Aboriginal Legal Service (NSW/ACT) Limited

19 April 2024

The Honourable Tom Bathurst AC KC
Chairperson
NSW Law Reform Commission
Locked Bag 5000
Parramatta NSW 2124

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

Dear Chairperson,

Re: Review of Serious Road Crime

I write to you on behalf of the Aboriginal Legal Service (NSW/ACT) Limited (**ALS**). Thank you for the opportunity to provide a submission to the NSW Law Reform Commission's review of serious road crime.

The ALS is a proud Aboriginal community-controlled organisation and the peak legal services provider to Aboriginal and Torres Strait Islander adults and children in NSW and the ACT.

More than 280 ALS staff members based at 27 offices across NSW and the ACT support Aboriginal and Torres Strait Islander people through the provision of legal advice, information and assistance, as well as court representation in criminal law, children's care and protection law, and family law.

Increasingly, we represent Aboriginal and Torres Strait Islander families in the NSW Coroner's Court, provide a variety of discrete civil law services including tenant's advocacy, and undertake policy work and advocacy for reform of systems which disproportionately impact Aboriginal and Torres Strait Islander communities.

In preparing this submission, we sought the feedback and experience of our solicitors who represent Aboriginal clients in criminal matters before courts of all levels in NSW. Our submission is enclosed, and we would welcome the opportunity to discuss the contents of our submission going forward as part of this review.
Sincerely,

Shaun Mortimer
Acc Spec Criminal Law
Principal Solicitor, Criminal Law Practice
Aboriginal Legal Service (NSW/ACT) Limited

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Submission to NSW Law Reform Commission

Review of Serious Road Crimes

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About the ALS

The Aboriginal Legal Service (NSW/ACT) Limited (**ALS**) is a proud Aboriginal community-controlled organisation and the peak legal services provider to Aboriginal and Torres Strait Islander adults and children in NSW and the ACT.

More than 280 ALS staff members based at 27 offices across NSW and the ACT support Aboriginal and Torres Strait Islander people through the provision of legal advice, information and assistance, as well as court representation in criminal law, children's care and protection law, and family law.

Increasingly, we represent Aboriginal and Torres Strait Islander families in the NSW Coroner's Court, and provide a variety of discrete civil law services including tenant's advocacy, employment and discrimination, and assistance with fines and fine-related debt. We represent the interests of the communities we service through our policy work and advocacy for reform of systems which disproportionately impact Aboriginal and Torres Strait Islander people.

This submission is informed by the feedback and experience of our solicitors who represent Aboriginal adults and children in criminal proceedings before courts of all levels in NSW.

Introduction

The ALS welcomes the opportunity to make a submission to the NSW Law Reform Commission's review of serious road crimes.

The ALS supports evidence-based law reform, particularly reforms which foreground the importance of connection to culture, community and healing for Aboriginal and Torres Strait Islander people, and which recognise the unique historical and contemporary experiences of Aboriginal and Torres Strait Islander people flowing from dispossession and colonisation.

One significant, worsening legacy of colonisation is the gross overrepresentation of Aboriginal and Torres Strait Islander people in NSW in custody, with figures released by the NSW Bureau of Crime Statistics and Research (**BOCSAR**) in March this year showing that the number of Aboriginal people in prison was the highest on record, despite a reduction in overall prison numbers.[1] This is a crisis for the NSW community as a whole, and in particular for the communities served by the ALS.

We acknowledge the harm that serious road crimes cause to individuals and communities and the public policy imperatives in ensuring the law is appropriately balanced to recognise the various community interests which intersect in the context of criminal justice. However, for the reasons detailed below, we strongly oppose any increase to maximum penalties for serious road crimes, the addition of new offences to the Standard Non-Parole Period scheme, and the introduction of any additional offences for serious road crimes.

We recognise and acknowledge the experiences of victims of serious road crimes and their families within the criminal justice system, and support a criminal legal system which is appropriately calibrated to prevent and address the impacts of serious road crime. Any steps to expand criminal offences and make criminal penalties more severe must, however:

1. only be pursued if there is a compelling evidence base, accompanied by sound analysis, which shows that criminal cases are currently not being appropriately dealt with within existing policy and legal settings, and
2. take into account the overwhelming evidence that criminalisation does little to deter crime.[2]

We are unaware of any evidence supporting the efficacy of increased criminalisation in deterring serious road crime. We are similarly unaware of any evidence base which shows that the criminal law in NSW as currently formulated is inadequate or being misapplied. In our experience as a provider of criminal law services across NSW, serious road crime charges are taken seriously by courts and frequently result in the imposition of custodial sentences. The use of imprisonment has not, however, lessened instances of serious road crimes in NSW or in other jurisdictions.

We urge against any increased emphasis on criminalisation, and support greater investment in public education and awareness-raising in relation to safe driving practices as a more effective means of increasing public safety.

We consider that any proposed reforms to criminal law and policy must be clearly justified by a strong evidence base in support of the need for reform, and take into account any unintended consequences which would undermine the obligations of the NSW Government under the National Agreement on Closing the Gap to reduce the numbers of Aboriginal adults and young people in custody.

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[1] Bureau of Crime Statistics and Research, *NSW Custody Statistics: Quarterly update March 2023* (Full Report, May 2023) 23. See also Aboriginal Legal Service (NSW/ACT) Limited, 'NSW prisons more unequal than ever with record level of Aboriginal people behind bars' (Media Release, 30 May 2022).

[2] See e.g. Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Report, March 2022) 636–41; NSW Bureau of Crime Statistics and Research, *Reoffending Statistics for NSW* (Web Page, 15 August 2022). See also Joanna JJ Wang and Suzanne Poynton, *Intensive Correction Orders Versus Short Prison Sentence: A Comparison of Re-Offending* (NSW Bureau of Crime Statistics and Research, Contemporary Issues in Crime and Justice No 207, October 2017); Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report No 133, December 2017) 269 [7.157]–[7.158].

Summary of Recommendations

1. Do not introduce any new offences for driving occasioning death or bodily harm.

2. Maintain the existing list of factors for dangerous driving and the existing circumstances of aggravation for dangerous driving.

3. Maintain existing serious road crime charges under the *Crimes Act 1900* in their current form.

4. Do not create a new act for road crimes.

5. Maintain the law on accessorial liability as it applies to serious road crimes.

6. Maintain the current maximum penalties for dangerous driving occasioning death and aggravated dangerous driving occasioning death.

7. Maintain the availability of Intensive Correction Orders for serious road crimes involving death.

8. Empower courts to grant restricted licences to disqualified drivers in some cases, where driving is necessary for specified medical, work, cultural or personal obligations.

9. Do not introduce mandatory or minimum sentences for any serious road crime offences.

10. Do not amend the sentencing scheme in NSW as it relates to serious road crime offences.

11. Continue to rely on *Whyte* as the guideline judgment on dangerous driving.

12. Do not expand the list of offences carrying a standard non-parole period to any dangerous driving offences under s 52A of the *Crimes Act 1900*.

