

24 September 2020

The Hon Peter McClellan AM
Chairperson
New South Wales Sentencing Council

By email: sentencingcouncil@justice.nsw.gov.au

Dear Chairperson

NSW Sentencing Council review of sentencing for offences involving assaults on emergency services workers

Thank you for the opportunity to provide a submission to the NSW Sentencing Council's review of sentencing for offences involving assaults on police officers, correctional staff, youth justice officers, emergency services workers and health workers (the **Review**).

We acknowledge that the Sentencing Council has provided background information on the offences that will be considered in this Review, the maximum penalties and non-parole periods for these offences, and preliminary sentencing data for these offences. We note that the Review will consider:

- recent trends in assaults on these workers and in sentencing decisions
- characteristics of offenders, including characteristics of reoffending offenders
- sentencing options to deter this behaviour and to reduce reoffending
- a comparison of NSW sentencing decisions for assaults on these workers with equivalent sentencing decisions in other Australian jurisdictions, and with equivalent sentencing decisions for assaults generally
- sentencing principles applied by NSW courts.

We would welcome the opportunity to provide a submission in due course to a comprehensive discussion paper, which presents the findings of the Sentencing Council's review of the above issues. In the interim, we provide general comments on whether the current penalties and sentencing patterns for offences (including the maximum penalties and any standard non-parole periods) involving assaults on police and other essential services personnel are adequate. We also understand that the Sentencing Council intends to conduct technology-facilitated in-person consultations later this year, and we welcome the opportunity to meet with the Secretariat to provide additional feedback to this review.

The current regime

The *Crimes Act 1900* (NSW) includes higher penalties for assaulting police or law enforcement officers. For example, the offence of assault occasioning actual bodily harm under section 59 of the *Crimes Act* has a penalty of 5 years imprisonment or 7 years if in company, compared with the same offence where the assault is upon a police officer acting in the course of his or her duty under section 60(2), which attracts 7 years imprisonment.

Assaulting people engaged in certain roles is recognised as an aggravating factor under section 21A(2)(a) of the *Crimes (Sentencing Procedure) Act 1999* (NSW). Specifically, section 21A(2)(a) of the *Crimes (Sentencing Procedure) Act* details the following occupations or voluntary work of victims who represent an aggravating factor:

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.

Victims in roles not covered by 21A(2)(a) may fall within 21A(2)(l):

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

The categories of persons falling within s21A(2)(l) are not exhaustive. Therefore, the existing offence and sentencing regimes recognise police and emergency service personnel as victims who represent an aggravating factor, acknowledging the need for greater punishment where they are victims acting in the course of their public or community functions.

The current regime is adequate

Legal Aid NSW considers that changes to penalty provisions and sentencing options should be based on clear evidence demonstrating a need for reform. In our view, while sentencing trends should be closely monitored to ensure assaults on emergency services workers attract appropriate penalties, at this time the data presented in the background information does not provide a sufficient evidence base for changes to penalty provisions or the sentencing regime.

We also submit that raw data of sentencing patterns and penalties should not be considered in isolation of important contextual information. An assessment of the adequacy of sentencing trends and current penalties should also include:

1. A review of the subjective and objective factors of specific cases, so that factors impacting the offender's culpability, such as acute mental illness, are taken into account. For example, in the experience of our solicitors, many of our clients charged with assaulting police or emergency services workers do so in circumstances where their intent to commit the offence is low, and where the client is suffering from acute mental illness and/or cognitive impairment.
2. An analysis of sentencing trends and assault incidents in the context of the increased number of interactions with police arising from increased police presence and surveillance over recent years, and the disproportionate impact of such policing approaches on those people experiencing vulnerability. This includes people experiencing homelessness, people with mental health, drug and alcohol issues, young people and Aboriginal and Torres Strait Islander people. The Sentencing Council should assess, if possible, the incidence of contact with frontline workers among these groups compared to the general population.
3. In terms of the Sentencing Council's consideration of trends in assaults on Corrective Services NSW and Youth Justice officers, the Sentencing Council should consider the potential impact of any new offences, increased penalties or lower evidentiary thresholds on Aboriginal and Torres Strait Islander people. In NSW, Aboriginal and Torres Strait Islander adults are imprisoned at a rate that is 12 times higher than non-Indigenous adults, and Aboriginal and Torres Strait Islander children are imprisoned at a rate that is 16 times higher than non-Indigenous children. We note recent estimates (June 2020) that despite Aboriginal and Torres Strait Islander people representing only 3.4% of the total NSW population:
 - Aboriginal and Torres Strait Islander children represent 40% of those in juvenile custody
 - Aboriginal and Torres Strait Islander people represented 25% of those in adult custody
 - Of the women in custody, 32% were Aboriginal or Torres Strait Islander
 - Aboriginal and Torres Strait Islander adults represented 26.1% of the total remand population - Aboriginal and Torres Strait Islander women represented 30.7% of the overall women on remand, and Aboriginal and Torres Strait Islander men represented 25.7% of the total men on remand.

