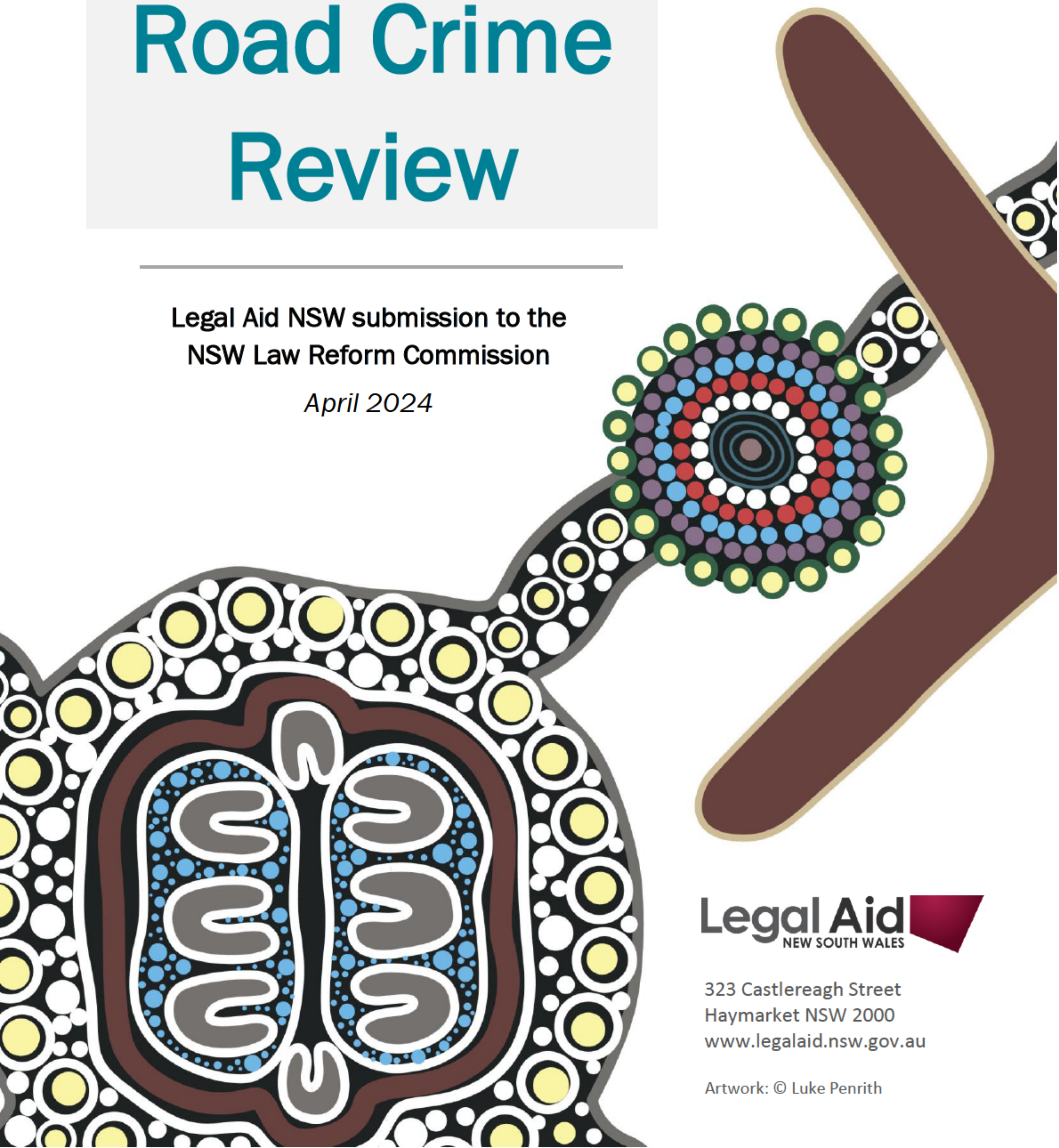
Serious Road Crime Review

Legal Aid NSW submission to the NSW Law Reform Commission

April 2024



Legal Aid NEW SOUTH WALES

323 Castlereagh Street
Haymarket NSW 2000
www.legalaid.nsw.gov.au

Artwork: © Luke Penrith

Acknowledgement 4

1. About Legal Aid NSW 5

2. Executive summary 6

3. Offences 7

3.1 Whether a new offence of vehicular homicide should be created (Q 2.1) 7

3.2 Dangerous driving occasioning death or GBH (Q 2.2) 8

3.3 Circumstances of aggravation for dangerous driving (Q 2.3) 8

3.4 Whether there should be an offence of Dangerous driving causing ABH (Q 2.4) 9

3.5 Wanton or furious driving (Q 2.5) 10

3.6 Potential new offences for driving causing death or GBH (Q 2.6) 10

3.7 Failing to stop and assist (Q 2.7) 10

3.8 Police pursuit (Q 2.8) 11

3.9 Predatory Driving (Q 2.9) 11

3.10 A new Serious Road Crimes Act (Q 2.10) 11

3.11 Accessorial liability (Q 2.11) 11

4. Penalties 13

4.1 Maximum penalties for offences involving death or injury (Q 3.1 and 3.2) 13

4.2 Maximum penalties for other serious road crime offences (Q 3.3) 14

4.3 Default and minimum licence disqualification periods (Q 3.4) 15

4.4 Mandatory minimum sentences (Q 3.5) 15

5. Sentencing principles and procedures 17

5.1 General sentencing principles and procedures (Q 4.1) 17

5.2 Guideline Judgment in *R v Whyte* (Q 4.2) 17

5.3 Standard Non-Parole Periods for dangerous driving offences (Q 4.3) 17

6. Jurisdictional issues 18

6.1 Table offences (Q 5.1) 18

6.2 Serious Children's Indictable offences (Q 5.2) 18

7. Restorative justice and the experience of victims 20
7.1 Victim impact statements (Q 6.1) 20
7.2 Restorative justice (Q 6.2) 21

Acknowledgement

We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise continuing connection to land, water and community.

We pay our respects to Elders both past and present and extend that respect to all Aboriginal and Torres Strait Islander people.

Legal Aid NSW is committed to working in partnership with community and providing culturally competent services to Aboriginal and Torres Strait Islander people.

1. About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. We offer telephone advice through our free legal helpline LawAccess NSW.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

The **Civil Law Division** provides advice, minor assistance, duty and casework services from the Central Sydney office and most regional offices. The purpose of the Civil Law Division is to improve the lives of people experiencing deep and persistent disadvantage or dislocation by using civil law to meet their fundamental needs. Our civil lawyers focus on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, employment, immigration, mental health, discrimination and fines.

The Civil Law practice includes a dedicated fines and Work Development Order (**WDO**) Service, which administers the WDO Scheme in partnership with the Department of Communities and Justice and Revenue NSW. Our WDO service provides specialist fines advice, assistance and representation to eligible people with unpaid fines. The WDO Service works to increase access to WDOs for disadvantaged people through strategic outreach, community engagement and capacity building.

