Response to 10 November 2022 inquiry by
Mr. Mark Speakman, Attorney General of NSW,
To the Chairperson, NSW Law Reform Commission.

The responses provided relate to the request by the Attorney General for the Commission to review and report upon:

i) Whether the existing provisions of the nominated driving offences under the Crimes Act, 1900 (NSW), "…remain fit for purpose."

ii) Whether the maximum penalties for those offences remain appropriate.

iii) Sentencing principals according to statute and common law, and their relevance.

About the author

The author is a 62 year old Australian self-funded retiree. He retired from practice as a Solicitor in Newcastle, New South Wales. He obtained his legal qualifications through Sydney University, and following his postgraduate legal qualifications through the College of Law he was admitted as a Lawyer of the Supreme Court of New South Wales. He undertook additional studies in Jurisprudence with Harvard University Law School, as well as obtaining a postgraduate degree in Management from the University of Wollongong.

Prior to his career in the legal profession, he completed a 40 year career as a police officer with the New South Wales Police Force, retiring a decorated senior officer at the rank of Detective Chief Inspector. A significant period of this service was in the Major Crime Squad, as a Detective within both the Drug Squad and the Homicide Squad.

Consequently, the recommendations and proposals of the author draw upon the extensive experience and knowledge, as an Australian legal practitioner as well as a criminal investigator in Australia's largest Police Force for over four decades. As a result, in constructing the recommendations he makes within this document, the author has been able to utilize his significant insight into the needs of victims and survivors of violent criminal abuse from the plethora of experiences, including the experiences of victims and survivors of crime during their dealings with the various facets of the Justice System. A system with which these innocent victims and survivors are forced, through no fault or desire of their own, to endure, all to various degrees for the rest of their lives.

Whether the provisions of Section 52A(1) – (4) Dangerous Driving Offences remain fit for purpose.

To provide an accurate response to this inquiry necessitates identification of the express original purpose of the subject provisions. As is convention in doing so, the Second Reading of the relevant Bill has been examined accordingly to precisely ascertain that purpose, as expressed to Parliament on 27 October 1994, by the then Attorney General, Minister for Justice, and Executive President of the Legislative Council, The Hon. J.P.Hannaford.

As was stated by him on that occasion, in reference to the purpose for enacting the Sec 52A offences, *"…it is clear that one of the major problems with the legislation as it presently stands is that it fails to act as a strong deterrent."*[1] It is extremely notable that the measure of the ineffectiveness of the legislation which gave rise to the subject Bill was cited as being, *"Importantly, however, despite a large increase in road traffic and an equally large increase in the road toll, the penalties for culpable driving have remained unchanged."*[2]

In concluding the Second Reading to the House, the Attorney General illustrated the purpose of the Legislation as follows, *"This Bill will provide a stronger deterrent against these type of offences. In particular, the Government is sending a message to the community and to the courts that dangerous driving which kills or maims will be severely punished wherever and whenever it occurs."*[3]

When the subject provisions are considered in the context of the expressed purpose of their enactment as just provided, the following becomes the natural conclusions at which to arrive. As the objectives were directly related to the expressed concern with a rising road toll, and an attempt at a deterrent factor to incidences of dangerous driving behaviour, then recent observations of the current road toll undeniably allude to the appraisal that the subject Legislation can, at present be considered to be less effective than would have been envisaged. This is exacerbated if considered in the context of recent "Toward Zero" road toll reduction campaigns.

A viable, and even cost-effective solution is considered possible. It is to be illustrated in conjunction with the following recommendations as to penalty and sentencing principles. Arguably however, it is more achievable than mere increases to current statutory maximum penalties.

[1] NSW Parliament, *Legislative Council Hansard – Crimes (Dangerous Driving Offences) Amendment Bill,* Second Reading – 27 October 1994, p 2.
[2] Above, n 1.
[3] Above, n 1, p 4.

Maximum sentences remaining appropriate and the relevance of statutory and common law sentencing principles.

Further examination of the Second Reading of the subject legislation reveals the desired context of penalties considered by Parliament at the time to be of appropriate severity. That context was for the offences to be located within a scale of severity commenced with negligent driving and culminating with the sentence of 25 years imprisonment for the offence of Manslaughter. Indeed, the subject offences were enacted directly because of the observation, *"…recognized by Mr. Justice Carruthers in the matter of R v Trevor Brian Garlick…provide abundant evidence that this matter requires urgent attention of the Legislature. The maximum penalties are so low that it leaves a sentencing judge with insufficient scope for what may be thought to be an appropriate penalty…".* [4] The Attorney General concluded, stating in that Reading, *"The most important and wide-ranging proposals, however, are those which concern the penalties for dangerous driving. It is proposed that the maximum penalties be increased to more accurately reflect the seriousness of this offence and its relationship to the offence of manslaughter."*[5].

