4 April 2024

Hon Tom Bathurst AC KC

Chairperson

New South Wales Law Reform Commission

GPO Box 31

Sydney NSW 2001

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

Dear The Honourable Tom Bathurst AC KC

Re: New South Wales Law Reform Commission *Review of Serious Road Crime*

Thank you for the opportunity to make a submission in response to the Commission's recent Consultation Paper (No 23, December 2023) (hereafter 'CP').

Background and Context

We are a group of scholars currently undertaking an Australian Research Council funded project titled, *Violence, Risk and Safety: The Changing Face of Australian Criminal Laws* (DP210101072). This project seeks to better understand how and why criminal laws in Australia have proliferated and diversified in their form since the 1970s, and to generate new knowledge about the causes and effects of innovation in criminal law-making. One of the topics we are examining is criminal laws directed at driving harms. We are interested in how, why and when personal harms (including fatal harms) caused by drivers of vehicles came to be regarded as deserving of criminalisation and punishment.

The start of our study's historical time frame (from the 1970s to the 2020s) lines up with the period when the 'road toll' (i.e. vehicle-related injuries, and deaths in particular) was at its worst, and the criminal law began to be engaged more actively as part of the solution.[1] The 'road toll' in Australia has been significantly reduced since the 1970s. Our starting premise is that criminalisation (encompassing law *making* and law *enforcement*) is *one* of multiple contributors to this improvement, that must be placed *alongside* other important contributors to this development (including road design, car design, random breath testing, public information/education campaigns and attitudinal change). Approaching criminal law's past (and future) influence on making our roads safer in isolation from these other factors risks

[1] 1970 recorded the highest number of road deaths (3798) since records began in the 1920s: *The History of Road Fatalities in Australia* (1998) https://www.infrastructure.gov.au/department/media/publications/history-road-fatalities-australia

producing a flawed diagnosis about the place of criminal law in achieving the goal of safety from harm.

In the past, criminal law scholars have paid insufficient attention to the road/driving context, and our project aims to make a contribution to addressing this oversight. We hope that our research findings can benefit future public debate, policy development and law reform decisions about the role of criminalisation in enhancing safety – in the roads/driving context and beyond.

This is the context for our submission in relation to the Commission's current review of serious road crime.

Principles, concepts and our research

Quality criminal law reform is not simply an exercise in producing more law or more offences. We also believe it is important to recognise that changes in the nature and parameters of criminalisation are not just about offence creation (or abolition) or the raising (or lowering) of maximum penalties. Rather, these are just some of the ways in which the reach of the criminal justice system is extended. In our research we have highlighted the fact that changes to the law at different times may either *expand* or *contract* the range of criminalised behaviours; or may be 'neutral' in this respect, and directed at other objectives, such as *rationalising* the statute books, or better supporting the interests of *victims* of criminal harm. We refer to these as four different *modalities* of criminalisation.[2]

We have introduced the concept of *modalities* to capture the wide variety of ways in which law reform calibrates the state's coercive and punitive authority in the name of safety and crime prevention. We conceived a typology that includes 17 different sub-modalities of criminal law-making. Full details are available in our published work, but by way of illustration, the typology includes 9 sub-modalities of *expanded* criminalisation:

1. offence creation;
2. offence expansion;
3. penal intensification (including increasing penalties, mandatory penalties, sentencing aggravating factors and other related procedural changes);
4. restricting defences (including reverse onus provisions);
5. expanding enforcement powers (including police powers as well as the powers of other state agencies including prosecution and corrections);
6. expanding pre/post-correctional powers (including pre-conviction remand and bail conditions, post-sentence detention and post-release conditions);
7. reducing procedural safeguards;
8. civil-criminal hybridity (that is, 'two-step' criminalisation, where conditions are imposed under a civil order and breach is a criminal offence); and
9. compliance regimes (that is, where criminal sanctions form part of a regulatory compliance regime).[3]

We have also identified 6 sub-modalities of *contracted* criminalisation (1. enhancing procedural safeguards; 2. expanding defences; 3. depenalisation; 4. diversionary programs; 5.

