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12 April 2024

The Hon Tom Bathurst AC KC
Chairperson
NSW Law Reform Commission
Locked Bag 5000
PARRAMATTA NSW 2124
By email: nsw-lrc@dcj.nsw.gov.au

Dear Chair,

Review of serious road crime

1. The NSW Bar Association (**Association**) thanks the NSW Law Reform Commission (**the Commission**) for the opportunity to make a further submission to its review of serious road crime. This submission is a response to the issues raised in the Consultation Paper and is intended to complement our preliminary submission, which has been enclosed for your information.
2. The Association is aware that an increasing number of deaths are occurring on NSW roads. There has been a significant increase in fatalities since the Association's preliminary submission, dated February 2023. The preliminary figures for 2023 indicate that there were 315 fatal crashes resulting in 351 fatalities.¹ This constitutes a 25 per cent increase on the 281 fatalities that occurred in 2022.² These tragic deaths underscore the importance of the Commission reviewing what policies are actually effective at reducing deaths and making recommendations consistent with the available evidence.
3. Not only are the lives of victims tragically cut short, but their deaths have a profound and enduring impact on their family, friends, and the wider community. The Association is supportive of victims and families being provided trauma-informed support, including counselling, and appropriate access to restorative justice.

Offences

4. Consistent with our preliminary submission, the Association submits that the existing provisions dealing with serious road crime, and accessorial liability, remain fit for purpose.

¹ Centre for Road Safety, "[NSW Road Toll Progress - preliminary provisional data as at 1 January 2024](#)", Transport for NSW, p 1; Centre for Road Safety, "[Monthly bulletin of preliminary traffic crash data December 2023](#)", Transport for NSW, p 3 and 5.

² Ibid

Vehicular Manslaughter

5. As stated in the Consultation Paper, there is no separate offence of vehicular manslaughter in NSW; however, the general offence of manslaughter can apply in some circumstances involving motor vehicles.³ No other Australian state or territory has a specific offence of vehicular manslaughter or homicide.⁴
6. The introduction of an offence of vehicular manslaughter is not supported by the Association because the full gamut of criminal conduct relating to driving is captured by each offence category under the current law, whether it involves negligence, dangerousness, or manslaughter involving the use of a motor vehicle.
7. While some may perceive a decision not to pursue a prosecution for manslaughter as too lenient, it is important to note that the use of manslaughter as a charge in preference to aggravated dangerous driving causing death is usually reserved for the more serious examples of culpability and is appropriately a matter of prosecutorial discretion. Examples of the use of manslaughter in the worst cases are reflected in recent decisions such as *R v Cook* [2023] NSWCCA 9; *Davidson v R* [2022] NSWCCA 153; and *Moanani v R* [2022] NSWCCA 85.
8. The Consultation Paper outlines the elements of a potential offence of “vehicular homicide”, as suggested by one preliminary submission.⁵ The offence would require one of the elements in (i)-(iv)⁶ and at least one of the additional elements in (v)-(viii)⁷ below:
 - (i) the prescribed concentration of alcohol was present in the accused’s blood, or
 - (ii) the accused was driving the vehicle concerned on a road at a speed that exceeded, by more than 45 kilometres per hour, the speed limit (if any) applicable to that length of road, or
 - (iii) the accused was driving the vehicle to escape pursuit by a police officer, or the accused was driving under the influence of a drug (other than intoxicating liquor) or
 - (iv) a combination of drugs which thereby very substantially impaired his/ her ability to drive,
 - (v) the accused was a Professional Driver (with a meaning similar to any person that receives payment for employment or offering a service involving the use of a motor vehicle, to include truck, bus, taxi and ride share operators); or
 - (vi) the accused was suspended, disqualified, unlicensed, or never held a licence; or
 - (vii) the accused was using a mobile telephone or other device at the time of the collision; or
 - (viii) the accused drove with a known or perceived medical condition that would impair their ability to drive.

³ NSW Law Reform Commission, “Serious Road Crime”, Consultation Paper 23, December 2023, p 11.

