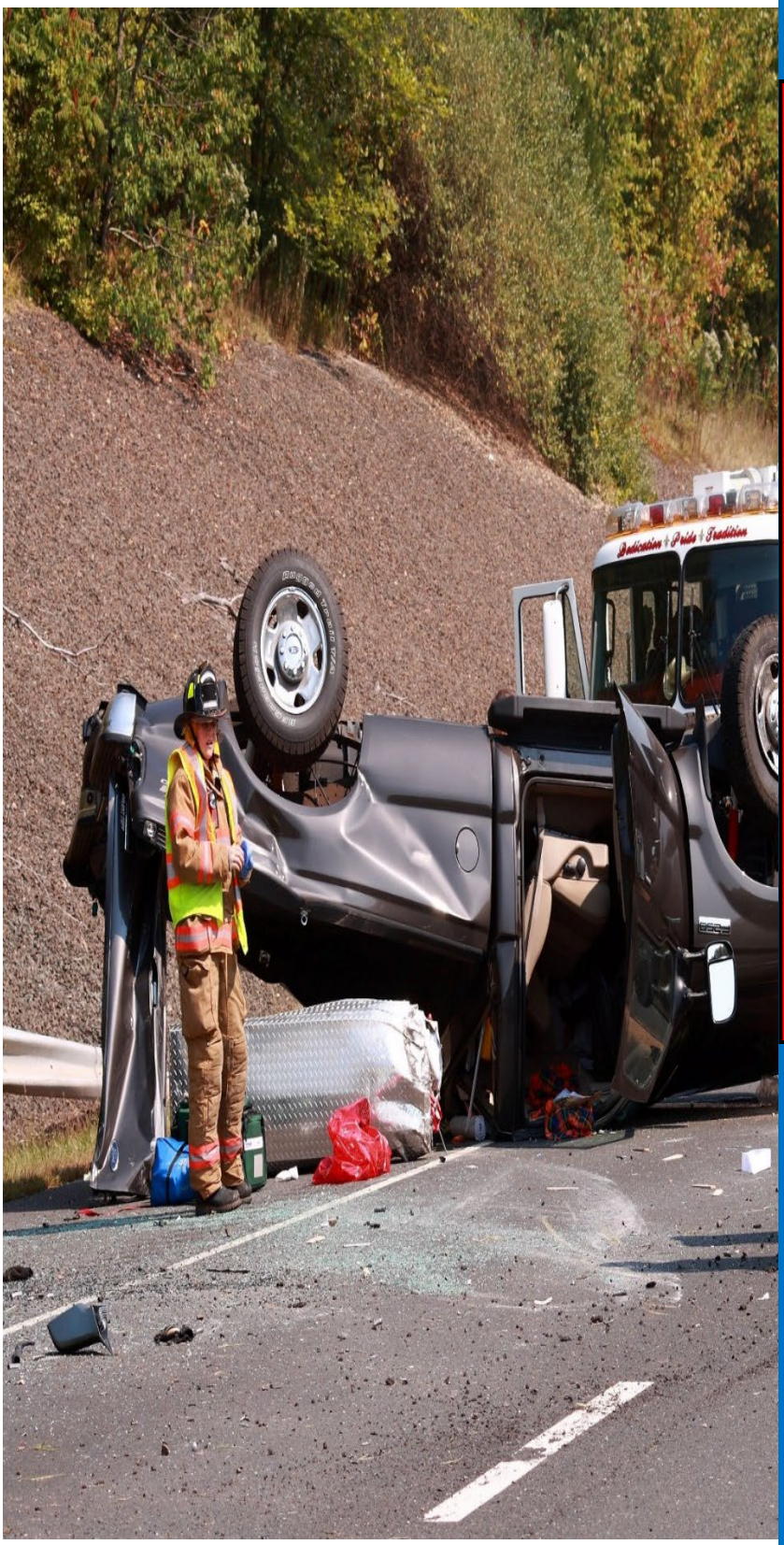

Serious Road Crime

Submission in reference to NSW Law Reform Commission Consultation Paper 23

by Mr. Frank Gilroy,

February, 2024

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1. The Author

Mr. Frank Gilroy is a recently retired solicitor, having practiced law in Newcastle N.S.W. Prior to that career he served for 40 years as a NSW Police Officer, having attained the rank of Detective Chief Inspector.

He holds a post-graduate degree in Management from the University of Wollongong, and completed additional legal studies in jurisprudence with the Harvard University Law School in the United States of America, after obtaining his legal qualifications at Sydney University and the College of Law.