13. Do not expand the list of strictly indictable offences.

14. Do not convert negligent driving occasioning death to a strictly indictable offence.

15. Consider making negligent driving occasioning death an indictable offence, to facilitate proper resolution of matters where appropriate, while maintaining the current maximum penalty.

16. Do not expand the list of serious children's indictable offences.

17. Improve victim experiences of the criminal justice system through increased access to witness assistance services and provision of information to guide victim's expectations and experiences.

18. Make restorative justice widely available for serious road crime offences, ensuring that the processes are opt-in (for both victim and defendant), are available regardless of plea, and are implemented as flexibly as possible.

Serious Road Crime Offences

Offences Involving Death or Bodily Harm

Proposed New Offences

Vehicular Manslaughter[3]

The ALS opposes introducing a new offence of vehicular manslaughter. The current range of available offences for driving causing death appropriately covers the field of criminality. Overcriminalisation in the form of creating numerous offences which may be charged for similar conduct risks unnecessary complexity in the law and may lead to absurdity in outcome based on inconsistent charging practices.

We caution against characterising all, or even a majority, of deaths arising from dangerous driving under the influence or driving recklessly as being akin to murder or manslaughter. We accept driving dangerously causing death will amount to manslaughter in some instances, and even murder if the requisite intent exists.[4] However, the existence of charges of dangerous and negligent driving occasioning death are an appropriate recognition by the legislature that offences of driving causing death sit on a broad scale, may involve a multitude of circumstances, and the tragedy of a victim's death may flow from conduct amounting momentary lapse in attention all the way up to deliberate and intentional acts.

We note that manslaughter cases involving driving are currently successfully prosecuted under existing legal settings.[5] Whilst manslaughter is a rare charge, this does not reflect that it is underutilised but, rather, reflects the gravity of the offence.

We strongly oppose the suggested factors for vehicular homicide at [2.34] of the consultation paper. Many of the factors listed are relevant to establishing the elements of the existing charges of dangerous driving and manslaughter, and some are also aggravating factors on sentence.[6] There is no clear rationale for the creation of this new offence.

Should a new offence of vehicular manslaughter be created, we oppose any requirement that it be tried in the Supreme Court. This would be inconsistent with current practice, and highly confusing, in circumstances where most manslaughter cases are tried in the District Court.[7]

A New Mid-tier offence[8]

The ALS opposes the introduction of a new mid-tier offence that sits between the existing dangerous driving and negligent driving offences. The current range of available offences appropriately covers the field of criminality.

As noted above, there is a public policy imperative in avoiding unnecessary complexity in the law by the creation of numerous offences capturing similar conduct. We have concerns that this will lead to confusion for victims and defendants, as cases of a similar nature may be proceeded with in different ways, and lead to absurdity in outcome based on inconsistent charging practices.

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[3] *Question 2.1: Vehicular manslaughter Should NSW have a new offence of "vehicular manslaughter/homicide"? If so, what should the elements and maximum penalty of any new offence be?*

[4] Crimes Act 1900 (NSW) s 18.

[5] See e.g. *Lees v R* [2019] NSWCCA 65; *Smith v R* [2020] NSWCCA 181; *Lord v R* [2020] NSWCCA 208; *Crowley v R* [2021] NSWCCA 45; *DPP v Abdulrahman* [2021] NSWCCA 114; *Byrne v R; Cahill v R* [2021] NSWCCA 185; *Moananu v R* [2022] NSWCCA 85; *Davidson v R* [2022] NSWCCA 153; *R v Cook* [2023] NSWCCA 9; *Chandler v R* [2023] NSWCCA 59.

[6] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A. For example, subsections (i), (ib) and (d) in the case of a disqualified licence.

[7] *Criminal procedure Act 1986* (NSW) s 46; *Criminal Procedure Regulation 2017* (NSW) s 115.

[8] *Question 2.6: Potential new offences for driving causing death or grievous bodily harm (1) Should there be a new mid-tier offence that sits between the existing dangerous driving and negligent driving offences? If so, what should its elements and maximum penalty be? (2) Does the law respond adequately to off-road driving causing death or grievous bodily harm, where that conduct does not meet the threshold of dangerous driving? If not, how should this be addressed?*

Negligent driving occasioning death or grievous bodily harm carries the potential for a sentence of imprisonment.[9] It is possible for one offence to have a range of outcomes, based on the seriousness of the conduct that makes up the elements of the offence. There is no reason that driving which does not amount to dangerous driving cannot simply be seen as a serious example of negligent driving occasioning death.

We equally oppose a new mid-tier offence for driving on private land. We endorse the findings of the 2015 inquiry regarding negligent driving on private land,[10] which explored the difficulty in proving negligence in situations of driving on private land, and the lack of public interest in prosecuting many instances of negligent driving on private land.

Dangerous Driving causing Actual Bodily Harm[11]

The ALS opposes the creation of a new offence for driving causing actual bodily harm. Introducing a new offence would risk significant net-widening and risk contributing to existing delays in the court system.

Driving dangerously in a way that causes harm to another, or risks causing harm to another, is conduct which is captured by existing offences. For example, s 53 of the *Crimes Act 1900* creates an offence of driving a vehicle in a wanton or furious manner that causes bodily harm. This carries a maximum penalty of two years imprisonment. Section 117 of the *Road Transport Act 2013* creates an offence of driving a motor vehicle furiously, recklessly or dangerously, with no requirement to prove consequence. The ALS is not aware of any known published judgments which suggest that existing offences do not sufficiently cover the field.

The threshold for actual bodily harm, that is, an injury that is more than merely transient or trifling,[12] is relatively low and would capture a significant number of low-end traffic matters (for example, 'fender benders'). Under the current laws, if the conduct is not pursued via criminal prosecution, low-end collisions are typically dealt with through insurance claims which provide appropriate avenue for redress without imposing criminal liability or further burdening the court system. Civil avenues also provide appropriate deterrent for drivers because of the financial implications of an at-fault collision. There is evidence that insurance premiums may influence a decision to drive.[13]

Recommendation 1: *Do not introduce any new offences for driving occasioning death or bodily harm.*

Existing Offences

Dangerous Driving[14]

The circumstances of dangerous driving remain appropriate and should not be expanded, unless there is compelling evidence demonstrating the need to expand the range of factors which are criminalised.

