Submission

Submission date:
5 April 2024

Submission Topic:
Serious Road Crime Review

Expressions called for by:
NSW Law Reform Commission

Closing date:
5 April 2024

Submission by:
Local Court of NSW

Submission:
The NSW Law Reform Commission has sought feedback from key stakeholders in relation to a review of the law relating to serous road crimes.

Please find attached a table of the Local Court of NSW's responses to each of the questions posed in the Consultation Paper dated December 2023.

It is noted that any changes to process, form and substance will require sufficient lead time for preparation and judicial education. For this reason, it will be necessary to include the Judicial Commission of NSW in any consultation phase, as any proposed changes progress towards commencement.

Given the impact any amendments may have on the Local Court, the Chief Magistrate would be grateful for the opportunity to be further consulted and involved, particularly in relation to the implementation of any recommended amendments to, or creation of, offence provisions.

Thank you for the opportunity to comment.

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Deputy Chief Magistrate | Local Court of NSW
Downing Centre Local Court | Level 4, 143 - 147 Liverpool Street, Sydney NSW 2000

Questions from consultation paper	Local Court of NSW submission
2. OFFENCES	
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?	The Local Court considers that the creation of any new offence, the elements of that offence, and any applicable maximum penalty, are matters for Government.
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? (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? (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?	(1) The Local Court considers that the circumstances of dangerous driving are appropriate and sufficiently capture a wide range of driving behaviour. There is already a considerable body of case law which has developed over a significant period of time, at first instance, intermediate and appellate levels, and which has its genesis in pronouncements made by courts interpreting the provisions in the *Crimes Act 1900* (NSW), the *Road Transport Act 2013* (NSW) and its predecessors, the *Road Transport (General) Act 1999* (NSW) and the *Traffic Act 1909* (NSW). (2) The Local Court considers that the current legislative provisions and the case law which has applied them strike an appropriate balance between intention-based offending and recklessness, particularly in the context of assessing moral culpability in cases involving momentary inattention (or misjudgment) as distinguished from abandoned responsibility. (3) The Local Court does not consider that any amendment is warranted to any of the elements in the suite of dangerous driving offences.
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?	(1) The Local Court does not consider that the removal of the word 'very' is warranted. The word 'very' in its context serves as a critical modifier that underscores the intensity of what is sought to be conveyed in s 52A(7)(d). (2) The Local Court submits that the circumstance of aggravation relating to speeding (by more than 45 km/h over the prevailing speed limit applicable to a stretch of road) should remain unaltered. It is but one of the four serious instances of aggravation outlined in s 52A(7)(b). Any amendment, by way of reduction of the speed limit referred to therein, would make it inconsistent and markedly disparate with the high levels of aggravated impropriety inherent in the remaining circumstances of aggravation in s 52A(7).

Questions from consultation paper	Local Court of NSW submission
(3) Are any other changes needed to the circumstances of aggravation? If additional circumstances are needed, how should they be expressed?	(3) The Local Court submits that the four circumstances of aggravation referred to in s 52A(7) sufficiently cover the field with respect to egregious conduct in one's manner of driving. The insertion of any additional circumstances of aggravation is a matter for Government, however, any feature of aggravation which is considered as appropriate for insertion into s 52A(7) should be of an equally high level of impropriety as the remaining grounds, so as to avoid any attenuation in the provision more broadly.
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?	The Local Court considers that the creation of any new offences, the kind of conduct those new offences would cover, and any applicable maximum penalty, are matters for Government.
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?	The Local Court concedes that s 53 of the *Crimes Act 1900* (NSW) includes language that is archaic but, notwithstanding this, should remain intact as it serves a vital purpose in the hierarchy of driving offences. Importantly, it pertains to 'any bodily harm', as opposed to 'actual bodily harm' or 'grievous bodily harm'. To this end, the provision as currently framed continues to have work to do and is regularly deployed as a back up charge in prosecutions for more serious offences, where proof of all the requisite elements may not be forthcoming.
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?	(1) The Local Court considers that the creation of any new offence, the elements of that offence, and any applicable maximum penalty, are matters for Government. The Local Court does not, however, believe that there is any pressing need for intermediate offences between the existing dangerous driving and negligent driving offences, given that there is sufficient elasticity in the wide-ranging reach of existing offences in their simpliciter and aggravated iterations. (2) The Local Court considers that there are sufficient statutory provisions, including ss 53 and 54 of the *Crimes Act 1900* (NSW) which are available to be deployed in circumstances involving off-road driving.
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?	The Local Court submits that the offence of failing to stop and assist after a vehicle impact which causes death or grievous bodily harm in s 52AB of the *Crimes Act 1900* (NSW) is sufficiently robust and appropriately harmonised to balance the objectives sought to be achieved in administering the criminal justice system and the community's expectations and standards. Any future reforms to the maximum penalty are a matter for Government, guided by any change to these expectations and standards.

