4.9	4	36

Source: Department of Justice

* Section 34B(1)(a)(i) of the POA.

† Section 35(1) of the POA.

‡ The difference in the proportions of offenders found guilty of the two types of offence was statistically significant: $\chi^2(1, N = 9101) = 231.09, p < .001$, although the size of this effect was small, $\Phi = .16$.

§ The difference in the proportions of offenders found guilty of the two types of offence who subsequently received an immediate custodial sentence was statistically significant: $\chi^2(1, N = 5771) = 13.64, p < .001$, although the size of this effect was small, $\Phi = .05$. The sentencing outcomes for 106 of the guilty verdict cases could not be confirmed. Thus, the percentage with an immediate custodial sentence is based on 5014 guilty verdicts for common assault and 757 guilty verdicts for assaulting a police officer.

|| The difference in mean length of sentence between those sentenced to prison for assaulting a police officer and those sent to prison for common assault was not statistically significant: $t(594) = 1.28, p > .05$.

The statistical analysis indicates that when a juvenile is charged with assaulting a police officer, in the Magistrates Court (Youth Justice Division) there is a significantly higher chance that the defendant will be found guilty than if he or she were charged with common assault. The analysis indicates that when a juvenile is found guilty of assaulting a police officer, there is not a significantly higher chance that he or she will receive immediate detention in comparison with a juvenile found guilty of committing a common assault. The analysis shows that when a juvenile receives immediate detention for assaulting a police officer, there is no significant difference between the length of detention he or she receives and the length of detention the juvenile would receive were he or she convicted of committing a common assault.

4.3 SENTENCES FOR OTHER WORKPLACE ASSAULTS

As mentioned, there are no specific offences in Tasmania for assaulting an emergency service worker while in the course of his or her employment, with the exception of assaulting a public officer. Nor are there specific sentence aggravation provisions in the *Sentencing Act 1997* (Tas) to explicitly direct the court to consider that the victim was at his or her workplace or was engaged in the duties of his or her employment when the assault happened. However, the fact that a person is assaulted in the course of his or her employment can be regarded by the court as an aggravating factor in sentencing. This aspect of the offence could be said to increase its seriousness in terms of both harm and culpability. The need for an emphasis on general deterrence in such cases is also a recognised factor in the sentencing process. The question that then follows is: Does the court consider the fact that the victim was at work at the time of the offence as an aggravating factor in the sentencing of an offender without a specific sentence aggravation provision?

Table 8: Outcomes in the Magistrates Court (Youth Justice Division) from 2006–2007 to 2010–2011 for assaulting a police officer and common assault pursuant to the POA

Offence	Total Number Finalised	Number Found Guilty [‡]	Number Immediate Custodial Sentence	Percentage Immediate Custodial Sentence [§]	Length of Sentence (Months)			
					Min.	Mean	Med.	Max.
Assault police officer [*]	249	217	23	11.0	1.0	6.6	6.0	20.0
Common assault [†]	1056	794	70	9.2	1.0	7.3	6.0	20.0

Source: Department of Justice

* Section 34B(1)(a)(i) of the POA

† Section 35(1) of the POA

‡ The difference in the proportions of offenders found guilty of the two types of offence was statistically significant: $\chi^2(1, N = 1305) = 16.51, p < .001$, although the size of this effect was small, $\Phi = .11$.

§ The difference in the proportions of offenders found guilty of the two types of offence who subsequently received an immediate custodial sentence was not statistically significant: $\chi^2(1, N = 972) = .64, p > .05$. Sentencing outcomes were known for 209 of the 294 defendants for assaulting a public officer and for 763 of the 794 defendants for common assault. Thus, the percentage with an immediate custodial sentence is based on 763 guilty verdicts for common assault and 209 guilty verdicts for assaulting a police officer.

|| The difference in mean length of sentence between those sentenced to prison for assaulting a police officer and those sentenced to prison for common assault was not statistically significant, $t(50.73) = -.32, p > .05$.

In an attempt to answer this question, the Council first considered data collated from the Magistrates Court. Given the Magistrates Court generally deals with summary offences, it is not practical in all cases to record the reasons sentences are imposed. As a result, it is not possible to determine if the occupation of the victim is considered an aggravating factor in imposing sentence in the Magistrates Court on offenders who have been found guilty of committing an assault.

The Supreme Court (Comments on Passing Sentence) database does include the reasons for the sentence imposed. Therefore, it is possible to determine if the occupation of the victim is considered an aggravating factor in imposing sentence in the Supreme Court on offenders who have been found guilty of committing an assault. For the purpose of this report, the Council considered all comments on passing sentence from June 2008 to February 2012. All sentences for the crimes of assault, aggravated assault, wounding or grievous bodily harm have been considered.

During this period, there were a total of 16 assaults on victims who were in their place of employment or engaged in the duties of their employment at the time they were assaulted. There were no fire officers, ambulance officers or hospital workers in this group. Those assaulted were police, prison officers, crowd controllers, security officers and taxi drivers. Of the 16 cases, there were 13 cases where the occupation of the victim was specifically mentioned as an aggravating factor in the sentence. There were seven assaults on correctional officers, three assaults on police officers, one assault on a security officer, one assault on a taxi driver and one assault on a crowd controller. The assaults where the occupation of the victim was not specifically mentioned as an aggravating factor involved one prison officer, one crowd controller and one taxi driver. In the case of the taxi driver, the court was concerned that the crime was racially motivated, so it placed particular significance on the need for general and specific deterrence for a racially motivated offence.

Examples of comments on passing sentence from the 13 instances where the court stated that the occupation of the victim was a relevant factor in the sentencing decision are as follows:

- 'Police officers acting in the course of their duties should be entitled to act without fear of being attacked ... a deterrent sentence is required.'³⁴
- 'Correctional Officers have an unpleasant job to do, and the courts need to come down heavily on people who assault them, and on people who try to escape.'³⁵
- 'Aggravating factors are that the assault occurred in a public place, without warning, and against a person responsible for public safety.'³⁶
- 'His Honour recognised the need to deter prison inmates from committing serious acts of defiance within the prison environment and in particular from attacking correctional officers who were often in vulnerable situations with groups of inmates. Again, those comments apply here. The position of corrections officers should not be seen to be undermined by these continuing attacks on them. It should be seen that the courts are penalising those who commit attacks of violence against them.'³⁷

Although working with a small sample size, this research indicates that if a person is at their place of employment when assaulted in Tasmania, the Supreme Court does take this into consideration as an aggravating factor in sentencing the offender without the presence of a specific sentence aggravation provision.

³⁴ *The State of Tasmania v Beeton*, Tennant J, 29 September 2011 (Sentence).

³⁵ *The State of Tasmania v Enniss*, Blow J, 10 December 2010 (Sentence).

³⁶ *The State of Tasmania v Comerford*, Slicer J, 11 March 2009 (Sentence).

³⁷ *The State of Tasmania v Goddard*, Tennant J, 30 May 2011 (Sentence).

5.

The Need for Reform

5.1 INTRODUCTION

The Drug and Crime Prevention Committee of the Parliament of Victoria states:

Research has shown that media reporting tends to sensationalise the issue of violent crime, generating fear among the general population that often does not match the actual level of risk faced.³⁸

The need for reform in Tasmania is contingent on the level of risk faced by emergency workers in Tasmania. It is therefore appropriate to assess the actual level of risk that emergency service workers face in Tasmania.

Given the offence of assaulting a police officer already exists, there is no requirement to show that there is a substantial level of risk associated with this class of emergency service worker and there is a need for a specific offence to protect them. It appears that the community concern in relation to assaults on police is due to a perceived increase in the incidence and severity of assaults and a perceived leniency in the sentences imposed on those who commit the assaults.³⁹ Due to an increase in these assaults in Tasmania, there have also been calls for the introduction of mandatory sentences of imprisonment for offenders who have seriously assaulted police.

As there are two separate issues to be discussed, this chapter is presented in two parts. Part A concentrates exclusively on assaults on police in Tasmania and Part B considers assaults on other emergency service workers.

5.2 PART A – ASSAULTS ON POLICE OFFICERS

In 2010 the Tasmanian Liberals went to the election with a policy of introducing mandatory minimum sentences for serious assaults against police and emergency service workers – a policy they still stand by.⁴⁰ In a media statement on 3 March 2010, the Police Association of Tasmania welcomed the announcement stating, 'from the evidence we have seen in other states, we anticipate that this measure will reduce the rate of assaults'.⁴¹

In an interview with the Police Association of Tasmania, it was stated that the evidence referred to in the media statement on 3 March 2010 was that found in Western Australia after the introduction of mandatory imprisonment for a serious assault on police and other officers.⁴² Given these penalties have been proposed by the Tasmanian Liberals and endorsed by the Police Association of Tasmania, it is prudent to analyse all aspects of the mandatory provisions in Western Australia, including the purpose and effect.

³⁸ Drugs and Crime Prevention Committee, above n 1, 70.

³⁹ In a recent submission to Parliament, the Police Association of Tasmania stated, 'Members of the Association have long held the belief that the charge of assault Police is not treated with the seriousness it deserves. Sentences handed out to the judiciary do nothing to deter further offences.' Police Association of Tasmania, Submission to Parliament of Tasmania, *Violence in the Community* (24 August 2010) 6.

⁴⁰ Elise Archer MP, *New Police Assault Figures Highlight Need for Mandatory Sentencing* (16 December 2011), Tasmanian Liberals <http://www.tas.liberal.org.au/default.cfm?action=news_detail&ID=12888>.

⁴¹ Police Association of Tasmania, above n 7.

⁴² Meeting with Randolph Wierenga, President, Police Association of Tasmania (23 November 2011).

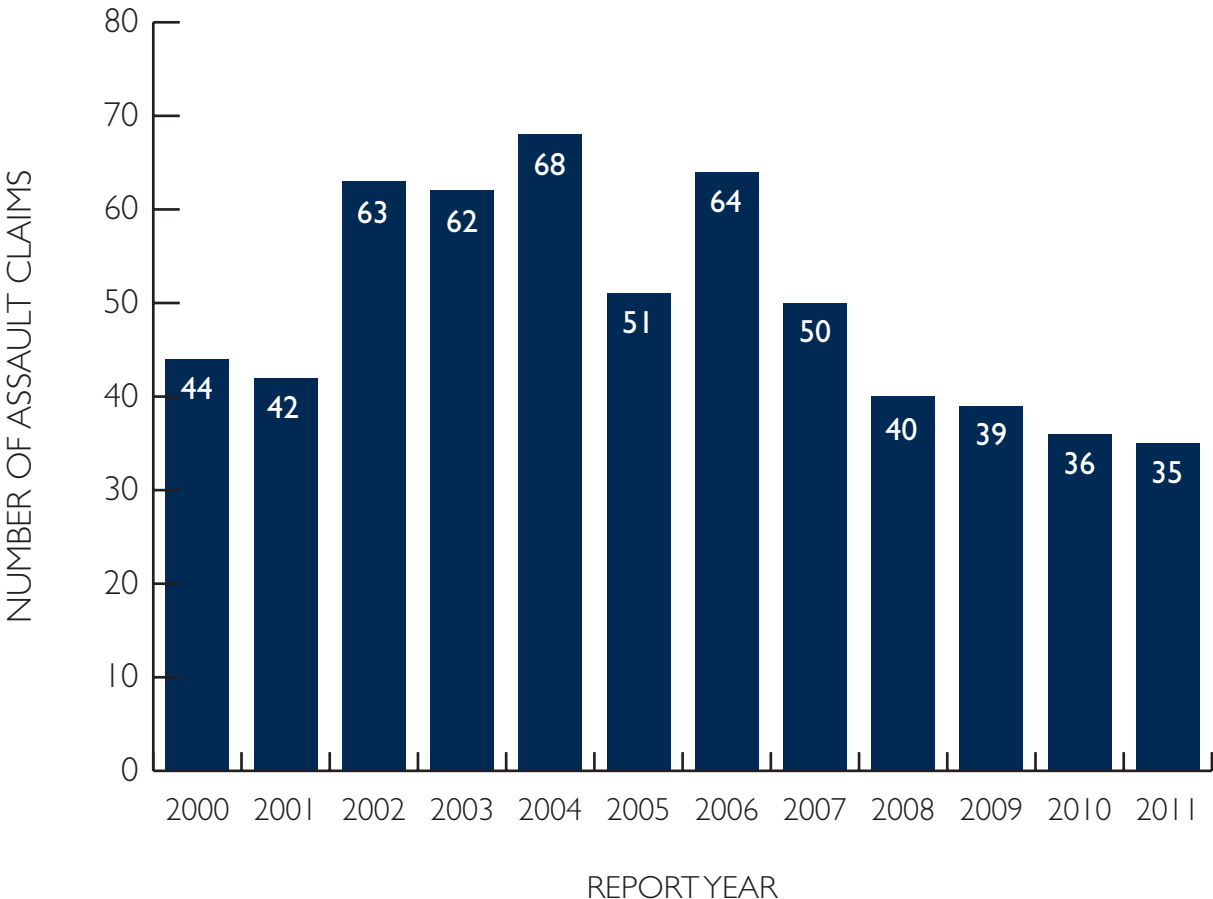
This section first considers data obtained from WorkCover Tasmania and Victims Support Services Tasmania to ascertain if there has been an increase in the seriousness of assaults on police in Tasmania. This is followed with data obtained from Tasmania Police on the number of assaults on police and the number of assaults in public places from 2006–2007 to 2010–2011. The last part of this section considers the implementation of mandatory minimum sentences for serious assaults on police and other officers in Western Australia in 2009.

5.2.1 The Seriousness of Assaults

WorkCover Tasmania

The number of workers compensation claims lodged by officers who have been assaulted seriously enough to warrant medical attention and/or time off work will indicate the number of serious assaults on officers in Tasmania. Data obtained from WorkCover Tasmania⁴³ for the last 10 years indicates the trend of serious assaults on officers over that period. As can be seen, the data indicates a steady decline in serious assaults on police in the last five-year period for the record years 2006–2011 (see Figure 1).

Figure 1: The number of workers compensation claims made by police officers for workplace assaults in Tasmania for the record years 2000–2011



Source: WorkCover Tasmania

⁴³ Refer to 5.3.1 for details on collation and classification of data from WorkCover Tasmania.

Victims Support Services

Data from Victims Support Services (VSS) can also be used to indicate the seriousness of assaults on police officers over time. The Victims of Crime Service (VCS), a service located within VSS, supports people in dealing with personal and practical problems associated with the impact of crime.⁴⁴ The VCS was established through cooperation between the Department of Justice and Tasmania Police to meet the needs of victims of crime in Tasmania.