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[9] *Road Transport Act 2013* (NSW) s 117(1).
[10] W V Windeyer, Review of Offences Relating to Fatal Car Accidents on Private Property (2015) [8.1].
[11] *Question 2.4: Dangerous driving causing actual bodily harm Should there be new offences to capture driving that causes actual bodily harm? If so, what should these new offences be, and what should be their maximum penalties?*
[12] *McIntyre v R* (2009) 198 A Crim R 549 [44].
[13] Dr Richard Tooth, Insurance influence on road-safety, submitted to Joint Select Committee on Road Safety, Parliament of Australia, 6.
[14] *Question 2.2: Dangerous driving occasioning death or grievous bodily harm (1) Are the circumstances of dangerous driving (Crimes Act 1900 (NSW) s 52A(1), s 52A(3)) appropriate? What, if any, circumstances should be added? … (3) Do any other elements of the dangerous driving offences (Crimes Act 1900 (NSW) s 52A(1), s 52A(3)) require amendment? If so, what needs to change?*

The suggested additional factors listed in the consultation paper are, in our view, not appropriate for the following reasons:

- Many professional drivers must comply with existing statutory regimes regulating their driving to a greater extent than other road users. For example, the *Heavy Vehicle National Law (NSW) 2013* heavily regulates both professional heavy vehicle drivers (such as truck drivers) and their employers, including significant rules aimed at reducing driver fatigue.[15] Drivers are personally criminally responsible for compliance with these regulations and can face heavy penalties for non-compliance.[16] Furthermore, the mere fact that a person is a professional driver does not speak to the manner of driving at the time of driving that caused death. Given this external regulation and this lack of clear connection to dangerous driving, there is no reason to include being a professional driver as an additional factor relevant to dangerous driving offences.

- Driving on a suspended or disqualified licence, whilst otherwise unlawful, does not in and of itself reflect the manner of driving at the time of any collision. As we set out in our preliminary submission, Aboriginal and Torres Strait Islander people are significantly more likely to be impacted by driver licensing disparities across Australia.[17] Adding this as a factor without any requirement that the person was otherwise driving dangerously would expand the offence inappropriately and be highly likely to disproportionately impact Aboriginal and Torres Strait Islander defendants.

- The Sentencing Council considered adding use of a mobile phone as a relevant factor in 2020 and declined to make this recommendation, citing a lack of evidence to justify the change.[18] There remains insufficient evidence to justify a change of this nature, particularly considering regulations that allow use of mobile phone in certain circumstances.[19]

- Driving with a known medical condition that would impair ability to drive, without qualification, risks a net-widening effect that would criminalise a significant number of drivers. This is particularly true within an ageing population. For example, a person with sleep apnoea would have a more impaired driving ability than a person without sleep apnoea,[20] but this does not mean that all people with sleep apnoea are inherently driving dangerously every time they are behind the wheel. Around 6.7% of Australian adults have sleep apnoea.[21]

Voluntariness[22]

The current law regarding voluntariness and dangerous driving remains appropriate, including as it relates to collisions where the defendant is found to have been driving involuntarily at the time of impact. We acknowledge the legitimate concerns about voluntariness and automatism raised in the consultation paper, but consider that the current caselaw sets out a clear, proportionate test for matters where a person falls asleep or becomes unconscious at the wheel: namely, a focus on whether their decision to drive in whatever their state was prior to losing consciousness amounts to dangerous driving (whether it be effects of medicine, tiredness, medical condition etc).[23]

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[15] *Heavy Vehicle National Law (NSW) 2013* (NSW) Chapter 6.
[16] See e.g. *Heavy Vehicle National Law (NSW) 2013* (NSW) ss 228, 250 – 251, 254, 258, 260.
[17] Aboriginal Legal Service (NSW/ACT) Ltd, Preliminary Submission PRC88, 1–2.
[18] NSW Sentencing Council, Repeat Traffic Offenders, Report (2020) [0.13], [2.23].
[19] *Road Rules 2014* (NSW) s 300.
[20] Only some people with sleep apnoea are restricted from having an unconditional licence: Austroads and the National Transport Commission, 'Assessing Fitness to Drive for commercial and private vehicle drivers'.
[21] Australian Institute of Health and Welfare, 'Sleep-related breathing disorders with a focus on obstructive sleep apnoea', iv.
[22] *Question 2.2: Dangerous driving occasioning death or grievous bodily harm …(2) Does the law adequately deal with situations in which a person voluntarily drove dangerously before their actions became involuntary (and they were driving involuntarily at the time of impact)? If not, how could this be resolved?...*
[23] *Jiminez v the Queen* [1992] HCA 14 [12].

We note the concerns expressed by the the Office of the Director of Public Prosecutions (**ODPP**) in relation to cases of prolonged involuntary driving, however, we are concerned that any proposed legislative change may unintentionally capture instances beyond the rare category of prolonged automatism seen in *R v Lidgard* [2022] NSWDC 445. In relation to *Lingard*, the following pertinent factors are not mentioned in the consultation paper and are relevant when considering the appropriateness of this case as a vehicle for law reform:

- Mr Lingard was not informed he suffered from hypoglycaemic unawareness by his doctor;[24]
- The contention of the Crown, repeated in the consultation paper, that the defendant took too high a dose of medication was not accepted by the trial judge;[25]
- The Crown did not negative that Mr Lingard held an honest and reasonable belief that it was safe for him to drive;[26]
- This decision was not appealed by the ODPP.

Mr Lingard was acquitted on a number of grounds, with issues around the contemporaneousness of the dangerous driving being just one. In those circumstances, we maintain that it is not appropriate to consider changing the law on the basis of the decision in that case.

The courts have repeatedly observed that it is ordinarily dangerous to reason from extreme cases.[27] Without further examples evidencing a clear gap in the law, we caution against law reform intended to capture a hypothetical extreme case, in circumstances where such reform may have an unintended net-widening effect.

Circumstances of Aggravation[28]

We do not consider that the word "very" should be removed from s 52A(7)(d). It is an important qualifier which makes clear the distinction between the aggravated offence and the basic offence. We do not consider that any changes are needed to the circumstances of aggravation.

***Recommendation 2**: Maintain the existing list of factors for dangerous driving and the existing circumstances of aggravation for dangerous driving.*

Other Serious Offences

Existing Offences[29]

We do not support amending or repealing the following charges:

- injuries by furious driving etc: *Crimes Act 1900* (NSW) s 53;

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[24] *R v Lidgard* [2022] NSWDC 445 [10].
[25] Ibid [97].
[26] Ibid [119].
[27] See e.g. *Bugmy v Director of Public Prosecutions (NSW)* [2024] NSWCA 70 [85]; *The King v Rohan (a pseudonym)* [2024] HCA 3 [74]; *Council of the New South Wales Bar Association v EFA (a pseudonym)* [2021] NSWCA 339 [253].
[28] *Question 2.3: Circumstances of aggravation for dangerous driving (1) Should the element of "very substantially impaired" (Crimes Act 1900 (NSW) s 52A(7)(d)) be amended to remove the word "very"? Why or why not? (2) Should the circumstance of aggravation related to speeding (Crimes Act 1900 (NSW) s 52A(7)(b)) be amended? If so, what should the threshold be? (3) Are any other changes needed to the circumstances of aggravation? If additional circumstances are needed, how should they be expressed?*
[29] *Question 2.5: Wanton or furious driving Should the offence of "injuries by furious driving etc" (Crimes Act 1900 (NSW) s 53) be repealed or amended? What, if anything, should replace this offence if it is repealed?*
Question 2.7: Failing to stop and assist Are any reforms needed to the offence of failing to stop and assist after a vehicle impact causing death or grievous bodily harm (Crimes Act 1900 (NSW) s 52AB)? If so, what should change?
Question 2.8: Police pursuits Are any reforms needed to the offence of failing to stop and driving recklessly or dangerously in response to a police pursuit (Crimes Act 1900 (NSW) s 51B)? If so, what should change?
Question 2.9: Predatory driving Are any reforms needed to the offence of predatory driving (Crimes Act 1900 (NSW) s 51A)? If so, what should change?