His Policing career spanned duties as a frontline general duties officer, Criminal Investigation as a local Detective, major crime investigations as a Detective of the Homicide Squad, as well as frontline Policing Command and Leadership roles as a Duty Officer, Crime Manager and Local Area Commander

These latter duties within the Police Force were performed at Commands within the northern areas of Sydney and incorporated the M1 Freeway among other major traffic arteries. This resulted in his attendance at and management of numerous incidents resulting in significant trauma and fatalities, many being the result of serious road crime within the law as it presently exists.

Consequently, the actions proposed within this submission, are drawn from the extensive experience and knowledge of the author obtained through his careers in the Australian legal profession as a Solicitor, as well as four decades as a Police Officer in the roles of Criminal Investigator and a frontline Police Officer and Police Commander.

2. The necessity for an altered response – the perception of inadequacy

The Legislature, as well as sections of the community have often declared the necessity for 'the law' to be more effective in the prevention of road trauma and road related deaths. That is accompanied by the belief of a need to respond 'more appropriately' when such incidents result from serious road crime.[1] The implication being that presently it is perceived that 'the law' is inadequate in addressing those concerns.

Demonstration that such a deduction presently exists is drawn from the fact the current consultation is being undertaken. That it is driven from such is evident from the language within the request to the Commission under Section 10 by the then Attorney General in November 2022. Previous responses to those perceived shortcomings of 'the law' are illustrated through examination of the history of the present legislation and evident in reference to the cited necessity for the enactment of the present legislation. One example was made during the second reading of the Bill to Parliament, when it was declared, *"…it is clear that one of the major problems with the legislation as it presently stands is that it fails to act as a strong deterrent*."[2]

The Legislative action undertaken in response resulted in the present law pertaining to Serious Road Crime. Despite its enactment however, the perception of inadequacy in its capacity for the prevention of and response to these crimes has failed to alter.

In Chapter Two of the Commission's Consultation Paper 23 it is requested that consideration is given to the possibility of new legislation. The consideration is sought to evaluate such actions as an option as a potential means for achieving the effective enhancement of measures to prevent road trauma and deaths. It was further suggested to consider whether any such legislative action would provide an effective resolution to the recognized inadequacy of responses at present to such crimes when committed.

[1] NSW Law Reform Commission Serious Road Crime Consultation Paper 23, p2, para 1.5
[2] NSW Parliament, Legislative Council Hansard, 2nd Reading, Crimes(Dangerous Driving Offences) Amendment Bill; 27 October 1994, p.2

While it is agreed that presently the responses of 'the law' to these offences are ineffective and thus generate a perception that it is not fit for purpose, in order to potentially generate meaningful improvement to these circumstances, it is crucial to recognize that the reality of the failures which are the actual source of those perceptions exist in the application of the current legislation. It is this which is inadequate and not the legislative content. That is, the processes adopted by the Courts in sentencing and its resultant ineffectiveness as a deterrent to the commission of these crimes is the actual source of the inadequacy of response. It is this factor which is the genesis of the perception of inadequacy of 'the law'. What is proposed therefore by this submission is not another amendment to the present law. Rather, the adoption of a proposed new paradigm which will facilitate a more effective utilization of the law as it presently exists.

3. Failure in implementation of current legislation.

New legislation is not recommended as an effective course of action to be undertaken to address what has become perceived to be a failure. Despite the apparent cynicism, realistically all that would be likely to be achieved through enacting amended or alternative legislation would be facilitation for the Government of the day, through carefully constructed media releases to the community, the opportunity to appear to address the perception of inadequacy. However, in reality no tangible results would actually be achieved from doing so.

This would be due to the fact that without action being undertaken to alter the implementation of legislation in the processes of the criminal justice system, and specifically at the sentencing phase, the sentences being imposed shall continue to be generally ineffective in achieving the desired objectives of their enactment. They will continue to be ineffective while ever they fail to induce any appropriate degree of preventative influence. This will not be induced unless factors presently impacting upon the sentencing process are appropriately modified.

Such influence, and hence those desired objectives are possible to attain merely through the utilization of the severity incorporated into the penalties contained within the present legislation. The sentences imposed upon offenders committing these offences fail to achieve that which was intended by Parliament and required of it by the community. This is because the severity of the sentences imposed fail to address the recognized necessity for a deterrent.

It is evident from perusal of the legislation that the maximum penalties applicable to these crimes are appropriate in terms of their severity. It shall be demonstrated that the perception of inadequacy results from the meagre severity of the penalties imposed. The penalties being imposed and the subsequent absence in deterrence result from the requirements imposed through sentencing obligations currently operating within that activity of the Courts. The influence of those factors on the scope of sentencing are manifest in the duration of imprisonment required to be served being significantly shorter than that which the maximum penalty the legislation provides as being appropriate regarding these crimes.