The **Criminal Law Division** assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority and Drug Court.

This submission draws on the expertise of our civil and criminal law services and specialist teams across the state, including the Children's Law Service.

Should you require any further information, please contact:

Name: Rhiannon McMillan

Position: Senior Legal Project Officer, Criminal Law Division

Phone:

Email:

2. Executive summary

Legal Aid NSW (**Legal Aid**) acknowledges the profound and traumatic impact of serious road crimes on the individuals involved, including victims and their families. We support evidence-based measures to reduce the incidence of serious road crime, including investments in programs that increase road safety awareness and address the factors which contribute to offending.

In our view, the focus of any reforms in this area should be on *preventing* serious motor vehicle injury and death, rather than adoption of more punitive approaches which are known to have limited real deterrent effect.

We are of the view that, with limited exceptions (such as modernisation of language in some provisions), existing offence provisions under the *Crimes Act 1900* (**Crimes Act**) and *Road Transport Act 2013* (**RTA**) remain fit for purpose.

We also consider that current maximum penalties provide adequate scope for sentencing of serious road crimes. We oppose increases in maximum penalties, including the imposition of standard non-parole periods (**SNPP**) and mandatory sentences which remove judicial discretion.

Noting the disproportionate impact of disqualification provisions on disadvantaged communities and individuals, we support reform to the current default and minimum disqualification provisions, as well as the adoption of a scheme for discretionary licences that may be granted by the Court.

Finally, we acknowledge the limitations of criminal sentencing as a forum for healing for both victims and offenders – especially in cases where relatively low culpability has resulted in catastrophic injuries and loss of life. We support further consideration about restorative justice models, and how they may integrate with important safeguards which are necessary in criminal proceedings. In relation to children, we note that a restorative justice model does exist but is unavailable in traffic matters and in cases involving death. In our view, removal of current restrictions under the *Young Offenders Act 1997* may benefit victims in some instances, and promote greater acceptance, learning and behaviour change in children in appropriate cases.

3. Offences

3.1 Whether a new offence of vehicular homicide should be created (Q 2.1)

Legal Aid **does not support** the creation of a new offence of vehicular manslaughter or vehicular homicide. In our view, existing offences cover the full spectrum of criminality where death results, from murder at one end (e.g. where there is evidence that a driver has used a motor vehicle as a weapon with intention to kill or cause grievous bodily harm (**GBH**)), through to negligent driving occasioning death at the other.