- fail to stop and assist after a vehicle impact causing death or grievous bodily harm: *Crimes Act 1900* (NSW) s 52AB;
- fail to stop and driving recklessly or dangerously in response to a police pursuit: *Crimes Act 1900* (NSW) s 51B; and
- predatory driving: *Crimes Act 1900* (NSW) s 51A.

We are unaware of any evidence supporting change to the above offences. The current law adequately covers the field of criminality and remains appropriate, particularly when relevant offences under the *Road Transport Act 2013* (NSW) are taken into account.[30]

Recommendation 3: *Maintain existing serious road crime charges under the Crimes Act 1900 in their current form.*

A New Act[31]

The ALS opposes the creation of a separate Act for serious road crime offences. In our view it is unnecessary and may cause confusion for the public and unnecessary complication for the courts (in particular, noting that the *Road Transport Act 2013* itself represents a relatively recent consolidation of various other Acts which had comprised the road transport legislation up until 2013).

We do not oppose restructuring matters currently in the *Crimes Act 1900* to situate them within their own division, if it is determined that such a move would reduce confusion rather than exacerbate it. However, we oppose any reform that would move current summary offences under the *Road Transport Act 2013* into indictable offences under the *Crimes Act 1900* without separate consultation.

Any proposed reform which would transform existing summary offences into indictable offences should not be undertaken without separate, thorough consultation with a range of stakeholders.

Recommendation 4: *Do not create a new act for road crimes.*

Accessorial Liability[32]

No reforms are needed to the law on accessorial liability as it applies to serious road crimes, as distinct from other offences. Any reforms to the law regarding accessorial liability should be undertaken with a view to reforming the law as it applies to all offences, not only to particular categories.

We strongly oppose the creation of any offence capturing non-driver conduct that contributes to serious road crimes that doesn't fit within the existing accessorial liability framework. The introduction of new offences capturing non-driver conduct would inevitably criminalise the actions of passengers who may have little to no control or influence over what a driver is doing.

In particular, the suggestion that the law should criminalise omissions from passengers (that is, passengers who do not attempt to prevent a driver who is under the influence from driving) is an unjustified basis for criminalisation.

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[30] See e.g. menacing driving contrary to *Road Transport Act 2013* (NSW) s 118, or failure to stop and assist contrary to *Road Transport Act 2013* (NSW) s 146.

[31] *Question 2.10: A new serious road crimes Act (1) Should there be a separate Act for serious road crime offences? Why or why not? (2) If so, which offences should be included in this new Act? Should any offences currently contained in the Road Transport Act 2013 (NSW) be transferred to any new Act? (3) Should the serious road crime offences be restructured into a new division of the Crimes Act 1900 (NSW)? If so, what offences should be included?*

[32] *Question 2.11: Accessorial liability for serious road crime offences (1) Are any reforms needed to the law on accessorial liability as it applies to serious road crimes? If so, what needs to change? (2) Is there a need for new offences to capture non-driver conduct that contributes to serious road crimes? If so, what should these offences cover and what should their maximum penalties be?*

Recommendation 5: *Maintain the law on accessorial liability as it applies to serious road crimes.*

Penalties

Maximum Penalties for Serious Road Crime Offences[33]

The ALS considers that the maximum penalties currently available under the *Crimes Act 1900* for dangerous driving and serious road crime offences remain appropriate and provide proper sentencing scope to courts. We oppose the introduction of increased maximum penalties for any offence being considered by this review.

The maximum penalties for dangerous driving serious road crime offences are broadly consistent with maximum penalties in other Australian jurisdictions. Legal stakeholders including prosecuting authorities are in agreement that the current maximum penalties for serious road crimes remain appropriate.[34]

Effects of Imprisonment and Public Perceptions of Sentencing

Increased maximum penalties are often proposed as a mechanism intended to deter criminal offending, however, evidence suggests that increasing maximum penalties is not effective in deterring crime. For example, the recent parliamentary *Inquiry into Victoria's Criminal Justice System* (2022) found that "punishment or the threat of punishment does not shift criminal behaviour or reduce recidivism".[35] On the contrary, research shows that people who receive non-custodial penalties are significantly less likely to be re-convicted within the next 12 months than those who receive sentences of imprisonment.[36] Other evidence suggests that even short periods of incarceration may in fact be linked with subsequent contact with the criminal process.[37]

Dangerous driving offences, more so than many other kinds of offending, rarely involve planning or premeditation. In our experiences, these offences often involve short-sighted or reckless decisions that may have severe but unintended consequences. The nature of these offences further suggests that increased penalties will not deter future offending.

Imprisonment has detrimental effects on a person's physical and mental health, the effects of which continue after release. Imprisonment frequently leads to loss of housing, barriers to employment, and broader disruption in families and communities.[38] Barriers to accessing adequate health care, mental health care and disability support in custodial environments are widely recognised.[39] Aboriginal and

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[33] *Question 3.1: (1) Are the maximum penalties for the following serious road crime offences involving death appropriate; Question 3.2: Are the maximum penalties for the following serious road crime offences involving bodily harm appropriate?*

[34] Law Society of NSW, Preliminary Submission PRC59 to NSW Law Reform Commission, *Review of Serious Road Crime* (15 February 2023) 1; NSW Office of the Director of Public Prosecutions (ODPP), Preliminary Submission PRC77 to NSW Law Reform Commission, *Review of Serious Road Crime* (17 February 2023) 6; NSW Bar Association, Preliminary Submission PRC83 to NSW Law Reform Commission, *Review of Serious Road Crime* (23 February 2023) 1 – 3.

[35] Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Report, March 2022) 636 – 41.

[36] NSW Bureau of Crime Statistics and Research, *Reoffending Statistics for NSW* (Web Page, 15 August 2022). See also Joanna JJ Wang and Suzanne Poynton, *Intensive Correction Orders Versus Short Prison Sentence: A Comparison of Re-Offending* (NSW Bureau of Crime Statistics and Research, Contemporary Issues in Crime and Justice No 207, October 2017).

[37] Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report No 133, December 2017) 269 [7.157]–[7.158].

[38] See Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (Report, 20 June 2013) 22–5; Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism* (Final Report, August 2019) vol 1, 89–90.

[39] The NSW Inspector of Custodial Services recently found that "demand for health services clearly outweighs the supply of health services" in NSW correctional centres: *Health Services in NSW Correctional Facilities* (Report, March 2021) 124. See also Victorian Ombudsman, *Investigation into Deaths and Harm in Custody* (Report, March 2014) 106; Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Report, March 2022) 594 (Finding 55).

