



## **NSW Police Force submission on the ‘Serious Road Crime’ consultation paper**

The NSW Police Force (NSWPF) appreciates the opportunity to provide comment on the ‘Serious Road Crime’ consultation paper as part of the Law Reform Commission review of serious road crime offences, penalties, sentencing principles and procedures, jurisdictional issues, and the experience and rights of victims.

We are happy to discuss these comments and any material from our earlier submission further. Please make requests to the contact person detailed at the end of this submission.

### **Chapter 2 – Serious Road Crime offences**

#### Vehicular Homicide (Q2.1)

The NSWPF considers that the purposes of sentencing as outlined in section 3A of the *Crimes (Sentencing Procedure) Act 1999* are not appropriately reflected in current sentencing trends for serious road crime, resulting in inadequate sentences that may not meet public expectations or provide sufficient deterrence.

To help address this issue, an additional offence of ‘vehicular homicide’ should be created to reflect the outcome of the crime and costs on the community, together with the expectations of justice for the death of another due to the identified driver behaviour and actions that resulted in the death. The use of term ‘vehicular homicide’ is deliberate to emphasise the seriousness and culpability of certain actions causing the death of another person. The offence should be heard before the District Court given the serious nature of the offence, the level of criminality involved and community expectations as to the treatment of the offence. The offence would capture instances where the actions of a driver caused the death of another person in aggravating circumstances such as driving at a very excessive speed or under the influence of drugs or alcohol, and in circumstances where the person was also unlicensed, or was a professional driver, was using a mobile phone at the time of impact or knew they had a medical condition which impaired their ability to drive. The maximum penalty for this offence should reflect the serious nature of this type of road crime. The NSWPF considers that an appropriate penalty would be 25 years’ imprisonment.

If a vehicular homicide offence is introduced, the manslaughter offence under section 24 of the *Crimes Act 1900* (‘Crimes Act’) would remain available for use where the elements of the new vehicular homicide offence do not apply.

Based on the NSWPF’s experience of the factors commonly involved in dangerous driving causing death, NSWPF proposes the following aggravating factors should be considered for inclusion in a vehicular homicide offence:

- (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



- (iv) the accused was driving under the influence of a drug (other than intoxicating liquor)/a combination of drugs which thereby substantially impaired his/her ability to drive,

in combination with the following additional factors:

- (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) driving in the capacity of a Professional Driver at the time of the crash, or
- (vi) the accused was suspended, disqualified, unlicensed, or never held a licence, or
- (vii) the accused was using a mobile phone 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.

Maximum penalty: 25 years' imprisonment.

The new offence would increase awareness of the known and identified causal and serious factors seen all too often in crashes that result in death on NSW roads. It will send a strong community message that society will not tolerate such acts. Importantly, it will also provide a clear set of qualifying factors or criteria for when this offence would apply, which will reduce complexity, and in turn assist police and the courts.

A recent NSW example where this proposed offence could apply is the Buxton crash which involved a provisioner driver driving in excess of 45km/h over the speed limit and using a mobile phone to film himself, killing 5 teenagers in the same utility.

The NSWPF notes that South Australia and the Northern Territory have legislated mandatory reporting requirements for health professionals if they believe a driver is medically unfit (mentally or physically) to drive. This review could consider similar mandatory reporting requirements in NSW for health professionals, as this may reduce the risk of serious road crime occurring.

The NSWPF also considers that providing legislative clarity to allow blood samples taken from offending drivers to be used for multiple purposes would be appropriate. The *Road Transport Act 2013* ('Road Transport Act') is currently silent on whether one sample can be taken from a driver for testing to satisfy all legislative requirements. Providing clarity on this issue would have strong privacy benefits for individuals and would result in a simpler and more resource efficient approach for police.

#### Dangerous driving occasioning death or grievous bodily harm (Q2.2)

##### *(1) Circumstances of dangerous driving under sections 52A(1) and 52A(3) of the Crimes Act*

Circumstances of dangerous driving under sections 52A(1) and 52A(3) are appropriate, however further circumstances could be included to enhance the provisions.