[2] L McNamara, J Quilter, R Hogg, H Douglas, A Loughnan and D Brown, 'Theorising criminalisation: The Value of a Modalities Approach' (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 91 <https://doi.org/10.5204/ijcjsd.v7i3.511>.
[3] Ibid 95.

narrowing offences; 6. decriminalisation) as well as the stand-alone modalities of 'rationalisation' and 'victims' mentioned above.

We tested our typology in a study of 107 statutes enacted in NSW, Victoria and Queensland between 2012 and 2016. We found that a large majority (85%) of statutes effected an expansion of criminalisation – with new offence creation (16%) and penal intensification (20%) accounting for the greatest number of such expansions. By contrast, only 14% of statutes narrowed the parameters of criminalisation.

We found many instances of statutes that 'rationalised' the statute books. Recognising that the Commission's review is concerned with *serious* road crime offences, it is noteworthy that a significant number of the statutes in our study were directed at changing road safety laws.[4] This suggests that in the context of driving and road safety – perhaps the 'busiest' site of criminalisation in Australia in terms of the number of offences detected and penalised – there is seen to be an almost continuous need to 'fine tune' legislation in pursuit of the optimal balance between effectiveness, fairness and efficiency.

We note that the law reform options canvassed in the Commission's CP show a preponderance of expanded criminalisation proposals, although not exclusively so, and a range of modalities are in operation. The following list is illustrative:

- new offences of 'vehicular manslaughter/homicide' (Q 2.1), dangerous driving causing actual bodily harm (Q 2.4) and driving causing death or grievous bodily harm (Q2.6) (*'offence creation'* sub-modality);
- additional circumstances of dangerous driving (Q 2.3) (*'offence expansion'* sub-modality);
- higher maximum penalties for offences involving death (Q 3.1), mandatory minimum sentences (Q 3.5), standard non-parole periods (Q 4.3) (*'penal intensification'* sub-modality);
- table offences (Q 5.1), serious children's indictable offences (Q 5.2) (*'reducing procedural safeguards'* sub-modality):
- repeal/amending 'injuries by furious driving etc' (Q 2.5) (*'narrowing offences'/decriminalisation'* sub-modalities);
- a new serious road crimes statute (Q 2.10) (*'rationalisation'* modality); and
- existing rights, victim impact statements and support schemes (Q 6.1), restorative justice (Q 6.2) (*'victims'* modality).

Much scholarly debate on criminalisation tends to assume that the essential normative challenge is to rein in criminal law excess. We advocate for a more nuanced, context-specific approach that recognises that criminalisation is not universally an always-expanding phenomenon. In a particular context, there may be concerns about actual or perceived *under*-criminalisation, and our position is that such matters also warrant attention. The terms of reference for this review of serious road crime (and the substance of a number of the preliminary submissions discussed in the CP) suggest that driving behaviours resulting in death or other serious harm *may* be one such context. For these reasons, a review of the law as it relates to serious road crime is welcome.

Finally, we have previously noted that '[d]isquiet about contemporary criminal law-making is not only associated with concerns about *what* criminal law is produced but also with concerns

[4] Ibid 104.

about *how* it is made.' [5] Therefore, our ongoing work on criminalisation in pursuit of safety is attentive to the *processes* by which criminal law is made. While cautious about over-generalisation, our preliminary research suggests that there may be qualitative differences between new criminal laws that are introduced quickly in response to a perceived crisis (a process we have referred to as 'single-stage executive-driven' criminal law making) and criminal laws that are introduced after careful research consultation and consideration by a law reform commission or other independent inquiry.[6]

About this submission

Our responses to the questions contained in the CP will be selective rather than comprehensive. Our approach is to apply the insights gained from our research about criminal law-making to the specific context of serious harms caused by vehicle driving. The unifying theme of our submission is that the creation of new offences and other forms of expanded criminalisation should be approached with great caution. The inadequacy of the status quo should be established via strong evidence before embarking on further attempts to 'perfect' the criminal law statute books.

We focus on the 'headline' proposal for a new offence of 'vehicular manslaughter/ homicide' (CP, Q 2.1), but much of our analysis (particularly our critique of 'gap filling' and 'particularism') applies equally to other 'new offence' proposals contained in the CP.