We are concerned that any increase in penalties will impact disproportionately on these groups and will contribute to increased incarceration rates of Aboriginal and Torres Strait Islander people, including Aboriginal and Torres Strait Islander young people and people with a disability. Analysis of the recommended contextual data will inform to what extent such groups will be affected by any subsequent reform recommendations. Considering sentencing trends in the absence of these important contextual factors also risks overlooking the underlying issues that may be contributing

to any actual increase in the opportunity for violent interactions with emergency workers.

We acknowledge that other jurisdictions (Victorian and the ACT) have recently introduced tougher penalties and lower evidentiary thresholds for offences relating to assault of emergency workers. The ACT reforms will be reviewed after 2 years. Significant changes to the NSW sentencing regime would be usefully informed by that review, as well as by available data on the impact of the Victorian reforms.

We also suggest that the Sentencing Council examine public health considerations, including access to appropriate treatment and support for people experiencing mental illness and/or cognitive impairment. Specifically, we are concerned that any increases to penalties or sentencing regimes may create an additional barrier to people seeking appropriate treatment and support, which will further disadvantage people experiencing mental illness or cognitive impairment, their families and carers and the wider community. For example, imposing mandatory minimum or increased sentences may deter carers and others from seeking assistance for a person experiencing mental illness or cognitive impairment involving aggressive behaviour, where the carer may be concerned that the person may behave aggressively towards emergency services workers, and then face a high penalty that does not take into account relevant mitigating factors. By contrast, increased focus on de-escalation strategies and approaches to people in crisis may be more useful in reducing assaults against emergency workers than a criminal justice response.

In this context, Legal Aid NSW welcomes the recent expansion of the Police Ambulance and Clinical Early Response (PACER) pilot program throughout metropolitan Sydney. The program aims to address the significant proportion of people with mental illness involved in police interactions which often result in charges and arrest, and sometimes avoidable deaths. The PACER program will employ 36 specialist mental health clinicians across 10 Police Area Commands and Districts. These clinicians will be embedded with first responders to support their on-scene response. A pilot program in the St George Police Area Command resulted in excellent outcomes, including reduced emergency department presentations and less time on scene.

Legal Aid NSW considers that the current sentencing regime for assaults on emergency services workers is generally appropriate, and that the judiciary should retain the fullest discretion in reflecting the aggravating and mitigating features when sentencing the accused. As noted above, in our casework experience there are cases where emergency services personnel are injured by offenders with mental illness and intellectual disability, and this can be a legitimate matter for the court to consider in sentencing. Legal Aid NSW would be strongly opposed to the introduction of mandatory minimum sentences for assaults on emergency workers. Such an approach inhibits the role of a sentencing court to tailor the sentence to the

circumstances of the case and the offender, and would increase the number of accused who plead not guilty to the charges

We also note the 2017 NSW Legislative Assembly Law and Safety Committee inquiry into violence against emergency services personnel, which found that the current regime is appropriate, and did not recommend the creation of any further offences or penalties, or further mandatory minimum sentences.¹ The findings of that Inquiry should also inform the current Review.

Thank you for considering Legal Aid NSW's submission. If you require any further information please contact Anastasia Krivenkova, Manager, Strategic Law Reform Unit on [REDACTED] or at [REDACTED].

Yours sincerely

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Brendan Thomas
Chief Executive Officer

¹ Legislative Assembly Committee on Law and Safety, Parliament of NSW, *Violence against emergency services personnel*, (Report 1/56, August 2017), viii.