In reference to the term driving 'in a manner dangerous', which is an existing element under each of these sections, the NSWPF notes that circumstances encompassed by the term have developed significantly over time, and include:

- the condition of the vehicle driven at the time,



- driving with known medical conditions that can randomly render the driver insensible,
- driving with high fatigue,
- driving whilst using a mobile phone,
- disobedience of traffic signs/signals,
- driving with Prescribed Concentration of Alcohol.

While codification of some of these factors may assist, it is important that interpretation of the term remains broad to leave scope for the judiciary to consider previously unknown factors which would fall under driving 'in a manner dangerous'.

In addition to the existing acts that amount to dangerous driving occasioning death (s 52A(1) Crimes Act) and dangerous driving occasioning grievous bodily harm (s 52A(3) Crimes Act), these provisions could be expanded to include the following aggravating circumstances:

- (iv) 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 vehicle, to include truck, bus, taxi, and ride share operators) driving in the capacity of a Professional Driver at the time of the crash; or
- (v) the accused was suspended, disqualified or unlicensed, or never held a licence; or
- (vi) the accused was using a mobile phone at the time of the collision; or
- (vii) the accused drove with a known or perceived medical condition that would impair their ability to drive; or
- (viii) consideration of the fact that at the time of the crash, the person was driving a significantly modified vehicle within the meaning of Part 6, Division 2 of the Road Transport (Vehicle Registration) Regulation 2017.

## *(2) Situations in which a person voluntarily drove dangerously before their actions became involuntary*

The law adequately deals with this situation. Pre-collision actions can satisfy the element of 'dangerous' under section 52A Crimes Act offences, meaning certain circumstances where a person drives dangerously voluntarily prior to their actions becoming involuntary are captured by these offences. An example of such an action is driving whilst significantly fatigued.

The driver and controller of the motor vehicle makes the decision to drive dangerously despite their level of affectation, whether it be as a result of drugs, alcohol, fatigue or a medical condition. If dangerous driving can be established as part of a voluntary action it should be immaterial as to whether they subsequently lose consciousness and their actions become involuntary.

Explicit codification of certain factors considered to be driving dangerously such as driving whilst fatigued or with a known medical condition could help to clarify this issue.

## *(3) Other elements of dangerous driving offences (sections 52A(1) and 52A(3) Crimes Act)*

The elements of section 52A of the Crimes Act are generally satisfactory, however clarification of the element 'at the time of impact' would be beneficial. This element has developed over time, and has been determined not to mean the precise moment of impact in *Jiminez v R*



(1992) 173 CLR 572, 578. Amendments to reflect this understanding in section 52A would provide clarity and remove doubt.

### Circumstances of aggravation for dangerous driving (Q2.3)

#### *(1) 'Very substantially impaired'*

The element of 'very substantially impaired' under section 52A(7)(d) of the Crimes Act should be amended to remove the word 'very' as it is a tautology, and use of the term 'substantially impaired' is sufficient. The inclusion of 'very' creates an additional factor which may be required to be proven in court, despite a lack of legal definition.

Removal of the word 'very' would improve consistency within the Crimes Act, aligning the terminology with 'substantial impairment' under section 23A (an alternative to murder).

Significant case law exists where the prosecution has been required to prove substantial impairment for offences passing the threshold of being impaired, such as certain high alcohol readings that warrant consideration as a factor of aggravation. 'Substantial impairment' is the aggravated form of 'under the influence' and is sufficient to describe these circumstances. The term 'very substantially impaired' is not required to describe the circumstances.

#### *(2) Aggravation related to speeding*

The NSWPF recommends that the circumstances of aggravation related to speeding under section 52A(7)(b) of the Crimes Act be amended. This could be through the introduction of a percentage-based breach of the speed limit, i.e., 50% or more over the speed limit, or through the addition of circumstances, including:

- exceeding the speed limit by 45km/h or greater (for Class C licence holder driving a Class A motor vehicle),
- any L, P1 or P2 driver exceeding the speed limit by greater than 30km/h,
- any Professional Driver driving any related vehicle exceeding the speed limit by greater than 30km/h (e.g., MR class licence holder driving MR HV at the time detected).