A new vehicular manslaughter offence? (Q 2.1)

Overview

Our primary submission in response to this question is that NSW already has the offence of manslaughter and legislation to create a new 'customised' offence of 'vehicular manslaughter' is not warranted. As discussed below, rather than turning quickly to the 'more law' solution, we believe it is necessary to better understand if and why the general offence of manslaughter in the context of motor vehicle deaths is, or is perceived to be, insufficient as a way of criminalising highly culpable forms of driving fatality. A new 'vehicular manslaughter' offence should only be considered if there is clear evidence that the status quo is inadequate. The evidence that is currently available in the public domain does not support a case for a new offence.

The importance of scrutinising the 'gap-filling' lens and the 'more law' solution

Criminalisation is a frequently employed public policy tool to address a range of types of conduct that are perceived to be harmful or carry a risk of harm. The creation of new offences is the most employed modality of criminal law-making in Australia.[7] Creation of new offences is often assumed necessary in order to fill a 'gap' in the current criminal law. As noted in the CP no Australian state or territory has introduced a vehicular manslaughter offence, although

[5] L McNamara, J Quilter, R Hogg, H Douglas, A Loughnan, D Brown and L Farmer, 'Understanding *processes* of criminalisation: Insights from an Australian study of criminal law-making' (2021) 21(3) *Criminology & Criminal Justice* 387, at 289 https://doi.org/10.1177/1748895819868519. See also A Ashworth. 'Is the criminal law a lost cause?' (2000) 116 *Law Quarterly Review* 225.
[6] See generally, McNamara et al (n 5) 394-401.
[7] See McNamara et al (n 2) 99-102.

the idea has recently been raised in the ACT.[8] We recommend a cautious approach to offence creation proposals that adopt a 'gap-filling' lens.[9]

In our research, we have seen that one of the most powerful tropes in criminalisation debates is the identification of an alleged 'gap' that needs to be 'filled' by *more* law.[10] We would argue, however, that focusing on an apparent 'gap' in the statute books is too narrow – particularly if it only draws attention to the 'absence' of an appropriately drafted offence. We believe it is important to interrogate the absences or deficits in the structural and operational settings into which any proposed new offence might be inserted. A gap paradigm which assumes the existence of a simple 'lacuna' into which a new offence can be inserted to 'fill' that (vacant) space, has a number of interconnected problems.

This approach has the capacity to obfuscate the problematic operation of the *current* criminal laws in respect of manslaughter involving a motor vehicle and assume that a 'new' offence will address these issues. As set out in the CP, the general law of manslaughter is available in instances of death involving a motor vehicle – usually by way of criminal negligence but also, in certain circumstances, by unlawful and dangerous act manslaughter (UDAM).

In addition to the issues over the application of the legal principles of UDAM, little is known about the circumstances and reasons why manslaughter is underutilised. The CP indicates some reasons for our lack of understanding including that official statistics are unavailable for vehicular manslaughter ([2.13]) (as there is no 'law part code' for such offences). Nevertheless, what we do know is that there are very high numbers of road fatalities including in NSW:

> someone is killed or hospitalised every 46 minutes because of a road traffic crash. In 2022, 288 people were killed and 9711 people were seriously injured on NSW roads. In 2023, to date, 332 lives have been lost. ([1.2], 1-2)

These numerical data contrast with the Commission's own research, reported in the CP, which estimates that only 58 charges of manslaughter (in a vehicular/driving context) were finalised in NSW between 2016-2022; with 35 proven, 18 charges withdrawn and 5 charges resulting in a not guilty outcome and acquittal.[11]

This *may* be suggestive of under-criminalisation in terms of a failure to pursue manslaughter convictions in driving fatalities, but assessing whether this conclusion is warranted requires careful consideration of a range of matters (see below). It is also plausible that the Office of the DPP may be pursuing a manslaughter conviction in cases where the level of culpability warrants it;[12] and that a significant proportion of road fatalities occur in circumstance where