However, when the maximum penalties applicable to the subject offences are examined, they are similar to penalties for other offences. The diminution of the deterrence of these provisions is easily recognized as being the result of the same factors as the sentences deterrence regarding other criminal offences. It relates to the evolution of the processes undertaken in arriving at specific sentences against offenders. To express the circumstances in over simplistic terms, the appropriate sentences exist, however they are no longer imposed. Consequently, a swift, yet effective improvement to deterrence, and one which arguably would be significantly popular with the community in general is potentially available to be implemented. It is possible in the form of a paradigm shift within sentencing principles and processes.

Such a shift, and particularly the legal support for such a suggestion, shall be outlined in more detail shortly, however it can be summarized as follows. At the point of sentencing, the default position of the court is altered from presently, to one which in order to afford adequate consideration of the severity that Parliament, and therefore the community, attributes to the criminality of offence, holds that the conviction requires the imposition of the maximum penalty under the legislation for that offence. In terms of duration then, movement is down from that position because of information before the Court in mitigation.

Such a paradigm is in no manner as draconian as pundits to the contrary would declare. Significantly, support for this as a more appropriate adoption of the accepted principles in sentencing is evinced in reference to the Australian Government Australian Law Reform Commission.

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[4] Above, n 3.
[5] Ibid.

The Commission illustrated the appropriate existing Statutory and Common Law sentencing principles in place in every State and Territory of Australia as being, Punishment, Deterrence, Protection of the Community, Denunciation of the offender's conduct, and Rehabilitation of the offender.[6]

How then is this inciteful in relation to the suggested paradigm shift? Quite simply in fact. In examination of the nominated principles, only one relates to rehabilitation, whereas 80% of those principles relate to punishment, deterrence, community protection and denunciation of the abhorrent conduct. The failure to achieve 80% of the nominated objectives of sentencing is because of the disproportionate weight the Courts apply to the remainder.

Further criticism of rehabilitation as an effective goal is readily available, as well as being acceptable to the majority of the community. It is achieved, if necessary, through reference to one characteristic, and that is recidivism. Its prevalence and currency cannot be denied when one considers the crime rate issues presently being dealt with by the Queensland Government in the national media. What that Government still fails to grasp is that new offences are not the solution. What is necessary to negate recividivism is the admission it is due directly to the absence of deterrence in sentences imposed. Queensland legislation has appropriate sentences in place which are not being imposed and the result is now being illustrated in its juvenile crime rate. Again serving as fodder to the national media.

Obviously minimal action is necessary to ensure the subject legislation operates as "***fit for purpose"***, in the minds of the community as well as in reality. In accepting the purpose for which the legislation was enacted, as stated to Parliament, the outcome of the activities of the criminal justice system may be simply ensured to be fit for purpose.

As it suggests, in the context of the brief illustration to this point and which shall be extrapolated upon in this document, the factors relevant to the sentencing principles expressed by the Australian Law Reform Commission, and the High Court of Australia, which are applicable to every jurisdiction within Australia, requires the re-alignment of sentencing principles with those relevant factors. In doing so, a Government can illustrate its recognition of those principles, as an existent and more appropriate tenet of sentencing.

[6] Australian Government, Australian Law Reform Commission Report 133 (2018) – *Considerations To Be Taken Into Account When* Sentencing*, 6.7[5].*

R v WHYTE (2002) 134 A Crim R 53 and the issue of Guideline Judgements of the NSW Court of Criminal Appeal:

Section 36 Crimes (Sentencing Procedure) Act 1999 (NSW)

Spigleman C.J.,

"Guideline Judgement means a judgement containing guidelines to be taken into account by courts sentencing offenders, being:

(a) guidelines that apply generally; or

(b) guidelines that apply to particular courts or classes of courts, to particular offences or classes of offences, to particular penalties or classes of penalties, or to particular classes of offenders."[7]

Note: There is no reference or consideration whatsoever of any class or classes of Victim.

