



Our ref: DIV 22/76

23 February 2023

The Honourable Tom Bathurst AC KC
Chairperson
NSW Law Reform Commission
Selborne Chambers
Level 6, 174 Philip Street
Sydney NSW 2000

By email: nsw-lrc@justice.nsw.gov.au

Dear Mr Bathurst AC KC,

Review of serious road crime: preliminary submission

1. The New South Wales Bar Association (the **Association**) thanks the New South Wales Law Reform Commission (the **Commission**) for the opportunity to provide preliminary submissions to its review of serious road crime, as relevant to the Terms of Reference dated 10 November 2022.

The existing provisions are fit for purpose

2. The Association submits that the existing provisions dealing with serious road and dangerous driving offences, and accessorial liability provisions, remain fit for purpose.
3. The full gamut of criminal conduct relating to driving is captured by each offence category, whether it involves negligence, dangerousness or manslaughter involving the use of a motor vehicle.
4. The Association does not consider amendment to accessorial liability provisions is justified. In the experience of its members who practise in criminal law, it is rare that any such basis for criminal liability arises in a case involving serious road crime.

Maximum sentences available for serious road crimes are appropriate

5. The Association considers that the current maximum penalties provide adequate scope for sentencing. The Association would be opposed to any increases in maximum penalties, on the following bases:



- a. The Association is not aware of any judicial consideration or indication that the maximum penalty for a road crime offence for which an offender is being sentenced does not provide adequate scope for reflection of the purposes of sentencing as contained in s 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (CSPA), including effecting punishment (s 3A(a)). A perusal of statistics prepared by the Judicial Information Research System for sentences imposed by higher courts in NSW indicates that in the period 24 September 2018 to 30 June 2022, none of the recorded serious road crime offences involved imposition of the maximum penalty.¹
 - b. There are strong guideline judgments that provide guidance to the Courts when sentencing offenders for some serious road crimes. Guideline judgments have statutory force and sentencing judges are obliged to take them into account: *Moodie v R* [2020] NSWCCA 160 at [24]. These include the guideline judgment for driving with a high range prescribed content of alcohol (*Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No. 3 of 2002)* [2004] NSWCCA 303) and dangerous driving (*R v Whyte* [2002] NSWCCA 343). In the experience of members, the guideline judgements are central to sentencing proceedings for serious road crimes and appropriately guide the exercise of judicial discretion.
 - c. The conduct and culpability captured by serious road crimes legislation is broad-ranging, including offences where a person deliberately uses a vehicle to cause death or injury, or offences where a person of otherwise good character engages in momentary inattention with fatal consequences. Judicial discretion is important to reflect the range of criminal conduct captured by serious road crime offences, as well as the range of subjective circumstances of offenders being sentenced.
 - d. The maximum penalties in NSW are within the range of maximum penalties available for similar offences in other jurisdictions.
6. For the following reasons, the Association considers that an increase in the maximum penalty is unlikely to prevent the commission of serious road crime through deterrence. Firstly, the current maximum

¹ Source: Judicial Information Research System, *Crimes Act 1900 (NSW): Offences finalised in the District and Supreme Courts*, sentencing statistics for sections 24, 51B, 52A, 52AB, 53.



penalties and sentences being imposed appear to be adequate in terms of having a deterrent effect upon persons who may be considering in engaging in driving which has the risk of causing harm to others. Secondly, there are a number of serious road crimes which do not involve any element of planning, but rather occur as a result of momentary inattention or driver error.

Relevant sentencing principles in statute and the common law for serious road crimes

7. Sentencing courts dealing with offenders who have committed serious road crimes are armed with sentencing principles arising from the comprehensive applicable sentencing legislation (as contained in the CSPA), as well as guideline judgments noted above at [5(b)] and a significant body of recent and historical appellate case law both from the NSW Court of Criminal Appeal and the High Court of Australia (such as *Jiminez v The Queen* (1992) 173 CLR 572).
8. The legislation governing many of the serious road crimes is also detailed in capturing specific conduct in its elements, as well as specifying the applicable aggravating factors.
9. The Association has not identified any need for legislative reform in the sentencing principles applicable to serious road crimes.

The experiences and rights of victims of serious road crime and their families within the criminal justice system

10. The Association acknowledges the traumatic impact upon victims and the families of victims of serious road crime. The Association supports victims and families being provided trauma-informed support and appropriate referrals for assistance throughout the criminal justice process.
11. The Association notes that it is common for victims and/or their families to participate in sentencing proceedings if they wish to do so, through the operation of Part 3, Division 2 of the CSPA ('Victim impact statements').
12. Section 30E(1)(a) of the CSPA provides that a court to which a victim impact statement has been tendered must consider the statement at any time after it convicts but before it sentences an offender. In accordance with section 30E(3), a victim impact statement of a family victim may, on the application of the prosecutor, be taken into account in connection with the determination of the punishment of the offence on the basis that the impact of a victim's death on family victims is an aspect of harm done to the community (see, for example, *Davidson v R* [2022] NSWCCA 153, being the motor vehicle manslaughter of four children in Oatlands in 2020, where s 30E(3) applied). A victim impact statement



may also be used to identify and establish that a victim has suffered substantial harm (CSPA, section 21A(2)(g)) as a matter of aggravation.

13. The Association notes the comprehensive compensation scheme available to victims through the *Motor Accidents Compensation Act 1999* (NSW), as well as the availability of compensation for more serious offences involving motor vehicles (such as murder) in accordance with the *Victims Rights and Support Act 2013* (NSW).

Other relevant matters

14. The Association suggests that the present review consider an evaluation of the factors leading to the commission of serious road crimes, so that an informed approach can be taken to developing strategies and policies to prevent serious road crime. The Association does not expect that increasing the maximum penalties, or limiting judicial discretion, would have any meaningful impact on the prevention of serious road crimes.
15. The Association also notes the importance of evaluating and implementing diversionary schemes such as the Traffic Offender Intervention Program (TOIP). The Association supports any wide-scale evaluation and improvement of the scheme, noting that the last review of the *Traffic Offender Intervention Program Operating Guidelines* was conducted in 2017.² The Association also supports increased access to the program for offenders in rural and remote communities.
16. The Association supports other diversionary and preventative measures that may include, but are not limited to, increased driver education, driver skill testing or increased stringency at the driver licensing stage. Consideration should be had to whether a program similar to the TOIP should be introduced as a pre-requisite to obtaining a licence. This would ensure that new drivers are given the opportunity to receive education relating to the impacts of risk taking, including hearing from those who have a lived experience of being affected by serious road crime.
17. The Association also supports the mandatory interlock scheme, but notes its associated cost, which limits access to the scheme, particularly by drivers in rural and regional communities.

² NSW Department of Communities and Justice, *Traffic Offender Intervention Program Operating Guidelines 2017*, available at: <https://localcourt.nsw.gov.au/local-court/sentencing--orders-and-appeals/sentencing-in-criminal-cases/traffic-offender-intervention-program.html>.



NEW SOUTH WALES
BAR ASSOCIATION

18. The Association thanks the NSW Law Reform Commission for the opportunity to provide a preliminary submission to this review and welcomes the opportunity to provide further feedback as the review progresses. Should you have any questions about this letter or wish to discuss its contents further, our contact at first instance is Harriet Ketley, Director, Policy and Law Reform at hketley@nswbar.asn.au.

Yours sincerely



Gabrielle Bashir SC
President