⁴ It is noted that following an inquiry into Dangerous Driving by the Standing Committee on Justice and Community Safety, the ACT Government has agreed to consider in more detail the appropriateness of the name of the current offence of ‘culpable driving causing death’ in section 29 of the *Crimes Act 1900* including considering any benefits of renaming the offence ‘vehicular manslaughter’. The ACT Government has also agreed to examine the appropriateness of the current penalties for this offence, in the context of the penalties for manslaughter.

⁵ NSW Law Reform Commission, *op. cit.*, p 16.

⁶ These elements constitute the current circumstances of aggravation for dangerous driving offences. See: s52A(7), *Crimes Act 1900* (NSW).

⁷ The elements outlined at (vii) and (viii) can form the basis of liability for dangerous driving occasioning death and the factors outlined at (v) and (vi) may already be taken into account by the court when sentencing for dangerous driving offences.

This proposed offence is not supported and is unnecessary for the same reason provided above in relation to vehicular manslaughter. The elements in (v)-(viii) do not appear to take the criminality to a significantly higher level than the conduct in (i)-(iv).

Dangerous driving offences

9. The circumstances that constitute dangerous driving as presently drafted in section 52A of the *Crimes Act 1900* (NSW) appear to be appropriate and are of sufficiently broad scope to capture this type of offending.

Dangerous driving occasioning death or grievous bodily harm

10. Subsections 52A(1) and 52A(3) of the *Crimes Act 1900* (NSW) provide for the offences of dangerous driving occasioning death and dangerous driving occasioning grievous bodily harm respectively. At the time of the impact, the person must be driving the vehicle:

- (a) under the influence of intoxicating liquor or of a drug, or
- (b) at a speed dangerous to another person or persons, or
- (c) in a manner dangerous to another person or persons.

11. The Consultation Paper outlines some potential additional circumstances that could constitute dangerous driving. These potential additional circumstances included:

- (a) the person was a Professional Driver (with a meaning similar to any person that receives payment for employment or offering a service involving the use of a vehicle, to include truck, bus, taxi and ride share operators), or
- (b) the person was suspended, disqualified, unlicensed, or never held a licence, or
- (c) the person was using a mobile telephone or other visible display device at the time of the collision, or
- (d) the person drove with a known or perceived medical condition that would impair their ability to drive.

12. However, the Consultation Paper also correctly notes that the use of a mobile phone has led to an offender being convicted of two counts of dangerous driving occasioning grievous bodily harm⁸ and driving against medical advice has also been found to constitute dangerous driving.⁹ This is because each of these circumstances are already accounted for properly in subsections 52A(3)(c) and 52A(1)(c) of the *Crimes Act 1900* (NSW) and do not need to be further circumscribed. The other two factors identified ((a) and (b)) do not of themselves affect the manner of driving and should not be matters that result in the guilt of an accused for an offence of dangerous driving. If an offence of dangerous driving is committed in a manner involving

⁸ *Thornton v R* [2020] NSWCCA 257 [16], [18], [21].

⁹ *Zreika v R* [2021] NSWCCA 243 [21]–[23].

these circumstances, then such matters can be, and are, taken into account on sentence as aggravating factors.¹⁰

13. Although the Association does not support a legislative amendment to include any of the specific circumstances proposed above, we note that it would be more appropriate for proposed circumstance (d) to refer to a medical condition that actually impaired the relevant person's ability to drive. The current wording may result in the inappropriate prosecution of individuals in circumstances where the medical condition had no connection with the manner in which the person drove at that time or the prosecution of individuals who have a medical condition, but are approved to drive subject to particular conditions or adjustments. It would be more appropriate to state "the person drove with a known or perceived medical condition that impaired their ability to drive".
14. In relation to situations in which a person voluntarily drove dangerously before their actions became involuntary (and they were driving involuntarily at the time of impact), there does not appear to be any particular difficulty prosecuting offences of this nature following the High Court of Australia's decision in *Jiminez v R* (1992) 173 CLR 572. Such matters appear to be regularly prosecuted successfully (see, for example, *Crockford v R* [2022] NSWCCA 115). The District Court case of *R v Lidgard* [2022] NSWDC 445 would appear to involve a unique set of circumstances where there was a prolonged period of driving as an automaton.