In describing the history of Guideline Judgements, His Honour illustrated the course as,

"Of particular significance…the legislative scheme now makes express provision for the effect of a guideline judgement. By reason of the combined effect of Sec 21A(4) and Sec 42A, and in light of the definition of what Sec 37A authorizes this Court to do, sentencing judges are obliged, by force of statute, to 'take into account' a guideline judgement given by this Court.".[8]

Discussion then moved to the realm of Custodial Sentences and their applicability in relation to offences of aggravated Dangerous Driving causing Death or Grievous Bodily Harm ;

"A custodial sentence will usually be appropriate unless the offender has a low level of moral culpability, as in the case of momentary inattention or misjudgement."

"Where the offender's moral culpability is high, a full-time custodial head sentence of less than 3 years (in the case of death) and 2 years (in the case of grievous bodily harm) would not generally be appropriate.".[9]

As an example of utilization of the proposed alteration of the sentencing paradigm, the above guideline could be altered to require that a full time head sentence of no more than 5 yrs below the maximum penalty was appropriate.

[7] R v Whyte (2002) 134 A Crim R 53 at [65].
[8] Ibid.
[9] Ibid.

What would the likely public response be in relation to such a sentencing guideline or principle ? What would be the comparable public response if, as was part of the sentence in R v Whyte, it was highlighted to the community that the offender lost his license for longer than his prison sentence?

Proposed factors relevant as Sentencing considerations.

As already eluded to, the factors to be proposed have already been nominated as legally appropriate, by both Common Law and Statutory sources. What is proposed is a more appropriate consideration of each, rather than the present preoccupation with mitigation of the onus for criminal conduct and perceived examples of rehabilitation. When a criminal advises they are rehabilitated, why it is stated is more significant than the fact it was stated. Is it not appropriate to take Judicial Notice of the proposition criminals are known for being dishonest ?

His Honour, Chief Justice Spigelman in his judgement in R v Whyte, provided some insight into the High Court of Australia in relation to sentencing processes when citing that court's decision in Wong v The Queen[10],

"His Honour concluded at [129] – [131] that such 'precise subclassifications' which were 'determined by reference ***only*** *to the quantity of the substance', were inconsistent with the legislation creating the offence.".*

In the context of that observation of Spigleman C.J., reference is made back to the 2nd Reading to the NSW Parliament of the Bill enacting the current dangerous driving offences when it was stated, *"…the Legislation as it presently stands…fails to act as a strong deterrent…This Bill will provide a stronger deterrent against these type of offences. In particular, the Government is sending a message to the community and to the courts that dangerous driving which kills or maims will be severely punished…"*[11] Obviously therefore, the sentence in the matter of R v Whyte, and any guidelines adopted in arriving at said sentence are, " inconsistent with the creating of the offence", and thus not fit for purpose.

Therefore, for sentences to appropriately reflect the purpose of the creation of the Legislation, they are required to adequately reflect the maximum penalty determined to be appropriate at the time of the creation of the offence. The proposed process to achieve this is the recommended sentencing paradigm shift.

[10] Wong v The Queen (2001) 76 ALJR 79.
[11] Above n 3.

In order to afford adequate consideration to all relevant sentencing factors, at the point of formulation of the sentence, the default position of the Court is altered from its present status to one which commences at consideration of the imposition of the maximum penalty the legislation creating the offence nominates. The Court's consideration of all factors the law nominates as relevant considerations in the formulation of sentence then operates in the sentencing process. It does so to reduce the applicable sentence from that maximum subject to the circumstances of the particular case. This information is placed before the Court in mitigation and subsequently tested by prosecutorial examination. Hence sentencing relates to the offence, the conduct of the offender, the community and the legislature, rather than purely on the offender.

The relevant factors to be considered in sentencing incorporate all those nominated in Statutory and Common Law and are as follows:

(a) the Legislature's expressed purpose for the legislation creating the offence; and
(b) the nominated maximum penalty; and
(c) the Common Law and Statutory purposes for which a court is to impose a sentence upon an offender:
    (i) ensure the offender is adequately punished for the offence, and
    (ii) prevent crime by deterring the offender and others from committing similar offences, and
    (iii) protect the community from the offender, and
    (iv) make the offender accountable for his or her actions, and
    (v) denounce the conduct of the offender, and
    (vi) recognize the harm done to the victim, and to the community, and
    (vii) promote the rehabilitation of the offender.

If any further support for this proposed process for sentencing is deemed required, it is irrefutably provided by the then Chief Justice of the High Court of Australia as follows,

"…the maximum penalty prescribed for an offence…does not mean that a lesser penalty must be imposed if it be possible to envisage a worse case…".[12]

[12] Veen v The Queen (No2) (1988) 164 CLR 465, per Mason C.J. at [15].