#### *(3) Any other changes to circumstances of aggravation*

The NSWPF suggests possible circumstances of aggravation that could be included are:

- driving a stolen vehicle
- driving whilst not holding a valid driver's licence
- unauthorised driving (driving disqualified / refused / cancelled / suspended / privileges withdrawn / never licenced / unlicenced / expired)
- driving an unregistered vehicle
- participating in street racing or competitive driving
- using a mobile telephone at the time of impact
- that the driver was a provisional licence holder in NSW or any other state, imposing conditions on their authority to drive, and at the time of the crash was in contravention of any condition
- that the driver contravened specific passenger restrictions such as only one passenger under the age of 21 after 11pm at night (for those that the restriction applies to)



- provisional driver – driving a prohibited vehicle
- provisional driver – exceed special speed limit
- driving a manual when licenced for automatic transmission only
- not wearing spectacles or contact lenses when required
- at the time of the crash, the driver was carrying more passengers than the capable seating provisions of the vehicle
- at the time of the crash, the driver had one or more passengers not wearing an occupant restraint
- the driver drove with a known or perceived medical condition that would impair their ability to drive
- that at the time of the crash, the person was driving a significantly modified vehicle within the meaning of Part 6, Division 2 of the Road Transport (Vehicle Registration) Regulation 2017
- driving any heavy vehicle with a speed limiting device that has been bypassed or deactivated.

### Dangerous driving causing actual bodily harm (Q2.4)

A legislative gap currently exists between negligent or dangerous driving without causing grievous bodily harm or death, and negligent or dangerous driving causing grievous bodily harm or death. If actual bodily harm was caused by wanton/furious driving, racing or wilful neglect or misconduct, an offence is available under section 53 of the Crimes Act. However, this is outside the structure of negligent and dangerous driving offences, and has a low penalty of two years' imprisonment. In addition, the current offence of negligent, furious, or reckless driving under section 117 of the Road Transport Act currently only carries a penalty of 10 penalty units where the driving does not occasion death or grievous bodily harm.

The NSWPF supports the creation of offences involving actual bodily harm to capture circumstances where a person suffers injuries due to negligent or dangerous driving, but the injuries do not meet the threshold for grievous bodily harm. Modern safety features of cars help to prevent serious injuries amounting to grievous bodily harm, but injuries sustained can still often be substantial. The creation of three new offences capturing actual bodily harm could help to fill this legislative gap:

- Negligent driving occasioning actual bodily harm (maximum three years' imprisonment),
- Dangerous driving occasioning actual bodily harm (maximum five years' imprisonment), and
- Aggravated dangerous driving occasioning actual bodily harm (maximum seven years' imprisonment).

Introduction of actual bodily harm driving offences could also capture psychiatric injuries and should be defined this way. These injuries can be significant and life-long and should be reflected with an adequate penalty.



## Wanton or furious driving (Q2.5)

Section 53 of the Crimes Act should be repealed as it is no longer appropriate and does not meet community expectations. The NSWPF recommends a new offence is drafted that covers actual bodily harm as discussed in Q2.4, with a higher maximum sentence than the current penalty available under section 53 to reflect the seriousness of the offence.

## Potential new offences for driving causing death or grievous bodily harm (Q2.6)

### *(1) New mid-tier offence between dangerous and negligent driving offences*

The NSWPF notes that conduct between dangerous and negligent driving could be covered by increasing the penalties for negligent driving causing grievous bodily harm, or death, and creation of an actual bodily harm offence.

However, the introduction of a new mid-tier indictable offence similar to the South Australian offence of causing death or grievous bodily harm by careless use of a vehicle, to be called 'reckless driving', should also be considered.

We suggest the maximum penalty for such an offence would be 10 years' imprisonment.