Circumstances of aggravation for dangerous driving

15. Subsections 52A(2) and 52A(4) of the *Crimes Act 1900* (NSW) provide for the offences of aggravated dangerous driving occasioning death and aggravated dangerous driving occasioning grievous bodily harm respectively. Subsection 52A(7) of the *Crimes Act 1900* (NSW) provides for a number of 'circumstances of aggravation' in relation to these offences. Circumstances of aggravation means any circumstances at the time of the impact occasioning death or grievous bodily harm in which:
 - (a) the prescribed concentration of alcohol was present in the accused's breath or blood, or
 - (b) the accused was driving the vehicle concerned on a road at a speed that exceeded, by more than 45 kilometres per hour, the speed limit (if any) applicable to that length of road, or
 - (c) the accused was driving the vehicle to escape pursuit by a police officer, or
 - (d) the accused's ability to drive was very substantially impaired by the fact that the accused was under the influence of a drug (other than intoxicating liquor) or a combination of drugs (whether or not intoxicating liquor was part of that combination).
16. The Association supports the suggested removal of the word 'very' in subsection 52A(7)(d) of the *Crimes Act 1900* (NSW) given that the term is somewhat tautological.

¹⁰ NSW Law Reform Commission, op. cit, p 16; *R v Russell* [2022] NSWCCA 294 [88]; *Spark v R* [2012] NSWCCA 140 [44]; *Moanani v R* [2022] NSWCCA 85 [84].

17. The Consultation Paper also includes a suggestion that the speed limit referred to in subsection 52A(7)(b) of the *Crimes Act 1900* (NSW) be amended to refer to a percentage over the speed limit instead of the current wording.¹¹
18. The Association submits that consideration should be given to amending this subsection to refer to a percentage over the speed limit, which would more accurately reflect the risk posed. A percentage of 50 per cent, up to maximum of 45 kilometres per hour (km/h), over the limit, may be appropriate. These criteria could apply in 60 km/h zones and higher. For example, the following could be considered circumstances of aggravation:
- (a) In a 60 km/h zone, speeding in excess of 30 km/h over the limit;
 - (b) In an 80 km/h zone, speeding 40 km/h over the limit;
 - (c) In a 90, 100, or 110 km/h zone, speeding in excess of 45 km/h over the limit.
- This would reflect a proportionate increase in the risk depending on the zone rather than adhering to a seemingly arbitrary figure.
19. The Consultation Paper lists a number of aggravating factors from other Australian jurisdictions¹² that could be adopted by NSW; however, these factors would usually be taken into account as part of the assessment of the objective seriousness of the offending. It is unnecessary to include these factors as statutory circumstances of aggravation.

New Offences

20. The Association submits that there is insufficient evidence to justify the creation of new offences, including in relation to: dangerous or negligent driving that causes actual bodily harm; a new mid-tier offence that sits between the existing dangerous driving and negligent driving offences¹³; and off-road driving causing death or grievous bodily harm.
21. The outdated language in the offence of wanton or furious driving in section 53 of the *Crimes Act 1900* (NSW) is acknowledged; however, given that 952 charges of this offence were finalised in NSW courts between 2016 and 2022¹⁴, the offence is clearly being utilised and serving a purpose as currently drafted.

Reforms to other offences

22. The Association submits that amendments are not required to the existing offences for failing to stop and assist¹⁵; failing to stop and driving dangerously or recklessly in response to a police pursuit¹⁶; or predatory driving¹⁷.

¹¹ NSW Law Reform Commission, op. cit, p 23.

¹² Ibid

¹³ It is noted that the section 5 of the *Statutes Amendment (Serious Vehicle and Vessel Offences) Act 2023* (SA) is very similar to the existing negligent driving provisions in NSW.

¹⁴ NSW Law Reform Commission, op. cit, p 26.

¹⁵ s 52AB, *Crimes Act 1900* (NSW).

¹⁶ s 51B, *Crimes Act 1900* (NSW).

¹⁷ s 51A, *Crimes Act 1900* (NSW).