Torres Strait Islander people in custody are less likely to be able to access culturally safe healthcare in prison than in the community.[40]

The NSW Special Commission of Inquiry into the Drug 'Ice' found that people in custody faced difficulty in accessing drug and alcohol treatment, whether they were on remand or serving a term of imprisonment of any length.[41] Similarly, people in prison do not necessarily receive comparable health care in custody. Due to rising incarceration rates, insufficient funding and the general vulnerability of prison populations, demand for the correctional health system outstrips supply.[42]

The disconnect between public perceptions of imprisonment and the reality of the impacts of imprisonment is often lost in discussions around crime and punishment. This has been previously noted by his Honour Justice Harrison, who observed:[43]

> "Any period of imprisonment must be understood for what it is: onerous, unpleasant, oppressive and burdensome. It is, as it should be, the last available punitive resort in any civilised system of criminal justice. Public discussions about the need to deter crime by the imposition of heavier sentences are not always obviously, or at least apparently, informed by an appreciation of the significance of full-time incarceration upon men and women who receive such sentences.'"

However, studies show that when members of the public are fully informed of the considerations and reasons for sentences, they are generally satisfied with the outcomes. For example, a 2011 study in Tasmania sought to investigate public sentiment around sentencing.[44] The study collated feedback from jurors across 138 trials in Tasmania before and after the sentence proceedings. The study found that 27% of participants wrongly believed crime had increased 'a lot' over the previous five-year period and only 7% of participants correctly believed crime had decreased. Prior to observing sentence proceedings, the majority of participants responded that sentences were too lenient and it was found that participants who favoured more punitive sentences were more likely to: incorrectly believe crime had increased, overestimate the proportion of crime involving violence and underestimate the proportion of convicted sex offenders who were imprisoned. [45]

Despite initial perceptions, more than half (52%) of participants suggested a sentence that was more lenient than the one ultimately imposed and after observing sentence proceedings and reading the judge's remarks on sentence 90% of participants considered that the sentence was (very or fairly) appropriate. [46]

These figures suggest that public calls for increased penalties may be exacerbated by a lack of public awareness and education about sentencing law and procedure. Legitimate public concerns should be addressed through public education and awareness raising, not through increases in any maximum penalty which are not justified by a compelling evidence base.

Sentencing courts have at their disposal a wide range of existing sentencing options to address the various purposes of sentencing under NSW law, including imposing terms of imprisonment up to statutory maximums which are broadly consistent with comparable offences in other Australian jurisdictions. In light of this, the current maximum penalties remain appropriate.

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[40] See Australian Institute of Health and Welfare, 'Health of People in Prison' (7 July 2022). 'This is despite the recommendations of the Royal Commission into Aboriginal Deaths in Custody for Aboriginal people in prison to have access to culturally safe health care and Aboriginal-specific health services': Sacha Kendall et al, 'Incarcerated Aboriginal Women's Experiences of Accessing Healthcare and the Limitations of the "Equal Treatment" Principle' (2020) 19 *International Journal for Equity in Health* 48, 50.

[41] NSW Special Commission of Inquiry into Crystal Methamphetamine and Other Amphetamine-type Stimulants, *Report – Volume 1* (January 2020) ii [197].

[42] Inspector of Custodial Services, NSW Government, *Health Services in NSW Correctional Facilities* (Report, March 2021) 14.

[43] *Mainwaring v R* [2009] NSWCCA 207 [71].

[44] Kate Warner et al, 'Public judgement on sentencing: Final results from the Tasmanian Jury Sentencing Study', *Trends and Issues in Crime and Criminal Justice* (Australian Institute of Criminology, No 407, February 2011).

[45] Ibid 3.

[46] Ibid.

Recommendation 6: *Maintain the current maximum penalties for dangerous driving occasioning death and aggravated dangerous driving occasioning death.*

Availability of Intensive Corrections Orders for Offences involving Death[47]

We strongly oppose any amendment that would prevent Intensive Corrections Orders (**ICOs**) from being imposed for any serious road crimes involving death, including an amendment to s 67 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (**CSPA**). ICOs serve an important purpose in the NSW sentencing scheme and are already subject to considered legislative restrictions.

The statutory scheme for ICOs was substantially amended in 2017 by the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW). In his second reading speech, then Attorney-General, Mark Speakman SC, expounded upon the purpose of s 66, stating:[48]

> [Section 66] will make community safety the paramount consideration when imposing an intensive correction order on offenders whose conduct would otherwise require them to serve a term of imprisonment. Community safety is not just about incarceration. *Imprisonment under two years is commonly not effective at bringing about medium to long term behaviour change that reduces re-offending. Evidence shows that community supervision and programs are far more effective at this.* That is why the new s 66 requires the sentencing court to assess whether imposing an intensive correction order or serving the sentence by way of full-time detention is more likely to address the offender's risk of re-offending [emphasis added].

There are already considerable limitations placed on the court as to when an ICO is available, including limiting the sentence length, types of offences and whether an ICO would address their risk of reoffending.[49] As outlined above, s 66 of the CSPA stipulates that community safety must be the 'paramount consideration' of the court when determining whether an ICO is appropriate.

If the court decides an ICO is appropriate, then the court must consider the appropriate conditions for an ICO. In addition to standard conditions, the court must impose at least one additional condition such as home detention, electronic monitoring, a curfew, completion of community service, compliance with a rehabilitation or treatment programs, an abstention condition requiring abstention from alcohol or drugs or both, and conditions restricting travel to certain areas or contact with certain people.[50]

While the majority of dangerous driving causing death offences will result in a term of imprisonment served in custody, ICOs should remain available for matters where the offending conduct is not at the high end of the range of objective seriousness and the defendant's moral culpability is reduced.

For example, in *R v Balla*,[51] the defendant was sentenced for dangerous driving causing death after turning right against a red arrow two seconds after it had changed from amber.[52] The defendant was not under the influence of any substances and had his two-year-old son in the car when the collision occurred, resulting in a motorcyclist being killed. He was found to be of very good character and to show a 'degree of remorse rarely seen' by the sentencing judge. Ultimately, the defendant was sentenced to a term of imprisonment for two years, to be served by way of an ICO. The ICO included conditions imposing home detention and the performance of community work for 400 hours.

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[47] *Question 3.1: Should s 67 of the Crimes (Sentencing Procedure) Act 1999 (NSW) be amended so intensive correction orders cannot be imposed for any serious road crime offences that involve death?*
[48] Legislative Assembly, Hansard, 11 October 2017, Crimes (Sentencing Procedure) Amendment (Sentencing Options) Bill 2017, 2.
[49] See *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 66 – 71.
[50] Ibid s 73A.
[51] [2021] NSWCCA 325.
[52] Ibid [17].

In our experience, sentencing judges appropriately exercise the sentencing discretion within current legislative limits. ICOs should remain available for dangerous driving causing death.

Recommendation 7: *Maintain the availability of Intensive Correction Orders for serious road crimes involving death.*

Licence Disqualification Periods[53]

We consider that the current maximum disqualification periods remain appropriate. We oppose the continuation of minimum mandatory disqualification periods and recommend, at a minimum, that the court should be empowered to grant restricted licences if deemed appropriate.