As is recognized in the Commission's Consultation Paper [3] the severity the Legislature attached to these crimes is evinced by the length of the terms of imprisonment the relevant maximum penalties impose. This Parliamentary intent was, as is always the case, declared in the enactment of the present legislation[4]. It is an intention the gravity of which is evinced by the fact Parliament determined one class of these offences as being so pernicious to the safety of the community as to require the penalty of 14 years imprisonment [5].

Therein lies the genesis of the perception of inadequacy. It is consequent of the belief that the current law is ineffective in preventing these crimes, because in reference to the sentences being imposed upon offenders, the result is an absence of a deterrent effect upon both the immediate and potential offenders. In statistical terms that belief is correct and factually based as it shall be demonstrated.

[3] NSW Law Reform Commission Consultation Paper 23, p.42, para 3.6
[4] Above n 2
[5] Section 52A(2) Crimes Act, 1900 (NSW)

The absence of the deterrence which Parliament intended to achieve through the enactment of the current legislation is the direct result of the failure to adequately utilize the penalties legislated by Parliament and expected to be imposed by the community. The absence of an effective deterrent from the sentences being imposed is demonstrated by the continued increase in the incidence of these crimes. The appropriate implementation of current legislative penalties would, subsequent to the deterrence effect this would generate, negate any potential for continued perceptions of inadequacy. The examination of historical relevant crime rates illustrates these facts.

It is compelling from the statistical evidence to recognise the fact that the imposition of low duration custodial terms in sentences for these crimes, has repeatedly resulted in an increase in the incidences of the same class of crime in the subsequent year. In illustration of this phenomena the following examination of sentences imposed between 2016 and 2022 confirms the alleged nexus between inadequate sentences imposed and consequent increases in the offences committed.

In relation to the offence under Section 52A(2) of the Crimes Act, 1900 (NSW) of Aggravated Dangerous Driving Causing Death, between the years 2016 and 2022, 100% of the offenders convicted of this crime were sentenced to imprisonment. A statistic which of itself would potentially suggest an appropriate application of the legislation.[6] However, further examination determines otherwise to be the reality regarding the responses to this crime.

The maximum penalty for this offence is 14 years imprisonment, however the longest term of imprisonment to which an offender was sentenced during that period was for 7 years and 3 months in 2017. The compelling evidence referred to regarding the absence of a deterrent effect of that sentence is provided through analysis of the facts regarding this offence in the year following the longest sentence imposed, being the year 2018. This reveals there were in fact more Section 52A(2) offences committed in 2018 than in the year that longest sentence was imposed. [7] Obviously that sentence was insufficient to deter this crime the next year.

[6] NSW Law Reform Commission Consultation Paper 23, Appendix C
[7] Ibid

This is not coincidental as examination of Section 52A(1) offences reveals. Also between the years 2016 and 2022, the Courts sentenced 62% of offenders convicted of that crime to terms of imprisonment. The longest term an offender was sentenced to for this offence, which carries a maximum penalty of 10 years imprisonment, was for 3 years and 4 months in 2016. Again, that sentence failed as a deterrent, exemplified by the fact that the year 2017 saw an increase in these offences.[8]

The inference to be drawn from these statistical trends is clear. It is not fanciful to speculate that the incidence of each of these crimes may have been different in the following year, if the relevant sentences had imposed terms of imprisonment of durations closer to the 14 years and 10 years the current legislation provides for respectively. This examination also reveals that there is a degree of consistency of failure. That consistent failure presents as the consequent absence of deterrence which manifests as the observed increases in the incidence of those crimes.

Whilst the sentences imposed were aligned with the relevant sentencing guideline obligations operating upon the courts at the time, those guidelines have created the situation where the priority in the focus of the sentencing process is being attributed such that the penalties being imposed offer no deterrence to potential offenders. It would be incomprehensible for the sentences such as those being imposed to be considered appropriate, if the factors to be considered during the role of sentencing were such that the court's considerations were determined by reference to sentencing guidelines other than those operating at present. Sentencing outcomes would be considerably different if guidelines pertaining to them were attuned to prioritizing consideration of the gravity of the offences rather than to factors concerned with individual offenders.

The majority of stakeholders, including the Legislature appropriately focus upon the offences and the deleterious impact these offences inflict upon society. How therefore, is it morally or logically justified to place a greater priority upon the antecedent influences acting upon the criminals committing those offences, when to do so is to the detriment of Parliamentary and Community expectations?