A new serious road crimes Act

23. Consistent with our preliminary submission, the Association submits that the relevant existing provisions remain fit for purpose in their own Acts. The Association does not support the transferring of serious road crime offences out of the *Crimes Act 1900* (NSW) and into another Act, which is unlikely to be the responsibility of the Attorney General. In addition, the Association does not support the introduction of more “second or subsequent” offence provisions of the kind included within the *Road Transport Act 2013* (NSW).¹⁸

Accessorial liability

24. The Association submits that there is insufficient evidence to justify amendments concerning accessorial liability. In the experience of the Association’s members who practise in criminal law, it is rare that any such basis for criminal liability arises in a case involving serious road crime. This view was included within the Association’s preliminary submission, shared by other preliminary submissions¹⁹, and acknowledged by the Consultation Paper.²⁰

Penalties

25. Consistent with our preliminary submission, the Association does not support increases to the current maximum penalties for serious road crime offences.
26. Increases in the maximum penalties are unlikely to prevent the commission of serious road crime through deterrence, especially considering that this type of crime does not usually involve any element of planning, but often occurs as a result of momentary inattention or driver error.
27. Increasing the risk of apprehension has more deterrent value than increasing the severity of penalties.²¹ Research published in 2019 concerning offences committed in NSW²² resulted in the following conclusion²³:

Our results show that increasing the risk of apprehension and conviction exhibits a much larger effect in reducing crime compared to raising the expected severity of punishment... Our conclusion that the deterrent effect of prison is rather limited will be regarded by some as controversial but it is entirely consistent with recent research on prison downsizing strategies that have been implemented over the last few years in the USA.

¹⁸ See: ss 9, 117(1), 117(2), 146(1), *Road Transport Act 2013* (NSW)

¹⁹ Local Court of NSW, Preliminary Submission PRC82, p 4; NSW Office of the Director of Public Prosecutions, Preliminary Submission PRC77, p 6.

²⁰ NSW Law Reform Commission, op. cit, p 38.

²¹ See: Maurice Bun, Richard Kelaher, Vasilis Sarafidis, and Don Weatherburn, ‘Crime, Deterrence and Punishment Revisited’ (2020) 59 *Empirical Economics* 2303; Ben Knight and Emeritus Professor David Brown, ‘Do harsher punishments deter crime?’, University of New South Wales, July 2020, available at:

<https://www.unsw.edu.au/newsroom/news/2020/07/do-harsher-punishments-deter-crime>

²² The research considered the individual crime categories of theft, robbery, assault, and homicide, and the broader crime categories of property and violent crime.

²³ Bun, Kelaher, Sarafidis, Weatherburn, op. cit. p 2329-2330.

28. The research also notes that arrest and conviction results in indirect sanctions including a loss of social standing, income, and employment opportunities.²⁴ The deterrent value of these sanctions may well outweigh a sentence of imprisonment.²⁵
29. As noted in the Consultation Paper, the maximum penalties for serious road crime offences involving death and bodily harm in NSW are broadly consistent with similar offences in other Australian states and territories.²⁶
30. Proposals to remove the availability of intensive correction orders (**ICOs**), increase default and minimum licence disqualification periods, and introduce mandatory minimum sentences are opposed.
31. The Association shares the concerns raised in the Consultation Paper regarding the potential adverse consequences of more punitive penalties upon vulnerable groups, including Aboriginal young people.²⁷ Aboriginal people are disproportionately over-represented in relation to serious road crime offences²⁸ and additional periods of incarceration are unlikely to have a positive impact of rates of reoffending, especially in relation to young people.²⁹

Intensive Correction Orders

32. The Consultation Paper notes that one preliminary submission suggested removing the availability of ICOs for serious road crime offences involving death on the basis that such deaths are comparable to murder and manslaughter, for which ICOs are not available.³⁰
33. The Association does not support this proposal. The court is best placed to determine whether an ICO is appropriate, in accordance with the *Crimes (Sentencing Procedure) Act 1999* (NSW), given the particular circumstances of each offence and offender. It is noted that ‘community safety must be the paramount consideration when the sentencing court is deciding whether to make an intensive correction order in relation to an offender’.³¹

Licence Disqualification Periods

34. The Association submits that no increases to the current default and minimum licence disqualification periods are warranted.
35. Reforms to licence disqualification periods introduced in 2017³², following a Parliamentary inquiry³³, were based upon a recognition that disproportionate licence disqualification periods

²⁴ Ibid, p 2322-2323.