Questions from consultation paper	Local Court of NSW submission
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?	The Local Court does not consider that any amendments are required to s 51B of the *Crimes Act 1900* (NSW). There is considerable proficiency in judicial officers' case management and hearing of these types of matters, particularly Magistrates in the Local Court before whom these charges are invariably heard.
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?	The Local Court does not consider that any amendments are required to s 51A of the *Crimes Act 1900* (NSW). There is considerable proficiency in judicial officers' case management and hearing of these types of matters, particularly Magistrates in the Local Court before whom these charges are invariably heard.
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?	(1)-(3) The Local Court considers that the structure of any legislation which criminalises serious road crime offences is a matter for Government. The Local Court does, however, observe that there may be some marginal benefit to all court users, in terms of clarity, if all serious road crime offences were contained in a single piece of legislation.
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?	(1) The Local Court considers that any reforms to accessorial liability as they apply to serious road crimes is a matter for Government. (2) The Local Court considers that the creation of any new offences, the kind of conduct those new offences would cover, and any applicable maximum penalty, are matters for Government.

Questions from consultation paper	Local Court of NSW submission
3. PENALTIES	
Question 3.1: Maximum penalties for offences involving death (1) Are the maximum penalties for the following serious road crime offences involving death appropriate: (a) dangerous driving occasioning death (*Crimes Act 1900* (NSW) s 52A(1)), and (b) aggravated dangerous driving occasioning death (*Crimes Act 1900* (NSW) s 52A(2))? If not, what should the maximum penalties be? (2) 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?	(1) The Local Court is disinclined to comment on the sufficiency of maximum penalties or any perceived need to increase maximum penalties. The Local Court is cognisant, though, of the fact that any increase to maximum penalties is an indication that higher penalties should be imposed. So much is made clear from the decision in *R v Way* (2004) 60 NSWLR 186 at [52], wherein the Court held that: "Traditionally any intention on the part of the legislature that the offences should attract a heavier sentence has been manifested by an increase in the statutory maximum: *R v Sha* (1988) 38 A Crim R 334; *R v Peel* [1971] 1 NSWLR 247. The courts are expected to recognise and reflect that intention when sentencing offenders for offences after such amendments are made: *R v Slattery* (1996) 90 A Crim R 519 at 524 and *R v Jurisic* (1998) 45 NSWLR 209 at 227." An increase, however, may represent a change in the community feeling or expectation as to the sentence appropriate for such an offence, although it should be understood that such a change will not necessarily have a wholly determinative or conclusive effect: *R v Crump* (unreported, 30/5/94, NSWCCA). It is submitted that any consideration given to the suitability of statutory maximum penalties would benefit greater from a focus on whether or not a matter is strictly indictable. The Local Court's jurisdictional limit of 2 years' imprisonment for a single offence, or 5 years' imprisonment for multiple offences, means that the only practical use to which the maximum statutory penalties may be put is the backdrop against which objective seriousness is assessed, in accordance with the decisions of *R v Doan* (2000) 50 NSWLR 115 and *Park v The Queen* [2021] HCA 37. (2) Whether an Intensive Correction Order should be available for a certain offence is a matter for Government. However, as outlined in more detail in the response to Question 3.5 below, in general the Local Court considers it beneficial to have full access to the full suite of sentencing options in every case.

Questions from consultation paper	Local Court of NSW submission
Question 3.2: Maximum penalties for offences involving bodily harm (1) Are the maximum penalties for the following serious road crime offences involving bodily harm appropriate: (a) dangerous driving occasioning grievous bodily harm (*Crimes Act 1900* (NSW) s 52A(3)) (b) aggravated dangerous driving occasioning grievous bodily harm (*Crimes Act 1900* (NSW) s 52A(4)), and (c) injuries by furious driving etc (*Crimes Act 1900* (NSW) s 53)? If not, what should the maximum penalties be?	See response to Question 3.1(1) above.
Question 3.3: Maximum penalties for other serious road crime offences Are the maximum penalties for the following serious road crime offences appropriate: (a) failing to stop and assist after a vehicle impact causing death (*Crimes Act 1900* (NSW) s 52AB(1)) (b) failing to stop and assist after a vehicle impact causing grievous bodily harm (*Crimes Act 1900* (NSW) s 52AB(2)) (c) predatory driving (*Crimes Act 1900* (NSW) s 51A), and (d) failing to stop and driving recklessly or dangerously in response to a police pursuit (first and second or subsequent offence) (*Crimes Act 1900* (NSW) s 51B(1))? If not, what should the maximum penalties be?	See response to Question 3.1(1) above.