### *(2) Off-road driving causing death or grievous bodily harm*

The NSWPF considers that off-road driving causing death or grievous bodily harm is not adequately captured by the law. Options to address this issue include:

- amending relevant sections of the Road Transport Act to remove the term 'road or road related area', broadening its application to off-road areas (noting this may not be appropriate given the objectives of the Act focusing on roads),
- incorporating off-road areas into new/amended legislation proposed above,
- moving the section 117 Road Transport Act offences (negligent driving causing death or grievous bodily harm) to the Crimes Act, removing the 'road/road related area' element, and increasing penalties.

The off-road areas could be prescribed by regulations.

The NSWPF notes that the offences relating to dangerous driving under the Crimes Act do not require the act to occur on a road or road related area.

## Failing to stop and assist (Q2.7)

There is no provision for failing to stop after a vehicle impact causing actual bodily harm. Given current vehicle safety features, victims may incur substantial injuries without being classified as grievous bodily harm or death. It should therefore be an offence for the driver of a motor vehicle to fail to stop and assist after a vehicle impact causing actual bodily harm in circumstances where the person knows or ought reasonably to have known the vehicle has been involved in an impact causing actual bodily harm.

Any consideration of increases to penalties for causing grievous bodily harm or death under section 52A of the Crimes Act should be accompanied by a corresponding increase to the penalties for failure to stop and assist under section 52AB of the Crimes Act given they were deliberately linked by Parliament. The creation of aggravated and specially aggravated forms



of the section 52AB offences in line with what has been suggested for the section 52A offence could address this issue. In the rare circumstances where a person is charged with a section 52AB offence in isolation, that is a 'not at fault' driver who flees a crash scene, the current penalties could remain in place.

### Police pursuits (Q2.8)

The NSWPF considers that the offence of driving recklessly or dangerously in response to a police pursuit requires reform to align with community expectations and act as an adequate deterrent. The offence should be made a serious indictable offence at a minimum, and the penalty should be increased from three years' imprisonment to a maximum five years' imprisonment for a first offence, and from five years' imprisonment to a maximum of seven years' imprisonment for a second or subsequent offence.

Consideration should be given to introducing an aggravated form of the offence with a higher penalty, adopting the section 52A aggravation scheme into section 51B.

### Predatory driving (Q2.9)

The NSWPF considers that the predatory driving offence should be amended to capture additional circumstances. Section 51A(1) should be amended to enable prosecution of drivers using a vehicle threatening an impact with anything with intent to cause (or recklessness in causing) actual bodily harm to another person. This will expand the current provision that requires that another vehicle is threatened.

In sub-section 51A(1)(b), the mens rea of intent to cause a person actual bodily harm is restrictive. A lesser intent of recklessness as to causing actual bodily harm should be considered.

A special circumstance of aggravation should be added if the person was or is in a domestic relationship with the victim within the meaning of the *Crimes (Domestic and Personal Violence) Act 2007*. Where this occurs, the sentence should be increased to seven years' imprisonment.

### A new Serious Road Crimes Act (Q2.10)

NSWPF supports providing visibility and clarity around serious road crime offences. Careful consideration would need to be given to the creation of a new, separate Act for serious road crime offences as it may lead to confusion. An alternative approach could be to amend the Crimes Act to create a Serious Road Crime Division to capture serious road crime offences.

### Accessorial liability for serious road crime offences (Q2.11)

The NSWPF notes that accessorial liability relates to serious indictable offences only (subject to five years' or more imprisonment).

NSWPF recommends consideration be given to introducing offences for passengers and/or those filming and disseminating serious road crime offences, and for acts such as granting permission to use a vehicle knowing the driver is unlicensed, disqualified or suspended where grievous bodily harm or death occurs. We also recommend consideration be given to including as an aggravating factor on sentence the fact that the offender's offence has been filmed and



disseminated on social media in circumstances where the offender was doing the filming, or ought reasonably to have known they were being filmed.

Consideration could be given to creating a new offence to capture behaviour such as 'encouragement' and/or 'counselling' the driver to commit an offence e.g., encouraging the driver to carry out dangerous acts.