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[8] NSW Law Reform Commission, *Serious road crime*. Consultation Paper 23 (December, 2023) [2.29].
[9] See generally, J Quilter, "Evaluating Criminalisation as a Strategy in Relation to Non-Physical Family Violence" in M McMahon and P McGorrery (eds), *Criminalising Coercive Control* (Springer, 2020)
[10] The creation of a new form of homicide in 2014 (assault causing death: see now *Crimes Act 1900* (NSW) s 25A) predicated on the assertion that there was a gap in the law when it came to 'one punch' killing is an illustrative example. See J Quilter, 'One Punch Laws, Mandatory Minimums and "Alcohol-Fuelled" as an Aggravating Factor: Implications for NSW Criminal Law' (2014) 3(1) *International Journal for Crime, Justice and Social Democracy* 81; J Quilter, 'The Thomas Kelly case: Why a "one punch" law is not the answer' (2014) 38(1) *Criminal Law Journal* 16; J Quilter, 'Populism and criminal justice policy: An Australian case study of non-punitive responses to alcohol related violence' (2015) 48(1) *Australian and New Zealand Journal of Criminology* 24.
[11] NSWLRC (n 8) [2.14].
[12] For a recent example, see 'Alleged street race organiser charged after young brothers killed', *Sydney Morning Herald*, 14 March 2024 https://www.smh.com.au/national/alleged-street-race-organiser-charged-after-young-brothers-killed-20240314-p5fclm.html?ref=rss

the at-fault driver's culpability doesn't reach the (appropriately high) threshold for manslaughter – an offence that carries a maximum penalty of 25 years imprisonment.

Our research to date on the history of the criminalisation of driving harms suggests that such harms may have been treated differently to other types of crimes, in ways that underappreciated the gravity of the harm caused and the culpability of the person responsible. For example, in a 1978 Australian Institute of Criminology report, Clifford and Marjoram observed:

> Traffic accidents, injuries and fatalities have become so much a part of daily life that society often appears to be somewhat oblivious to the contributory circumstances that may eventually come to the attention of criminal justice authorities.
>
> Further, it can be argued that while most people who break the law are considered deviant and are socially ostracised, those convicted of motoring offences are more often still regarded as law abiding citizens and their behaviour is tolerated and even excused.[13]

Kerry King's book on driving fatalities in Western Australia, *A Lesser Species of Homicide: Death, Drivers and the Law* (2020), suggests there has been 'resistance' to treating road deaths as equivalent to other homicides. While King does acknowledge that things eventually began to change in the 2000s and 2010s, her analysis is critical of the fact that community and government attitudes and judicial sentencing practices were so slow to change.[14]

We note, however, that this characterisation – that driving fatalities have been treated by the law and the court system as a 'lesser species of homicide' – is not universally accepted. For example, Daryl Brown has observed:

> There is a dearth of evidence to support the proposition that jury reluctance to convict for manslaughter was the principal reason for the introduction of the offence of dangerous driving causing death in Australia. … There is no evidence today to suggest that juries are reluctant to convict dangerous drivers on a charge of motor manslaughter where appropriate.[15]

We note that the statistics for the period 2016-2022 (cited in the CP and referred to above) indicate a 60% proven rate for this type of manslaughter.

It is important to acknowledge what is *not* known about the context in which the current law of manslaughter operates. Raw statistics on the number of manslaughter matters finalised tell us nothing about which driving fatality matters were not charged as manslaughter and why. We also know little about: the attitudes and practices of the police in deciding which charges to lay; prosecutorial decisions about charges and withdrawal; whether/how plea negotiations may (or may not) impact on the type and number of matters prosecuted as manslaughter, including whether matters originally charged as manslaughter are downgraded during plea negotiations; and the attitudes that exist in the community or the public (and by extension, a jury's willingness to convict in such matters).

There is also an element of uncertainty about the public reaction to a new offence. In relation to public attitudes to driving offences, while the CP refers to some of the existing research in this area, it is useful to keep in mind the likely range of views of members of the public (and juries) in relation to driving offences. The CP refers to empirical research conducted by the

[13] W Clifford and J Marjoram, *Road Safety and Crime* (Australian Institute of Criminology, 1978) 2 https://www.aic.gov.au/sites/default/files/2020-05/road-safety-crime.pdf

[14] K King, A *Lesser Species of Homicide: Death, Drivers and the Law* (UWA Publishing, 2020), see generally 264-71.

[15] D Brown, *Traffic Offences and Accidents* (LexisNexis, 4th ed, 2006) 114.