It is not the case that manslaughter *cannot* be preferred as a charge in appropriate cases involving death by motor vehicle: the appropriate charge and particularisation of an offence will turn on the specific facts of each case. Following the present line of authority, **manslaughter by unlawful and dangerous** act *can* and *has* been successfully charged in a range of exceptional cases, including where a vehicle is used:

- as a weapon but without the requisite intent or foresight for murder,[1]
- in a deliberately destructive way with the intention to evade police,[2]
- in an intimidatory and predatory manner.[3]

The alternative species of involuntary **manslaughter by criminal negligence** encompasses a spectrum of offending, including conduct that may otherwise be charged as an aggravated dangerous driving offence under s.52A(2) but manslaughter is preferred given the nature and seriousness of the offence(s).[4]

In relation to the **suggested elements of a new vehicular homicide offence** at p.16 of the Consultation Paper, we are concerned that there appears to be very little difference with the elements of the existing s.52A(2) offence, but a maximum penalty commensurate with manslaughter. In particular, we are **concerned about the emphasis on licence status** (which is not necessarily linked with a poor driving record) rather conduct directly related to increased risk of road accident. There is real capacity for the proposed element "*suspended…unlicenced or never held a licence*" to disproportionately impact on Aboriginal and regional/remote communities, and echo the observations of the Aboriginal Legal Service NSW/ACT in their Preliminary Submissions in this respect. We note also that **licence suspensions can be imposed for a range of reasons that are closely connected to economic disadvantage** (such as unpaid

---

[1] Such as *R v Lees* [2019] NSWCCA 65. See also the matter of Linda Britton, who was sentenced by Huggett DCJ in the District Court in April 2023..
[2] Such as *Chandler v R* [2023] NSWCCA 59.
[3] Such as *R v Cook* [2023] NSWCCA 9.
[4] See for example *R v Davidson* [2013] NSWCCA 153.

fines). The lack of public transport and local access to essential services further compounds disadvantage in regional and remote areas.

Given there is scope currently to prosecute appropriate cases as manslaughter, and no evidence that available penalties for offences under s.52A(2) are inadequate, we are of the view that **a new and separate offence of vehicular homicide is unnecessary**.

It may however be appropriate to consider creation of a separate Law Part Code specifically for manslaughter involving a motor vehicle. This would enable statistical differentiation of vehicular homicide cases.

3.2 Dangerous driving occasioning death or GBH (Q 2.2)

Legal Aid NSW is of the view that the circumstances of dangerous driving under s.52A(1) and (3) are appropriate, expressed in sufficiently broad terms to capture a range of dangerous driving scenarios. In our view, **the list of circumstances should not be expanded**.

We reiterate our concerns above at 3.1 about proposed inclusion of a factor that the person was "*suspended…unlicenced or never held a licence*".

In relation to proposed inclusion of use of a **mobile phone or other visible display**, we endorse the observation in the Consultation Paper[5] that this may already be captured under either s.52A or the lesser offence of negligent driving depending on the particular facts and circumstances.

In relation to cases of **automatism**, we have limited experience with cases where the period of involuntary driving was so prolonged as to render the period of voluntary driving not "sufficiently contemporaneous to the impact". We are unaware of how frequently the issue has arisen, and would welcome further data about this. Any reform to address this issue of principle would need to be carefully and narrowly worded to avoid unintended net widening for the offence.

3.3 Circumstances of aggravation for dangerous driving (Q 2.3)

In relation to the circumstance of aggravation being "**very substantially" impaired**, we are unaware of any cases where an issue has arisen with proof on account of the statutory language, so as to justify legislative amendment. We are concerned that removing the word 'very' may indicate an intention to lower the threshold which must be established by the prosecution. It is important to clearly differentiate between states which are sufficient to establish the basic and aggravated form of the offence.

---

[5] At p.21.

In relation to **speed,** we note that 45km/h is consistent with the high range speeding offence, which is regarded as sufficiently serious as to warrant immediate licence suspension. We acknowledge however that proportions relative to the speed limit in a given area may be more appropriate. For example, we acknowledge that more than 45km/h over in a 40km/h school or residential zone may present a different accident risk profile to 45km/h over in a 100km/h dual carriage freeway. If such an approach were to be adopted, the relevant **proportions should be determined in an evidence-based way** and having regard to the significantly higher maximum penalty for the more serious aggravated offences.

We **do not support expansion** of the current list of aggravating factors, and note that the types of circumstances referred to at p.23 of the Consultation Paper may give rise to separate criminal charges (e.g. s.154A(b) *Crimes Act* drive conveyance taken without consent; s.54 *Road Transport Act* (**RTA**) drive while disqualified; s.115(1) street racing; s.146(1) *RTA* failing to stop and assist). Such conduct can otherwise be taken into account as part of an assessment of the objective seriousness the instinctive synthesis on sentencing.