Questions from consultation paper	Local Court of NSW submission
Question 3.4: Default and minimum licence disqualification periods Is the licence disqualification scheme for serious road crime offences appropriate? If not, how should it change?	The Local Court's view is that the appropriateness of the licence disqualification scheme is a matter for Government. However, the Court also considers that in general, it is preferable that the judicial discretion to impose a penalty not be limited where possible.
Question 3.5: Mandatory minimum sentences Should any serious road crime offences in the *Crimes Act 1900* (NSW) have mandatory minimum sentences? If so, what should these be?	The Local Court's view is that the imposition of minimum sentences for certain serious road crime offences is a matter for Government. However, the Local Court generally considers it beneficial that the full suite of sentencing options be available to a judicial officer imposing a sentence, as this enables due regard to be had to the various aggravating and mitigating factors pertinent to each matter, assessed on the merits of each case and according to law. In addition to limiting the exercise of judicial discretion, the Local Court also observes that minimum sentences can reduce the incentive to plead guilty and consequently increase the Court's workload.
4. SENTENCING PRINCIPLES AND PROCEDURES	
Question 4.1: General sentencing principles and procedures 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?	The Local Court considers that the application of statutory sentencing provisions in the *Crimes (Sentencing Procedure) Act 1999* (NSW), buttressed by principles derived from relevant caselaw from appellate courts, contain sufficient guidance to allow experienced judicial officers to determine appropriate sentences for serious road crime offences, having regard to the specific circumstances of each case. These include: ▪ The purposes of sentencing in s 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW). ▪ The aggravating factors in s 21A(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW). ▪ The mitigating factors in s 21A(3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW). ▪ Insofar as the Local Court is concerned, the objective seriousness of offending conduct, which is to be assessed against the backdrop of the statutory maximums prescribed by Parliament rather than the jurisdictional maximums applicable in the Local Court: *R v Doan* (2000) 50 NSWLR 115 (Grove J at [35]); *Park v the Queen* [2021] HCA 37 at [19]; *Markarian v the Queen* (2005) 228 CLR 357; *Veen v The Queen (No 2)* (1988) 164 CLR 465. ▪ Guideline judgments delivered by the Court of Criminal Appeal.

Questions from consultation paper	Local Court of NSW submission
Question 4.2: Guideline judgment for dangerous driving offences Is the *R v Whyte* guideline judgment for dangerous driving offences still relevant and appropriate? If not, should there be a new guideline judgment?	The Local Court is disinclined to comment on the relevance or appropriateness of a guideline judgment of the Court of Criminal Appeal, or the need for any new guideline judgment in relation to serious road crime offences.
Question 4.3: Standard non-parole periods 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?	The Local Court submits that the penalties prescribed by Parliament for serious road crime offences, including the imposition of standard non-parole periods, is a matter for Government. The Local Court also notes that, as provided by s 54D of the *Crimes (Sentencing Procedure) Act 1999* (NSW), any standard non-parole period would only apply to matters dealt with on indictment in superior courts.
5. JURISDICTIONAL ISSUES	
Question 5.1: Table offences (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? (2) Should the offence of negligent driving occasioning death (*Road Transport Act 2013* (NSW) s 117(1)(a)) be made indictable or strictly indictable?	(1)-(2) It is to be noted that 94.7% of Table 1 offences are finalised in the Local Court, whilst 99.7% of all Table 2 offences are finalised in the Local Court. The appropriateness of jurisdiction was discussed by Deane J, albeit in a dissenting judgment, in *Kingswell v The Queen* (1985) HCA 72; 62 ALR 161 at 200-201: "The correct criterion of what constitutes a serious offence is that it not be one which can appropriately be dealt with summarily by justices or magistrates. Within the limit of those offences which are capable of being appropriately so dealt with, the question of whether a particular offence should, as a matter of legislative policy, actually be dealt with summarily by justices or magistrates is a matter for Parliament."
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?	See response to Question 5.1 above. The Local Court considers that in general, this is a question best answered by the Children's Court.

Questions from consultation paper	Local Court of NSW submission
6. THE EXPERIENCES AND RIGHTS OF VICTIMS	
Question 6.1: Existing rights, victim impact statement and support schemes 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?	The Local Court does not consider it is best placed to proffer a view on the sufficiency of matters relating to victims of serious road crimes.
Question 6.2: Restorative justice (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?	(1) The Local Court submits that it is a matter for Government whether restorative justice initiatives should be made available for serious road crime offences, and at what point in the criminal justice process that initiative should be invoked. If any such scheme is to be implemented, the Court submits it is clear that this should only occur with the consent of a victim, and be facilitated in a bespoke and carefully structured manner. (2) Section 21A(3)(i) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) permits the Court to take into account an offender's remorse, where an offender has provided evidence that they have accepted responsibility for their actions, and have acknowledged any loss, injury or damage caused and/or made reparation for that loss, injury or damage. The Local Court submits that this is provision is sufficiently broad for a sentencing Court to have regard to an offender's participation in a restorative justice program, in fixing a sentence within the broader context of a matter and having regard to the matters required to be taken into account on sentence (see also response to Question 4.1 above). (3) The Local Court submits that whether any restorative justice process for serious road crime offences should be legislated is a matter for Government.