[8] Ibid

4. Sentencing – the present focus

Illustration of the paradigm currently influencing the implementation of the present legislation in its sentencing phase, makes it abundantly apparent such activity is undertaken contrary to the expressed objectives of Parliament, as advocated during the process of enactment of the governing legislation. That variation occurs through the application of a greater priority upon exculpatory factors during sentencing. Doing so influences the outcome of sentencing at the expense of considerations including legislative intent, punishment, deterrence, the rights of victims and the protection of the community.

It is appropriate that the Commission in Consultation Paper 23 questions the continued validity of *Whyte's case* [9] in relation to this issue. The application of sentencing priorities away from such factors, including the intent of the Parliament is clearly illustrated by examination of that case . It was stated by Spigleman C J at [65], *"…Where the offender's moral culpability is high, a full time custodial sentence of less than 3 years (in the case of death) would not generally be appropriate."* [10] This influences sentences imposed for crimes including the offence of aggravated dangerous driving causing death, having a maximum penalty of 14 years imprisonment. The sentence eluded to provides a dramatic illustration of the divergence of sentences from the Legislature's intent.

Current sentencing outcomes impact upon perceptions of the inadequacy of 'the law' to be able to prevent or to appropriately respond to the commission of these crimes. That it is an impact of such a characteristic is clear when it is recognized that the offenders who were the recipients of the sentences imposing terms of imprisonment of the longest durations, have already been released. That is so however their maximum penalties, had they been imposed, do not expire until the years 2031 for the Section 52A(2) crime and 2026 for the Section 52A(1) crime.

[9] NSW Law Reform Commission, Consultation Paper 23, Question 4.2, p xi
[10] R v Whyte (2002) 134 A Crim R 53

Further demonstration supporting the notion of the inappropriate variance between sentences imposed and the legislative intent in enactment of this law is provided from Whyte's case[11]. It exists in recognition of the fact that criminal was imprisoned for a period of time less than the period for which their driver's licence was suspended.

For the secondary victims of these crimes, the families and other loved ones of the victims killed or significantly injured due to the offences the criminals responsible committed these inadequacies are not lost or inconsequential. Those loved ones of the victims are often before the media being shown distraught, and exiting the Court providing a common declaration of their perception of inadequacy of 'the law', citing their belief of an injustice with which they are forced to endure, through no culpability on their behalf. It is often expressed in their declaration, *"…but we got a life sentence…"*, in reference to their loved one being deceased as a result of the crime.

The sentences referred to are but a few examples being demonstrative of the failure to utilize the current legislation appropriately, as a result of the effect of sentencing guidelines. It also succinctly illustrates the resulting source of the perception of inadequacy identified as existing. This regulation of the prioritization of considerations by the court is illustrated in the comments of His Honour Spigleman C J when stating at [65];

> *"Guideline Judgement means a judgement containing guidelines to be taken into account by courts sentencing offenders, being:…*
>
> *(a) guidelines that apply generally; or*
>
> *(b) guidelines that apply to particular courts or classes of courts, to particular offences or classes of offences, to particular penalties or classes of penalties, or to particular classes of offenders.".*

His Honour continued, stating,

> *"…sentencing judges are obliged, by force of statute, to 'take into account' a guideline judgement given by this court."*[12]

[11] Ibid
[12] Above n 10

Based upon this criteria and upon the obligations upon sentencing judges, it is not unreasonable to deduce the source of the inadequacy of 'the law'. It is not the content of the present legislation, it is the result of the evolution of the implementation of that law. It has evolved through the impact of the obligations imposed into sentencing considerations by guideline judgements and similar sentencing guidelines.

It is consequently equally possible to adduce a viable course of action to be undertaken as a manner in which the identified inadequacies may be rectified. Such a rectification would thereby provide the opportunity for the appropriate alteration of the perception of inadequacies. Described simply, it is capable of being achieved through action to alter the paradigm under which sentencing is undertaken. The alteration would be to prioritising sentencing considerations upon the Offence, not the Offender.

5. Sentencing - a New Paradigm

For the sentences imposed to more accurately reflect the gravity of the crime requires the application of sentencing guidelines which focus the priorities of considerations upon the Offence rather than the Offender. If such a paradigm was adopted rather than as is the present priorities in considerations, then the divergence of such a sentence from what is actually required of the sentencing role would be of a reduced scale than at present.

How would it be evaluated as appropriate to adopt the recommendation of Whyte's case if considered in the context of the legislative penalty applicable to that crime, and all that this infers? It would be unconscionable rather than 'not generally be appropriate' to consider to impose a sentence requiring a custodial term of no more than 11 years below the maximum penalty the legislation attributes to the offence. How is doing so compliant with the Commission's enunciations as to such factors being pertinent to sentencing parameters? [13]

[13] Above n 3

When contemplated in detail, it cannot be sensibly contemplated that at present the priorities attributed to considerations of the Courts by sentencing guidelines, including as a result of Whyte's case, actually accord with the requirements of sentencing. This is particularly apparent when recognizing the requirement for considerations of protecting the community from the offender, or for making the offender realistically accountable for his or her actions. Equally it fails to incorporate the requirements to adequately denounce the offender's conduct, and to recognize the harm done to the victim and the community.