3.4 Whether there should be an offence of Dangerous driving causing ABH (Q 2.4)

Legal Aid **does not support** the creation of a new offence of Dangerous driving causing ABH. In our experience, where the level of injury sustained is insufficient to establish GBH under s.52A(3), the prosecution may prefer either:

- dangerous driving under s.117(2) *RTA* with facts which reflect that another person was injured, and the degree of injury is taken into account in assessment of objective seriousness. A first offence carries a maximum penalty of 9 months' imprisonment and/or fine of 20 penalty units.
- In more serious cases, s.53 *Crimes Act* – injuries by wanton or furious driving, with a maximum penalty of 2 years' imprisonment.

In our experience, there is sometimes a reluctance by the prosecution to accept these as alternative charges, even where is it apparent there is likely to be an issue establishing GBH injury. This may be driven by the much lower maximum penalties that are applicable, particularly where it is thought that culpability is relatively high.

Section 53 appears to have work to do here – it contemplates a range of conduct between negligence and dangerousness, and *any* bodily harm that is inflicted as a result. However, we acknowledge there is a need to modernise the language of the provision (addressed below at 3.5) to make clearer its scope and application.

3.5 Wanton or furious driving (Q 2.5)

Legal Aid **agrees** that the language used in s.53 *Crimes Act* is outdated and should be modernised. As suggested above at 3.4, this may be a vehicle for addressing concerns about the absence of any specific provision covering reckless driving which causes injury of some kind.

As the Consultation Paper notes,[6] courts have interpreted s.53 to include driving conduct which leads to *any* bodily harm and that is done:

- recklessly,
- at speed or in a manner that causes danger to the life of the driver or other road users, or
- with intentional breaching of, or disregard for, the standard of care expected of a reasonable driver.

Consideration could be given to including 'death' and 'any bodily harm', and differentiating the seriousness of those consequences through different tiered maximum penalties.

Amendment of this kind may ultimately result in more scope for negotiation of lesser, more appropriate alternative charges if the maximum penalties reflected some differentiation depending on the resultant harm.

3.6 Potential new offences for driving causing death or GBH (Q 2.6)

Legal Aid has proposed that s.53 be modernised and therefore creation of a further new mid-tier offence would be unnecessary. In our submission, conduct between negligence and dangerous driving is already capable of being reflected through s.53.

Although we accept that the penalties for negligent driving are much lower than dangerous driving, this reflects the extraordinary nature of criminalising negligence – where culpability is very low but results are catastrophic, harsher criminal punishment is not a panacea to achieving justice.

3.7 Failing to stop and assist (Q 2.7)

Legal Aid **does not support** expansion of the existing provisions covering failure to stop and assist following impact. We are unaware of any evidence which justifies expansion of these responsibilities to all passengers in a vehicle through the imposition of criminal liability.

---

[6] At p.25.

3.8 Police pursuit (Q 2.8)

Legal Aid does not have any suggestions for reform of this offence.

3.9 Predatory Driving (Q 2.9)

In our view, **no reform is necessary** to the offence of predatory driving under s. 51A *Crimes Act*. Predatory driving without threat of impact and through reckless conduct is covered by the separate offence of menacing driving under s.118 RTA.

3.10 A new Serious Road Crimes Act (Q 2.10)

Legal Aid **does not support** amalgamation of existing *Crimes Act* and RTA offence provisions into a single Act. The combination of offences and the hierarchy of seriousness across the two Acts is generally well understood. Extracting selected offences has the potential to cause confusion and result in unintended consequences, given the technical operation of certain provisions (such as application of the offence provisions to private land).

While we do not generally support existing summary offences being made into indictable offences, we **do maintain our previous support**[7] **for all traffic matters involving Young People** (with the exception of Serious Children's Indictable Offences) **being within the jurisdiction of the Children's Court**. This is consistent with the 2010 Strategic Review of the NSW Juvenile Justice System, which noted that hearing traffic matters in the Children's Court would be consistent with the principles of the *Children (Criminal Proceedings) Act 1987* and would recognise that different considerations should apply to children and young people. This would also accord with the conclusions of the NSW Law Reform Commission in its 2012 report, Penalty Notices.

3.11 Accessorial liability (Q 2.11)

Legal Aid is of the view that existing accessorial liability offence provisions **do not require reform**. As the Consultation Paper notes,[8] principles of joint criminal enterprise have been successfully relied upon to prosecute passengers involved in serious fatal road crimes.

Legal Aid is **strongly opposed to new offences that would criminalise owners, parents or passengers** for failing to prevent a driver from committing road crimes, or owners of vehicles for permitting an unlicenced driver from using a vehicle. We are

---

[7] Legal Aid NSW Submission to the Sentencing Council Review into Repeat Traffic Offenders (March 2019).