Victims of Crime Assistance awards can be up to \$30,000 for the primary victim, depending on the victim and the effects of the crime. Claims for Victims of Crime Assistance awards by police officers have declined considerably over the last 10 years

(see Table 9). For the financial year 2000–2001 there were a total of 41 claims made by police officers, whereas in 2010–2011 there were only five claims. None of the claims in the 2010–2011 period was considered 'serious', with the largest claim being \$5400.00 and the average claim being around \$500.00. VSS advise that the decrease in claims for assistance from police officers is due directly to legislative changes in 2005.⁴⁵ These changes tightened the gateway for compensation, which had a direct effect on the number of claims for two reasons. First, compensation was not to be awarded if it were also payable under workers compensation law, meaning that VCS now only provide assistance for pain and suffering. Secondly, administrative changes within Tasmania Police meant that a claim had to be approved by the Police Commissioner's Office; as a result the number of claims decreased significantly.⁴⁶

Table 9: Victims of Crime claims made by police officers, 2000–2001 to 2010–2011

Period	Female	Male	Total
1 July 2000 – 30 June 2001	12	29	41
1 July 2001 – 30 June 2002	5	25	30
1 July 2002 – 30 June 2003	9	28	37
1 July 2003 – 30 June 2004	9	23	32
1 July 2004 – 30 June 2005	7	15	22
1 July 2005 – 30 June 2006	0	12	12
1 July 2006 – 30 June 2007	5	11	16
1 July 2007 – 30 June 2008	3	10	13
1 July 2008 – 30 June 2009	4	5	9
1 July 2009 – 30 June 2010	0	3	3
1 July 2010 – 30 June 2011	2	3	5

Source: Victims of Crime

⁴⁴ Department of Justice, *Victims of Crime Service* (3 February 2011) Victims Support Services <<http://www.justice.tas.gov.au/victims/services/victimsofcrime>>.

⁴⁵ The amendments to the Act in 2005 also incorporated a name change from the *Victims of Crime Assistance Act 1976* to the *Criminal Injuries Compensation Act 1976*.

⁴⁶ Meeting with Debra Rabe, Manager of Victims Support Services (10 November 2011).

5.2.2 The Number of Assaults

Tasmania Police provided the Council with raw data indicating the number of charges for assaulting a police officer for the financial years 2006–2007 to 2010–2011. This data shows a steady decline in charges for assaulting a police officer over the five years (see Figure 2). A closer examination indicates a steady decline in the four-year period from 2006–2007 to 2009–2010, followed by a substantial drop in the number of charges for the 2010–2011 financial year.

Tasmania Police advise that they cannot explain the substantial drop in charges found at both an indictable and a summary level for the 2010–2011 financial year. Tasmania Police recognise that there are many factors that could contribute to this, including operational changes, changes in policing practices or a rise in other offences on police, that is, resist or obstruct. Further, specific attention is drawn to the recent general decline in all areas of crime in Tasmania and Australia.

The figures indicating the steady decline in assaults on police also correlate with figures from Tasmania Police for assaults in public places in Tasmania. Both sets of data indicate a steady decline in the four-year period for the financial years 2006–2007 to 2009–2010, and a substantial drop in assaults for the 2010–2011 financial year (see Figures 2 and 3).

5.2.3 Interpretation of the Data

It has been claimed that the '[s]hocking new police assault figures in the Tasmania Police Corporate Performance Report for November 2011 showing a 25 per cent increase in police assaults highlights the need for mandatory sentencing in Tasmania'.⁴⁷ To use this '25 per cent increase' in charges for assaulting a police officer in isolation does not necessarily present a true indication of the level of assaults on police for the following reasons.

First, Tasmania Police advise that it is not uncommon for one offence on police to decrease at the same time as another increases to offset the decrease. For example, an increase in charges for obstructing a police officer will often result in a decrease in assault, resist or threaten and abuse. In this instance, an examination of the Tasmania Police Corporate Performance Report for November 2011⁴⁸ does indicate a 25 per cent increase in assaulting a police officer; but there was also a 40 per cent decrease in obstructing a police officer (see Table 10).

Table 10: Offences against police taken from the Tasmanian Police Corporate Performance Report of November 2011

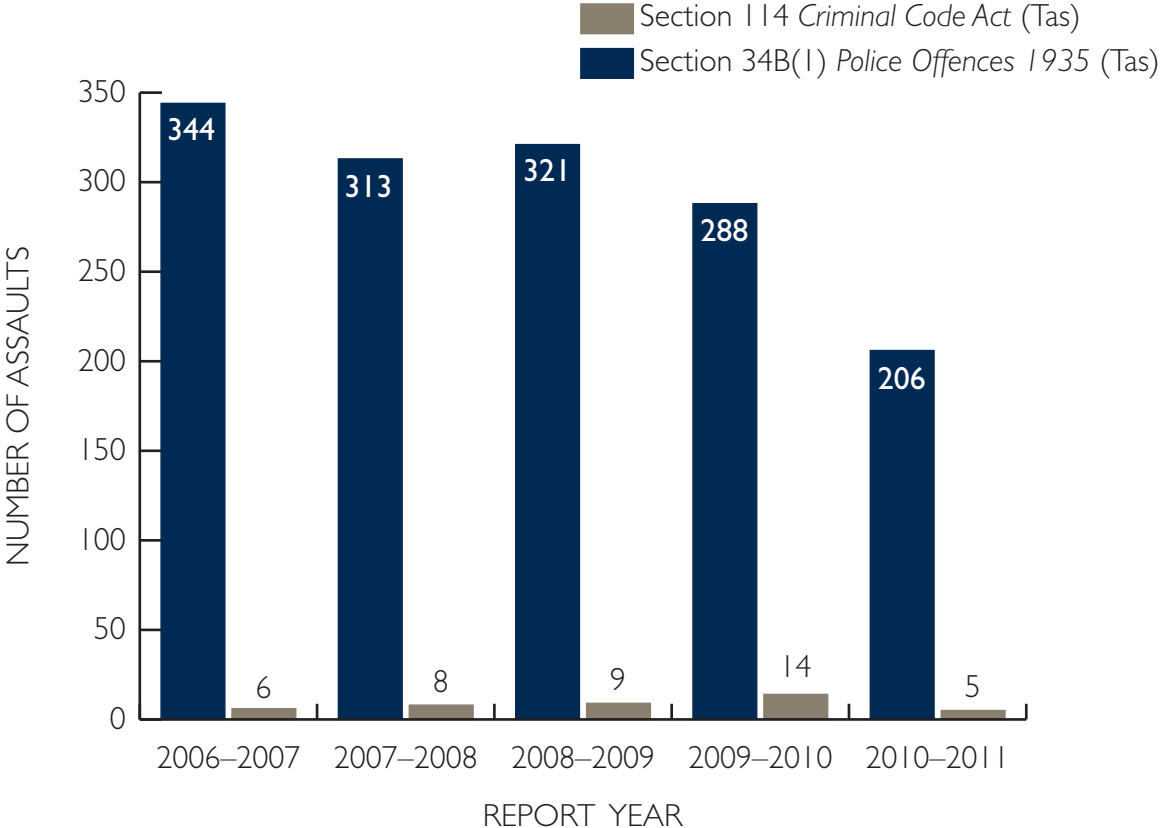
Offence	Previous Year	Current	Change	
Assault	97	122	+25	+25.8%
Resist	149	139	-10	-6.7%
Obstruct	54	32	-22	-40.7%
Threaten/abuse, intimidate	154	139	-15	-9.7%
Code offence	3	9	+6	+200%

Source: Tasmania Police

⁴⁷ Elise Archer MP, above n 40.

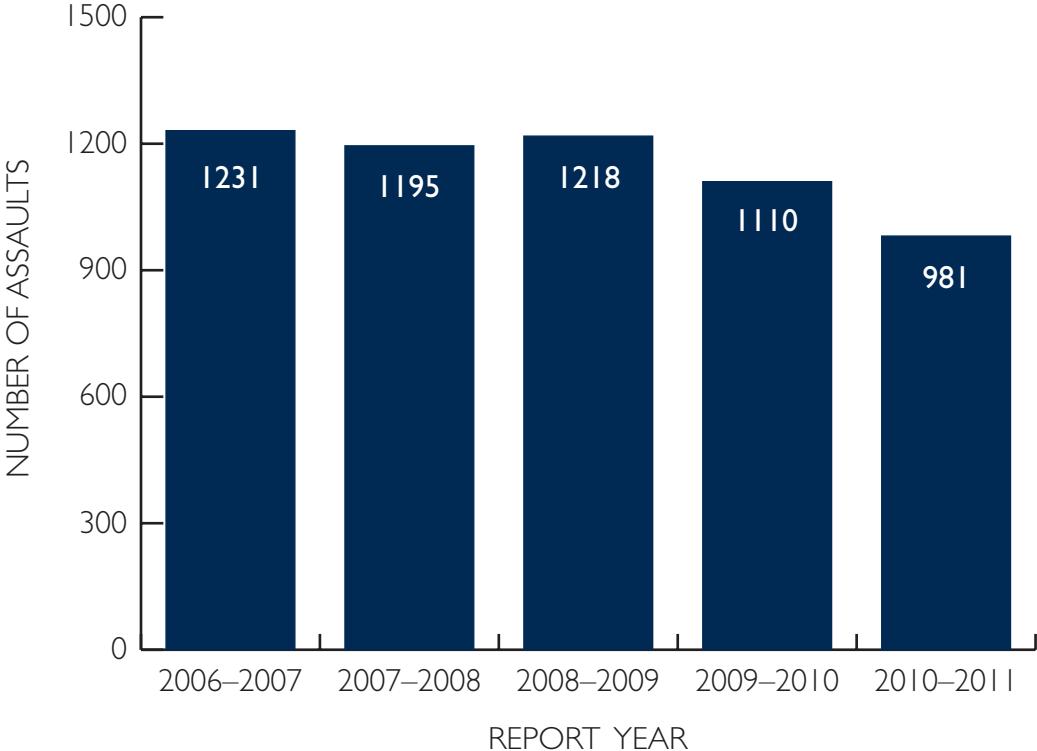
⁴⁸ Tasmania Police, *Corporate Performance Report November 2011* (12 December 2012) Tasmania Police <www.police.tas.gov.au/about-us/our-performance>. The Corporate Performance Report is published on the Tasmania Police website on a monthly basis.

Figure 2: Charges for assaulting a police officer in Tasmania for the financial years 2006–2007 to 2010–2011



Source: Tasmania Police

Figure 3: Charges for public place assaults in Tasmania for the financial years 2006–2007 to 2010–2011



Source: Tasmania Police

The report does show a spike in the number of assaults for the five months from the beginning of the financial year to November, compared with the same period in 2010. However, the figures for the entire 2010–2011 financial year shows an unexplained substantial drop in assaults on police. In fact, for that year there was an unexplained decrease in *all* offences on police, including resist, obstruct, threaten, abuse and intimidate (see Table 11 and Figure 2).

If the November 2011 report had been compared with the same time period for the 2009–2010, 2008–2009 or 2007–2008 financial years, it would have shown a decline in assaults on police. In other words, by only comparing the 2010–2011 financial year figures to that date, a year in which the overall total assaults on police had decreased by 28.5 per cent (refer to Table 11), the increase appears substantial; however, when compared with the five-year trend, this is not found to be the case.

5.2.4 Mandatory Minimum Sentences in Western Australia

Purpose

The mandatory sentencing legislation for assaults on emergency service workers was one of the commitments of the Liberal Party in Western Australia in the 2008 election. Their 'Protecting Our Police' policy called for mandatory sentences for assaulting police and public officers and tougher sentences for grievous bodily harm and serious assaults. This was backed by the assertion that there had been a significant rise in these crimes in Western Australia. In March 2009, a rally was organised by the WA Police Union of Workers to support laws for mandatory sentencing for offenders who assault police and other public officers. The rally was attended by 2500 people.⁴⁹

The *Criminal Code Amendment Act 2009* (WA) came into effect on 22 September 2009. In essence, if an offender is convicted of an offence against s 297 or s 318 of the *Criminal Code 1913* (WA), in 'prescribed circumstances' he or she is subject to a mandatory minimum term of imprisonment.⁵⁰

Table 11: Offences against police taken from the Tasmanian Police Annual Corporate Performance Report of 2010–2011

Offence	Previous Year	Current	Change	
Assault	288	206	-82	-28.5%
Resist	370	321	-49	-13.2%
Obstruct	121	121	0	0.0%
Threaten/abuse, intimidate	382	344	-38	-9.9%
Code offence	14	5	-9	-64.3%

Source: Tasmania Police

⁴⁹ Warwick Stanley, 'Thousands Rally to Support WA Police', *The Age* (online), 17 March 2009 <<http://news.theage.com.au/breaking-news-national/thousands-rally-to-support-wa-police-20090317-90xh.html>>.

⁵⁰ See s 3.5 for a detailed explanation of 'prescribed circumstances'.

Effect

In a Ministerial Media Statement of September 2010, one year after the introduction of the mandatory sentencing legislation, the WA Attorney General and the Minister for Police stated that reported assaults against police officers had decreased by 28 per cent since the Liberal–National Government introduced the legislation.⁵¹ They asserted that this decrease in assaults was directly attributable to the mandatory sentencing that came into force in 2009. Whether this decrease was, in fact, the result of mandatory minimum legislation has not been substantiated.

Records obtained from the Business Intelligence Office, Western Australia Police, illustrate the annualised number of reported assaults on police officers from June 2006 to December 2010 (see Appendix). These records show a trend in offences that appears to indicate a substantial decline in the number of assaults since the introduction of mandatory sentencing in September 2009. Additional records from the same office indicate the monthly number of reported assaults on police officers from July 2005 to January 2011 (see Appendix). These records indicate that the decline in reported assaults began prior to the introduction of mandatory sentencing in September of 2009.

This decline, prior to the introduction of mandatory sentencing, was explained by the Business Intelligence Office as follows:

The introduction of the mandatory sentencing bill and the public protest in March 2009 in support of the legislation and subsequent debate in Parliament may have influenced community behaviour prior to the commencement of the legislation in September 2009.⁵²

In relation to other factors that could explain the decline in assaults on police officers in WA, the annual crime statistics from the WA Police website indicate that assaults in public places have also declined (see Figure 4, page 30).⁵³ The financial years 2009–2010 to 2010–2011 show the largest decline relative to previous years. These statistics indicate a substantial decline in public place assaults that matches the pattern of assaults on police officers for the same period.