The NSWPF notes that the *Crimes Prevention Act 1916* could be applied to circumstances where drivers are encouraged into dangerous and criminal driving behaviour by persons. However, the penalty for the relevant offence of 'inciting to crimes' (s 2 *Crimes Prevention Act 1916*) is insufficient for these purposes and would need to be increased.

### Other NSWPF comments relating to offences

The NSWPF considers that a person believed to be involved in a fatal or serious injury crash should be required to submit to a forensic procedure upon request of a senior police officer. This would be used to obtain vital evidence, such as evidence of seating positions of occupants, evidence of involvement in the crash and airbag DNA or data.

The NSWPF considers that Schedule 3 of the Road Transport Act should be amended so that blood and urine samples (drug and mandatory testing) must be taken within six hours of the incident and that the power of arrest conferred under Schedule 3 for the purpose of mandatory sampling be applicable to any location at the time or any location, place or premises up to six hours after the incident occurred.

In relation to post-crash alcohol and drug testing, the NSWPF considers that there are some gaps in the regulatory framework with respect to sample-taking and use of results in the prosecution of serious road crime offences. Schedule 3 of the Road Transport Act regulates how and when a person can be tested for drugs and alcohol in their system. Where the driver is not admitted to hospital, and there is no fatality or likely fatality, there is no power to arrest them for the purpose of taking a sample. There is therefore a gap where there is a serious injury that would be deemed grievous bodily harm. Police officers are unable to undertake post-crash testing of bicycle riders for drugs and alcohol in both fatal and grievous bodily harm crashes. Although police officers may require uninjured drivers to undergo RBT and MDT, RBTs may indicate slightly lower concentration of alcohol than a blood test, and MDTs can only screen for four prescribed illicit drugs. Post-crash testing enables more comprehensive analysis. We consider that appropriate regulatory amendments are required to address these gaps to ensure offenders can be appropriately prosecuted and sentenced.

These police powers will assist in the gathering of critical information and evidence to support prosecution of serious road crime.

## **Chapter 3 – Penalties**

### Maximum penalties for offences involving death (Q3.1)

The NSWPF considers that the maximum penalties for both dangerous driving occasioning death (s 52A(1) Crimes Act) and aggravated dangerous driving occasioning death (s 52A(2) Crimes Act) are no longer appropriate and should be increased. We also note that the guideline judgments are not represented in actual sentencing outcomes.





Maximum penalties for these two offences should be raised to better reflect the serious nature of the offence and community expectations. If the specially aggravated form of the offence is created as suggested above, the maximum penalties for dangerous driving occasioning death should be 15 years' imprisonment simpliciter, 20 years' imprisonment aggravated, and 25 years' imprisonment specially aggravated.

The NSWPF does not consider that Intensive Correction Orders are an appropriate sentencing option where a death has occurred as a result of serious road crime and should not be available. This would align with existing provisions that exclude Intensive Corrections Orders from being made for murder or manslaughter offences.

### Maximum penalties for offences involving bodily harm (Q3.2)

The NSWPF considers that the maximum penalties for both dangerous driving occasioning grievous bodily harm (s 52A(3) Crimes Act) and aggravated dangerous driving occasioning grievous bodily harm (s 52A(4) Crimes Act) remain appropriate. However, we note that the guideline judgments are not represented in actual sentencing outcomes. Consideration should be given to developing new guideline judgements to emphasise appropriate penalties for these serious offences.

We do not consider that the maximum penalties for injuries by furious driving (s 53 Crimes Act) or grievous bodily harm (s 54 Crimes Act) are appropriate as they do not adequately reflect the seriousness of the offence. While section 54 of the Crimes Act is a broad grievous bodily harm offence that is not specific to road crime, it is commonly used to charge road offences as it carries a more appropriate penalty than specific road offences involving grievous bodily harm.