The function of sentencing at present fails in adequacy because the courts are obliged to adhere to other presently active sentencing guidelines influencing the process to produce outcomes contrary to those abovementioned legal conventions regarding sentencing. Hence, a realignment of those guidelines will act to redirect the focus of sentences imposed.

Reference to *Moon's case*[14] and in it the Court's reference to *R v H*[15] provide support for the recommended focus to be adopted for the sentencing process. Central to be gleaned from such reference is the support those decisions exemplify for the paramount priority of sentencing consideratons being attributable to the intent of the Legislature. To simplify this observation is to state that were this focus to be adopted, then sentencing guidelines would function to direct the primary priority of considerations in the sentencing process upon the offence rather than the offender.

What is urgently necessary is action to move the influence of this proposed paradigm beyond the realm of the theoretical. It is presently confined within this realm as the sentencing statistics presented illustrate. What is incomprehensible is the failure, or refusal, to recognize the nexus between the inadequate utilization of the maximum penalties with the increasing incidence of these crimes being committed. This is despite the readily available data which supports that position. It appears any other justification for the increase in these crimes rapidly receives acceptance, yet this unpalatable reality continues to be, as has been observed, at best ignored or at the worst denied.

[14] R v Moon (2000) NSWCCA 534 [67]
[15] R v H (1980) 3 A Crim R 53, 65

The High Court of Australia declared in *Muldrock's case*[16], *"The offence's maximum penalty is an important guidepost that the Courts consider in the sentencing process."* It is apparent that any scrutiny of the New South Wales position at present, were it to involve reference to the Parliamentary and societal expectations would recognize the variance between the sentences being imposed and those expectations as being unacceptable. This is however, as it has been demonstrated, the existing situation between the years 2016 and 2022 in respect to responses by 'the law' to serious road crime in New South Wales.

It is recommended as being more appropriate for a greater proportion of the significance in the priority of sentencing considerations, to be attributed to factors including the application of accountability upon offenders for the presence of their *mens rea* in the commission of the offence. The severity of sentence imposed should reflect such accountability, with it being influenced by the degree of the offender's malevolence or reckless disregard for others demonstrated in the commission of the offence.

6. Implementing the new sentencing paradigm

All that is required is an effective alteration to the present paradigm pertinent to sentencing criminals for these offences. The alteration recommended will achieve a new and more appropriate process of sentencing. The recommended alteration is the adoption of a new paradigm which operates by requiring the Court's considerations upon sentencing for these crimes to commence from the position of anticipating the imposition of the existing maximum penalty attributable for the relevant offence for which the offender has been convicted.

During the sentencing process, operating under this new premise, evidence in mitigation may then be adduced pertaining to matters which function to reduce the duration of imprisonment from the relevant maximum penalty prescribed for that offence.

[16] Muldrock v R (2011) 244 CLR 120 at [27]

The proportion of any deduction to be applied as a result of such evidence being accepted shall be determined in qualitative terms. Such terms to be categorized through new sentencing guidelines, including guideline judgements made in consideration of the new sentencing paradigm.

In adoption of this approach the judicial officer undertaking a particular sentencing role continues to effectively retain their judicial discretion. It continues to exist through the weight attributed to the evidence presented in mitigation in order to justify a reduction of the sentence from the maximum penalty, albeit within the new relevant guidelines in place. Similarly, the Court of Criminal Appeal retains its authority in the process as a result of the obligations it continues to impose through the necessity of sentencing courts to comply with guideline judgements from that superior Court.

Under the operation of the recommended paradigm, stakeholders retain their capacity through a variety of sources, such as for example the state Sentencing Council or local parliamentary representatives, to communicate their issues and concerns for consideration in relation to factors influencing sentencing guidelines.

All that would alter is the point of commencing the sentencing deliberations and the priorities upon factors in consideration during this activity. Deliberations originate with consideration of the imposition of the maximum penalty. It is the deviation from that maximum which would then require justification as within the requirements under a new sentencing paradigm, and why it is that the maximum penalty is not to be imposed.