[8] At p.38-39.

concerned that such provisions would disproportionately impact on disadvantaged, regional and remote communities, where:

- problems such as poverty, lack of access to driving tuition, licence sanctions imposed due to inability to pay fines, and ignorance about appeal and review rights may all play a part in a person's unlicenced driving status; and
- lack of access to public transport, geographical distance to essential services, and limited financial means will often result in pressure being placed on individuals who own a vehicle to allow others the use of it.

Such provisions may also expose victims of domestic and family violence to criminal punishment for the actions of their abusers.

We note that under s.177 *RTA,* if the driver of a motor vehicle is alleged to have committed an offence against the RTA, the responsible person for the vehicle or person having custody of the vehicle must, when requested by an authorised officer, immediately give information as to the name and home address of the driver. It is an offence to fail to comply with such a request. Under s.316 *Crimes Act*, concealment of a serious indictable offence is punishable by imprisonment of between 2 – 5 years.

Given the availability of such provisions and operation of accessorial liability principles in appropriate cases, we suggest that there is **no utility or evidence base to justify further expansion of criminal liability to parents, passengers and vehicle owners.**

4. Penalties

Legal Aid NSW considers that the **current maximum penalties provide adequate scope** to reflect the wide range of conduct that is criminalised in serious driving offences. We are not aware of any judicial commentary or case examples which indicate that the available maximums were insufficient to reflect objective seriousness of an offence, or the various purposes of sentencing under s.3A of the *Crimes (Sentencing Procedure) Act 1999* (**C(SP)A**).

While there is evidence from previous empirical studies of deterrence that suggest the threat of imprisonment generates a small *general* deterrent effect, the research also indicates that **increases in the severity of penalties**, such as increasing the length of terms of imprisonment, **do not produce a corresponding increase in deterrence**.[9]

In its April 2011 paper on imprisonment and deterrence, the Victorian Sentencing Advisory Council observed "...*research into specific deterrence shows that* ***imprisonment has, at best, no effect on the rate of reoffending and often results in a greater rate of recidivism.***"[10] A more recent study published by Bun et al similarly found that that while criminal activity is highly responsive to the prospect of arrest and conviction, it is much less responsive to the prospect or severity of imprisonment, if at all.[11]

Against the background of those general observations, Legal Aid NSW provides the following specific responses.

4.1 Maximum penalties for offences involving death or injury (Q 3.1 and 3.2)

Legal Aid is of the view that existing maximum penalties for the offences of **dangerous driving occasioning death or GBH** (*Crimes Act 1900* (NSW) s 52A(1) and (3)), and aggravated dangerous driving occasioning death (*Crimes Act 1900* (NSW) s 52A(2) and (4)) are **appropriate and should not be increased.**

Maximum penalties for driving offences which result in death or GBH are broadly consistent with other states and territories. Neither available sentencing statistics or judicial observations suggest there is inadequate scope to properly reflect objective seriousness of offending.

---

[9] Ritchie, D, (2011) 'Sentencing Matters: Does Imprisonment Deter? A Review of the Evidence' Sentencing Advisory Council Victoria.
[10] Ritchie, above n 9 p.2.
[11] Bun, M, Kelaher, R, Sarafidis, V and Weatherburn, D (2020) 'Crime, deterrence and punishment revisited' *Empirical Economics* 59, p.2303-23333, at 2305.

Legal Aid **opposes removal of the availability of Intensive Corrections Order** (**ICO**) **for any driving offence involving death**. As the statistics at Table 3.2 of the Consultation Paper note, sentences imposed between 2016 – 2022 for Aggravated Dangerous Driving causing death resulted exclusively in full time custody. However, in a small percentage of Dangerous driving cases, a supervised community sentence was regarded as appropriate.

Sentences imposed for Aggravated dangerous driving occasioning GBH demonstrate a similar pattern, with 71% of all matters between 2016-2022 resulting in full time imprisonment.

Section 68 *C(SP)A* limits the availability of an ICO to cases where the term of imprisonment to be imposed is 2 years or less for a single offence, or an aggregate term of no more than 3 years. Against maximum penalties of 10- and 14-years' imprisonment for dangerous and aggravated dangerous driving occasioning death respectively, this self-limits imposition of an ICO to matters at the lower end of the spectrum of overall seriousness. The availability of a broad range of sentencing options is particularly important in relation to the offence of negligent driving causing death, where there may be a low level of culpability on the part of the driver, notwithstanding the very significant harm caused.

In considering whether or not to make an ICO, community safety is the paramount consideration, with the court required to assess whether an ICO or full-time detention is more likely to address the offender's risk of reoffending.

ICOs are an important sentencing option, which provide a sentencing court with wide discretion to impose several additional conditions under s.73A and s.73B *C(SP)A*, such as home detention, curfew, community service hours, abstention and place restrictions. Judicial discretion should not be limited by removal of ICOs as an available sentencing option in appropriate cases.