### Maximum penalties for other serious road crime offences (Q3.3)

The NSWPF considers that the maximum penalties for both failing to stop and assist after a vehicle impact causing death (s 52AB(1) Crimes Act) and failing to stop and assist after a vehicle impact causing grievous bodily harm (s 52AB(2) Crimes Act) remain appropriate. However, we note that the guideline judgments are not represented in actual sentencing outcomes. Consideration should be given to developing new guideline judgements to emphasise appropriate penalties for these serious offences.

The NSWPF reiterates that the maximum penalties of two years' imprisonment for an offence under section 53 of the Crimes Act, and the maximum penalty for negligent driving occasioning grievous bodily harm under section 117 of the Road Transport Act are insufficient and should be increased.

The NSWPF notes that the majority of charges for offences under section 52AB of the Crimes Act are accompanied by charges under sections 52A or 53 of the Crimes Act, or section 117 of the Road Transport Act. We suggest reform so that in circumstances where the maximum penalty for the 'at fault' offence charged exceeds the existing penalty for the section 52AB offence, the penalty should match the penalty for the 'at fault' offence.

The maximum penalty for predatory driving (section 51A Crimes Act) may remain appropriate, but NSWPF considers that the systemic leniency displayed by the lower tier courts is a concern.



The maximum penalty for the police pursuit offence is no longer appropriate and should be increased. For a first offence, the penalty should be increased from three years' imprisonment to a maximum of five years' imprisonment to reflect the serious nature of the offence. The NSWPF has extensive guidelines relating to decisions to initiate and/or continue a pursuit. This includes consideration of the risk to community and police safety and the need to immediately apprehend an offender. Given the risks involved, it is therefore critical that strong penalties are in place for drivers who participate in police pursuits, to deter them from engaging in a pursuit and prolonging it to the point where the increased risks result in police decision to terminate.

Further consultation on maximum penalties would be welcomed by the NSWPF.

### Default and minimum licence disqualification periods (Q3.4)

The NSWPF considers that licence disqualification is a powerful disincentive and serves as an important sentencing principle to educate the community and address recidivous behaviour. However, NSW courts typically impose the minimum period of disqualification.

We support a general increase in the mandatory minimum disqualification periods for road crime offences, including consideration of the following increases:

- Negligent driving occasioning death: five years
- Dangerous driving occasioning death: seven years
- Police pursuits: five years
- Aggravated dangerous driving occasioning death: 14 years
- Vehicular homicide: 25 years

The NSWPF notes that while licence suspension is a separate issue, expansion of the police power to suspend a person's licence during serious road crime investigations relating to death or serious injury should be considered. The current suspension power under section 224 of the Road Transport Act is currently limited to certain offences. It is proposed that section 224 be amended to allow for immediate licence suspension where a person is charged with negligent driving occasioning death, with a deeming clause that the accused cannot enter a guilty plea until a police investigation has been completed. This will ensure community and road safety expectations are met while the NSWPF investigates. Currently, the NSWPF is permitted to immediately suspend the driver's licence under section 223 of the Road Transport Act, but the suspension period is for 14 days.

### Mandatory minimum sentences (Q3.5)

If mandatory minimum sentences are to be introduced, the NSWPF considers that the most appropriate offence to be subject to mandatory minimum sentences is the offence under section 51B of the Crimes Act (police pursuits).

A further option that could be considered is the introduction of standard non-parole periods for certain road crime offences (see response to Q4.3).



#### Other NSWPF comments relating to sentencing

The NSWPF considers that it would be beneficial to incorporate the police pursuit offence into the proposed Serious Road Crime Division in the Crimes Act or new, separate Act for serious road crime offences to address issues with the application of second and subsequent offences and sentencing provisions. Section 9(5)(d) of the Roads Transport Act outlines what is considered an 'equivalent offence' in the context of 'second and subsequent offences' that incur greater penalties. Serious road offences under the Crimes Act do not have an equivalent provision, which creates issues in circumstances where the offences involved span the two different Acts (such as police pursuits).