Sentencing Advisory Panel in England and Wales in 2008, which, in relation to tougher sentences for driving offences, concluded:

> … it seems possible that imposing tougher sentences on the 'dangerous' and 'careless' offences might win the support of the tough-minded – but lose that of more liberally minded people.[16]

In our submission, more needs to be understood about all of these operational contexts before serious attention is given to whether there is a problem to which the 'solution' is a new offence. Though mindful of the Commission's timeframe and capacity constraints, we suggest that it would be desirable to gather further quantitative and qualitative data on charging, prosecuting and plea negotiation practices, including via consultation with police, prosecutors, defence lawyers and judges.

Formal and substantive criminalisation

Hasty adoption of a new offence as the 'solution', without further inquiry, would also risk misunderstanding the difference between *formal* and *substantive* criminalisation.[17] Formal criminalisation is effected when a crime is added to (or amended in) the statute books. Substantive criminalisation refers to the operation of the law, and its assessment requires consideration of matters such as the decision-making and actions of police, prosecutors and courts.[18] How they do or don't act is crucial. Understanding substantive criminalisation, therefore, requires empirical inquiry into many factors beyond offence creation and other forms of law-making, including how key decision-makers exercise discretion. As Lacey and Zedner have observed, party political interests, administrative pressures and constraints upon the implementation of laws, including training of criminal justice officials and the influence of professional cultures, all play a significant factor in criminalisation: 'These extra-legal factors play an important part in determining how crime is actually policed and prosecuted through the criminal justice process.'[19]

We submit that consideration of the necessity or desirability of drafting a new offence to fill a 'gap' in relation to deaths involving motor vehicles must address the interrelationship between the definition of the existing offence of manslaughter (i.e. formal criminalisation) and substantive criminalisation. Addressing the expectations of the NSW community is one of the considerations with which the Commission is rightly concerned (CP, [1.5]). The creation of a new offence may give the (instantaneous) impression of concerted action to reduce road trauma, but reform of this sort risks community disappointment (i.e. the opposite of what is intended) unless the *operational* dimension of the criminal law is fully understood and anticipated.

One possible consequence of creating a new offence of vehicular manslaughter – especially if, as would seem logical, it is assigned a place in the hierarchy of homicide offences below manslaughter (maximum 25 years and above aggravated dangerous driving causing death (14 years)) – is that it may become the default offence for highly culpable road fatalities, with manslaughter regarded (substantively even if not formally) as no longer applicable to driving fatalities. We query whether a 'downgrade' of this sort is consistent with the community

[16] M Hough et al, *Attitudes to the Sentencing of Offences Involving Death by Drunk Driving*. Research Report 5 (Sentencing Advisory Panel, 2008) 46.
[17] N Lacey and L Zedner, 'Legal constructions of crime' in M Maguire, R Morgan & R Reiner (eds), *The Oxford Handbook of Criminology* (Oxford University Press, 5th ed, 2012) 159.
[18] Ibid 162.
[19] Ibid 178.

concerns that animated the Government's referral of the topic of serious road crime to the Commission. If, alternatively, vehicular manslaughter was given the same maximum as manslaughter, it is not clear what would be achieved from the creation of a new offence, apart from a rather shallow form of symbolic criminalisation, which may also prove disappointing to some members of the community.

A known constraint in the current law: the meaning of 'unlawful act'

The Commission's CP draws attention to the narrow interpretation that the courts have given to the 'unlawful act' component of the definition of manslaughter by unlawful and dangerous act. In our view, the objective test of dangerousness sets an appropriate threshold for determining whether a person who has unintentionally caused the death of another person should be criminally responsible for manslaughter. It is the appropriate standard whether the act causing death occurs in a driving context or a non-driving context. We submit that the approach adopted in *R v Pullman* (1991) 25 NSWLR 89 is unduly restrictive. We support the position taken by the Office of the DPP in its preliminary submission:

> In the view of the ODPP, there is significant force in the observation made by Simpson J in *Borkowski* at [3] that "unlawful and dangerous" is a composite concept; where, then, the conduct in question must be sufficiently dangerous so as to justify the application of the criminal law, it is not clear why a breach of a statutory or regulatory prohibition that meets this level of dangerous should not qualify as the relevant unlawfulness.
>
> In these circumstances, and noting the continued doubts expressed by the Court of Criminal Appeal as to the correctness of *Pullman*, the Commission may wish to consider this issue and whether legislative reform is appropriate.[20]

While we do not resile from our earlier suggestion that the Commission would benefit from further analysis of ODPP decision-making and charge selection in road fatality matters, we are prepared to speculate that the removal of the *Pullman* constraint will go a considerable way to addressing any real or perceived 'gap' in substantive criminalisation in relation to culpable deaths on NSW roads.