In **relation to s.53 – Wanton/Furious driving**, we acknowledge above at 3.4 - 3.6 that reform of this section is necessary and appropriate. This may involve consideration of a tiered maximum penalty depending on the resultant harm caused.

4.2 Maximum penalties for other serious road crime offences (Q 3.3)

The Consultation Paper observes[12] that sentences for these other offences in NSW appear broadly consistent with other jurisdictions. In the absence of evidence indicating current penalties provide inadequate scope to sentence offenders charged with these offences, **no change to maximum penalties for these offences is warranted.**

---

[12] At p.57-61.

4.3 Default and minimum licence disqualification periods (Q 3.4)

Evidence suggests that disqualification periods are a weak deterrent. For example, a 2021 report by BOCSAR found that while the 2017 Driver Licence Reforms halved the penalties imposed for unauthorised driving offences in many cases, they did not impact court volume or reoffending. The report found "*these findings are consistent with other research in suggesting that repeat offenders are not responsive to changes in sanctions for driving offences*"[13]

Lengthy disqualifications periods also have a disproportionate impact on people already experiencing significant socio-economic disadvantage and Aboriginal people in regional and remote communities. In regional areas, being unable to drive over long distances can make it impossible to get to work, school, buy groceries or visit a doctor. In our experience, the lack of available and affordable public transport in many regional, rural and remote areas tends be a significant factor in re-offending.

While disqualification may be said to serve *other* purposes such as punishment or specific deterrence, a relative lack of public transport, employment options and financial resources means fixed disqualification periods will exert a far more punitive effect on than on individuals living in disadvantaged communities.

Legal Aid **supports** increased judicial discretion by **removal of prescribed minimum periods of disqualification.**

Additionally, and to reduce the impact of geographical and socioeconomic disadvantage, **we support the 2020 proposal by the Sentencing Council for a scheme which enables a court to grant restricted licences to disqualified drivers in some cases.** We note that where an offender is sentenced to imprisonment for a major disqualification offence, the specified licence disqualification period is automatically extended by "*any period of imprisonment under that sentence".*[14] It would be appropriate that such an application for a restricted licence can be brought at or near the time of release planning, taking into account their anticipated personal circumstances including residence, employment opportunities and health needs.

4.4 Mandatory minimum sentences (Q 3.5)

Legal Aid **strongly opposes the introduction of mandatory and/or minimum sentences**.

---

[13] Klauzner, I, *The impact of the NSW Driver Licence Disqualification Reforms on sentencing and reoffending'*, Crime and Justice Bulletin No. CJB243 (Bureau of Crime Statistics and Research, 2021). Available: [The impact of the NSW Driver Licence Disqualification Reforms on sentencing and reoffending]

[14] See s.206A *Road Transport Act.*

Justice must be individual and proportionate, and this requires the exercise of judicial discretion. In *R v Whyte* (2002) 55 NSWLR 252 at [147], Spigelman CJ said "*[t]he maintenance of a broad sentencing discretion is essential to ensure that all of the wide variations of circumstances of the offence and the offender are taken into account. Sentences must be individualised*." We adopt the NSW Sentencing Council's previous concerns about the constraint mandatory or presumptive sentencing has on judicial discretion.[15]

Mandatory sentences also have a demonstrated history of disproportionately impacting on vulnerable groups within society, including Indigenous people, those with mental illness or cognitive impairment, and the impoverished. Evidence suggests that mandatory sentencing increases incarceration, is costly, and is not effective as a crime deterrent.[16] We note also that mandatory minimum regimes have the potential to reduce early guilty pleas and may inadvertently thereby lead to higher numbers of contested matters.

We note in its 2018 report, 'Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples', the Australian Law Reform Commission considered these issues, and recommended that all Commonwealth, state and territory governments **repeal sentencing provisions which impose mandatory or presumptive terms of imprisonment.**[17]

Given that the reasons for traffic offending can be diverse, sentences should be flexible and able to be tailored to the circumstances of each case and each individual's particular risk factors for reoffending.

[15] Consultation Paper, [3.69].
[16] Law Council of Australia Mandatory Sentencing Discussion Paper May 2014:
[17] ALRC Report 133: Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (ALRC Report 133) | ALRC Recommendation 8-1.

5. Sentencing principles and procedures

5.1 General sentencing principles and procedures (Q 4.1)

Legal Aid has not identified any sentencing principles or procedures applicable to serious road crime which require reform.

5.2 Guideline Judgment in *R v Whyte* (Q 4.2)

We acknowledge that there have been some significant changes since *Whyte*, including the 2018 sentencing reforms and statutory discounts. However, as the Consultation Paper notes, the Court of Criminal Appeal only recently clarified how *Whyte* is to be reconciled in *R v Eaton* [2023] NSWCCA 125.