Section 9(2) of the Roads Transport Act 2013, which relates to determinations of a second or subsequent offence, should be amended to be consistent with section 9(2A), which relates to determinations of a second or subsequent offence where the previous offence was dealt with by way of penalty notice. This would support simpler interpretation and application of the provisions.

### **Chapter 4 – Sentencing principles and procedures**

#### General sentencing principles and procedures (Q4.1)

The NSWPF does not have any concerns with the overriding principles of sentencing and the objectives and purposes outlined in the *Crimes (Sentencing Procedure) Act 1999*. However, the NSWPF considers that the objectives and purposes of sentencing may not be adequately reflected in current sentencing trends, with sentencing guidelines not presently in line with community expectations or providing sufficient deterrent (see response to Q4.2).

#### Guideline judgment for dangerous driving offences (Q4.2)

NSWPF considers inadequate sentences may minimise and marginalise the loss of lives and causation of serious injuries through the reckless use of motor vehicles. The NSWPF recommends that sentencing guidelines be reviewed to ensure they are fit for purpose, reflect current community expectations, and appropriately recognise the ongoing emotional trauma experienced by victims of road crime. Sentencing guidelines should pose a strong deterrent against committing serious road crime.

The NSWPF is supportive of an application being made for a new guideline judgment to replace *R v Whyte* given its age and diminishing reflection of community expectations for road crime offences, particularly those involving death. *R v Whyte* defines a 'typical offender' as being a young male, and while this cohort remains over-represented in crash statistics, the demographic of offenders for these offences has broadened. A new guideline judgment is required to address all offenders more appropriately, and to readdress sentences for offences generally.

With reference to custodial sentencing as reflected in *R v Jurisic* (1998) 45 NSWLR 209, the NSWPF also supports the creation of guideline judgments for all offences falling under any proposed Serious Road Crime Division in the Crimes Act or new separate Act for serious road crime offences. This would help to increase consistency in sentencing for these offences.



In reviewing the current judgment and preparing for a new guideline judgment, it would be beneficial to consider sentencing statistics to identify key areas that need to be addressed.

### Standard non-parole periods (Q4.3)

The NSWPF supports standard non-parole periods for certain dangerous driving offences, particularly where there has been a death of a person. These could include:

- Dangerous driving occasioning death: five years standard non-parole period
- Aggravated dangerous driving occasioning death: seven years standard non-parole period
- Specially aggravated dangerous driving occasioning death: nine years standard non-parole period

Introducing standard non-parole periods would improve consistency and uniformity in sentencing, ensuring adequate deterrence and punishment of offenders.

## **Chapter 5 – Jurisdictional issues**

### Table offences (Q5.1)

The NSWPF recommends that certain serious road crime offences, including any offences involving the death of a person, be made strictly indictable. Consideration should also be given to moving grievous bodily harm and aggravated grievous bodily harm offences from Table 1 to become strictly indictable.

Alternatively, if this approach is not supported, the NSWPF recommends that negligent driving occasioning death could be made an indictable offence.

These changes are necessary due to the jurisdictional limits of Local Courts. The significance of offences involving the death of a person which would be more appropriately dealt with at a District Court level.

### Serious children's indictable offences (Q5.2)

The NSWPF supports the addition of certain serious road crime offences to the definition of 'serious children's indictable offence' under section 3 of the *Children (Criminal Proceedings) Act 1987*. This would include offences such as dangerous driving occasioning death and aggravated dangerous driving occasioning death and could potentially encompass all offences involving the death of a person.

This aligns with the movement of these types of offences towards becoming indictable and strictly indictable for adult offenders due to the serious nature of the offences. We note that the same sentencing principles apply to children within the higher jurisdictions as in the Children's Court, so a child should not be disadvantaged by having the matter dealt with in a higher court.



## Chapter 6 – The experience and rights of victims

### Existing rights, victim impact statement and support schemes (Q6.1)

#### *Experience of victims*

The NSWPF notes that victims are generally reluctant to relive traumatic events and confront offenders in courts. Consideration should be made for the use of Audio-Visual Link or Video Evidence in Chief provisions, such as those used for domestic violence or vulnerable persons, to ease the burden of the court process for victims.