The problem with particularism

Another motivation behind our call for caution in relation to the proposal for a new 'customised' offence of vehicular manslaughter is that it may be criticised for exhibiting what criminal law scholars have referred to as undue 'particularism'. A feature of criminal law making over at least the last 20 years, is a tendency towards greater and greater specificity in the drafting of statutory provisions that define criminal offences, often with the purported aim of 'perfectly' capturing the precise dimensions of the conduct which is presented as in need of (further) criminalisation. This specificity is achieved at the expense of communication, via offence label, of the moral wrongness of the conduct being addressed. The 'rock-throwing'

[20] Office of the Director of Public Prosecutions NSW, 'Preliminary Submission to the NSW Law Reform Commission review on Serious Road Crime', 17 February 2023, 5. See *R v Borkowski* [2009] NSWCCA 102 [3*]; R v Nguyen* [2010] VSC 442 [28]; *Davidson v R* [2022] NSWCCA 153 [198].

offence introduced in NSW in 2008 is a classic example.[21] The proposed new 'performance crime offence' (i.e. social media 'posting and boasting' in relation to a car theft or break and enter offence) offers a very recent example.[22]

We acknowledge that there is a long history of particularism in the driving harms context, including in the articulation of discrete aggravating factors considered relevant to culpability. Nonetheless, in this submission we caution against the further pursuit of what we consider to be an unrealistic, undesirable and unnecessary objective: 'perfecting' the criminal law via very specific statutory provisions to ensure 100% coverage of those harmful behaviours deemed sufficiently serious to warrant criminalisation. Particularism can abstract or decontextualise an offence from the intrinsic wrongdoing and culpability at the heart of the conduct in question, and set up a false expectation that with precision comes a greater guarantee of conviction and appropriate punishment.

We suggest that the more energy that is devoted to drafting precision (and attempting to achieve stakeholder consensus) in relation to such offence definition, paradoxically, the greater the risk that the exercise will give rise to the pitfalls of 'particularism': the inclusion of 'definitional detail that merely exemplifies rather than delimits wrongdoing.'[23] Horder has pointed out that this gives rise to the problem that: '[v]ery precise specification of the modes of responsibility opens up the possibility of unmeritorious technical argument' over which conduct falls within the offence and, more importantly, creates 'arbitrary distinctions between [that conduct] included and those left out.'[24]

Particularism also has the potential to undermine the important communicative function of the criminal law.[25] The criminal law exerts symbolic as well as instrumental power.[26] The criminal law is the state's most coercive and powerful tool that may be used against an individual. It declares not only which behaviours are undesirable, but so unacceptable that they should attract criminal punishment. Criminal law's symbolism is part of the appeal of criminalisation as a technique of public policy and regulation. It is important to engage with this dimension of criminal law-making rather than dismiss symbolism as superficial or illegitimate as a basis for criminalisation.[27] Particularist drafting tends to undercut the ability of a new law to communicate community consensus and symbolise serious social condemnation.

In our view, the suggested list of circumstances for a new vehicular manslaughter offence (CP, [2.34]) represent a form of particularism which, for the reasons just outlined, we would generally recommend against in criminal law-making.

The superficial appeal of the elements in (i)-(iv) is obvious – they are 'known' quantities, being current circumstances of aggravation for dangerous driving offences. However, the list

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[21] *Crimes Act 1900* (NSW), s 49A, as amended by the *Crimes Amendment (Rock Throwing) Act 2008* (NSW); see A Loughnan, 'Drink Spiking and Rock Throwing: The Creation and Construction of Criminal Offences in the Current Era' (2010) 35(1) *Alternative Law Journal* 18 https://doi.org/10.1177/1037969X1003500104

[22] Bail and Crimes Amendment Bill 2024; See generally, N Dole, 'Tougher bail laws and a new 'post and boast' social media offence have been announced to crack down on youth crime. How will it work?' *ABC News* (online), 12 March 2024 https://www.abc.net.au/news/2024-03-12/nsw-youth-crime-legislation-bail-social-media-incarceration/103578062

[23] J Horder, 'Rethinking Non-Fatal Offences Against the Person' (1994) 14(3) *Oxford journal of Legal Studies* 335, 338.

