



17 February 2023

NSW Law Reform Commission
Via Email: nsw-lrc@justice.nsw.gov.au

Preliminary Submission Review of Serious Road Crime

Introduction

The Road Trauma Support Group NSW (**RTSG**) is the voice of families impacted by road trauma. Our Vision is that no one should lose their life and no family should experience the death of a loved one through the criminal act of another road user (**Road Trauma Death**).

RTSG seeks to achieve our Vision by working with all stakeholders and act as an advocate for safer roads for all road users in NSW, with a special focus on trauma support, education, reform and research.

Established in March 2021 and officially launched in November 2022, RTSG NSW has the financial backing and support of the NSW Department of Transport and the NSW Police.

The Problem

At its most basic, the current incarnation of the criminal justice system in New South Wales, as it pertains to serious road crime:

- Regards vehicular homicide as a 'lesser species' of homicide, with reduced criminal culpability for persons killing others with the illegal use of a motor vehicle compared to other methods.
- Derives from provisions in the Crimes Act NSW which have not evolved for many years, are not aligned with current community standards and fall short of other laws in comparable jurisdictions (both within other states and territories of Australia and also jurisdictions such as the U.S., UK, New Zealand and Canada), for example with respect to the absence of minimum non-parole offences.
- Are applied by judicial officers and legal practitioners who have inbuilt historical biases in them with respect to serious road crime (serious road crime is not as criminally culpable as other serious crimes or forms of homicide) based on decades in the legal profession, often relying on previous case law and sentencing principles which only further embed and perpetuate those inbuilt historical biases.



- Has inbuilt flaws with respect to the presumption of bail, with ‘road killers’ nearly always granted bail and able to recirculate in the community amongst victims’ families pending the final judicial outcome.
- Does not afford victims’ families sufficient standing and respect, with the offender and the offender’s families often granted more rights and privileges than the victim and their families.
- Inappropriately places exclusive focus on the driver to the complete exclusion of other persons who have played a contributory role in the criminal behaviour by the defendant (e.g. other passengers in the vehicle and/or adults who have ‘turned a blind eye’ to their children’s illegal behaviour).
- Is not transparent and is lacking in key communication protocols, with many examples able to be provided by our members whereby key decisions, milestones and outcomes in the broader criminal justice system are not made known to victim’s families and the broader public.
- In many cases, the judicial process re-traumatizes victims and families, for example through completely inappropriate use of the term ‘accident’.
- Is not acting as a sufficient deterrent to members of the public, with the overall road toll in NSW broadly flat over recent years, but with an increased incidence of persons being killed on NSW roads though the criminal act of another, a fact attested to by the establishment and growth of RTSG.

In summary, the judicial system treats serious road crime as a lesser species of homicide, placing far too little value on human life lost as a direct consequence of serious road crimes, particularly when compared to other homicides and serious criminal offences.

Sentencing outcomes for serious road crimes, however they may be derived, often result in many offenders receiving no custodial sentence whatsoever. The same can not be said for homicides by other means. These outcomes are completely out of alignment with broader community expectations. Our members can provide many harrowing testimonies to evidence this.

The RTSG welcomes this review. It is time to rebalance the scales of justice and move our system from being a ‘legal system’ to a ‘justice system’ that delivers fair and just outcomes that appropriately recognises the moral and criminal culpability of the offending behaviour and which also seeks to place an appropriate value on the loss of human life and diminution in life caused by the offending behaviour, so as to drive community outcomes which reduce/eliminate the incidence of these tragic incidents.

Terms of Reference

Under the Terms of reference, we have been asked to consider and the RTSG provides the following responses:



1. whether the existing serious road crime offences, and the law on accessorial liability, are fit for purpose,
2. whether the maximum sentences for serious road crimes are appropriate,
3. the sentencing principles relevant to serious road crimes,
4. the experience and rights of victims of serious road crimes and their families in the criminal justice system, and
5. any other matters considered relevant.

Whether the existing serious road crime offences, and the law on accessorial liability, are fit for purpose.

For the reasons stated above, RTSG submits that the existing provisions of the *Crimes Act 1900 (NSW)* and the *Road Transport Act 2013 (NSW)* (*Road Transport Act*) as set out in the Background Note do not remain fit for purpose.

Whilst the list of offences in the Background Note appears complete and exhaustive, RTSG is of the view that the offences need to be **rewritten in new singular legislation to place greater community and judicial emphasis and focus to change behaviours on our roads by delivering penalty and judicial outcomes that better align with current community expectations.**

We recommend that the offences in the *Crimes Act* and *Road Transport Act* be combined into a new singular piece of legislation that covers the totality of all driving offences and which aligns with best practice derived from other comparable Australian and foreign jurisdictions.

In particular, we propose that serious road crime offences in new singular legislation **have minimum non-parole periods for each category of offence** so as to reset expectations and outcomes for the community, the judiciary and the legal profession.

With respect to the law on accessorial liability, RTSG submits that the law is wholly inadequate. We refer the NSW LRC to the case of *R v Davidson [2021] NSWDC 164* with respect to the offending behaviour of the passenger in that matter, as documented by Bennett SC DCJ.