²⁵ Ibid, p 2323.

²⁶ NSW Law Reform Commission, op. cit, p 47 and 53.

²⁷ NSW Law Reform Commission, op. cit, p 44-45.

²⁸ Ibid

²⁹ See: Public Defenders (NSW), ‘Impacts of Imprisonment and Remand in Custody’ in Public Defenders (NSW), ‘Buggy Bar Book’, November 2022, available at:

https://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/bar-book.aspx

³⁰ NSW Law Reform Commission, op. cit, p 51.

³¹ s 66(1), *Crimes (Sentencing Procedure) Act 1999* (NSW).

³² *Road Transport Amendment (Driver Licence Disqualification) Act 2017* (NSW)

³³ NSW Legislative Assembly Committee on Law and Safety, “Driver Licence Disqualification Reform”, Report 3/55, November 2013.

have an adverse impact upon a person's mobility, access to education and essential goods and services, and employment prospects.³⁴ The reforms also recognised the disproportionate impact upon people in regional areas of NSW, especially Aboriginal communities.³⁵

36. Any increase to the default or minimum licence disqualification periods, or erosion of any flexibility in their implementation, will not act as a significant deterrent³⁶ but will undermine the 2017 reforms and increase disadvantage in regional NSW, especially in Aboriginal communities.

Mandatory minimum sentences

37. The Association strongly opposes the introduction of any mandatory minimum sentences, including for any serious road crime offences.
38. The conduct and culpability captured by serious road crime offences is broad-ranging. Offences may involve a person deliberately using a vehicle to cause death or injury but may also involve a person of otherwise good character engaging in momentary inattention with fatal consequences. Judicial discretion is important as a means to reflect the range of criminal conduct captured by serious road crime offences, as well as the range of subjective circumstances of offenders being sentenced.
39. The Association endorses the conclusions of the Mandatory Sentencing Policy Discussion Paper published by the Law Council of Australia in May 2014.³⁷ The Law Council concluded that mandatory sentencing³⁸:
- a. potentially results in unjust, harsh and disproportionate sentences where the punishment does not fit the crime. It is not possible for Parliament to know in advance whether a mandatory minimum penalty will be just and appropriate across the full range of circumstances in which an offence may be committed. There are already numerous reported examples where mandatory sentencing has applied with anomalous or unjust results;
 - b. when adopted, fails to produce convincing evidence which demonstrates that increases in penalties for offences deter crime;
 - c. potentially increases the likelihood of recidivism because prisoners are placed in a learning environment for crime, which reinforces criminal identity and fails to address the underlying causes of crime;
 - d. provides short to medium term incapacitation of offenders without regard for rehabilitation prospects and the likelihood of prisoners reoffending once released back into the community;
 - e. wrongly undermines the community's confidence in the judiciary and the criminal justice system as a whole. In-depth research demonstrates that when members of the public are

³⁴ The Hon. Mark Speakman, MP, "Road Transport Amendment (Driver Licence Disqualification) Bill 2017", Second Reading Speech, NSW Legislative Assembly, 12 September 2017.

³⁵ Ibid

³⁶ NSW Sentencing Council, "Repeat Traffic Offenders", September 2020, 1.32

³⁷ Law Council of Australia, 'Policy Discussion Paper - Mandatory Sentencing', May 2014, available at: <https://lawcouncil.au/resources/policies-and-guidelines/policy-discussion-paper-mandatory-sentencing>

³⁸ Ibid, p 5-6.

fully informed about the particular circumstances of the case and the offender, 90 per cent view judges' sentences as appropriate;

- f. displaces discretion to other parts of the criminal justice system, most notably law enforcement and prosecutors, and thereby fails to eliminate inconsistency in sentencing;
- g. results in significant economic costs to the community, both in terms of increasing incarceration rates and increasing the burden upon the already under-resourced criminal justice system, without sufficient evidence to suggest a commensurate reduction in crime; and
- h. is inconsistent with Australia's international obligations, including:
 - a. the prohibition against arbitrary detention as contained in Article 9 of the International Covenant on Civil and Political Rights (ICCPR);
 - b. the right to a fair trial and the provision that prison sentences must in effect be subject to appeal as per Article 14 of the ICCPR; and
 - c. key obligations concerning children under Articles 3, 37 and 40 of the Convention on the Rights of the Child.