As noted by Spigelman CJ in Whyte, the guideline is a 'guide' or a 'check' only, and the sentence imposed in a particular case will be determined by the exercise of a broad discretion taking into account all of the factors required to be taken into account by s21A of the *C(SP)A.*[18] Legal Aid is of the view that *Whyte* remains relevant and appropriate for this purpose.

5.3 Standard Non-Parole Periods for dangerous driving offences (Q 4.3)

Legal Aid has **previously opposed** retention of the SNPP scheme and advocated for a review of the standard non-parole period (**SNPP**) system as a whole, including consideration of abolishing the scheme if it is found to detract from the principles underlying it.[19]

We note that the Law Reform Commission has not been asked to consider whether the SNPP scheme remains appropriate as part of this review. We **maintain our support** for a more comprehensive review of the SNPP scheme in NSW and **strongly oppose** any existing serious road crime offences being added to the SNPP scheme.

---

[18] *R v Whyte* [2002] NSWCCA 343 at [232].

[19] Legal Aid NSW Preliminary Submission to the NSW Law Reform Commission on Crimes (Sentencing Procedure) Act 1999, November 2011 (NSW Law Reform Commission Report 139, Reference PSE 18); Legal Aid NSW Submission to the NSW Sentencing Council Review of Standard Minimum Non Parole Periods, October 2013.

6. Jurisdictional issues

6.1 Table offences (Q 5.1)

Legal Aid **does not oppose** negligent driving occasioning death being made indictable as a Table offence but **does not support any increase in the maximum penalty for that offence**.

As the Consultation Paper notes,[20] most serious road crime Table offences are heard in the Local Court in any event, so amending negligent driving in this way appears unlikely to result in a significant change in sentencing dispositions. It may, however, assist in resolving charges by facilitating negotiation of a lesser alternative in appropriate cases.

Currently, where a more serious charge such as Dangerous Driving under s.52A is laid, the EAGP committal process is engaged. Delay in that process often results in Charge Certification occurring outside of six months. Under s.179(1) *Criminal Procedure* Act, summary offences must be commenced not later than 6 months from the date of the alleged offence (unless the matter is or has been subject of a coronial inquest[21]). If a charge of negligence has not been laid within time, it may leave no alternative resolution available (noting s.53 does not presently cover death).

6.2 Serious Children's Indictable offences (Q 5.2)

Legal Aid **does not support** Dangerous driving offences in s.52A *Crimes Act* being added to the definition of a 'serious children's indictable offence'. The list of Serious Children's Indictable offences in s.3 *Childrens (Criminal Proceedings) Act 1987* (**CCPA**) covers the most serious offences with a high level of criminality, including homicide, offences punishable by 25 years or life, or manufacturing firearms. Arguably, this is unnecessary given the existing power of the Children's Court under s.31(3) *Childrens (Criminal Proceedings) Act 1987* to commit the matter to the District Court if it is of the opinion that the charge may not properly be disposed of in a summary manner.

We maintain our **previous support[22] for all traffic matters involving young people being within the jurisdiction of the Children's Court**. Rather than focusing on more punitive measures, we are of the view that young people and the community ultimately benefits from a rehabilitative approach to assist them to become safer drivers.

We also note the limited application of the *Young Offenders Act 1997* (**YOA**) in relation to traffic offences. Currently the YOA does not apply to a traffic offence committed by a

---

[20] At p.97.
[21] See s.179(3) *CPA*.
[22] Legal Aid NSW Submission to the NSW Sentencing Council (March 2019), *Repeat Traffic Offenders*

child who was old enough to obtain a learner licence when the alleged offence occurred.[23] We submit that it would be appropriate for the Commission to recommend removal of this limitation. While a warning, caution or conference may not be appropriate for all traffic offences, they should be available for use in suitable cases. As we note below at 7.2, Youth Justice Conferences under the YOA may provide an avenue for restorative justice participation.

[23] *Young Offenders Act 1997* s.8(2)(b).

7. Restorative justice and the experience of victims

The issues considered by the Commission in this chapter are largely outside Legal Aid's areas of expertise. We make the following limited comments about victims and restorative justice.

7.1 Victim impact statements (Q 6.1)

Victim Impact Statements (**VIS**) inform the court about the effects of a crime on victims, and assist the court in performing its functions under section 3A of the *C(SP)A*. We acknowledge that another important feature of a VIS is its expressive function, by providing an opportunity for victims to give voice to their suffering and to be heard by the court, prosecution, and the offender.

In 2017, the NSW Sentencing Council conducted a comprehensive review of victims' involvement in sentencing. Following this, the *Crimes Legislation Amendment (Victims) Bill 2018* was passed, expanding the statutory eligibility criteria to make a VIS, and the content and use that may be made of a VIS.

Under s.27(4) *C(SP)A*, a VIS may be given and considered on sentence for a range of offences, including in the Local Court in driving offences that resulted in death of any person, or a Table 1 offence that resulted in actual physical bodily harm to any person. In our view, there is **no basis to further expand the VIS statutory scheme**.