As noted in our preliminary submission, Aboriginal and Torres Strait Islander people face additional geographical, cultural, economic, and social barriers to obtaining a driver licence.[54] For those living in areas with limited public transportation such as regional and remote communities, the lack of a licence can have significant implications for employment, access to healthcare and basic services.

The imperative to drive in communities with low levels of driver licensing and without public transportation infrastructure can lead to secondary criminalisation through fines, charges and imprisonment for unlicensed or disqualified driving. This is a well-documented phenomenon which further entrenches marginalised communities in cycles of contact with the legal system and disproportionately harms Aboriginal communities. The extension of disqualification schemes will further exacerbate systemic inequalities in rural and regional NSW.

We support the recommendation of the Sentencing Council in 2020 to permit courts to grant restricted licences to disqualified drivers in some cases, where driving is necessary for specified medical, work, cultural or personal obligations.

Recommendation 8: *Empower courts to grant restricted licences to disqualified drivers in some cases, where driving is necessary for specified medical, work, cultural or personal obligations.*

Mandatory Minimum Sentences[55]

The ALS strongly opposes the introduction of mandatory or minimum sentences for any offences because of their propensity to disproportionately impact Aboriginal and Torres Strait Islander people in contact with the criminal process and increase Aboriginal and Torres Strait Islander incarceration.

In 2017, the Australian Law Reform Commission Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples found that "mandatory sentencing increases incarceration, is costly and is not effective as a crime deterrent",[56] and may disproportionately impact marginalised groups including Aboriginal and Torres Strait Islander people. The Inquiry found that "[p]resumptive minimum sentences can have a similar effect to mandatory minimum sentences."[57]

Mandatory and presumptive sentencing provisions curtail judicial discretion and limit the ability of sentencing courts to give effect to principles of individualised justice, proportionality, and use of imprisonment as a last resort. The Australian Law Reform Commission also found that, "[w]hile

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[53] *Question 3.4: Is the licence disqualification scheme for serious road crime offences appropriate? If not, how should it change?*

[54] See, eg, Australian Law Reform Commission, Pathways to Justice (2017) chapter 12.

[55] *Question 3.5: Should any serious road crime offences in the Crimes Act 1900 (NSW) have mandatory minimum sentences? If so, what should these be?*

[56] Australian Law Reform Commission, Pathways To Justice–Inquiry Into The Incarceration Rate Of Aboriginal And Torres Strait Islander Peoples (ALRC Report No 133) [8.1].

[57] Ibid [8.5]. The Inquiry ultimately recommended 'that Commonwealth, state and territory governments should repeal sentencing provisions which impose mandatory or presumptive terms of imprisonment upon conviction of an offender, and that have a disproportionate impact on Aboriginal and Torres Strait Islander peoples': Recommendation 8–1.

increasing incarceration, there is no evidence that mandatory sentencing acts as a deterrent and reduces crime."[58]

Furthermore, the introduction of mandatory minimum sentences will discourage early resolution which may otherwise avoid burden to the courts, and may result in inconsistent sentences across the spectrum of serious road crime offences.

Recommendation 9: *Do not introduce mandatory or minimum sentences for any serious road crime offences*

Sentencing Principles and Procedures

General Sentencing Principles and Procedures[59]

The current sentencing framework adequately addresses serious road crimes in NSW. There are no factors unique to serious road crimes that would warrant the introduction of targeted sentencing provisions.

The ALS is supportive of evidence-based sentencing reforms, particularly reforms which foreground the importance of connection to culture and community for Aboriginal and Torres Strait Islander people in addressing the statutory purposes of sentencing. We consider that any proposed amendments to the general sentencing framework under the *Crimes (Sentencing Procedure) Act 1999* should not be confined in scope to serious road crime offences.

Any proposal to amend general principles and features of the NSW sentencing scheme must not be undertaken without a comprehensive review which includes specific consideration of implementing Recommendation 6–1 of the Australian Law Reform Commission Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples – that sentencing legislation should provide that, when sentencing Aboriginal and Torres Strait Islander offenders, courts take into account unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples.[60]

Recommendation 10: *Do not amend the sentencing scheme in NSW for serious road crime offences.*

Guideline Judgment for Dangerous Driving Offences[61]

The *R v Whyte* guideline judgment remains a relevant and appropriate guide for the courts. We consider there to be no need for a new guideline judgment.

The guideline in *Whyte* serves three primary purposes. First, it outlines what it describes as a 'typical' case. Second, it indicates that a custodial sentence will usually be appropriate, unless the defendant has a low level of moral culpability. Finally, it indicates that where a defendant's moral culpability is high, a full-time custodial head sentence of less than three years for an offence involving death (or two years for grievous bodily harm) would not generally be appropriate.

R v Whyte serves as a 'guide' or a 'check' for the courts when sentencing dangerous driving offences.[62] The judgment itself assists judges by modifying the language of the previous *Jurisic* guideline, which

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[58] Ibid [8.13], citing Michael Tonry, 'The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings' (2009) 38 *Crime and Justice* 65.

[59] *Question 4.1: Are any issues relevant to serious road crime offences not adequately addressed by the general sentencing framework? If so, what specific reforms could address this?*

[60] Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report No 133, December 2017) 269 [7.157]–[7.158].

[61] *Question 4.2: Is the R v Whyte guideline judgment for dangerous driving offences still relevant and appropriate? If not, should there be a new guideline judgment?*

[62] *R v Whyte* [2002] NSWCCA 232; *R v Eaton* [2023] NSWCCA 125.

was considered to have an unduly prescriptive tone, and established a guideline which allowed for greater judicial discretion.[63] We consider that the benefits offered by *Whyte* outweigh the limitations. Further, any perceived limitations are unlikely to be avoided by a new guideline judgment.

One limitation identified in the consultation paper, was that the 'typical' case outlined in the judgment does not reflect the majority of dangerous driving cases today. While we accept *Whyte* does not represent the majority of dangerous driving cases before the courts today, it is unlikely that any single case could be capable of doing so.

As outlined in *Whyte*, many cases of dangerous driving involve a young person with limited prior convictions who has injured or killed a single stranger. However, there are many other cases of dangerous driving frequently seen before the courts which involve a distinctly wide range of circumstances, locations and acts. These kinds of offences are committed by all kinds of people, including drivers of all ages and experience levels. Defendants include first-time drivers, elderly drivers, professional drivers (such as long-haul truck drivers or taxi drivers), unlicensed drivers and everyday drivers who have no record of traffic offences. Offences can arise from long-term drug or alcohol addiction, momentary distractions, medical anomalies or temperament. The location of the offence can also have significant implications: speeding on a quiet country road may attract a different level of moral culpability to speeding in a school zone.