[24] Ibid 340; see also Loughnan (n 21) 20-1; Quilter. 'One Punch Laws ….' (n 9) 95-96.

[25] See generally RA Duff, *Punishment, Communication and Community* (Oxford University Press, 2000).

[26] V Tadros, 'The distinctiveness of domestic abuse: A freedom based account' (2005) 65(3) *Louisiana Law Review* 989, 1011.

[27] See D Brown, 'Criminalisation and Normative Theory' (2013) 25(2) *Current Issues in Criminal Justice* 605, 620 DOI: 10.1080/10345329.2013.12035986

exemplifies the difficulty of 'capturing'/perfecting a precise offence formulation. While the elements in (i)-(iv) mirror the current circumstances of aggravation for dangerous driving offences (*Crimes Act 1900* (NSW) s 52A(7)), such a list does not (and could not ever) capture all conceivable ways that 'vehicular manslaughter' might occur. To take an obvious example, they do not cover using a car as a 'weapon'.[28] Further, as is noted in the CP, from a statistical perspective, the elements in (v) – (viii), would limit the application of the offence ([2.38]).

Problematically, circumstance/element (vi) has great capacity to adversely impact Aboriginal and Torres Strait Islander people (CP, [2.43]) with the potential for contributing to the already serious over-incarceration of Aboriginal and Torres Strait Islander people.[29] We note the compelling statistics provided in the preliminary submission of the Aboriginal Legal Service (NSW/ACT).[30]

We would also advocate against drafting approaches based on the adoption of 'formulas' of the sort outlined in the CP, [2.34]. It combines particularism with a mathematical matrix approach that, in our view, sits uncomfortably with the complex humanity of the loss suffered by victims and families and the gravity of the responsible driver's wrongdoing. Stripped of context, such an approach creates what Horder has referred to as a 'moral vacuity',[31] and a consequent failure to symbolise and communicate the gravity of the wrong. Furthermore, such lists are destined to disappoint on the first occasion that a highly culpable death occurs in circumstances that fall outside those specified in the statutory formula. Here, we reinforce a point made earlier: attempts to 'perfect' the criminal law through greater and greater specificity are always incomplete, and destined to disappoint, sooner or later.

General offence preferred over particularism

Our primary submission is that the Commission should not recommend a new offence of vehicular manslaughter – and certainly not until more is known about police and prosecutor charging and negotiating practices under the current law. However, if the Commission is minded to recommend a new offence ('vehicular manslaughter'), we would advocate against more particularism, and for a *general* offence that attempts to capture the moral wrongness of the behaviour. Under the current laws of manslaughter in NSW, this is captured by the requirement of a *gross* breach of a duty of care giving rise to a high risk of death/serious injury (in the case of manslaughter by criminal negligence), and the dual requirement of an unlawful act and 'dangerousness' (for manslaughter by unlawful and dangerous act).

If the Commission is satisfied that there is a culpability 'gap' between these manslaughter formulations and the next relevant offence in the hierarchy of homicide offences – aggravated dangerous driving causing death – that 'gap' should be filled with an offence fault element expressed in appropriately general normative language that captures (and communicates to the wider community) the nature and degree of wrongfulness involved. This approach would also recognise the importance of 'fair labelling' in the drafting and naming of criminal offences.[32] It would maximise the criminal law's capacity to send a powerful message of disapproval and

[28] See *Lees v R* [2019] NSWCCA 65.
[29] See Australian Law Reform Commission, *Pathways to Justice - Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander* Peoples. Report 133 (ALRC, 2017); Australian Bureau of Statistics, Prisoners in Australia (ABS, 2023) https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release.
[30] Aboriginal Legal Service (NSW/ACT), 'Preliminary submission to the review: Review of serious road crime NSW' (3 March 2023), 2
[31] Horder (n 23) 340.
[32] J Chalmers & F Leverick, 'Fair Labelling in Criminal Law' (2008) 71(2) *Modern Law Review* 219.

reprobation, that speaks of the unacceptability and moral culpability of unintentional killings involving driving and motor vehicles, and communicates not only to the wider community, but to key decision-makers in the justice system, including police, prosecutors, and the judiciary. It also respects the 'emotionalism' and 'populist' drivers of criminal law-making that are sometimes disparaged in criminalisation scholarship as 'irrational' and therefore invalid considerations, and addresses 'the experiences and rights of victims of serious road crime and their families …' (CP, [1.6]).