Sentencing principles and procedures

Principles and Procedures

- 40. Sentencing courts dealing with offenders who have committed serious road crimes are able to utilise comprehensive and appropriate principles and procedures provided for by legislation and the common law.
- 41. The *Crimes (Sentencing Procedure) Act 1999* (NSW) provides for principles and procedures in relation to such matters as the purposes of sentencing³⁹; aggravating and mitigating factors⁴⁰; sentencing discounts⁴¹; and victim impact statements.⁴² The legislation governing many of the serious road crime offences also provides detailed information, including relevant aggravating factors.⁴³
- 42. The Association supports the important role played by guideline judgments and the significant body of recent and historical appellate case law from the NSW Court of Criminal Appeal.
- 43. The Association has not identified any need for legislative reform in the sentencing principles applicable to serious road crime.

Guideline judgments

- 44. Guideline judgments have statutory force, under Part 3, Division 4 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), and must be taken in account by sentencing judges.⁴⁴ The NSW Court of Criminal Appeal has delivered six guideline judgments, including:

³⁹ Section 3A, *Crimes (Sentencing Procedure) Act 1999* (NSW)

⁴⁰ Section 21A, *Crimes (Sentencing Procedure) Act 1999* (NSW)

⁴¹ Part 3, Division 1A, *Crimes (Sentencing Procedure) Act 1999* (NSW)

⁴² Part 3, Division 2, *Crimes (Sentencing Procedure) Act 1999* (NSW)

⁴³ See, for example, s 52A(7), *Crimes Act 1900* (NSW)

⁴⁴ *Moodie v R* [2020] NSWCCA 160 at [24]; *R v Whyte* (2002) 55 NSWLR 252 at [65]

- a) High range prescribed concentration of alcohol: *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Content of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* (2004) 61 NSWLR 305.
- b) Dangerous driving: *R v Jurisic* (1998) 45 NSWLR 209, which was reformulated in *R v Whyte* (2002) 55 NSWLR 252.

- 45. As stated in the Association’s preliminary submission, our members believe guideline judgements play a central role in relevant sentencing proceedings for serious road crime offences and appropriately guide the exercise of judicial discretion.
- 46. The Association does not wish to raise any concerns regarding the guideline judgment on dangerous driving in *R v Whyte* (2002) 55 NSWLR 252.

Standard non-parole periods

- 47. The Association does not generally support the Standard Non-Parole Period (SNPP) scheme, and does not support expansion of the scheme in respect of dangerous driving offences. While noting that maximum penalties and SNPPs are legislative guideposts⁴⁵, it is important to guard against the undermining of judicial discretion in the sentencing of offenders, which is essential to individualised justice.

Jurisdictional issues

Local Court of New South Wales

- 48. The Association does not support any serious road crime offences in the *Crimes Act 1900* (NSW), that are currently listed in Table 1 and Table 2 of Schedule 1 of the *Criminal Procedure Act 1986* (NSW), being made strictly indictable. The Association also does not support negligent driving occasioning death⁴⁶ being made indictable or strictly indictable.

Children’s Court of New South Wales

- 49. The specialist jurisdiction of the Children’s Court has been developed to deal with certain matters involving children in recognition of the principle that children should be treated differently than adults because children are likely to be less mature and lack the ability to fully understand criminal proceedings.⁴⁷
- 50. The Children’s Court has jurisdiction to hear and determine proceedings in respect of any offence (whether indictable or otherwise) other than a serious children’s indictable offence.⁴⁸ Therefore, all serious road crime offences in the *Crimes Act 1900* (NSW) can be dealt with in the Children’s Court, except for manslaughter, which is a serious children’s indictable offence.⁴⁹

⁴⁵ *Muldrock v The Queen* [2011] HCA 39 at [27].