The *Whyte* guideline assists by offering a clear starting point from which other cases can be distinguished, as well as clear guidelines as to sentencing for dangerous driving offences. The ongoing utility and flexibility of the *Whyte* guideline is demonstrated in the recent case of *R v Eaton*,[64] which considered a sentence for the offence of aggravated dangerous navigation in which an infant was killed in a kayaking incident. In this case, the defendant struggled with significant mental health issues and substance addiction. Despite the drastically different circumstances to the typical case described in *Whyte*, the NSW Court of Criminal Appeal was assisted by the guideline judgment in assessing whether full-time imprisonment was required.

Recommendation 11: *Continue to rely on Whyte as the guideline judgment on dangerous driving.*

Standard Non-Parole Periods[65]

The ALS strongly opposes the expansion of the standard non-parole period (**SNPP**) scheme. We oppose the SNPP scheme in its entirety and consider that it should not be extended in its application to anything other than the most serious offences.

Sentencing in NSW is best served by preserving judicial discretion, with the instinctive synthesis to be applied by sentencing courts guided by the legislative guidepost of the maximum penalty and longstanding sentencing principles enabling courts to balance the various purposes of sentencing in determining appropriate outcomes in individual cases.

Dangerous Driving Offences and SNPPs

The introduction of SNPPs for dangerous driving offences would be inappropriate due to the wide variety of circumstances that may constitute an offence and may lead to inconsistent or unjust outcomes across the broader spectrum of serious road crimes.

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[63] *R v Eaton* [2023] NSWCCA 125 [68].
[64] [2023] NSWCCA 125.
[65] *Question 4.3: Should any of the dangerous driving offences (Crimes Act 1900 (NSW) s 52A) have standard non-parole periods? If so, what should the standard non-parole periods be?*

As outlined above, serious road crimes offences include a wide variety of conduct and circumstances, with varying levels of objective seriousness and moral culpability. The Sentencing Council has previously observed that SNPPs may be inappropriate for offences "that embrace a wide variety of behaviour with a clear differentiation in their seriousness."[66] NSW Police have similarly recognised the difficulty of SNPPs for such offences. [67]

In 2011, the NSW Sentencing Council conducted a comprehensive review of whether SNPPs should be introduced for dangerous driving offences. The review report observed: [68]

> ....just as with driving manslaughter cases, the facts and circumstances of dangerous driving cases, even of an aggravated nature, will vary so greatly that it would be difficult for the court to determine an offence of midrange objective seriousness upon which the SNPP would be based.

Ultimately, the Sentencing Council found that introducing SNPPs for dangerous driving offences would unnecessarily increase the complexity of sentencing for these proceedings and recommended that there be no SNPPs introduced for any dangerous driving offences.[69]

The introduction of SNPPs for dangerous driving offences would likely result in inconsistent or unjust outcomes. The courts have characterised the distinction between vehicular manslaughter and aggravated dangerous driving occasioning death as a "fine one".[70] Ultimately, the decision to charge one over the other will often be determined by prosecutorial discretion, more so than the elements of the offence. If SNPPs were to be introduced for dangerous driving offences, it may artificially inflate aggravated dangerous driving offences, potentially resulting in sentences for vehicular manslaughter receiving lesser sentences than sentences for dangerous driving. To introduce SNPPs partway through the 'scale' of dangerous driving offences would inevitably impede the likelihood of matters resolving, placing additional burden on the court system and requiring victims to go through the stress and trauma of a criminal trial.

No expansion of the SNPP scheme in NSW should be considered without a comprehensive review of the scheme and its impacts.

Recommendation 12: *Do not expand the list of offences carrying a standard non-parole period to any dangerous driving offences under s 52A of the Crimes Act 1900.*

Jurisdictional Issues

Table Offences[71]

The ALS opposes the conversion of any 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) to strictly indictable offences.

There is no evidence that the current Table offences are unduly limited by the jurisdictional limit of the Local Court. Table offences encompass a wide range of criminality – for example, a police pursuit that is terminated after a few moments is significantly less serious than a pursuit that traverses large geographic areas and places significant numbers of members of the public at risk. Requiring every police pursuit charge to be dealt with by the District Court would contribute to court delays and

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[66] NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) 19 [2.52].
[67] NSW Sentencing Council, *Standard Non-Parole Periods for Dangerous Driving Offences*, Report (January 2011) 35, citing Submission 9b: The Commissioner of the Police dated 14 September 2010.
[68] NSW Sentencing Council, *Standard Non-Parole Periods for Dangerous Driving Offences*, Report (January 2011) 46.
[69] Ibid 47.
[70] *Thompson v R* [2007] NSWCCA 299 [15].
[71] *Question 5.1: (1) Should 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) be made strictly indictable?*

require significant expenditure of public resources. Under the current scheme, the ODPP can consider the criminality of such charges and, where appropriate, elect for the Table offence to be dealt with on indictment.

Converting Table offences to strictly indictable offences would also remove them from consideration for resolution in matters subject to the Early Appropriate Guilty Plea (**EAGP**) scheme. The EAGP process mandates negotiation between defence and the ODPP through a case conference, explicitly intended to explore any possibility of a plea of guilty to any offence.[72] In many circumstances, this becomes a negotiation on both the appropriate charge to capture the offending conduct, as well as the appropriate jurisdiction for the sentence proceedings (that is, whether the Local or District Court will sentence the defendant). Table offences are often key avenues for resolution in the EAGP negotiation process.

Recommendation 13: *Do not expand the existing list of strictly indictable offences.*

Negligent Driving Occasioning Death[73]

The ALS opposes the conversion of negligent driving occasioning death to a strictly indictable offence.

Negligent driving may carry a low degree of criminality as compared with other serious road crimes, with defendants bearing significantly lower moral culpability than those convicted of dangerous driving. The difference between a collision from which no criminal proceedings flow and conduct which is charged as negligent driving is, in many circumstances, relatively small. It would be inappropriate to elevate negligent driving occasioning death to strictly indictable status.

We do not oppose consideration being given to negligent driving occasioning death being made indictable, however we would oppose any increase to the current maximum penalty.

A six-month time limitation applies to the laying of summary charges,[74] meaning negligent driving occasioning death is often prevented by statute from being considered as an avenue of resolution for proceedings subject to the EAGP scheme, as the six-month limitation period has elapsed by the time the matter is being considered for resolution. This prevents matters that may properly be charged as negligent driving occasioning death (rather than, for example, dangerous driving occasioning death) from proceeding under the more appropriate charging option.

Recommendation 14: *Do not convert negligent driving occasioning death to a strictly indictable offence.*

Recommendation 15: *Consider making negligent driving occasioning death an indictable offence to facilitate proper resolution of matters where appropriate, while maintaining the current maximum penalty.*

[72] *Criminal Procedure Act 1986* (NSW) s 70(2).
[73] *Question 5.1: (2) Should the offence of negligent driving occasioning death (Road Transport Act 2013 (NSW) s 117(1)(a)) be made indictable or strictly indictable?*
[74] *Criminal Procedure Act 1986* (NSW) s 179.

Serious Children's Indictable Offences[75]

The ALS opposes including the offences in s 52A of the *Crimes Act 1900* in the definition of "serious children's indictable offence" (**SCIOs**) in s 3 of the *Children (Criminal Proceedings) Act 1987* (**CCPA**).