In our view, an offence definition that relies on 'lists' (CP, [2.34]) is inadequate to achieve the goals and benefits described here. The problem with such 'lists' is that they attempt to articulate the core moral culpability of the offence by proving the presence of discrete circumstances (such as exceeding the speed limit by more than 45kms (CP, [2.34])) and treating these circumstances as proxies for the serious wrongness that justifies criminalisation.

Relevance of our analysis to other new offence/offence definition options under consideration by the NSWLRC

Our submission has focused on the existing offence of manslaughter, and the option of creating an additional homicide offence of 'vehicular manslaughter). The arguments we have made in this context apply also to a number of other options canvassed in the Commission's CP, including:

- whether, for the purpose of the existing dangerous driving offences, the list of factors that constitute 'dangerous' driving should be expanded (Q2.2);
- whether there should be a new offence of dangerous driving causing actual bodily harm (Q2.3); and
- whether there should be a new mid or lower tier offence (Q2.6).

On the first of these issues we reiterate the point made above: that the enterprise of incremental particularism is always incomplete. Adding further indicia of 'dangerous' driving risks producing arbitrary categories of criminal conduct outside of which future culpable fatal and serious injury crashes will continue to fall. For example, adding the use of a hand-held mobile phone to the list of circumstances of dangerousness would appear to offer limited operational utility (noting the statistics reported in the CP, [2.40] which indicated that only 0.15% of fatal and serious injury crashes featured this particular circumstance) and could not anticipate future advances in vehicle technology or change in driving practice that will not be covered by the expanded statutory categories.

We note that the CP seeks views on the role of restorative justice in relation to serious road crime (Q6.2). Recalling the CP observation that 'many victims of serious road crimes and their families feel there is a significant gap in what the criminal justice system can offer them' (CP, [6.43]), we close by advocating for close and careful consideration of the possibility that enhanced restorative justice options will go a significant way to addressing the concerns that animated the Commission's reference. In particular, enhancing restorative justice options has the potential to provide more context-specific accommodation of victims of serious road crime, without the significant issues of a new offence, as discussed in this submission.

Restorative Justice (Q6.2)

We claim no specific expertise on the topic of restorative justice (and are pleased that the Commission has drawn on the work of Professor Bolitho and others (CP, [6.32] ff). However, as criminal law and criminal justice scholars we are familiar with restorative justice principles and practices and strongly support the proposal for making restorative justice more widely available in relation to driving-related serious injury and death. Recalling that 'many victims of serious road crimes and their families feel there is a significant gap in what the criminal justice system can offer them' (CP, [6.43]), we consider that a high quality and widely available restorative justice process is likely to go a significant way towards meeting the justice expectations of the community that are currently unmet, and which, in some instances, are manifesting as calls for new offences and higher penalties. A reform approach based on enhancing restorative justice options has the potential to provide more context-specific and meaningful accommodation of victims of serious road crime, without the significant issues surrounding the creation of new offences that we have highlighted in this submission.

Conclusion

The key message of this submission, based on our collective expertise, and ongoing collaborative research, is that the Commission should be wary of embracing 'more law' – including new offences and even greater particularity – as the solution to concerns about the adequacy of the criminal justice system's response to serious injury and death caused by vehicle drivers. Alleged deficiencies in the operation of the current law require further investigation and understanding before calls for further legislative reform can be sustained.

Meanwhile, restorative justice options should be actively explored because they have the potential to constructively acknowledge the experiences and respect the rights of victims of serious road crimes and their families.

If we can be of any further assistance in relation to the Commission's work, please do not hesitate to contact us.

Sincerely

(on behalf of)

Professor Luke McNamara, Professor Julia Quilter, Professor Arlie Loughnan, Honorary Professor Russell Hogg, Emeritus Professor David Brown, Professor Lindsay Farmer

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