As stated earlier, data obtained from Tasmania Police shows that assaults on police in Tasmania decreased by 28 per cent in the 2010–2011 financial year. Tasmania Police recognise that many factors could have contributed to this decrease, but it must be noted that this occurred without the introduction of mandatory minimum sentences in Tasmania (see Table 11). The Tasmanian data also shows a substantial decrease in public place assaults in the 2010–2011 financial year, consistent with the decrease in assaults on police officers.

Just prior to the implementation of the mandatory sentencing legislation in Western Australia, the police changed their policy in relation to single officer patrols. In April 2008, by Commissioner's Instruction, it became policy that members of the police service were not to be 'rostered, directed or encouraged' to patrol alone.⁵⁴ In order to consider the true impact of abolishing single officer patrols, it is necessary to show the assault rate for officers working alone prior to the change of policy.

It is not asserted that the change in policy for single officer patrols explains the recent decline in assaults on police officers in Western Australia. However, the phasing out of single officer patrols is a factor that could have contributed to this recent decline, apart from the introduction of the mandatory minimum penalty legislation in September 2009.

⁵¹ Rob Johnson and Christian Porter, 'Assaults against Police Plummet under Mandatory Sentencing Laws' (Ministerial Media Statement, 22 September 2010) <www.mediastatements.wa.gov.au/pages/StatementDetails.aspx?listName=StatementsBarnett&StatId=3115>. See also Rob Johnson and Christian Porter, 'Reported Assaults against Police Continue to Decline' (Ministerial Media Statement, 23 June 2011) <www.mediastatements.wa.gov.au/pages/StatementDetails.aspx?listName=StatementsBarnett&StatId=4369>.

⁵² Business Intelligence Office, Western Australia Police, 'Assault Police Officer – Mandatory Sentencing' (Western Australia Police, 2012).

⁵³ Western Australia Police Service, *Crime Statistics*, Western Australia Police (Retrieved January 2013) <<http://www.police.wa.gov.au/Aboutus/Statistics/Crimestatistics/tabid/1219/Default.aspx>>.

⁵⁴ Western Australia Police, 'Police Manual, PA-1.2.2 Single Officer Patrols', in Western Australia, *Police Gazette*, no. 15, 9 April 2008.

Another factor worth considering is the general decline in all public place assaults in Western Australia that occurred around the same time as the decline in assaults to police officers. As noted, Tasmania has also experienced a sudden decline in assaults on police officers and in public place assaults in a timeframe consistent with that in Western Australia. Tasmania Police have partly attributed this to the general decline in all areas of crime in Tasmania and in Australia.

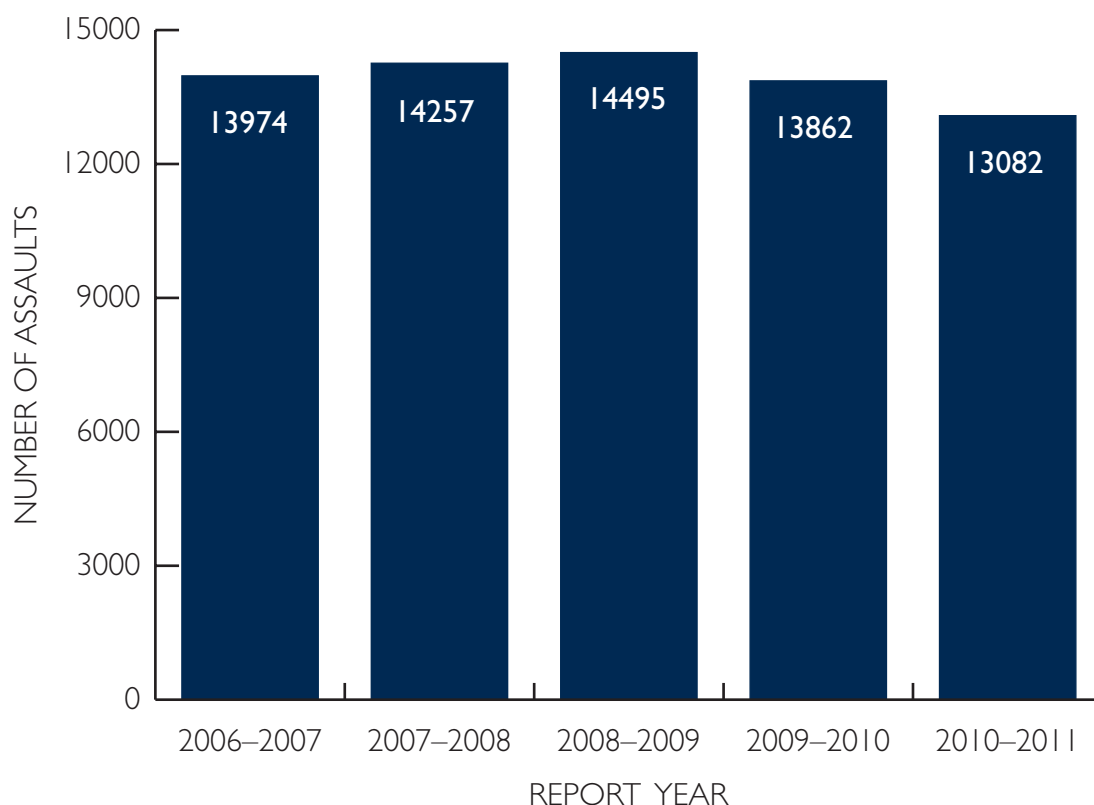
Commentary

On 10 December 2011, a newspaper report in Western Australia⁵⁵ commented on the finalisation of cases since the introduction of the minimum mandatory penalties in September 2009. Of the 34 offenders whose cases were finalised in Western Australian

courts between September 2009 (when the laws were introduced) and December 2011, only 12⁵⁶ had been jailed. A precedent had been set when a juvenile was charged under mandatory sentencing and given a supervision order.⁵⁷ The then president of the Western Australia Police Union, Russell Armstrong, is reported to have said, ‘the laws were being watered down by excessive plea bargaining and called for a review’. The report further stated:

15 charges had ended with non-custodial sentences, including fines, behaviour orders and suspended sentences that resulted in plea bargaining when prosecutors accepted guilty pleas to lesser charges and removed the ‘bodily harm’ element, which triggers incarceration.⁵⁸

Figure 4: Assaults in public places in Western Australia from 2006–2007 to 2010–2011



Source: Western Australia Police

⁵⁵ Glenn Cordingley, ‘Officer Bitten by the Law’, *The Sunday Times* (online), 10 December 2011 <<http://www.news.com.au/officer-bitten-by-the-law/story-e6frfkp9-1226218847278>>.

⁵⁶ There were in fact 13 cases whereby an offender was incarcerated pursuant to s 318(4) of the *Criminal Code 1913* (WA).

⁵⁷ Cordingley, above n 55.

⁵⁸ *Ibid.*

On 11 June 2011, the Greens introduced a Bill into the Western Australian Parliament banning mandatory sentencing for mentally ill offenders. This move was backed by the Law Society, with its President, Hylton Quail, stating that it was a “step in the right direction” because the present law did not take into account the individual’s circumstances”.⁵⁹ Mr Quail argued that ‘a person whose judgment or behaviour was impaired by mental health issues at the time of committing an offence should have this taken into account by the court and be sentenced accordingly’.⁶⁰ The Western Australian Chief Justice, Wayne Martin, backed the Law Society’s stance on mandatory sentencing laws, stating that ‘mandatory sentencing laws take away judicial discretion and go against the principles of fairness’.⁶¹ One of the first people charged under the tough new laws was a 22 year-old woman suffering from post-traumatic stress disorder and depression. The woman allegedly assaulted a paramedic, who only suffered minor cuts to the nose. The charges against her were eventually downgraded, but her case did highlight the judiciary’s concerns.

5.3 PART B – ASSAULTS ON EMERGENCY SERVICE WORKERS

The purpose of this section is to highlight which workers are at the greatest risk of assault in the course of their employment. This section first summarises data from WorkCover Tasmania in relation to workers compensation claims made in this State for the twelve-year period from the beginning of 2000 to the end of 2011. This is followed by a review of figures obtained from the Department of Health and Human Services (DHHS) and the Victims of Crime Service (VCS). This section also informs discussion of which class of worker should be included within the scope of any legislative reform and, if there is legislative reform, which workers should be included in the definition of an emergency service worker.

5.3.1 Workers Compensation Claims

Workers compensation figures give the number and occupation of workers who have been subject to a workplace assault resulting in a workers compensation claim. These figures give a clear indication of both the number of serious assaults and the occupations that are most at risk of assault in Tasmania.

The WorkCover Scheme Analysis Unit of the Rehabilitation and Compensation section of WorkCover Tasmania provided the Council with a report on the number of claims, categorised by profession. WorkCover provided data on two categories used to classify claims, which they call ‘mechanisms of injury’;⁶² these are: ‘being assaulted by a person or persons’ and ‘exposure to workplace or occupational violence’. WorkCover Tasmania has stated that ‘exposure to workplace or occupational violence’ generally covers stress claims relating to an episode of occupational violence, for example, an armed holdup at a service station resulting in a stress claim for a worker who was not harmed physically. Given this category includes stress claims that are a result of occupational violence but are not assaults per se, these figures have not been included in the data.

WorkCover Tasmania does not record whether it is a fellow employee or a member of the public who has committed an assault. Also, the data from WorkCover has been grouped according to the Australian and New Zealand Standard Classification of Occupations (ANZSCO),⁶³ a system of occupation classification developed by the Australian Bureau of Statistics (ABS). To simplify the data for the purposes of this Final Advice, the Council has aggregated the occupational groups for school teachers and teachers aides as well as enrolled and registered nurses and aides. These classifications are separately defined by the ANZSCO classifications.

⁵⁹ Emily Moulton, ‘Top Judge Backs Stance on Mandatory Sentencing’, *Perth Now* (online), 23 June 2011 < <http://www.perthnow.com.au/top-judge-backs-stance-on-mandatory-sentencing/story-fn6mh6b5-1226080887511> >.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² A mechanism of injury is the ‘overall action, exposure or event that best describes the circumstances that resulted in the most serious injury or disease [as] defined in the Type of Occurrence Classification System (TOOCS3)’. Rehabilitation and Compensation Section, WorkCover Tasmania, *Data for the Sentencing Advisory Council: Number and Profession of Workers Who Have Been Assaulted in the Workplace* (WorkCover Tasmania, 2012) 4.

⁶³ Australian Bureau of Statistics, *ANZSCO – Australian and New Zealand Standard Classification of Occupations, First Edition, Revision 1*, Cat. No. 1220.0 (Australian Bureau of Statistics, 2009). ANZSCO replaces the Australian Standard Classification of Occupations (ASCO).

A further consideration when drawing inferences from this data is that it indicates the actual number of workers compensation claims that have been made. This data is not expressed as an incident rate per head of population for those occupational groups.

The Council has not reproduced all of the data provided by WorkCover Tasmania. The data that has been included concerns those professions typically classified as emergency workers, that is, police, fire and ambulance. The other occupational groups included are those afforded protection in other jurisdictions and those with higher rates of assault.

As can be seen in Figure 5 (page 34), there are high levels of assaults on police officers, nurses (including mental health nurses), teachers and special care workers (including residential care assistants and aged or disabled carers). Although the level of assaults on prison officers appears to be low, the small number of officers in this occupation when considered per head of population translates into a high incident rate for assaults on these officers.

5.3.2 Assaults on Ambulance Officers and Emergency Staff

Information was provided by DHHS to assist the Council with determining the assaults on health care staff that translate into assaults on emergency service workers. DHHS reported 624 aggressive incidents on health care staff for the one-year period from 2010 to 2011 (see Table 12). Unfortunately, this data does not discriminate between those who work in emergency areas and those who do not. The total 624 aggressive incidents reported to DHHS resulted in 25 workers compensation claims, representing 4 per cent of the total number of incidents. The claims were classified by type of service (see Table 13). In this time period, there was one claim from Ambulance Tasmania; DHHS states this is the only workers compensation claim encountered for an assault on an ambulance officer in the last five years.⁶⁴

Table 12: Department of Health and Human Services reported aggressive incidents from 1 November 2010 to 31 October 2011

Type of Incident	Number
Exposure to verbal abuse	319
Deliberate kicks/punches/bites/pushes/grabs	223
Accidental contact	20
Assault with an object or weapon	33
Threat with an object or weapon	26
<Not Specified>	3
Total	624

Source: Department of Health and Human Services

⁶⁴ This was made in September 2010 and was not so much a deliberate assault as a person lashing out (the ambulance officer, who was pregnant at the time, received a kick to the abdomen). The claim covered an appointment with a general practitioner and a total of five days leave from employment.

The Council contacted the Royal Hobart Hospital in an attempt to obtain anecdotal evidence as to the number of assaults in accident and emergency areas that could go unreported. The hospital advised that verbal abuse is common, happening as an every-day occurrence, but it is often unreported as most hospital staff consider it part of the job. Physical abuse is not common and happens rarely in accident and emergency. Physical assaults are more common in obstetric and paediatric units as these units are more likely to be affected by custody and child protection issues. Apart from the problems experienced in the obstetric and paediatric units, the main groups who cause abuse are patients affected by drugs and alcohol, aggressive psychiatric patients and patients suffering from dementia.⁶⁵

A substantial number of aggressive incidents are directed at health care staff within DHHS, and ambulance and emergency staff are often subjected to verbal abuse. However, they are very rarely subjected to physical workplace assaults.

5.3.3 Victims Support Services

Victims Support Services figures indicate the number of workplace assaults resulting in Victims of Crime Assistance awards and the professions of the workers assaulted. These figures can also indicate the number of serious occupational assaults and the occupations at a higher risk of assault.