It is anticipated as a result that the terms of imprisonment imposed would be likely to increase in their duration. Doing so would evoke a consequent enhancement of the deterrence to future offenders as cognizance of the severity of the duration of terms of imprisonment likely to eventuate becomes increasingly widespread. This realization would subsequently induce a decrease in the incidence of the commission of these crimes. The combined effect being therefore, more relevant periods of imprisonment, an effective deterrent influence upon potential offenders and a resultant reduction in these crimes. All of these benefits would combine to provide a tangible negation of the existing perception of inadequacy of ‘the law’ with regard to these crimes.

Criticism of this recommendation is anticipated to be expressed predominantly from proponents of a primarily conciliatory and rehabilitative priority to be applicable to the sentencing deliberations. Such criticism is most likely to additionally purport that utilization of the recommended process would be exceedingly draconian, as well as disproportionately so in its effect upon offenders from lower educated and disadvantaged socio-economic circumstances within the community.

However, to argue such is to ignore the clear reality of the fact that the recommended process would function to actually ensure the maintenance of an egalitarian approach to sentencing. It does so because the less privileged offenders are those with a greater capacity during the sentencing process to present more matters for consideration in mitigation.

The recommended process thereby affords the potential, through the content of a guideline judgement's obligations upon the courts, for such offenders to have their sentences lowered further from the maximum penalty than offenders who are more advantaged in terms of socio-economic standing, educational capacity and opportunity within the community.

The process more effectively aligns accountability for the offence with an offender's culpability in having committed it. It does so in part by utilizing the maximum penalty prescribed as the benchmark it was intended to provide. This proposition is something the High Court of Australia has previously recognized as appropriate. The Court succinctly illustrated this point regarding the appropriateness of the recommended alterations as a relevant sentencing paradigm. It did so in the matter of *Veen*[17] when His Honour Mason C.J. stated;

> *"…the maximum penalty prescribed for an offence…does not mean that a lesser penalty must be imposed if it be possible to envisage a worse case."*.

[17] Veen v The Queen (No.2) (1988) 164 CLR 465 at [15]

7. Restorative Justice considerations

Consideration of activities within the scope of restorative justice has been undertaken in terms of evaluation of the potential other existing pieces of legislation which could be utilized in that regard. In particular, this was done contemplating the possibility of seeking compensation for causing a wrongful death [18] . Considering this aspect revealed the legislative instruments identified as being potentially available are subject to significant limitations. A considerable weakness is in response to circumstances regarding a perpetrator who is impecunious or otherwise impoverished. However were such an undertaking to be desired to be pursued, and with the identified shortcoming of the legislation momentarily aside, amendments would be still necessary to be enacted for such action to be attempted.

Albeit destined for an ineffective outcome in the circumstances described above, remaining in the hypothetical, the amendment required to facilitate such an effort would be to create a Section 25(2A)(c) in the Victims Rights & Support Act 2013 (NSW). A brief historical examination of the legislation provides the necessary context to support such a proposition. Section 25(2A)(b) was incorporated to the Act as an amendment creating a specific exception to the ineligibility of victims in circumstances relating to death having resulted from motor vehicle accidents.

The exception under that section only applies as an exception regarding a victim's ineligibility to compensatory relief in circumstances involving a motor vehicle collision when a person has been charged with the offence of murder in relation to those circumstances. In relation to serious road crimes an amendment would need to involve the inclusion of a provision to extend that exception to encapsulate circumstances in which a person is charged with an offence under the present Section 52A of the Crimes Act, 1900 (NSW), that is the serious road crime offences.

However, it is considered as anything other than appropriate, and even likely to be considered callous or even flippant for it to be contemplated as a form of restorative justice to include assuring compensatory relief for inflicting a wrongful death only if the perpetrator is a person of means.

[18] Compensation to Relatives Act 1897 (NSW); Victims Rights & Support Act 2013 (NSW)

When it is correctly recognized it is apparent that restorative justice constitutes processes aimed to repair the harm occasioned by the act that is the subject of the proceedings, namely the offence, rather than affording considerations upon the offender. It is therefore viewed as a process of reparation to a victim for the commission of an offence upon them directly or otherwise. It is in these terms therefore, entirely reasonable to categorize the course of action this submission proposes in terms of it being a form of a process of restorative justice itself.

Incorporation of additional processes possessed with the characteristics of restorative justice would be worthwhile at a juncture in the process advocated. It should be with a view to the facilitation of presentation of any actions undertaken by the offender and the outcomes achieved or which were attempted but failed to have been achieved, being incorporated into the evaluation of the evidence presented in mitigation to the Court in the sentencing phase. Incorporation into that phase of proceedings would serve to directly link the activity undertaken to contrition for the offence having been committed. The weight of that evidence is then evaluated as a consideration during the presentation of evidence in mitigation of the imposition of the maximum penalty.