⁴⁶ s 117(1)(a), *Road Transport Act 2013* (NSW)

⁴⁷ NSW Law Reform Commission, op. cit, p 99; Judicial Commission of NSW, ‘Children’s Court of NSW Resource Handbook, February 2024, p 17

⁴⁸ See: s 28(1), *Children (Criminal Proceedings) Act 1987* (NSW). A serious children’s indictable offence is defined in section 3 of the *Children (Criminal Proceedings) Act 1987* (NSW).

⁴⁹ *Ibid*

51. The Consultation Paper raises the question as to whether the dangerous driving offences in s 52A of the *Crimes Act 1900* (NSW) should be added to the definition of “serious children’s indictable offence” in section 3 of the *Children (Criminal Proceedings) Act 1987* (NSW), thereby excluding them from the jurisdiction of the Children’s Court.
52. The Association supports the view articulated in the Consultation Paper that the Children’s Court is best placed to deal with children charged with serious road crime offences due to its specialist knowledge, experience and framework.⁵⁰ Therefore, we do not support the exclusion of the dangerous driving offences in s 52A of the *Crimes Act 1900* (NSW) from the jurisdiction of the Children’s Court.

The experiences and rights of victims

53. The Association recognises the profound impact serious road crime has on victims and their family and friends. Serious road crimes can result in prolonged grief and substantial and ongoing mental distress and physical injuries.⁵¹ Victims may also perceive that they have been let down by the criminal justice system due to lengthy trials, a focus on the offender instead of the impact of the crime, and sentencing expectations that have not been met.⁵²
54. The Association notes the various initiatives that have been introduced to support victims of crime, including the Charter of Victims Rights, the use of victim impact statements, and the compulsory third party (CTP) compensation scheme for motor vehicle collisions.⁵³

Counselling

55. The Association is supportive of victims and families being provided trauma-informed support and appropriate referrals for assistance through the criminal justice process.
56. In its preliminary submission, the Office of the Director of Public Prosecutions expressed concerns regarding the inability of the majority of victims of serious road crime to receive support under the *Victims Rights and Support Act 2013* (NSW).⁵⁴ The Association would support consideration being given to ensuring that counselling equivalent to that generally available under the Act is available to victims of serious road crime and their families.

Victim impact statements

57. Victim impact statements provide for an effective means by which primary and family victims of crime may participate in the sentencing process and explain to the court the harm caused by the offence.⁵⁵
58. The court must consider a tendered victim impact statement at any time after it convicts, but before it sentences, an offender for the offence and may make any comment on the statement

⁵⁰ NSW Law Reform Commission, op. cit, p 104.

⁵¹ Ibid, p 105-106.

⁵² Ibid, p 107-108.

⁵³ Ibid, p 109-112.

⁵⁴ See: s 25(2), *Victims Rights and Support Act 2013* (NSW) and s 3, *Motor Accidents Compensation Act 1999* (NSW).

⁵⁵ See: Part 3, Division 2. *Crimes (Sentencing Procedure) Act 1999* (NSW)

that the court considers appropriate.⁵⁶ A victim impact statement of a family victim may be taken into account by a court on sentence on the basis that the harmful impact of a primary victim's death on family victims is an aspect of harm done to the community.⁵⁷ This may only occur following an application by the prosecutor and the agreement of the court.⁵⁸ If the injury, emotional harm, loss or damage caused by an offence is substantial, it may be taken into account as an aggravating factor on sentence.⁵⁹

59. The Association does not recommend any amendments to Part 3, Division 2 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