Although VSS were able to supply data in relation to claims by police officers for assistance awards, information regarding the occupation of victims is not readily available (this requires manual extraction of data on all claimants in the agency). However, in an interview, the Manager of VSS, who has had over 10 years within the service, advised that there are predominately two classes of worker who consistently make genuine claims. These are custodial officers and nurses in psychiatric wards. In addition, the Manager stated that there are minimal claims for fire officers, ambulance officers and doctors or nurses in emergency wards.⁶⁶

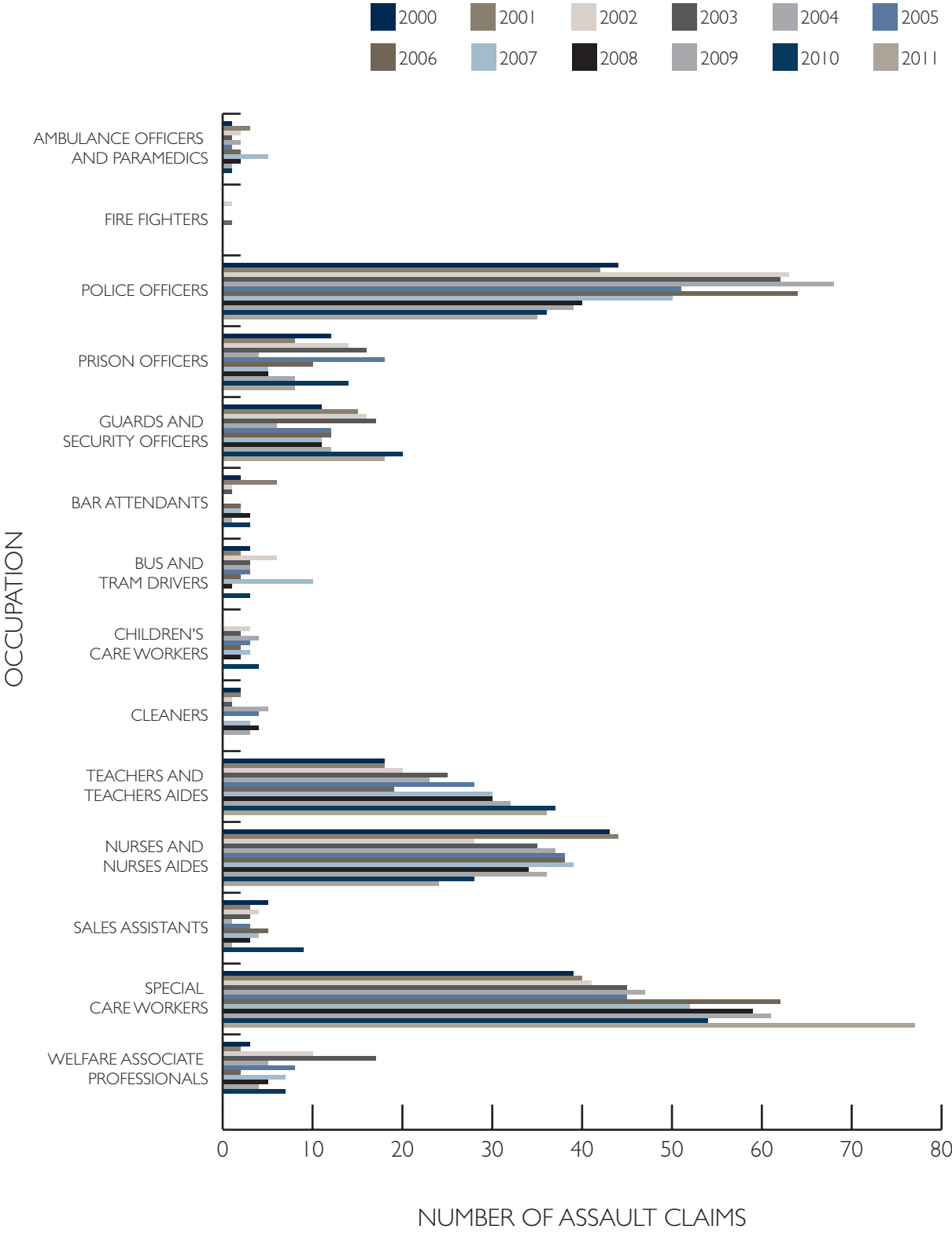
Table 13: Department of Health and Human Services workers compensation claims for aggressive incidents from 1 November 2010 to 31 October 2011

Area	Number
Ambulance Tasmania	1
Children and Youth Services	6
Disability and Community Services	2
Northern Area Health Service (NAHS)	1
Southern Tasmania Area Health Service (STAHS)	3
Statewide and Mental Health Services	12
Total	25

Source: Department of Health and Human Services

⁶⁵ Meeting with Don Burton, Nurse Unit Manager, Emergency Department Nursing, Royal Hobart Hospital (January 2011).
⁶⁶ Meeting with Debra Rabe, Manager, Victims Support Services, Department of Justice (December 2011).

Figure 5: The number of workers compensation claims in Tasmania for the record years 2000– 2011



Source: WorkCover Tasmania

6.

Options for Reform

This chapter considers the options available for change in Tasmania. It assesses the advantages and disadvantages in each option and repeats the questions posed in the Consultation Paper. It then outlines the submissions received in response to the questions posed and the findings of further research as a result of the submissions. Discussion and recommendations follow.

It is important, however, that before considering the following options an appropriate definition of an emergency service worker is developed.

6.1 THE DEFINITION OF AN EMERGENCY SERVICE WORKER

An emergency service worker by the strict definition includes police, State Emergency Service (SES) workers, fire officers and ambulance workers. The strict definition does not include volunteer fire officers and volunteer ambulance workers. A wider definition of an emergency service worker includes those at first point of contact in an emergency; this definition includes emergency hospital staff and volunteers.

In the Consultation Paper, the Council understood emergency service workers to be those at first point of contact in an emergency and used the following definition of an emergency service worker:

Any person engaged, whether for remuneration or voluntarily, in the Tasmania Police Service, the SES, TFS, Ambulance Tasmania, or any person providing rescue, resuscitation or medical treatment including, but not exclusively, people employed in hospitals.

As mentioned, Tasmania has a provision in s 34B(2)(a) of the POA that makes it an offence to assault, resist, intimidate or wilfully obstruct a 'public officer' in the execution of his or her duty. A public officer is defined as any person 'acting in good faith in the execution, or intended execution, of an Act or a public duty or authority'.⁶⁷ In Queensland, the definition of a public officer includes 'a member, officer or employee of a service established for a public purpose under an Act',⁶⁸ for example, the *Ambulance Service Act 1991*, the *Health Services Act 1992*, the *Child Protection Act 1999* or the *Transport Operations (Passenger Transport) Act 1994* (see Table 2, page 8). The Northern Territory has a summary offence whereby it is an offence to assault, obstruct or hinder any person 'providing rescue, resuscitation, medical treatment, first aid or succour of any kind to a third person'.⁶⁹

In the Consultation Paper, the Council stated that if a new provision for an assault on an emergency worker was proposed, then a definition for an emergency service worker was essential. Consideration was needed as to whether the definition should be by general description or by specific categories of worker. If by specific categories, then the definition would need to contain a list of occupations to be included in the title.

Definition

How should 'emergency service worker' be defined?

⁶⁷ *Police Offences Act 1935* (Tas) s 34B(4).

⁶⁸ *Criminal Code Act 1899* (Qld) s 340(3a).

⁶⁹ *Criminal Code Act 1983* (NT) s 155A.

Submissions

The DPEM submitted that the definition of an emergency service worker should include all workers engaged at the first point of contact in an emergency. The DPEM preferred a general description for the definition rather than specifying a particular category for each worker to be contained in the definition. The DPEM stated that the definition proposed in the Consultation Paper was appropriate as it covered volunteer workers such as surf life savers and St Johns Ambulance volunteers. It also covered private industries that perform emergency management work, such as the two private ambulance companies that currently operate in Tasmania. According to the DPEM, the definition should not extend to individual members of the public who rescue, resuscitate or provide medical assistance to others but are not specifically engaged to provide emergency services.

The TFS supported the Council's definition.

Ambulance Tasmania submitted that, from an ambulance-worker's perspective, all operational staff, irrespective of their paid status, should be included.

The SES preferred the definition of an 'emergency management worker' found in the *Emergency Management Act 2006* (Tas) and submitted that this definition should be considered for the definition of an emergency service worker. The definition of an emergency management worker covers emergency 'response'-focused workers included in the Council's definition but also emergency workers involved with non-response emergency functions, such as disaster recovery, emergency preparedness and risk management work within communities:

Coupled with the comprehensive definitions for emergency and emergency management, it should therefore apply to ambulance and fire services, most police work, municipal-level emergency management work (e.g., risk assessments, emergency management planning, emergency coordination, disaster relief and recovery, etc.) and the emergency management work of many NGOs, such as Red Cross (in disaster recovery, victim registration and inquiry, related training, etc.), St John Ambulance (first aid response and training), etc.

The DPP submitted:

I believe the small sample of Judges' comments on passing sentence detailed at 4.3 of the Paper demonstrates that at least in the Supreme Court appropriate recognition is given to the occupation of victims of assault in accordance with their vulnerability to [the] same (for example, the inclusion of taxi drivers as a category of occupation whose assault in the course of their occupation as an aggravating factor).

The DPP stated that the Court's approach is philosophically sounder than a categorisation of emergency service workers alone as one that will attract additional punishment in the event of an assault.

Discussion

The Council considered the definition of an emergency management worker in the *Emergency Management Act 2006* (Tas) s 3. This definition is as follows:

emergency management worker means –

- (a) a member of a statutory service, whether for payment or other consideration or as a volunteer; or
- (b) an authorised officer; or
- (c) a person who does or omits to do any act in the assistance of, or under the direction or control of, an authorised officer; or
- (d) a person prescribed by the regulations to be an emergency management worker; or
- (e) any other person who, in good faith –
 - (i) participates in emergency management or rescue and retrieval operations; or
 - (ii) performs or exercises, or purportedly performs or exercises, functions or powers under this Act; or
 - (iii) is involved in the administration or execution, or the purported administration or execution, of this Act[.]

The Council is of the view that the definition of an emergency service worker should only extend to those at the forefront of an emergency. The definition is not required to provide extra protection for those involved in such activities as administration, planning and coordination in emergency areas, as outlined in the *Emergency Management Act 2006* (Tas). However, in the event of a state emergency or other situations in Tasmania requiring the use of special emergency powers, all those who participate in these emergencies or situations, whether in administration, planning and coordination and so on, should be protected from an assault. The recommended definition expressly excludes a police officer. The reason for this will become clear in 6.4 below.

The Council proposes the following definition of an emergency service worker:

Definition

The definition of an emergency service worker:

- (1)(a) A person employed or appointed under the *Fire Service Act 1979* (Tas); or
 - (b) A person employed or appointed under the *Ambulance Act 1982* (Tas); or
 - (c) An emergency management worker as defined in subsections (a), (b), (c) and (d) of the definition contained in the *Emergency Management Act 2006* (Tas); or
 - (d) An emergency management worker as defined in subsection (e) of the definition contained in the *Emergency Management Act 2006* (Tas) where there is:
 - (i) An authorised use of emergency powers under s 40 of the *Emergency Management Act 2006* (Tas); or
 - (ii) A declared state of emergency under s 42 of the *Emergency Management Act 2006* (Tas); or
 - (e) A person employed within a department of emergency medicine, or its equivalent.
- (2) This does not include a police officer under the *Police Service Act 2003* (Tas).

6.2 OPTION 1 – NO CHANGE

The first option is to make no changes to the current laws or sentencing options that operate in Tasmania. Under this option, recourse for an assault on an emergency service worker will remain the same and the existing legislative provisions (as explained in Chapter 2) will be available.

6.2.1 Tasmanian Police

Raw data from Tasmania Police indicates that assaults on police have declined in Tasmania over the last five years. The data also indicates that public place assaults have declined over the same five-year period. Data from WorkCover Tasmania has indicated that the number of assaults on police serious enough to warrant workers compensation claims for medical attention and/or time off work has declined over the last five years. Data from Victims Support Services indicates a substantial decline in claims for Victims of Crime Assistance awards for workplace assaults on police officers. Data used in this Final Advice shows that claims of a recent increase in assaults on police officers have been taken out of context and the figures for the period highlighted do not reflect a true indication of the decline in assaults on police over recent years.

Notwithstanding the decline in assaults on police in Tasmania, there is still the view by some members of the community that assaults on police are not treated as seriously as they should be. As a result, the Council obtained data on the sentences handed down in the Magistrates Court and the Magistrates Court Youth Justice Division in Tasmania for assaulting a police officer and compared this with the sentences handed down for common assault over the five-year period from 2006 to 2011. The data was then analysed, the results indicating that if an adult offender is found guilty of assaulting a police officer, he or she is more likely to receive a custodial sentence than if he or she were found guilty of common assault. However, there is no significant difference in the length of sentence that the offender would receive.

For juvenile offenders, there is no significant difference in the likelihood of receiving detention for assaulting a police officer as opposed to common assault. The length of any detention for assaulting a police officer is not significantly different from the length of detention for a common assault.

Tasmania Police have commented on the results of these findings. They would like it noted that, in their view, an offender charged with assaulting a police officer is more likely to have prior convictions than an offender charged with common assault. A common assault is more likely to be a one-off incident involving an offender who has no prior convictions, whereas this is rarely the case with an offender charged with assaulting a police officer.

6.2.2 Emergency Service Workers

The Sentencing Advisory Council's findings for other workplace assaults in Tasmania are outlined in Chapter 5. As noted, the data obtained from WorkCover Tasmania indicates that very few workers compensation claims are made for fire officers and ambulance officers proportionate to the number of employees in these occupations. The data indicates that, proportionate to the population, it is police officers, correctional service officers, teachers, special care workers and nursing staff who are more likely to be assaulted in the workplace. Figures from DHHS in relation to aggressive incidents do not translate into assaults on ambulance and emergency staff. Victims Support Services also report minimal Victims of Crime Assistance awards for fire officers, ambulance officers and emergency staff.

The Consultation Paper revealed that in Tasmania fire officers, ambulance officers and hospital emergency staff are not among the occupational groups at the highest risk of being assaulted in the workplace. The Council concluded that the community perception of those at risk is different from those who are statistically at risk of being assaulted in the workplace.

It could therefore be argued that introducing new laws would merely add to the complexity of the current legal system without providing any real deterrence for would-be offenders or further protection to

emergency service workers in our community. There may be other avenues to protect these professions from workplace assaults such as concentrating more on crime prevention methods as opposed to concentrating on how to punish an offender after an assault has occurred.⁷⁰

The disadvantage of not introducing new provisions into the current criminal law in Tasmania is that it could be interpreted by some members of the community as a lack of responsiveness on behalf of the Legislature to expressly condemn assaults on these particular classes of worker. In addition, it could be seen as not treating assaults on these workers with the seriousness they deserve.

Question 1

Do the existing laws and current sentencing practices in Tasmania provide an adequate response to assaults on emergency service workers?

Consultation

The DPEM submitted that they supported proposals, including legislative provisions, to more strongly deter and remedy assaults against police officers and emergency service workers. The DPEM drew attention to the statistical findings in the Consultation Paper and stated that, while the current penalties for assaulting a police officer are double the penalties for common assault, 'there is not consistent evidence of this differentiation being reflected in the sentencing practice'.