In general, the ALS supports the position of Legal Aid NSW regarding the jurisdiction of the Children's Court: the Children's Court should have jurisdiction to hear all charges for people under the age of 18, with a residual discretion to commit particularly serious matters to higher courts where appropriate.[76] This recognises that, irrespective of the offence, children exist in a different category to adults. In our view, the law should recognise these differences structurally and consistently across all matters.

In relation to serious road crimes, the ALS strongly opposes any expansion of the list of SCIOs in the absence of compelling evidence that serious road crimes are not being dealt with appropriately in the Children's Court. While the Children's Court exercises a specialist jurisdiction which requires magistrates to take into account a range of considerations specific to children, a significant number of serious matters dealt with by the Children's Court result in the imposition of a custodial penalty.[77]

We note that the current list of SCIOs is reasonably narrow, with the lowest maximum penalty being 20 years, and most SCIOs carrying life imprisonment as a maximum penalty.[78] This recognises that only the most serious matters should be removed from the specialist Children's Court jurisdiction. The most serious offence being considered by the Review is aggravated dangerous driving occasioning death, which has a maximum penalty of 14 years.[79] This sits significantly below the maximum penalties of current SCIOs.

We also note that some charges under s 52A are not even strictly indictable matters in the adult jurisdiction.[80] Requiring charges against children to be dealt with in the District Court in circumstances where adults accused of the same offences may be dealt with in the Local Court would sharply contradict the principles applicable to children under the criminal law both under the CCPA and international law.

The committal of children's matters to higher courts to be dealt with by trial has implications that extend beyond the range of available sentencing outcomes:

- The Children's Court procedure and process was developed specifically to make court as non-threatening, accessible and intelligible as possible to young people,[81] as required by s 12 of the CCPA. For example, in the Children's Court, lawyers remain seated and defendants are referred to by their first names. Importantly, Children's Court magistrates make a significant effort to explain what is happening in simple and approachable language and the manner and approach of the court is more casual than other courts. District and Supreme Court proceedings are far more formal and intimidating, posing barriers to child defendants understanding and participating in their own case.[82]
- There is significant delay associated with matters running to trial in higher courts. Taking into account the special vulnerability of children, the desirability of early intervention and emphasis

[75] *Question 5.2: Serious children's indictable offences Should the dangerous driving offences in s 52A of the Crimes Act 1900 (NSW) be added to the definition of "serious children's indictable offence" in section 3 of the Children (Criminal Proceedings) Act 1987 (NSW)? If so, what offences should be added?*

[76] Legal Aid NSW, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse (October 2016) 27.

[77] Approximately 18% of dangerous driving matters in the Children's Court result in a control order: NSWLRC Consultation Paper, Serious Road Crime (December 2023) 103.

[78] *Children (Criminal Proceedings) Act 1987* (NSW) s 3.

[79] S52A Crimes Act 1900

[80] Schedule 1 Criminal Procedure Act – offences under s 52A other than occasioning death are contained in Table 1.

[81] See, e.g., *Children (Criminal Proceedings) Act 1987* (NSW) s 10; Caitlin Akthar, *What do I need to know about practicing in the Children's Court?*, Criminal CPD, pdf.

[82] P Johnstone, 'Criminal matters — the grey matter between right and wrong: neurobiology and young offending', paper presented at Children's Legal Service Conference, 11 October 2014, Sydney, published in Judicial Commission of NSW, Children's Court Handbook at [19-2000]; R Zajac, S O'Neill, H Hayne, 'Disorder in the courtroom? Child witnesses under cross-examination' (2012) 32 *Developmental Review* 181.

on rehabilitation for children in contact with the criminal legal system, the introduction of delay to children's criminal proceedings must be avoided wherever possible. Delay in finalisation of proceedings means that children spend a protracted time either on remand or subject to bail conditions, are exposed to courts, police, correctives and other criminogenic experiences for long periods (in some cases, years), and children who are found or plead guilty are not eligible to receive the support associated with formal supervision from Youth Justice until after the conclusion of their court proceedings.

- Criminal proceedings relating to children involve additional, sometimes complex, legal concepts and procedures which may be challenging for jurors to understand and apply, and heighten the risk of error. Matters involving children which are dealt with in the higher courts are bound by strict confidentiality rules,[83] other than in specified circumstances,[84] which may heighten the risk of mistrial if the rules are not complied with by jurors. Further, the presumption of *doli incapax* is an element of offences for children under 14 years,[85] and therefore is a question for the decider of fact (in many cases, a jury) in a SCIO matter. This can be a complicated aspect of children's criminal law for members of the public serving on a jury to understand.

Recommendation 16: *Do not expand the existing list of serious children's indictable offences.*

The Experiences and Rights of Victims

Existing Rights, Victim Impacts Statements and Support Schemes[86]

We recognise the profound impact of serious road crimes on victims and families. As noted in the consultation paper, for victims, the trial process can feel alienating, impersonal and retraumatising. This may leave victims feeling that justice has not been done. However, it is imperative that any reforms designed to support victims of crime do not erode the fundamental principles of criminal law safeguarding fair trial rights for accused persons. We recommend investment in additional support for victims throughout all stages of the criminal process, with a particular focus on improved access to witness assistance services and provision of information to guide the expectations and experiences of victims and their families.

Recommendation 17: *Improve victim experiences of the criminal justice system through increased access to witness assistance services and provision of information to guide victims' expectations and experiences.*

Restorative Justice[87]

The ALS supports reduced reliance on criminalisation and punitive, carceral responses to crime. We support increased investment in holistic, trauma and disability-informed early intervention approaches to addressing factors underlying contact with the criminal legal system, and investment in Aboriginal community-controlled organisations to deliver relevant programs and services.

We support restorative justice processes being made widely available for serious road offences. There should be flexibility in the time at which they are offered, in line with the recommendations of the

[83] *Children (Criminal Proceedings) Act 1987* (NSW) s 15A.
[84] *Children (Criminal Proceedings) Act 1987* (NSW) ss 15B – 15G.
[85] *RP v The Queen* [2016] HCA 53.
[86] *Question 6.1: Is there a need to improve the existing rights, victim impact statement and support schemes for victims of serious road crimes and their families? If so, what could be done?*
[87] *Question 6.2: (1) Should restorative justice be made widely available for serious road crime offences? If so, at what stage in the criminal justice process should restorative justice be available? (2) If restorative justice was to be made available pre-sentence, should an offender's participation be taken into account in sentencing? (3) Should restorative justice processes for serious road crimes be supported by legislation? If so, what legislative safeguards and processes would be appropriate?*

New Zealand Ministry of Justice and the Victorian Law Reform Commission cited in the consultation paper. Judges should have discretion about how, and to what extent, to take a defendant's participation into account on sentence.

Recommendation 18: *Make restorative justice widely available for serious road crime offences.*

Thank you for the opportunity to make a submission. If you wish to discuss our feedback further, please contact our policy team at Policy@alsnswact.org.au