Restorative justice

60. The Association understands that restorative justice involves the implementation of processes that attempt to address some of the needs of victims of crime that are not met by the traditional court system.⁶⁰ For example, a limited post-sentence restorative justice service provided by Corrective Services NSW (CSNSW) involves victims and offenders communicating about the relevant crime and its impact.⁶¹ This may involve direct communication, indirect communication through a facilitator, or a mix of different forms of communication.⁶²
61. The Consultation Paper states that studies of restorative justice programs in the United Kingdom and the Australian Capital Territory have concluded that victims who chose to take part in a restorative justice process were significantly more satisfied than victims who only went to court.⁶³ Restorative justice may have a positive impact on the emotional state of the victim and may reduce the traumatic effect of the crime.⁶⁴ Victims may appreciate the opportunity to explain the impact of a crime to the offender and seek an explanation for the offender's actions.⁶⁵
62. It is noted that the Royal Melbourne Institute of Technology's Centre for Innovative Justice ran a successful pilot restorative justice program for people affected by serious road crimes that caused death or serious injury in Victoria.⁶⁶ The pilot resulted in the expansion of restorative justice services for serious road crime victims in Victoria.⁶⁷
63. The Association submits that given the potential benefits to victims of crime, restorative justice should be available in relation to serious road crime. However, it is noted that restorative justice will not be appropriate in all cases, participation should be voluntary, the process should be tailored to the particular needs of the victim, and judicial discretion should be maintained. The

⁵⁶ s 30E, *Crimes (Sentencing Procedure) Act 1999* (NSW)

⁵⁷ s 30E(3), *Crimes (Sentencing Procedure) Act 1999* (NSW)

⁵⁸ Ibid

⁵⁹ s 21A(2)(g), *Crimes (Sentencing Procedure) Act 1999* (NSW)

⁶⁰ NSW Law Reform Commission, op. cit, p 112; J Bolitho, "Putting Justice Needs First: A Case Study of Best Practice" (2015) 3 *Restorative Justice: An International Journal* 256, p 259.

⁶¹ NSW Law Reform Commission, op. cit, p 113; NSW Government, 'Restorative Justice Service: Policy', 28 November 2023, p 7–8.

⁶² Ibid

⁶³ NSW Law Reform Commission, op. cit, p 113; Centre for Innovative Justice, "It's Healing to Hear Another Person's Story and also to Tell Your Own Story: Report on the CIJ's Restorative Justice Conferencing Pilot Program", October 2019, p 17–18.

⁶⁴ NSW Law Reform Commission, op. cit, p 114.

⁶⁵ Ibid

⁶⁶ Ibid, p 115; Centre for Innovative Justice, op. cit., p 4-5.

⁶⁷ RMIT University, Centre for Innovative Justice, Preliminary Submission PRC80, p 2.

precise way in which restorative justice should be incorporated into sentencing is complex and would require careful analysis. The Consultation Paper notes the potential for victims to be reluctant to engage in restorative justice processes if it results in a reduction in the sentence imposed upon the offender.⁶⁸

64. The Association submits that substantive matters, such as the availability of restorative justice, should be implemented in principal legislation.⁶⁹ Reforms implemented in principal legislation are subject to scrutiny and debate in the Legislature, which is an important check and balance on Executive power.⁷⁰

Conclusion

65. Thank you again for the opportunity to provide a further submission to the Commission's review of serious road crime.
66. Should you require any further information in relation to this submission, please contact
in the first instance.

Yours sincerely,

Dr Ruth Higgins SC
President

Enc: NSW Bar Association, Review of serious road crime, Preliminary submission to the NSW Law Reform Commission, 23 February 2023.

⁶⁸ NSW Law Reform Commission, *op. cit.*, p 119-120

⁶⁹ See: NSW Bar Association, Submission to the Inquiry into the 'Making of Delegated Legislation in New South Wales', NSW Legislative Council's Regulation Committee, 5 June 2020, p 4.

⁷⁰ *Ibid*, p 6.



Our ref: DIV 22/76

23 February 2023

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

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

Dear Mr Bathurst AC KC,

Review of serious road crime: preliminary submission

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

The existing provisions are fit for purpose

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

Maximum sentences available for serious road crimes are appropriate

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



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

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



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

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

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

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

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



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

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

Other relevant matters

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

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



NEW SOUTH WALES
BAR ASSOCIATION

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

Yours sincerely



Gabrielle Bashir SC
President