The TFS submitted that firefighters are not at the higher end of the risk scale in relation to assaults; as a result, 'preventative measures may be more appropriate'.

⁷⁰ For example, in the United Kingdom, specific legislation has been introduced that intends to prevent the escalation of behaviour that leads to more serious offences. Part 8 of the *Criminal Justice and Immigration Act 2008* (c 4) deals with anti-social behaviour; and s 120 of that Act provides power to a constable or an authorised member of National Health Service (NHS) staff to remove a person suspected of causing a nuisance or a disturbance on NHS hospital premises. This enables the NHS to tackle (i.e. without having to wait for the police) low-level disturbance behaviour (intimidation, swearing, blocking of staff from performing their duties) and helps to prevent the escalation of such behaviour to more serious offences such as assault on NHS staff. For further information, refer to Confederation of British Industry and Partnership of Public Employers, *Preventing Workplace Harassment and Violence: Joint Guidance Implementing a European Social Partner Agreement* (European Commission, 2010) <<http://www.hse.gov.uk/violence/preventing-workplace-harassment.pdf>>.

Ambulance Tasmania submitted that the increasing number of verbal and physical acts of aggression towards ambulance staff would indicate that the current legislation provides little deterrence to potential offenders.

The SES submitted that it was not aware of any significant assaults on any state emergency staff or volunteers that have required an activation of the penalty provisions under s 60 of the *Emergency Management Act 2006* (Tas) or resulted in workers compensation claims.

The DPP is of the view that the present regime is adequate:

Inevitably some sentences will be less punitive than one would think appropriate, however after an appreciation of the entire sentencing considerations the response is more understandable.

The Law Society submitted that the existing laws and current sentencing practices in Tasmania provide an adequate response to assaults on emergency service workers:

The evidence presented in the Consultation Paper does not support the case for legislative change based on the need for general deterrence or indeed on any other basis.

The Tasmanian Association of Community Legal Centres (TACLIC) is firmly of the view that there should be no change to either the current law or the sentencing options that operate in Tasmania:

There has been no case made out for harsher sentencing of offenders sentenced for assaulting police officers or other emergency workers.

Discussion

The Consultation Paper considered the statements by the Drug and Crime Prevention Committee of the Parliament of Victoria that media reporting sensationalises the issue of violent crime by generating a fear among the population that does not match the actual level of risk faced.⁷¹ It has been stated that, in Tasmania, there is community concern in relation to assaults on emergency service workers due to an increase in the incidence and severity of assaults and a leniency in the sentences imposed on those who assault them. The Council is mindful that the perception of risk faced by emergency service workers may not match the actual level of risk. Research in the Consultation Paper considered these statements regarding the perceived community concerns in relation to the incidence, severity and leniency in Tasmania.

Increase in the Incidence and Severity of Assaults

The Council first considered whether there has been an increase in serious assaults on emergency service workers in Tasmania. It found that, within the proposed definition, fire officers, ambulance officers and hospital emergency staff are not in the category of occupational groups at the highest risk of being assaulted in the workplace. To address the suggestion that these assaults could possibly go unreported, the Council contacted the Royal Hobart Hospital, which confirmed that verbal assaults are common and considered part of the job, but physical assaults are very rare.

In relation to assaults on police officers, the Consultation Paper considered the figures from Tasmania Police for assaults on police officers for the financial years from 2006–2007 to 2010–2011. The evidence indicates that assaults on police officers declined over that time. The annual reporting for the 2011–2012 financial year, released at the end of June 2012 (after the release of the Consultation Paper), shows a continuation of the general decline in assaults on police since the 2006–2007 financial year.⁷²

⁷¹ Drug and Crime Prevention Committee, above n 1.

⁷² As mentioned in the Consultation Paper, the figures in the Tasmanian Police *Corporate Performance Report* for the 2010–2011 financial year (above n 48) indicate a substantial drop in assaults on police for that year. This unusual and substantial drop was noted for all assaults (including public assaults) in Tasmania and in almost all crime in Tasmania and Australia. The figures for the Tasmanian Police *Corporate Performance Report* for the 2011–2012 financial year appear to indicate a 39.7 per cent increase in assaults on police officers compared with the 2010–2011 financial year. However, when the figures for 2011–2012 are compared with the 2009–2010 Tasmania Police *Corporate Performance Report*, the increase in assaults on police officers is only 1.4 per cent. When compared with the 2008–2009 financial year, the level of assaults on police officers for the 2011–2012 financial year has dropped by 9 per cent.

These figures and the evidence presented in the Consultation Paper indicate that there is no real increase in the incidence and severity of assaults on police or other emergency service workers in Tasmania. An indictable offence for an assault on a police officer already exists in the Code and the evidence suggests there is no need to amend it to include a further offence for an assault on an emergency service worker based on the need for increased general deterrence or denunciation. Therefore, in relation to serious assaults, it is concluded that the existing laws provide an adequate response to assaults on emergency service workers in Tasmania.

The submission by Ambulance Tasmania regarding less serious assaults was not captured in the Council's research as there are no records of unreported behaviour; nor can it be assessed if the incidence of this behaviour is increasing over time. No data was available to substantiate Ambulance Tasmania's concerns that less serious assaults have been increasing as these assaults did not proceed to any formal reporting processes.

As stated by Ambulance Tasmania:

Threatening behaviour, verbal and physical aggression towards ambulance staff are unfortunately too common an occurrence in ambulance operations but fortunately they result in very few injuries or lost time hence the lack of reported incidents.

The Council is of the view that threatening behaviour, such as verbal and physical aggression, whether it leads to injury or not, is reprehensible. Therefore, in this context, some change to the current laws may be able to provide a more adequate response to less serious assaults on emergency service workers.

Leniency in Sentencing

The DPEM has drawn attention to the statistical findings in the Consultation Paper indicating that, while the current penalties for assaulting a police officer are double the penalties for common assault, 'there is not consistent evidence of this differentiation being reflected in the sentencing practice'. The evidence the DPEM refers to is that found at 4.2.4 in this Final Advice. The analysis is of the sentencing ranges in the Magistrates Court over the five years between 2006 and 2011 and compares the sentences handed down to offenders convicted for an assault on a police officer and the sentences handed down to offenders convicted for a common assault. A statistical analysis of this data indicates that, in the Magistrates Court, a person convicted of assaulting a police officer pursuant to s 34B(1)(a)(i) has a significantly higher chance of receiving an immediate custodial sentence than a person convicted of committing common assault pursuant to s 35(1). The analysis indicates no significant difference between the length of the custodial sentence the offender receives when convicted of assaulting a police officer and the length of the custodial sentence the offender receives when convicted of committing a common assault.

In light of the statistical analysis and the views of Ambulance Tasmania and the DPEM, the Council considers it should reject Option 1 and consider possible legislative changes that more adequately respond to assaults on police and emergency workers.

6.3 OPTION 2 – A NEW CRIMINAL PROVISION

This option asks whether there should be a new offence in the Code or the POA for an assault on an emergency service worker. Criminal provisions for assaults on emergency workers already exist in most other jurisdictions in Australia. However, there is a wide variation in the type of provision afforded and the definition of the class of worker and the professions contained in these provisions.

As shown (see Chapter 5), fire officers, ambulance officers and hospital emergency staff are not among the occupational groups found to be at high risk of workplace assault in Tasmania. However, this does not undermine an expectation that this class of worker should be afforded special protection from assault. The symbolic nature of a separate provision for emergency service workers is an important argument in support of its introduction. The creation of a separate offence for this purpose acknowledges the community's abhorrence of this type of behaviour and also acts to educate members of the public about certain behaviours that are not acceptable.

The Tasmania Law Reform Institute addressed the symbolic function of criminal law in its recent report on racial vilification and racially motivated offences.⁷³ The issues paper posed the question of whether the 'symbolic function of a law [is] a sufficient justification for its introduction'.⁷⁴ The submissions in response to the issues paper expressed arguments for and against the creation of laws purely as a symbolic function. In support of an offence being created for symbolic reasons alone, it was submitted that such offences can send a strong public statement of society's

condemnation of certain behaviours⁷⁵ and the symbolic function of a law can be 'absolutely and without question sufficient justification for its introduction'.⁷⁶ Opposing submissions argued that it was not a 'useful or necessary exercise of Parliament's power over citizens to enact criminal laws to serve a "symbolic function" and "[f]or any additional restrictions on individual or collective freedom to be justified, their actual rather than their emotive, speculative or "symbolic" benefits must be demonstrated'.⁷⁷

There is also the practical component of affording legislative protection to emergency service workers. If these workers are assaulted or obstructed to the extent they cannot administer aid, then they cannot get on with their job. This is the purpose of creating an offence of obstructing or assaulting workers in many legislative instruments in Tasmania. For example, s 45 of the *Food Act 2003* (Tas) makes it an offence to threaten, intimidate or assault an authorised officer in the exercise of his or her functions under the Act. One of the purposes of this Act is to 'ensure the provision of food that is safe and fit for human consumption'.⁷⁸ The reason for creating an offence of obstructing or assaulting an authorised officer pursuant to the *Food Act 2003* (Tas) is not specifically to protect the worker from an assault but more so to allow the worker to carry out his or her job without undue interference. A similar provision is also found in s 60 of the *Emergency Management Act 2006* (Tas), making it an offence to 'assault, resist, impede or obstruct an emergency management worker'. The same section also creates an offence of failing to 'comply with a lawful requirement or direction of such an emergency management worker'. The purpose of these offences is to ensure that the emergency management, rescue or retrieval operation is not impeded in any way.

⁷³ Tasmania Law Reform Institute, *Racial Vilification and Racially Motivated Offences*, Final Report no. 14 (Tasmania Law Reform Institute, 2011) <www.utas.edu.au/law-reform/publications>.

⁷⁴ Tasmania Law Reform Institute, *Racial Vilification and Racially Motivated Offences*, Issues Paper no. 16 (Tasmania Law Reform Institute, 2010) <www.utas.edu.au/law-reform/publications> 22.

⁷⁵ Tasmania Law Reform Institute, above n 73, 43.

⁷⁶ *Ibid* 30.

⁷⁷ *Ibid* 30.

⁷⁸ *Food Act 2003* (Tas).

The same can be said of assault provisions that protect emergency service workers. Interference with these workers can render them incapable of providing the appropriate service in an emergency situation. The question is whether a specific offence of assaulting an emergency service worker will allow workers to do their job more effectively than under existing laws that enable prosecution of persons who assault them.

A specific offence would also have the advantage of giving the sentencing court more information about the offender's criminal history and whether he or she has committed similar assaults in the past. In this instance, the purpose of a specific offence is not to create a higher penalty but to draw the judge's or magistrate's attention to an offender's history when considering the need for personal deterrence and determining an appropriate sentence.

Question 2

Should Tasmania introduce further offences for an assault on an 'emergency service worker' in the Code or the *Police Offences Act 1935*?

Consultation

The DPEM is supportive of legislation that:

[c]ondemns assaults on emergency service workers, and acknowledges the critical services they perform for the Tasmanian community. Assaults on emergency service workers should be treated with the seriousness they deserve, and be specifically acknowledged in the legislation.

The DPEM submitted that the provisions should be similar to those already provided in s 114 of the Code and s 34B(1)(a) of the POA and that it may be appropriate to reform these sections so that they apply to emergency service workers rather than just to police officers.

The TFS questioned whether the inclusion of a specific offence for assaulting an emergency service worker would reduce the incidence of assaults. The TFS submitted that there could be some advantage in giving the sentencing court more information about an offender's criminal history when determining an appropriate sentence.

Ambulance Tasmania referred to the discussion in the Consultation Paper at 6.3, which addressed the creation of laws purely for a symbolic function. Ambulance Tasmania does not support the view that introducing specific legislation to help protect its staff would be purely symbolic. It argues that such legislation would actually be protective:

Ambulance personnel are normally called to an incident and are not there for any other reason than to render assistance and aid; they do not have the opportunity to decline the request for assistance and have a limited capacity to withdraw once committed. As such, Ambulance Tasmania does not support the view that the introduction of specific legislation that would help to protect its staff would be symbolic, and would argue that as part of ensuring an ambulance officer can respond to requests for assistance, specific legislation aimed at protecting them and reducing their exposure to acts of violence while undertaking their work role is in fact essential.

Discussion

As discussed under Question 1, the Council does not recommend an amendment to the Code to include a new indictable offence specifically for assaults on emergency service workers. There is no justification for an offence of this nature. However, the Council is of the view that continued and ongoing verbal and physical assaults and threatening behaviour towards ambulance staff, although not necessarily leading to physical harm, are reprehensible. The Council considers that the submission from Ambulance Tasmania has merit; the creation of an offence to protect these workers may indeed provide better protection for them by sending the message that verbal abuse, threats and physical assaults on emergency workers are unacceptable.

The Council recommends that an offence be created to protect emergency service workers from minor assaults in the workplace. Given these offences are minor, an amendment to the offence of assaulting a public officer in s 34B(2) of the POA to specifically include an assault on an emergency service worker will address this issue. Because this recommendation is tied to a recommendation in relation to amending the penalty provisions for assaulting a police officer in s 34B of the POA, it will be spelt out in the next section of this advice.

6.4 OPTION 3 – PENALTY ENHANCEMENT PROVISIONS AND GRADUATION OF PENALTIES

As explained earlier (see 3.3 above), a penalty enhancement provision is an increased maximum penalty on an existing offence when certain factors are evident. These provisions provide an express denunciation of certain crimes by increasing the penalty that might be imposed for certain offences without needing to draft entirely new offences.

In New South Wales, the legislation provides for a graduation of penalty ranges depending on the severity of an assault (see Table 3, page 10). New South Wales enacted these provisions in 1997 after recognising that the original provision, adopted from the UK *Offences against the Person Act 1861*, did not make any distinction between minor and serious assaults.

Although it is possible to have penalty enhancement or graduation of penalties in the Code, this is not consistent with the Code legislative drafting style. The Code does not specify maximum or minimum punishment for individual offences. In Tasmania all offences in the Code have the same very high maximum penalty of 21 years.