Whether the maximum sentences for serious road crimes are appropriate

The RTSG submits that maximum sentences for serious road crimes in the *Crimes Act* and *Road Transport Act* may well be 'appropriate', but that final sentencing outcomes for serious road crimes are wholly inadequate and inappropriate as they rarely if ever approach the maximum sentence, for the following reasons:



- the inherent conservatism in the charging process in order to mitigate risk and secure convictions means the most appropriate maximum sentence for the offending behaviour is often not used as the relevant benchmark.
- the 25% early plea discount for admitting guilt in matters that are often non-controversial. This is compounded when the offender then appeals the first instance decision.
- that very few motor manslaughter charges are brought in NSW. RTSG would be particularly interested to understand how many such instances occur in NSW relative to other states and territories of Australia.
- that the judiciary is relying on 20-year-old sentencing guidelines – *R v Whyte* and often inappropriate use of comparable cases for incomparable situations, which implicitly embeds and compounds unsatisfactory outcomes.
- that there are no minimum non-parole periods applied for cases of serious road crimes.
- that common law sentencing principles (concepts such as accumulation for multiple offences and the principle of a ‘crushing sentence’) are subject to judicial uncertainty and current possible review by High Court – see *R v Davidson*.
- That offenders are given discounts for remorse, which is often untested and cannot be accurately measured.
- That minors are prosecuted in Children’s Court in respect of serious road offences.

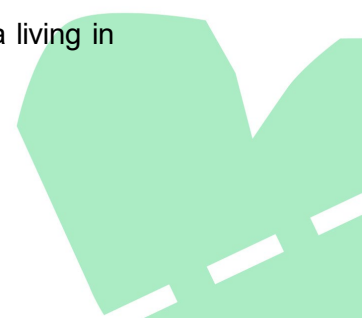
The sentencing principles relevant to serious road crimes

We refer the NSW LRC to relevant case law and to the Sentencing Council September 2022 Report for further insight and analysis.

The experience and rights of victims of serious road crimes and their families in the criminal justice system.

The RTSG has commissioned a report by research firm *fiftyfive5* that brings together the results from:

- A review of existing academic literature and road trauma support organisations globally;
- 2102 surveys of NSW residents;
- 18 in depth interviews with those intimately affected by road trauma living in NSW; and



- 20 interviews with experts who interact with families who have lost a loved one and those involved with road trauma in the areas of research, support and advocacy.

This Report is in the final stages of review before publication. We would be pleased to provide a full copy of the Report to NSW LRC once finalised. In the meantime, we can share some key findings and observations from the Report:

- There is widespread public support for broader legislative reform relating to criminal driving behaviour.
- 62% of persons are supportive of charging drivers with a form of 'vehicular manslaughter' when they kill someone on the road through their criminal act.
- 73% of respondents believe penalties for driving whilst on drugs should be harsher.
- 44% of respondents believe penalties for driving whilst on drugs should be harsher.

Additionally, RTSG has encouraged its members to make their own preliminary submissions to NSW LRC. We also anticipate many members will be willing to meet with NSW LRC participants at an appropriate juncture to share their experiences in more detail.

Any Other Matters Considered Relevant

RTSG makes the following additional points in this preliminary submission:

1. We highly recommend NSW LRC **compare and analyse relevant statutes and laws in other states and territories of Australia, comparable jurisdictions and also Scandinavian countries (which have world leading outcomes with respect to road fatalities) as they relate to the serious road crime** to form a view on best practice and the extent to which NSW compares.
2. Many serious road crimes are often carried out by **recidivists – particularly people with a poor driving history**. This ought to be part of NSW LRC's review – to review laws and procedures in NSW so that, so far as humanly possible, such persons are not able to drive on our roads before they kill an innocent person.
3. RTSG believes that persons who commit serious criminal offences on NSW roads (but who are fortunate in not killing or seriously injuring someone) ought to be exposed to a form of **Victims Impact Panel**, through which they can hear from victims and/ or victims' families of previous unrelated incidents of serious road crime, to mitigate the risk of recidivism by such persons. We would be happy to elaborate on this proposal.




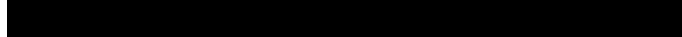
4. RTSG members' trauma is often reactivated by inappropriate and incentive **use of the term 'accident'** in cases of serious road crime by members of the legal profession and judiciary. RTSG asks that this practice be addressed and rectified.

5. **Parole** –

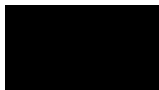


6. **Timing** – RTSG greatly respects the important work that NSW LRC undertakes and welcomes this Review. At the same time, we are concerned about the open-ended nature of this Review in terms of timing, noting that work would still be required post the Review to draft any necessary legislation reforming current statutes. Accordingly, we are keen to work with NSW LRC to expedite this Review so that meaningful change can occur at the earliest possible opportunity, so that innocent lives may be saved on NSW Roads.

Thank you for the opportunity to make this submission. RTSG and its members look forward to further engagement with NSW LRC throughout the course of 2023.

Please direct any initial enquiries or questions in relation to this submission to 


Yours sincerely,



Road Trauma Support Group NSW.