In relation however to broader access to supports, Legal Aid's submission to the NSW Department of Communities and Justice Statutory Review of the under the *Victims Rights and Support Act 2013* recognised that the Act currently excludes from eligibility injuries arising from acts of violence involving motor vehicles.[24] The limited exceptions provided for include family victims where the act of violence took the form of an intentional killing, where a person has been charged with murder, or where the act of violence was a terrorist act.[25] Legal Aid recommended that victims of domestic and family related acts of violence involving motor vehicles be eligible for support under the Act.[26]

---

[24] *Victims Rights and Supports Act 2013,* s.25(2).

[25] *Victims Rights and Supports Act 2013,* s.25(2A) and (2B)

[26] Legal Aid NSW Submission to the Statutory Review of the *Victims Rights and Support Act* (29 July 2022), p.18, recommendation 5. Available: https://dcj.nsw.gov.au/content/dam/dcj/dcj-website/documents/about-us/engage-with-us/public-consultations/review-of-the-victims-rights-and-support-act-2013-/legal-aid-nsw-submission.pdf

7.2 Restorative justice (Q 6.2)

Legal Aid **welcomes further discussion and consultation** about restorative justice models. In our experience, offenders involved in serious road crime are often deeply affected, especially where the level of criminality or culpability is low (e.g. where it is the result of momentary inattention or worn tyres) but has resulted in a catastrophic injuries or loss of life. In some cases, the life lost or irreparably harmed is that of a family member or friend. The criminal law may be seen as a blunt instrument, which does little to support healing for either victim or offender.

In relation to children, we note that an avenue for expanding restorative justice exists through Youth Justice Conferences (**YJC**) under the YOA. Currently however, YJC are not available for:

- traffic offences committed by a child who was old enough to obtain a learner licence at the time of the offence: YOA s.8(2)(b)
- any offence that resulted in the death of a person: YOA s.8(2)(c)

As noted above at 6.2, Legal Aid **supports the Children's Court having jurisdiction** to deal with traffic matters where the child is of licensable age, and removal of these restrictions on eligibility under the Young Offenders Act.

Currently, because of the limits on the jurisdiction of the Children's Court and eligibility under the YOA:

- a child who is of licensable age who commits an offence of negligent driving occasioning GBH cannot be sentenced in the Children's Court or participate in a YJC; but
- a child who is just under licensable age who commits an offence of dangerous driving occasioning GBH can be sentenced in the Children's Court and referred for a YJC.

While YOA disposition will not be suitable in every case, these options provide an avenue for restorative justice which may benefit victims and promote greater acceptance, learning and behaviour change in children in appropriate cases.

The principles and purposes of a YJC are set out in s.34 YOA:

> **34 Principles and purposes of conferencing**
>
> (1) The principles that are to guide the operation of this Part and persons exercising functions under this Part, are as follows—
>
> (a) The principle that measures for dealing with children who are alleged to have committed offences are to be designed so as—
>
> (i) to **promote acceptance by the child concerned of responsibility** for his or her own behaviour, and
>
> (ii) to strengthen the family or family group of the child concerned, and

(iii) to provide the child concerned with developmental and support services that will enable the child to overcome the offending behaviour and become a fully autonomous individual, and

(iv) to **enhance the rights and place of victims** in the juvenile justice process, and

(v) to be culturally appropriate, wherever possible, and

(vi) to **have due regard to the interests of any victim**.

…

A YJC is a meeting between a young person (**YP**) who has committed an offence, the victim, and other relevant participants, such as police, respected Elders or community members. A YJC **provides a forum for the YP to accept responsibility** by talking about the offence and thinking about the harm they have caused the victim. It allows the victim to ask the YP about the offence and to **tell them how they felt about the offence and how they were harmed**.

The participants decide on an outcome plan, setting out tasks for the YP to complete to make up for some of the harm they have caused. This can include an apology, actions directly for the victim, and steps to link the young person into the community.

In our view, there are many benefits to a YJC, beyond restorative justice for a victim. It provides a YP with opportunities to participate in the development of a conference plan, with the benefit of input from Youth Justice and other support services. It provides important opportunities for learning, reflection and a measure of accountability given outcome plans are submitted to the Magistrate and there is follow up if that plan is not completed.

If s.8 of the YOA was amended to enable all traffic matters involving death or GBH to be dealt with by the Children's Court by way of a YJC, consideration would need to be given to whether s.18 of the YOA or the Regulations should be amended to prevent use of cautions in such cases.

© Legal Aid Commission of NSW 2021.

You may copy, print, distribute, download and otherwise freely deal with this work for a non-profit purpose provided that you attribute Legal Aid NSW as the owners. To reproduce or modify the work for any other purpose you need to ask for and be given permission by Legal Aid NSW.