All summary offences in the POA have their own penalty provisions, so it would be possible to incorporate penalty enhancement provisions into this Act. However, if matters are summary (in other words, heard by the Magistrates Court), as all offences in the POA are, then they are not normally punishable by more than three years' imprisonment.⁷⁹

As mentioned in 3.3, there are already penalty enhancement provisions for assault. Pursuant to s 35(2) of the POA, if the court considers that an assault was of an aggravated nature, the maximum penalty is increased from one year to two. Under s 35(3), the maximum penalty of two years is also available if the assault is accompanied by an indecent intent.⁸⁰ Penalty enhancement provisions providing for emergency service workers could be added to the assault and

⁷⁹ *Acts Interpretation Act 1931* (Tas) s 38(2).

⁸⁰ Whether this is a penalty enhancement provision or a separate offence is perhaps open to debate.

aggravated assault provisions found in s 35 of the POA. Penalty enhancement provisions could also be added to s 34B(1) of the POA to include when harm is suffered by an assaulted police officer. Section 34B(2) could also be amended to increase the penalty if the public officer is an emergency service worker. As mentioned, this section currently only covers employees who are included in the definition of a 'public officer' and excludes, for example, ambulance officers employed by a private company.

Question 3

- (a) Should s 34B(1) of the *Police Offences Act 1935* (Tas) have a graduation of penalties so that, in addition to a maximum penalty of 50 penalty units or imprisonment for a term of 2 years for assaulting a police officer, there is a maximum penalty of 75 penalty units and/or imprisonment for a term of 3 years if the police officer assaulted suffers harm?
- (b) Should s 34B(2) be amended to provide that, where a public officer is an emergency worker, there is a maximum penalty of 50 penalty units and/or imprisonment for a term of 2 years?
- (c) Should s 34B(2) have a graduation of penalties so that, in addition to a maximum penalty of 50 penalty units or imprisonment for a term of 2 years for assaulting an emergency worker, there is a maximum penalty of 75 penalty units and/or imprisonment for 3 years if the emergency service worker assaulted suffers harm?
- (d) Should s 35 be amended to provide that where an assault is committed on an emergency service worker there is a maximum penalty of a fine not exceeding 50 penalty units and/or imprisonment for a term not exceeding 2 years?
- (e) Should s 35 have a graduation of penalties so that, in addition to a maximum penalty of 50 penalty units or imprisonment for 2 years for assaulting an emergency service worker, there is a maximum penalty of 75 penalty units and/or imprisonment for 3 years if the emergency service worker assaulted suffers harm?

Consultation

While all respondents to the Consultation Paper made submissions as to whether there should be amendment to the legislative provisions for police and emergency service workers, only one submission specifically commented on the question of graduation of penalty. The DPP submitted that the 'proper application of sentencing principles will see more aggravating circumstances dealt with [than] by graduation of penalty'.

Discussion

The Council recommends amendments to the POA to broaden the existing offence of assaulting a public officer to include emergency service workers while retaining the separate offence of assault on a police officer. The Council is of the view that this is a more appropriate response than the creation of a new and specific offence for an assault on an emergency service worker, which includes police officers. The two issues are dealt with separately below.

Emergency Service Workers

To amend the existing provisions in the POA to include an offence for an assault on an emergency service worker, the Council recommends that s 34B(2) (assault a public officer) be broadened to include the proposed definition of an emergency service worker. The proposed definition includes those employed or appointed pursuant to the *Fires Service Act 1979* (Tas), the *Ambulance Act 1982* (Tas), the *Emergency Management Act 2006* (Tas) and the department of emergency medicine, or its equivalent. The definition does not include a police officer under the *Police Service Act 2003* (Tas). The Council also recommends that the punishment for this offence be increased from a penalty not exceeding 25 penalty units or a term of imprisonment not exceeding 12 months to a penalty not exceeding 50 penalty units or a term of imprisonment not exceeding two years. This will adequately cover an emergency service worker for offences that do not result in serious harm.

Police Officers

The DPEM has argued that courts do not treat the offence of assaulting a police officer as seriously as the penalty provisions require. The sentencing practices for an assault on a police officer, compared with the sentencing practices for a common assault, is related to offence seriousness.

Offence seriousness (or gravity of an offence) is a key factor in sentencing, and the 'concept is also embedded in the common law principles of sentencing'.⁸¹ In most jurisdictions, the seriousness of an offence is expressed primarily through the maximum penalty. Although, ultimately, the sentencing outcomes are decisions by individual judicial officers, these decisions are made within a common law and statutory framework. Recent research by the Victorian Sentencing Advisory Council notes:

There are a number of sources of information on offence seriousness. Parliament's views of offence seriousness are expressed in legislation ... defining an offence and setting its maximum penalty. ... Courts express offence seriousness through [sentencing outcomes].⁸²

Community attitudes are also a source of information on offence seriousness; these can be gauged by surveys, focus groups and opinion polls.⁸³ The Victorian Council further notes:

Offence seriousness has both subjective and objective elements. While statutory maximum penalties provide Parliament's views on the seriousness of an offence, individuals will differ in their personal opinion about which offences are more serious than others depending on ... their value systems, life experiences [etc.].⁸⁴

The Victorian Council goes on to state that, '[s]ignificant disparities between the legislature's views of offence seriousness, the courts' views and informed public opinion may result in a loss of confidence in one or more of the arms of government'.⁸⁵

The Victorian Council researched this premise by studying a range of sentences imposed by courts in Victoria and comparing the sentences with the penalties set by Parliament for those offences. To do this it used comprehensive data on the range of sentences imposed by courts and produced an 'offence seriousness score'. The seriousness score is a valid way of comparing sentencing severity across offences using more than just imprisonment terms, given that, generally, not all charges of an offence receive imprisonment. The seriousness score is created by combining imprisonment terms and the rate of imprisonment. Using selected offences in Victoria between 2006–2007 and 2009–2010, examples of seriousness scores ranged from 1.2 for arson, 4.7 for rape and 19.0 for murder.⁸⁶

The Tasmanian Sentencing Advisory Council applied the Victorian Council's formula to data in the Consultation Paper. This data gives the current sentencing practices for assault on a police officer and common assault in the Magistrates Court over a five-year period. Given the current penalties for assaulting a police officer in the POA are double the penalties for common assault, the Council aimed to find out whether consistent evidence of this differentiation was reflected in the sentencing practice.

⁸¹ Sentencing Advisory Council [Victoria], *Sentencing Severity for Serious and Significant Offences: A Statistical Report* (Sentencing Advisory Council, 2011) 1.

⁸² *Ibid.* 2.

⁸³ *Ibid.*

⁸⁴ *Ibid.* 1.

⁸⁵ *Ibid.* 2.

⁸⁶ *Ibid.* 11.

Using the sentencing outcomes in the Magistrates Court between 2006–2007 and 2010–2011 for the charge of assaulting a police officer⁸⁷ and common assault⁸⁸ pursuant to the POA (see 4.2.4), the Council determined that the seriousness score for assault police is 0.79 and the seriousness score for common assault is calculated at 0.48.⁸⁹ Thus, after taking into account the rate at which immediate custodial sentences are imposed, sentencing for assault police is found to be more severe than sentencing for common assault. The offence seriousness score for an assault on a police officer is technically not double that for a common assault, as indicated by Parliament in the penalty provisions. The courts are, nevertheless, treating an assault on a police officer with considerably more seriousness than a common assault.

Notwithstanding the greater severity of sentences for assaulting police compared with common assault, the Council considers that there should be greater differentiation between them. The Council therefore recommends that the maximum penalties for an assault on a police officer should be increased from the existing maxima and that the offence should continue to stand alone with a penalty higher than that for an assault on an emergency service worker or a public officer, or for

a common assault. The Council is of the view that an assault on a police officer should have the most severe penalty for several reasons. First, it reiterates to judicial officers Parliament's original intention that an assault on a police officer is considered more serious than other assaults. Secondly, the Council considers that police should stand alone because they are the only group of emergency service workers that actually has to confront people; therefore, the risk to a police officer is continuing and greater. Lastly, one can readily envisage that the consequences of an assault on an emergency service worker can be as bad as the consequences of an assault on a police officer; however, the affront to public authority and to the administration of justice is greater with a police officer. An assault on a police officer is a direct threat to the maintenance of the public order on which our society depends for stability and good governance under a free and democratic system of government. The assault on an emergency service worker is reprehensible for a different reason – emergency service workers provide valued assistance to the community and are vulnerable as a result.

Table 14 below shows the current provisions in the POA and compares these with the new provisions recommended by the Council.

Table 14: Current and recommended provisions, *Police Offences Act 1935 (Tas)* – Assault Police Officer

Current Provisions	Recommended Provisions
Section 34B(1) of the <i>Police Offences Act 1935 (Tas)</i> – Assault police officer: liable on summary conviction to a penalty not exceeding 50 penalty units or to imprisonment for a term not exceeding 2 years	Section 34B(1) of the <i>Police Offences Act 1935 (Tas)</i> – Assault police officer: liable on summary conviction to a penalty not exceeding 75 penalty units or to imprisonment for a term not exceeding 3 years
Section 34B(2) of the <i>Police Offences Act 1935 (Tas)</i> – Assault public officer liable on summary conviction to a penalty not exceeding 25 penalty units or to imprisonment for a term not exceeding 12 months.	Section 34B(2) of the <i>Police Offences Act 1935 (Tas)</i> – Assault public officer or emergency service worker liable on summary conviction to a penalty not exceeding 50 penalty units or to imprisonment for a term not exceeding 2 years.
Section 35 of the <i>Police Offences Act 1935 (Tas)</i> – Common assault: liable on summary conviction to a penalty not exceeding 20 penalty units or to imprisonment for a term not exceeding 12 months	Section 35 of the <i>Police Offences Act 1935 (Tas)</i> – Common assault: liable on summary conviction to a penalty not exceeding 20 penalty units or to imprisonment for a term not exceeding 12 months

⁸⁷ *Police Offences Act 1935 (Tas)* s 34B(1)(a)(i).

⁸⁸ *Police Offences Act 1935 (Tas)* s 35(1).

⁸⁹ Seriousness scores have been calculated using the Victorian Sentencing Advisory Council's formula from above n 81, fn 13, but months have been substituted for years and 'immediate custodial sentence' for 'imprisonment'. The seriousness score for assault police is 0.79 (4 x 0.141) and for common assault is 0.48 (4 x 0.089).

The outcome of the proposed amendments is, in effect, a graduation of penalties. The graduation indicates the gravity of an offence against a police officer. It acknowledges that an assault on an emergency service worker should have attached to it severe consequences; however, these should be less severe than for an assault on a police officer, which should stand alone in its own category, but more severe than for a common assault.

The Council is of the view that the increase in the penalty provisions will indicate to the courts the legislative view of the gravity (or seriousness) of the offence. Kate Warner also notes that the nature and gravity of an offence are central to the exercise of judicial discretion, and in summary offences in Tasmania, the 'legislative view of the gravity of the offence is expressed primarily through the maximum penalty'.⁹⁰ The courts in Tasmania have recognised that when 'the legislative intent is sufficiently manifest, eg by substantial increases in penalty ... the courts ought not to ignore it and should henceforth regard the offence more seriously'.⁹¹ This precedent has since been supported in *Shipton*⁹² where Cox CJ noted that a 'series of legislative increases in the potential for punishment is seen as a clear indication that the public, through their representatives, regarded [the offence in question] ... as a serious problem requiring considerably higher penalties than in the past'.⁹³ This reasoning was later applied in *Watson*⁹⁴ where a term of imprisonment for dangerous driving had been increased in the Court of Criminal appeal 'where Parliament so manifestly demonstrates its concern in this respect'.⁹⁵

Recommendation 1

- (a) That the penalty in s 34B(1) of the *Police Offences Act 1935* (Tas) (assault a police officer) be increased to a maximum penalty of 75 penalty units or imprisonment for a term of 3 years or both;⁹⁶ and
- (b) That s 34B(2) of the *Police Offences Act 1935* (Tas) (assault a public officer) be broadened to include an emergency service worker and the maximum penalty be increased to 50 penalty units or imprisonment for 2 years or both; and
- (c) That s 35 of the *Police Offences Act 1935* (Tas) (common assault) should remain at the existing maximum penalty of 20 penalty units or imprisonment for a term of 12 months.

⁹⁰ Warner, above n 13, 78.

⁹¹ *Ibid* 79. See also *Manning v Bennett* [1971] Tas SR 51, *Percy* [1975] Tas SR 62, *Osbourne v Febey* [1987] TASSC 26.

⁹² *Shipton v R* [2003] TASSC 23.

⁹³ *Ibid* [10] (Cox CJ).

⁹⁴ *DPP v Watson* [2004] TASSC 54.

⁹⁵ *Ibid* [19] (Slicer J).

⁹⁶ The recommended amendments to the POA include the words 'or both' despite the discussions at 2.2 ('Legislation Relating to Assaults on Police Officers') stating that the *Acts Interpretation Act 1931* (Tas) s 37(5A) interprets a penalty that includes a fine or a term of imprisonment as meaning 'or both'. In the decision in *Rosevear v Bonde* (2005) 15 Tas R 153, Crawford J stated that an offender could not be sentenced to both a fine and a term of imprisonment under the assault provisions. The inclusion of the words 'or both' in this recommendation serves to clarify the intention of the proposed penalty provision.

6.5 OPTION 4 – SENTENCE AGGRAVATION PROVISIONS

A sentence aggravation provision is generally located in the sentencing legislation and allows the court to consider an assault on a police officer or an emergency service worker as an aggravating factor in sentencing. An example of a sentence aggravation provision can be found in the *Crimes (Sentencing Procedure) Act 1999* (NSW), which provides that if the victim is one from a list of nominated occupations and the offence arose because of the victim's occupation then this is an aggravating factor to be taken into account in determining the appropriate sentence (see Table 4, page 12). Sentence aggravation provisions differ from penalty enhancement provisions, which are generally located in the offence provisions and provide for an increased maximum penalty where the victim's employment is a relevant proven element of the offence.

The *Sentencing Act 1997* (Tas) does not contain any explicit sentence aggravation or mitigation provisions. However, the *Family Violence Act 2004* (Tas) contains a provision that allows the court, when determining the appropriate sentence for a family violence offence, to take into account as an aggravating factor the fact that a child was present at the time of the offence, or that the offender knew that the affected person was pregnant at the time of the offence. This provision is found in s 13, which states:

13. Sentencing Factors

When determining the sentence for a family violence offence, a court or a judge –

- a. may consider to be an aggravating factor the fact that the offender knew, or was reckless as to whether, a child was present or on the premises at the time of the offence, or knew that the affected person was pregnant; and
- b. must take into account the results of any rehabilitation program assessment undertaken in respect of the offender and placed before the court or judge.