That is recommended to be adopted rather than requiring reparations being undertaken as a part of the penalty itself. It is necessary for the Court's consideration to be of a qualitative nature, the parameters of which are determined through guideline judgements, as could recommended activities to be undertaken as demonstrations of contrition for consideration. In that way the consideration is commensurate with the restorative value achieved, and not the mere recognition of participation without any discernible benefit to survivors and secondary victims.

8. Recommendations summarized

The recommended alteration is to the sentencing processes as follows:

(i) Adoption of a new paradigm requiring that the Court's considerations upon sentencing for these crimes commences from the position of the imposition of the existing maximum penalty.

(ii) Evidence in mitigation may be adduced pertaining to matters which function to reduce the duration of imprisonment from the relevant maximum penalty prescribed for that offence.

(iii) The proportion of any deduction to be applied as a result of such evidence referred to at (ii) being accepted shall be determined in qualitative terms.

(iv) The qualitative terms referred to at (iii) are categorized through new sentencing guidelines, including guideline judgements made in consideration of the new sentencing paradigm to be applied.

(v) A greater proportion of the significance in the priority of sentencing considerations is to be attributed to application of accountability upon offenders for the presence of their *mens rea* in the commission of the offence. The severity of sentence imposed is to reflect such accountability, which is influenced by the degree of the offender's malevolence or reckless disregard for others demonstrated in the commission of the offence.

(vi) Incorporation of additional processes of restorative justice with a view to the facilitation of presentation of any actions undertaken by the offender and the outcomes achieved or which were attempted but failed to have been achieved, being incorporated into the evaluation of the evidence in mitigation provided to the Court during the submissions in the sentencing phase.

(vii) The weight of that evidence, is evaluated during the presentation of evidence in mitigation of the imposition of the maximum penalty. That is recommended to be adopted rather than requiring reparations being undertaken as a part of the penalty itself.

(viii) It is necessary for the Court's consideration of the evidence referred to in (vii) to be of a qualitative nature, the parameters of which are determined through guideline judgement, as could recommended activities to be undertaken as demonstrations of contrition for consideration.

(ix) Deviation from imposition of the relevant maximum penalty requires justification as to why within the context of the requirements under this new paradigm of sentencing guidelines that the maximum penalty is not to be imposed.

Implementation of these recommendations would result in the provision of an appropriate response to these crimes by generation of the preventative influence required for the deterrence of future incidences. In doing so the resultant reduction in the incidence of these crimes would thereby reduce the pernicious impact upon the community these crimes generate. That outcome would act to negate the community's perception of inadequacy of the present laws.

The recommended actions have been illustrated to be simple to undertake, logically effective in their purported impact and as demonstrated, housed within the broader concepts of restorative justice. This is so together with the illustrated egalitarian utilization of the law since considerations of evidence in mitigation remains as a facet of the sentencing processes within the recommended adaptation herein.

9. Responses to the Commission's Questions

Question 2.1: Vehicular Manslaughter

No, it is not considered to be an appropriate course of action for any new legislation to be enacted. That is a course of action previously undertaken and yet the present consultation was deemed to be necessary. Refer to the section of this submission titled *Failure in Implementation of Current Legislation*. Action considered to be appropriate is contained within this submission in the sections titled, *Sentencing – a New Paradigm* and *Implementing the new sentencing paradigm,* which recommend an alternative course of action.

Question 2.2: (1) – (3) Dangerous driving occasioning death or grievous bodily harm

No, refer to the response to Question 2.1

Question 2.3: (1) – (3) Circumstances of aggravation for dangerous driving

No, in addition to referral to the response provided to Question 2.1, as has been demonstrated within this submission, the content of the relevant legislation remains to be appropriate. The inadequacies which are the genesis of the request to the Commission for this consultation to be undertaken relate to the processes governing sentencing for these crimes.

Question 2.4: Dangerous driving causing actual bodily harm

No, refer to the response provided to Question 2.1.

Question 2.5: Wanton or furious driving

No, refer to the response provided to Question 2.3.

Question 2.6: (1) – (2) Potential new offences

No, refer to the responses provided to Question 2.3.

Question 2.7: Failing to stop and assist

No, refer to the response provided to Question 2.3.

Question 2.8: **Police pursuits**

No, in addition to the responses provided to Questions 2.1 and 2.3, it is important to recognize and accept as further illustration of the necessity for adoption of the recommended action this submission proposes, that if the present sentencing processes were already aligned to this submission's recommendations as Parliament and other Stakeholders intended, serious road crime offences would already receive the regulatory scrutiny from the Courts this submission proposes and be obtaining the outcomes it envisages. Were that to have occurred as a matter of course then it can be argued the deterrent effect may have been such that there may have not been the offence committed or subsequent proceedings which were the catalyst to the enactment of the legislation referred to as "Skye's Law".