The NSWPF also notes that the current use of the term ‘accident’ in situations relevant to serious road crime can be considered offensive by victims as it does not accurately reflect the fact that there was an element of wrongdoing. The term should be removed and replaced with other terms (e.g., ‘crash’) in legislation and the courts. It is hoped that the change in terminology in these institutions will flow through to the media and the community.

#### *Victim impact statements*

The NSWPF supports the use of victim impact statements as a means of ensuring the sentencing court is aware of the specific impact of the crime on the victim. It can also provide a means for victims and their families to participate in the judicial process, which may assist in their healing.

Victim Impact Statements could be expanded to be tendered in all matters relating to sections 52A(1), 52A(2), 53 and 54 of the Crimes Act. They are currently only used in matters relating to the use of a vehicle causing death that are before the District Court. This would better reflect the harms caused to victims and their families and assist them to feel visible and recognised in the justice system.

#### *Other victim impact support schemes and processes*

We note there could be opportunities for improvement, such as introducing an entitlement for victims to receive an explanation of the court process and how the sentence was determined. This typically occurs as a matter of practice but could be embedded into the process through codification. Although this may go some way to assisting victims, the NSWPF reiterates that the main concern is that sentences currently imposed by the courts do not align with community expectations regarding the severity of the offence, and a review of sentencing guidelines is required.

The NSWPF supports the proposed position for the NSW Department of Communities and Justice review into the *Victims Rights and Support Act 2013*, including that the Victims Support Scheme should be broadened in scope to include victims of serious road crime being permitted to receive mental health and financial support immediately after the collision. This is important as access to mental health and financial support is critical to assist youth who are victims of crime as exposure to trauma is a known risk factor to future offending.



## Restorative justice (Q6.2)

### *(1) Availability of restorative justice*

The NSWPF considers that restorative justice generally has scope in assisting both victims and offenders. We support the inclusion of restorative justice processes and principles in the justice system, as victims of serious road crime should be supported in their healing process wherever possible. Consideration could be given to broadening availability of restorative justice processes for crashes where injuries are less serious than grievous bodily harm. However, the NSWPF notes that such practices are complementary to (and do not negate the need for) penalties in criminal proceedings which are commensurate with the harm caused.

Where restorative justice processes are used, the NSWPF recommends this occurs after a plea of guilty but prior to sentencing, noting there would need to be an adjournment period for this to occur.

For young offenders, the NSWPF supports restorative justice processes pre-sentencing, provided it is appropriate for both the victim and the offender. Diversions under the *Young Offenders Act 1997*, such as youth justice conferences, allow the victims to take part in the restorative justice measure via the provision of impact statements or being involved in the development of the young offender's action plan. Additionally, restorative justice provides opportunities for young offenders to take responsibility and recognise the consequences and harm caused by their decisions and actions. Often, young offenders are unable to associate a consequence with their actions, such as the role and purpose of a good behaviour bond, compared to restorative justice methods. The NSWPF notes, however, that section 8 of the *Young Offenders Act 1997* limits the scope of offences covered by the Act to summary offences and indictable offences that may be dealt with summarily.

### *(2) Consideration of offender's participation in restorative justice*

If restorative justice processes are undertaken, this should occur prior to sentencing, and an offender's participation should be taken into account in sentencing. The same principle should be applied as when an offender pleads guilty to a charge and a discount is applied in sentencing.

Participation should be voluntary but would demonstrate remorse and potentially provide an explanation to the victims surrounding the crime. The facilitator would then prepare a report for the sentencing court, which may also include steps undertaken by the offender to address the harm they have caused.

### *(3) Supporting legislation for restorative justice processes*

The NSWPF recommends that restorative justice processes are supported by legislation. Upon guilt being established for a serious road crime, proceedings should be adjourned to consider the suitability of the parties' engagement in restorative justice processes. This could include the offender's willingness to participate as well as the safety of the victim or their families.