The absence of an express provision making the occupational status of the victim an aggravating factor does not, of course, prevent the prosecution from relying on such a factor in the prosecutor's sentencing address. Nor does it prevent the court from taking it into account as an aggravating factor in imposing sentence. As noted, the occupations of a variety of victims, such as police officers, taxi drivers etc., have been seen as relevant factors in sentencing decisions.

One argument against including specific aggravating provisions in the *Sentencing Act 1997* (Tas) is that the inclusion of a list of occupations that should be afforded greater protection by the law will, unintentionally, come to be considered exclusive by those applying the law. The consequence of this exclusivity is that those groups that are not explicitly mentioned will not be considered as worthy of protection.

Sentence aggravation provisions can play a symbolic function in the law, showing the community that assaults on vulnerable workers are not tolerated by society. The issue is whether, on a policy basis, the Government believes it is appropriate to isolate one type of offending and provide a specific provision affording a heavier sentence for an assault on only that particular group of victims.

Question 4

Should a special sentence aggravation provision be inserted into the *Sentencing Act 1997* to make an assault on an emergency service worker an aggravating factor in sentencing?

Consultation

The DPP submits that the courts already recognise occupational vulnerability to attack and that is a more satisfactory criterion than occupational description or genre.

The Law Society does not agree with the inclusion of a sentence aggravation provision in the *Sentencing Act 1997* (Tas): 'It is the Society's view that sentencing is best left to the judicial officer, who is able to take account of all of the circumstances of a case in deciding the appropriate sentence.'

The TACLIC opposes a sentence aggravation provision, stating:

the flexibility of Tasmania's current sentencing laws allow the courts to take into consideration the numerous factors that determine the seriousness of an assault against police and other emergency service workers to allow a range from a minimum of \$120 fine to a maximum of 21 years imprisonment.

Discussion

The Council's principal recommendation is to increase the existing penalty provisions in s 34B(1) of the POA, to broaden the definition of a public officer in s 34B(2) to include an emergency service worker and to increase the penalty provisions in s 34B(2) of the POA. The Council is of the view that amendments to the penalty provisions are a more practical solution than the insertion of aggravation provisions into the *Sentencing Act 1997* (Tas).

At present, the *Sentencing Act 1997* (Tas) has no aggravating, mitigating or other factors to be taken into account in determining the appropriate sentence for an offence. Other jurisdictions in Australia have factors included in their sentencing legislation that must be taken into account when determining a sentence. Section 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) includes a list of over a dozen occupational categories that attract an aggravating factor in the sentencing process for an assault. The section also contains a list of over a dozen circumstances in which a sentence is aggravated if an offence has been committed in those situations. In the past, there have been recommendations that the *Sentencing Act 1997* (Tas) be amended to include sentence aggravation provisions. For example in April 2011, the Tasmania Law Reform Institute recommended in its final report on racial vilification and racially motivated offences that a sentence aggravation provision be introduced in Tasmania for offences motivated by racial hatred.⁹⁷ The Tasmania Law Reform Institute recommended that this provision be modelled on that in the Victorian sentencing legislation.⁹⁸ This recommendation has not yet been taken up.

⁹⁷ Tasmania Law Reform Institute, above n 73, Recommendation 5.

⁹⁸ *Sentencing Act 1991* (Vic) s 5(2)(daaa).

The lack of specific aggravating provisions in the *Sentencing Act 1997* (Tas) to date has stemmed from the view that, without these provisions, the sentencing court retains full discretion when sentencing an offender. There is also an issue with whether, on a policy basis, it is appropriate to isolate one type of offending behaviour and legislate specifically in relation to sentencing for that type of offending. In general, the law makers of Tasmania have avoided inserting lists of sentence aggravation provisions, possibly because there is a lingering concern that any such list will be treated as exclusive, and other particularly relevant matters might be omitted.

With the above considerations in mind, the Council is also of the view that an increased penalty provision has a more practical effect than a sentence aggravation provision. A penalty provision appears to send a clearer message than the legislative prescription of an aggravating factor.

6.6 OPTION 5 – MANDATORY MINIMUM PENALTIES AND SENTENCES

Technically, a mandatory sentence is a sentence where the sentencing court only has one option and the sentence is fixed.⁹⁹ Mandatory sentences can take various forms; however, the term 'mandatory sentence' is generally understood to cover the situation where Parliament sets a minimum penalty but leaves the court with discretion to impose a harsher sentence where it considers it appropriate. A mandatory minimum sentence generally refers to a mandatory minimum term of imprisonment or detention.

6.6.1 *Special Penalties and Mandatory Minimum Penalties for Summary Offences*

The most commonly recognised mandatory penalties found in Tasmania are those for drink driving and fisheries offences. A common mandatory penalty is a 'special penalty'. Special penalties are 'generally fines that relate to the subject matter of the offence that can be or must be imposed in addition to a general penalty'.¹⁰⁰ For example, special penalties apply for fish illegally obtained or for each unit of excess weight when a vehicle is overloaded.

Mandatory licence disqualification is a common penalty for drink driving offences. In this instance, the mandatory requirement for disqualification is for the charge of driving with excessive concentration of breath or blood alcohol pursuant to s 6 of the *Road Safety (Alcohol and Drugs) Act 1970* (Tas).

Mandatory minimum fines are also common for regulatory offences. An example of a regulatory offence is an on-the-spot fine for littering. This can be imposed by an infringement notice, as an alternative to prosecution in court. It can be argued that these are not technically mandatory penalties as they can be challenged in court.

⁹⁹ Kate Warner, 'Mandatory Sentencing and the Role of the Academic' (2007) *Criminal Law Forum* 18(3–4) 321, 321–322.

¹⁰⁰ *Ibid* 326.

Criticisms aimed at fixed penalties and mandatory minimum fines include that they may be disproportionately harsh and unfair to a person of limited means. A default on a fine may leave the person liable to a term of imprisonment unless alternatives are available to the court that enforces payment. When it was first introduced, mandatory licence disqualification was also subject to considerable criticism on the grounds of fairness. It was asserted that a person whose livelihood depended on his or her licence should be treated differently from a person who drives a car for leisure purposes. These criticisms have been tempered by the provision in Tasmania allowing the courts to grant a restricted licence in appropriate cases.

Notwithstanding the criticisms against these provisions, it has been found that 'these offences are more susceptible to general deterrence than most' and the 'interests protected, public safety on the roads or the preservation of scarce natural resources overrides considerations of fairness'.¹⁰¹

Question 5

Should mandatory fines be considered in Tasmania for offenders who assault emergency service workers?

Question 6

Should any other type of mandatory penalty be considered in Tasmania for offenders who assault emergency service workers?

Submissions into all types of mandatory sentencing, whether in the form of a fine, a penalty or a term of imprisonment, will be dealt with at the end of Question 7 (Submissions for Mandatory Sentences). The majority of submissions into this referral were against mandatory sentencing. All but one of the submissions against mandatory sentencing had a blanket approach in that mandatory sentencing, for all but minor offences, should be avoided. It is therefore practical to deal with all forms of mandatory sentencing together:

6.6.2 Mandatory Minimum Sentences of Imprisonment

A mandatory minimum term of imprisonment refers to Parliament setting a fixed minimum term of imprisonment as the sentence for the commission of a particular criminal offence. Mandatory sentences are often the product of 'tough on crime' initiatives prescribing severe mandatory minimum penalties for specific offences.¹⁰² Proponents of mandatory minimum terms of imprisonment argue that legislation intervening in judicial sentencing discretion will 'appease public concern about crime and punishment'.¹⁰³ Mandatory minimum terms are said to be an appropriate and proportionate response to the worst case offender.¹⁰⁴

It has been argued that mandatory sentencing deals with the concern of leniency in sentencing and prevents crime through incapacitation and deterrence. Lawrence Sherman has stated that the incapacitation component prevents offenders from continuing to offend as 'past behaviour is the best predictor of future behaviour ... it is reasonable to attempt to prevent crime by preventing known offenders from continuing their criminal behaviour'.¹⁰⁵ The same author concludes that 'incapacitating offenders who continue to commit crimes at high rates ... [is] effective in reducing crime'.¹⁰⁶

¹⁰¹ Ibid 326.

¹⁰² Adrian Hoel and Karen Gelb, *Sentencing Matters: Mandatory Sentencing* (Sentencing Advisory Council [Victoria], 2008) 2.

¹⁰³ Declan Roche, *Mandatory Sentencing*, Trends and Issues in Crime and Criminal Justice no. 138 (Australian Institute of Criminology, 1999) 1.

¹⁰⁴ Commonwealth, *Parliamentary Debates*, Senate, 13 March 2000, 12642 (Faulkner).

¹⁰⁵ Lawrence W Sherman et al., *Preventing Crime: What Works, What Doesn't, What's Promising: A Report to the United States Congress* (National Institute of Justice, 1998) <<https://www.ncjrs.gov/works/>>. Cited in Roche, above n 103.

¹⁰⁶ Sherman et al., above n 105.

Deterrence is also seen as 'one of the central aims of mandatory sentencing'.¹⁰⁷ When a person has been found guilty of an offence, the judge or magistrate is guided by the aims or purposes of sentencing. In Tasmania, these aims are set out in s 3 of the *Sentencing Act 1996* (Tas). Section 3(e)(i) specifically states that the purpose of the Act is to help prevent crime and promote respect for the law by allowing courts to impose sentences aimed at deterring offenders and other persons from committing offences. Proponents of mandatory sentencing argue that it aims to prevent crime through deterring offenders from continuing to commit crimes once they are released (specific deterrence), and deterring other members of the community from committing crime (general deterrence).¹⁰⁸

Another purpose of mandatory sentencing is to eliminate inconsistency in sentencing. In this respect, 'mandatory sentencing is based on the principle that discretion is the enemy of consistency'.¹⁰⁹ When judges have discretion as to the sentence they impose, there is the possibility of unequal treatment of offenders who have done equal wrong.¹¹⁰ Legislation intervening in judicial sentencing discretion attempts to eliminate this inconsistency.

Opponents of mandatory sentences challenge the argument that the elimination of judicial discretion will create consistency in sentencing. When there are different circumstances to a crime, in the interests of justice the offenders arguably should also be treated differently. For the offender who is at the lower end of the scale in terms of seriousness, there will be an unjust sentencing outcome as the factors that differentiate the case in terms of culpability cannot be taken into consideration.

Judicial discretion is guided by legislation and common law principles of sentencing. One of these sentencing principles is that of 'proportionality'. Proportionality is a limiting principle that requires the punishment imposed on an offender to be proportionate to the offending behaviour.¹¹¹ The principle of proportionality is sometimes expressed in terms of just deserts; this is a modern form of retributive theory that can be traced back to the Old Testament idea of *lex talionis* – an eye for an eye.¹¹² Minimum mandatory sentencing runs counter to the principles that underpin retributive theory and have the potential to lead to the imposition of sentences that are disproportionate to the specific circumstances of a given offence.¹¹³

Opponents of mandatory sentences argue against deterrence as a sentencing principle for offences committed in the heat of the moment. Deterrence comes from rational choice theory and assumes that a person can weigh up benefits and costs in any given situation and make a rational choice that will maximise personal advantage. Proponents of mandatory sentencing consider that the gravity and the certainty of mandatory penalties will ensure that a rational person will understand that the costs of getting caught will outweigh the benefits of the crime. Opponents argue that, in some cases, mandatory sentencing is ineffective as it assumes that all offenders make a choice based on rational calculations and consider the possible consequences of an offence prior to committing it. This may be the case in some instances, but for offences committed in the heat of the moment, when a person is suffering from a disorder or mental illness or when a person is under the influence of alcohol or drugs, it is likely that the offender has not made a rational cost–benefit calculation prior to committing the offence.

¹⁰⁷ Roche, above n 103. Cited in Hoel and Gelb, above n 102.

¹⁰⁸ Roche, above n 103, 4.

¹⁰⁹ *Ibid* 4.

¹¹⁰ John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Clarendon Press, 1990). Cited in Roche, above n 103, 4.

¹¹¹ *Veen v The Queen (No 1)* (1979) 143 CLR 458, *Veen v The Queen (No 2)* (1988) 164 CLR 465, *Hoare v The Queen* (1989) 167 CLR 348.

¹¹² Exodus 21:24. See Hoel and Gelb, above n 102.

¹¹³ For further reading, see Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report no. 103 (Australian Law Reform Commission, 2006), Hoel and Gelb, above n 102, and Warner, above n 99.

It has been argued that mandatory terms of imprisonment increase demand on resources including police, legal aid and the courts. If a defendant is guilty, it is in the public interest that he or she plead as such – a guilty plea saves the community the significant costs of a trial and witnesses the pressure of having to give evidence in court. If there is a mandatory minimum penalty attached to the offence, the offender is less likely to plead guilty; thus, there are more contested hearings. The issue of avoiding a trial also means that judges' discretion is displaced into less transparent parts of the legal system. Lawyers tend to then negotiate with the prosecutor for a less serious offence to be pursued in order to avoid a trial, and the prosecutor then has to decide whether to withdraw more serious charges. As a result, control over the sentence moves into hands of prosecutors and lawyers rather than judges and magistrates. The consequence is that the penalty imposed on the defendant is determined by a means that is neither transparent nor consistent; nor are there any mechanisms to review it.

Question 7

Should mandatory minimum sentences be considered in Tasmania for offenders who assault emergency service workers?

Consultation

Views on mandatory sentencing were found to be polemic in nature. It was evident that submissions were either strongly for or strongly against mandatory penalties. The submissions from agencies that represent emergency service workers also expressed opposing views. While the DPEM argued for all forms of mandatory penalties, Ambulance Tasmania submitted that it does not believe mandatory minimum penalties are appropriate in relation to these offences. The TFS stated it was not appropriately positioned to comment and would be supportive of Tasmania Police's response.

As mentioned, the majority of submissions were strongly against mandatory penalties for all but minor offences. The following submissions are grouped and presented according to whether they are for or against mandatory sentences.

Submissions for Mandatory Sentences

The DPEM submitted the following:

The DPEM is supportive of proposals, including legislative provisions, to more strongly deter and remedy assaults against police officers and other emergency service workers. DPEM believe that there is a need for recognition of the work that all emergency service workers perform, and that any assault against such people should be condemned and specifically acknowledged with summary and criminal legislative provisions.