Question 2.9: **Predatory driving**

No, refer to the response provided to Question 2.3.

Question 2.10: **(1) – (3)** **A new serious road crimes Act**

No, refer to the response provided to Question 2.3.

Question 2.11: **Accessorial liability for serious road crime offences**

No, the present capacity of the law through the effective utilization of legislation governing offences regarding Accessories, Aiding and Abetting, as well as Principals in degrees are in existence and potentially effective. As this submission recommends in relation to sentencing for serious road crimes, it recommends the same approach to address these crimes.

Question 3.1: **(1)(a) –(b), (2)** **Maximum penalties for offences involving death**

No, refer to the response provided to Question 2.1. Furthermore, it is the appropriateness of the sentences imposed and not of the offences which is the actual cause of the necessity for corrective action to be undertaken. To be effective, the action must address the cause, not just appear to by any cosmetic focus upon the periphery.

Question 3.2: Maximum penalties for offences involving bodily harm

Yes, refer to the responses provided to Questions 2.1 and 3.1.

Question 3.3: Maximum penalties for other serious road crime offences

Yes, refer to the responses provided to Questions 2.1 and 3.1.

Question 3.4: Default and minimum licence disqualification periods

Yes, refer to the responses provided to Questions 2.1 and 3.1. Anecdotal evidence is also provided within this submission of a sentence imposed where the offender convicted of an Aggravated Dangerous Driving Causing Death offence served a term of imprisonment of a duration shorter than their licence disqualification period.

Question 3.5: Mandatory minimum sentences

No, refer to the section of this submission titled *Sentencing-a New Paradigm.*

Question 4.1: General sentencing principles and procedures

Yes, refer to the section of this submission titled *Sentencing-a New Paradigm.*

Question 4.2: Guideline judgement for dangerous driving offences

RvWhyte[19] is inappropriate. References to it within this submission establish so and in doing so illustrate the necessity for a new guideline judgement accordingly. To develop and implement such a guideline judgement is recommended as the effective mechanism available to expeditiously implement the recommendations proposed by this submission.

Question 4.3: Standard non-parole periods

No, refer to the response to Question 2.1 and the section of this submission titled *The necessity for an altered response – the perception of inadequacy.*

[19] Above n 10

Question 5.1: **(1) – (2)** **Table offences**

These offences should be Strictly Indictable offences. To do so would provide a tangible demonstration to a variety of stakeholders, of the severity with which it is considered such offences are required to be treated. Furthermore, doing so ensures the availablility in sentencing of the relevant maximum penalties to all offences.

Question 5.2: **Serious children's indictable offences**

Yes, refer to the response to Question 5.1 as well as the recommendations of this proposal. Furthermore, all offences determined to be Strictly Indictable offences should be considered a Serious Children's Indictable Offence.

The age of the perpetrator does not alter the severity of impact to survivors and nor should it regarding the ramifications for the crime upon the offender.

Is it to be realistically and ethically argued in the alternative, to a survivor or secondary victim that it is fortunate for them that the offender was an adult of financial means?

Question 6.1: **Existing rights, victim impact statement and support schemes**

Yes, refer to the responses to Questions 2.1, 3.1, 4.1 and 5.1 as the appropriate grounds for an ideology as to what is necessary to be done to direct the deterrence of and response to these offences.

Question 6.2: **Restorative Justice**

(1) Yes, in reference to the recommended sentencing process purported in this submission, incorporation of additional processes of restorative justice would be worthwhile at an appropriate juncture of the process advocated. It is required, if it is to be effective, to be undertaken with a view to facilitation of presentation of any outcomes achieved or failed to have been achieved by an offender, being incorporated into the evaluation of the evidence in mitigation provided to the Court during the submissions in the sentencing phase. The weight of that evidence of contrition or otherwise is evaluated as a consideration of evidence in mitigation of the imposition of the maximum penalty, rather than as part of the penalty itself.

(2) Yes, and it is recommended it is taken into account as described in response to Question 6.1. What it is that is necessary is for the Court's consideration to be of a qualitative nature, the parameters of which are determined through guideline judgement. In that way the consideration is commensurate with the restorative value achieved, and not the mere recognition of participation with no tangible benefit to survivors and secondary victims.

(3) Yes, however it is recommended if this is considered to be implemented it is done so in reference to the proposed amendment suggested within this submission in its section titled *Restorative Justice consideration.*, as well as being mindful of the legislative limitations identified therein which it would be necessary to rectify.

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