As part of this supportive approach, DPEM believe 'Mandatory Sentencing', for assaults on emergency service workers, not dissimilar to that which already exists in Tasmania for 'Drink Driving' and some 'Fisheries' offences, with a range of penalties should be introduced. As is the situation in Western Australia this type of sentencing should focus specifically on criminal assaults and be dealt with by the Supreme Court of Tasmania and not the Magistrates Court as well.¹¹⁴

¹¹⁴ The Council received one submission from a community member recommending a mandatory sentence for all serious, unprovoked, premeditated assaults and incidents of grievous bodily harm perpetrated against police officers.

Submissions against Mandatory Sentences

Ambulance Tasmania submitted that it does not believe mandatory minimum sentencing and penalties are appropriate in relation to these offences and would prefer that each offence is dealt with in relation to its own unique circumstance and situation by the courts.

The DPP opposes mandatory minimum sentences for all but the simplest regulatory offence. It was submitted that the prospect of injustice is lessened by individual sentencing, even though each sentence is unlikely to please everyone or to perfectly balance the often competing aims of sentencing.¹¹⁵

The Law Society does not support the introduction of mandatory minimum penalties or penalty enhancement provisions. It is the Society's view that sentencing is best left to the judicial officer, who is able to take account of all the circumstances of a case in deciding the appropriate sentence.

TACLCL is strongly opposed to the introduction of a mandatory minimum sentence:

TACLCL firmly believes that a mandatory minimum sentence is unable to take account of the particular circumstances of the case and results in the redistribution of discretion from the courts to the police and prosecuting authorities.¹¹⁶ This is

highlighted in research available from Western Australia with a newspaper report pointing out that since mandatory sentencing laws were introduced for assaulting emergency service workers only a third of offenders have been imprisoned, with prosecutors entering into plea bargaining in which the offender agrees to plead guilty to a lesser charge.¹¹⁷

Importantly, mandatory sentencing schemes contravene accepted sentencing principles including proportionality, which seeks to 'restrain excessive, arbitrary and capricious punishment'.¹¹⁸ The principle of proportionality requires courts to impose sentences that reflect the gravity of the crime when considered against objective circumstances such as the maximum penalty for the offence, the nature of the offence and the degree of harm caused.¹¹⁹

TACLCL believes that the introduction of mandatory sentencing provisions would be contrary to the purposes of Tasmania's *Sentencing Act 1997* (Tas) including that 'fair procedures' be adopted in the sentencing of offenders.¹²⁰

TACLCL also strongly believes that any introduction of mandatory sentencing provisions would amount to a breach of Australia's international human rights standards that prohibit the imposition of arbitrary detention and cruel, inhuman or degrading punishment.¹²¹

¹¹⁵ A similar submission was received from a community member in relation to the DPP's view that 'the prospect of injustice is lessened by individual sentencing'.

¹¹⁶ Neil Morgan, 'Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?' (2000) 24 *Criminal Law Journal* 164, 176–179; Neil Morgan, 'Why We Should Not Have Mandatory Penalties: Theoretical Structures and Political Realities' (2002) 23 *Adelaide Law Review* 141, 151.

¹¹⁷ Cordingley, above n 55.

¹¹⁸ *Hoare v The Queen* (1989) 167 CLR 348, 354. Other sentencing principles that are contravened are parsimony and individualised justice.

¹¹⁹ Richard Fox, 'The Meaning of Proportionality in Sentencing' (1994) 19 *Melbourne University Law Review* 489, 498.

¹²⁰ Section 3(d) of the *Sentencing Act 1997* (Tas). See also section 3(c) of the *Sentencing Act 1997* (Tas).

¹²¹ Article 7 of the *International Covenant on Civil and Political Rights*, 16 December 1966 [1980] ATS 23 (entered into force generally on 23 March 1976); Article 16 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984 [1989] ATS 21 (entered into force generally on 26 June 1987). See also, Human Rights and Equal Opportunity Commission, *Mandatory Detention Laws in Australia: An Overview of Current Laws and Proposed Reform*, Australian Human Rights Commission <http://www.hreoc.gov.au/human_rights/children/mandatory_briefing.html> (Retrieved 23 August 2012).

Finally, TACLC does not believe that either a mandatory fine or a legislatively prescribed minimum mandatory fine should be considered in Tasmania for offenders who assault emergency service workers. TACLC believes that if the courts consider the fine to be the most appropriate sentence ... there [should] be sufficient flexibility to allow the financial circumstances of the offender to be taken into account.¹²² We agree with the former Chief Justice of the Supreme Court of Tasmania that a fine is capable of having a particularly 'draconian' effect on economically disadvantaged offenders, leading to an inability to repay the fine and ultimately imprisonment.¹²³

Discussion

The submissions into consultation Questions 3 to 7 on mandatory fines, penalties and terms of imprisonment were overwhelmingly against the imposition of mandatory sentences for offences of assaulting emergency service workers in Tasmania. The majority of Council members do not support mandatory sentences. Therefore, the Council does not make recommendations in support of mandatory fines, penalties and terms of imprisonment. It is the view of a majority of the Council that mandatory imprisonment is not an appropriate solution to the issue of assaults on emergency service workers.

Mandatory sentencing laws are normally enacted in response to a belief that judges and magistrates are out of touch with community views. The Council has acknowledged the view of the DPEM that the existing sentencing practices in the Magistrates Court for an assault on a police officer do not reflect the legislative intent indicated in the penalty provisions, which are double the penalty for common assault. The Council has addressed this concern by recommending legislative amendments to the POA increasing the penalty

provision for an assault on a police officer. The Council has also shown that the courts in Tasmania have, in the past, interpreted legislative increases in potential punishment as a clear indication that the 'Parliament has demonstrated its concern in this respect'.¹²⁴

If Parliament enacts the Council's recommended amendments but the differentiation between the seriousness of the offences, as indicated by the increase in the penalty provisions, is not reflected in the sentencing practices over time, the Council will initiate a review of these provisions and reconsider these recommendations.

The discussion on mandatory sentencing (see 6.6.2) draws reference to arguments against mandatory sentencing including:

- unjust sentencing outcomes, as the factors that differentiate a case in terms of culpability cannot be taken into consideration
- the sentencing principle of proportionality (that the punishment be proportionate to the offending behaviour), which transgressed when mandatory sentences lead to the imposition of sentences that are disproportionate to specific circumstances of a given offence
- the rational choice theory underpinning the sentencing principle of deterrence, which is inappropriate for offences committed in the heat of the moment
- the issue of avoiding trial (to avoid a mandatory sentence), which means that judges' discretion is displaced into less transparent parts of the legal system, namely prosecutors and lawyers – the consequences of this are that the penalty imposed is neither transparent nor consistent.

These arguments all have merit.

¹²² *Broughton v Lowe* [1979] Tas R (NC 7) is a Tasmanian common law precedent for the requirement that the financial circumstances of the offender be considered.

¹²³ According to the former Chief Justice of the Supreme Court of Tasmania, the legislatively prescribed minimum amount fine was capable of being 'draconian': Tasmania Law Reform Institute, *Sentencing*, Final Report no. 11 (Tasmania Law Reform Institute, 2008) [3.9.18].

¹²⁴ *Shipton v R* [2003] TASSC 23.

The mandatory sentences introduced in Western Australia in 2009 for an assault on a police officer also apply to juveniles between the ages of 16 and 18. If similar provisions were to be introduced in Tasmania, they would be contrary to the principles of the *Youth Justice Act 1997* (Tas).¹²⁵

Mandatory sentencing laws also must be assessed in light of their cost. To avoid the imposition of a mandatory sentence of imprisonment, defendants have been found to be less likely to plead guilty, thus increasing demands on resources including police, legal aid and the courts. More significantly, custodial sentences are expensive. In 2011–2012, the general cost per prisoner per day in Tasmania was \$299.00.¹²⁶ As a result, the added cost of mandatory sentencing turns out to be an expensive means of pursuing reductions in crime.

Put bluntly by Declan Roche, 'critics of mandatory sentencing argue that it is a crude policy, resting on crude assumptions about how crime is prevented, what the public want, and what legislation can deliver'.¹²⁷

¹²⁵ One of the main principles of the *Youth Justice Act 1997* (Tas) is that detention be used as a last resort, as stated in s 5(1)(g).

¹²⁶ Department of Justice, *Annual Report 2011–12* (Department of Justice, 2012) <http://www.justice.tas.gov.au/annual_reports/Department_of_Justice_Annual_Report_2011-12_web.pdf>.

¹²⁷ Roche, above n 103.

Appendix

Strategy and Performance, Business Intelligence Office, WA Police

ASSAULT POLICE OFFICER – MANDATORY SENTENCING

An amendment to the Criminal Code that took effect from 22 September 2009 applies mandatory minimum terms of imprisonment for offenders who assault and cause bodily harm to police officers, ambulance officers, transit guards, court security officers or prison officers.

Chart 1 below illustrates the monthly number of reported offences for Assault Police Officer while Chart 2 illustrates the annualised trend in offences.

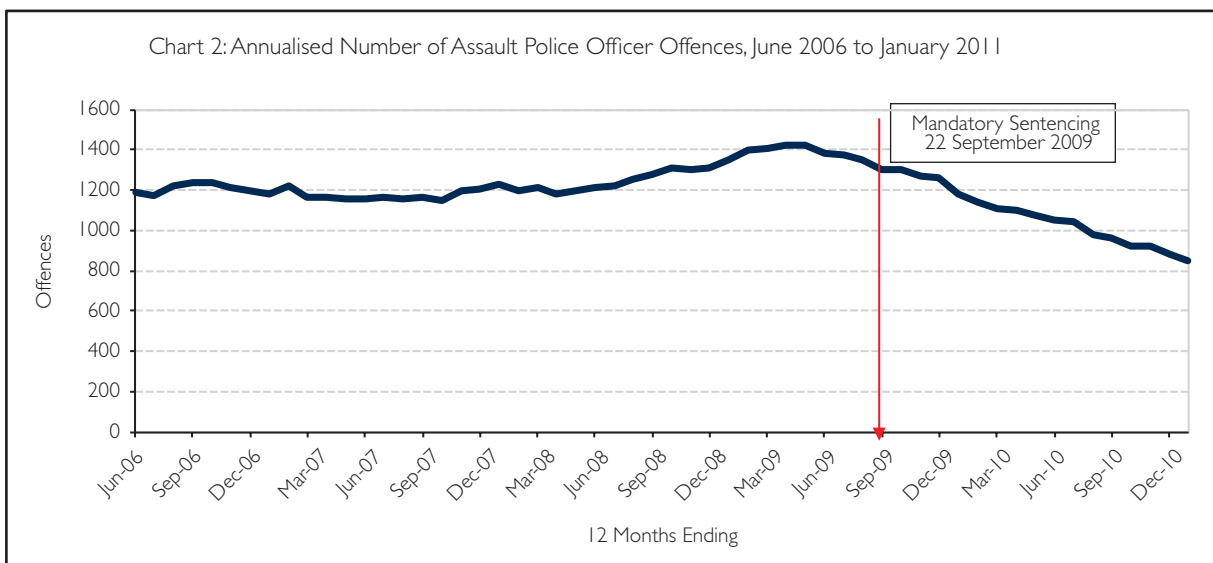
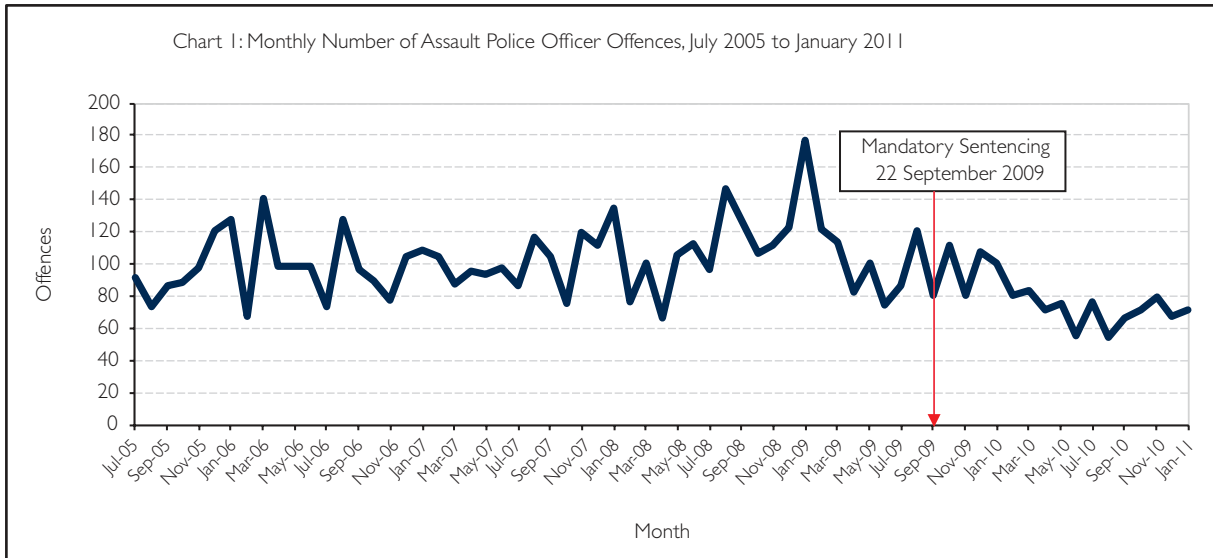


Table 1: Calendar Year Assault On Police Officer Comparisons

Calendar Year Summary			
	Offences	Variance from Previous Year	% Change from Previous Year
2006	1198		
2007	1201	3	0.25%
2008	1309	108	8.99%
2009	1257	-52	-3.97%
2010	878	-379	-30.15%

Analysis:

- There were 848 assault offences against police officers in the period February 2010 to January 2011. This was a 39.3% (333 offences) decrease compared with the period February 2009 to January 2010 (1181 offences).
- The 2010 calendar year resulted in 878 offences being reported, a decrease of 30.1% (379 offences) compared with the 1257 reported offences in the 2009 calendar year. It is also lower than the corresponding period in previous years.
- The annualised trend in assault offences against police shown in Chart 2 indicates a decreasing trend in offences from 1181 in the 12 months ending January 2010 to 848 in the 12 months ending January 2011. This represents a decrease of 39.3% (333 offences). The number of offences for the 12 month period ending January 2011 is also the lowest since the 12 months ending June 2006. The introduction of the mandatory sentencing bill and the public protest in March 2009 in support of the legislation and subsequent debate in Parliament may have influenced community behaviour prior to the commencement of the legislation in September 2009.
- It is important to note that mandatory sentencing applies only to assaults against police and other public officers where the assault has caused bodily harm. The number of assault offences against police that result in bodily harm to the officer are relatively small. However, the above statistics suggest that the introduction of the legislation may have contributed in a reduction of all assaults against police.

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