

Serious road crime

152

REPORT

February 2025

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Dear Attorney

Serious road crime

We make this report – Report 152: *Serious road crime* – pursuant to the reference to this Commission dated 10 November 2022.

Yours sincerely,



The Hon Tom Bathurst AC KC

Chairperson

17 February 2025

Table of contents

Participants	ix
Executive summary	xi
Recommendations	xix
1. Introduction	1
Background to the review	3
The scope of the review	4
The review focuses on certain <i>Crimes Act</i> offences	4
Some issues are beyond the scope of the review	5
Our approach to this review	7
The experiences of victims	8
Reform should be evidence based and principled	11
The criminal law is just one measure to address road safety	11
We consider unintended consequences	13
Our process	14
Chapter outline	15
2. Vehicular homicide/manslaughter	17
Vehicular homicide/manslaughter	18
A new offence could have an important symbolic role	18
Models for a new vehicular homicide/manslaughter offence	19
We do not support a new homicide/manslaughter offence	20
Law Part Code for manslaughter involving a vehicle	24
The rule in <i>Pullman</i>	25
Some considered the rule overly restrictive	25
The rule should not be legislatively reformed	25
3. Offences causing death or bodily harm	29
Overview of the offence hierarchy	30
The circumstances of dangerous driving	31

Some proposed additional circumstances	31
Additional circumstances should not be added	32
Existing circumstances should not change	35
The element of “at the time of impact”	36
Some considered “at the time of impact” too restrictive	37
The law is clear and strikes the right balance	38
Circumstances of aggravation	39
Review the aggravating circumstance of speed	40
“Very substantial impairment” should not change	43
Some groups supported adding new aggravating circumstances	45
Unlawful street racing should be added	46
No further aggravating circumstances should be added	47
A new specially aggravated offence	50
The NSW Police Force proposed a new offence	50
A specially aggravated offence should not be introduced	51
Impacts causing actual bodily harm	52
There should be dangerous driving occasioning actual bodily harm offences	52
Section 53 should be amended and modernised	57
A new mid-tier offence	58
Some considered that a new mid-tier offence would fill a gap	58
There should not be a new mid-tier offence	59
Negligent off-road driving is outside our scope	60
4. Other serious road crime offences	63
Failing to stop and assist	64
There should be an offence that covers impacts causing ABH	64
The offence is otherwise operating appropriately	65
Police pursuit	66
The police pursuit offence should not change	66
An aggravated police pursuit offence should not be introduced	67
Predatory driving	68
Some groups supported amendments	68
The offence should not be amended	69

Accessorial liability	70
Some argued new offences would play an important role	70
There should be no new accessory offences	71
5. Penalties	75
Maximum penalties	76
Support for increasing maximum penalties	77
The maximum penalties should not change	80
Mandatory minimum penalties	86
Some supported mandatory minimum sentences	87
There are strong arguments against mandatory sentences	88
Intensive correction orders	89
Some considered ICOs should not be available	90
ICOs should remain available	90
Rehabilitation programs as a sentence condition	94
Some supported rehabilitation programs	95
Programs should not be mandatory	95
Licence disqualification is outside the scope	96
Some supported changes to disqualification periods	96
6. Sentencing principles and procedures	99
Some issues are outside the scope of our review	100
Changes to the general sentencing framework	101
Regular reviews of judicial decisions should not be introduced	101
The aggravating factors should not change	102
Previous road offences should not count as a criminal record	104
Sentencing guidelines should not be introduced	105
Guideline judgment for dangerous driving	108
There are concerns the guideline is outdated	108
Others considered Whyte was relevant and appropriate	110
Standard non-parole periods	111
Dangerous driving offences are not appropriate for SNPPs	111
There are concerns about the SNPP scheme as a whole	113

We do not see a need for further guidance in sentencing	114
There could be unintended consequences of imposing SNPPs	114
7. Legislative structure and jurisdiction	117
A standalone serious road crimes Act	118
There was some support for a new Act	119
There should not be a standalone serious road crimes Act	119
A new division in the Crimes Act	121
There should be a new serious road crimes division	121
Serious road crime offences in the Local Court	122
Some argued serious road crimes should be strictly indictable	123
No Table offences should become strictly indictable	124
Negligent driving occasioning death	127
Some supported making it indictable or strictly indictable	127
The offence should not become indictable	128
Serious road offences in the Children's Court	130
Cases can be dealt with on indictment where appropriate	131
The Children's Court is appropriate for other cases	132
Only the most serious criminal offences should be SCIOs	132
Higher courts may not necessarily impose harsher sentences	133
The change may have unintended outcomes	133
8. Victims' experiences and their rights	135
Victims felt their needs were not met	136
The term "accident" should be avoided	136
More trauma-informed victim support services are needed	137
Victims received insufficient information about proceedings	139
Counselling for road crime victims may not be sufficient	140
Victims found the CTP scheme inadequate and inaccessible	142
Restorative justice should be considered further	143
There was overwhelming support for restorative justice	145
Processes should be voluntary and contextual	146
There was some support for flexibility in timing	147

Some support for taking participation into account on sentence	148
Support for restorative justice legislation	149
Victim impact panels may have benefits	150
Some existing laws should not change	152
Victim impact statements should not change	152
Remote evidence laws should not extend to road crime victims	153
Appendix A: Preliminary submissions	155
Appendix B: Submissions	159
Appendix C: Consultations	163

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Terms of reference

Pursuant to section 10 of the *Law Reform Commission Act 1967*, the NSW Law Reform Commission is asked to review and report by on the following matters:

1. Whether the existing provisions of the *Crimes Act 1900* (NSW) dealing with serious road and dangerous driving offences (in particular in Part 3 Division 6 and manslaughter) (**serious road crime**) and accessorial liability provisions remain fit for purpose.
2. Whether the maximum sentences available for serious road crimes remain appropriate.
3. Relevant sentencing principles in statute and the common law for serious road crimes.
4. The experiences and rights of victims of serious road crime and their families within the criminal justice system.
5. Any other matter the Commission considers relevant.

[Received 10 November 2022]

Executive summary

Introduction (Chapter 1)

- 0.1 The Attorney General asked us to review aspects of the law relating to serious road crime offences, through terms of reference received in November 2022.
- 0.2 The report presents our recommendations for reform. It follows preliminary submissions and consultations, a consultation paper released in December 2023, and submissions received, and consultations conducted, in response to that paper.
- 0.3 In accordance with the terms of reference, we focus on serious road crime offences in the *Crimes Act 1900* (NSW) (*Crimes Act*), along with the offence of manslaughter and accessorial liability.
- 0.4 Some issues are beyond the scope of the review. These include:
 - road crime offences that are not in the *Crimes Act*, and reforms to other Acts
 - broader reforms that are not specific to serious road crime offences or serious road crime victims, or that would affect the criminal law more broadly
 - some matters that relate to wider NSW Government policies, and
 - some issues relating to the investigation and prosecution of serious road crime offences.
- 0.5 We also only consider decisions in individual cases or sentencing outcomes to the extent that they are relevant to whether the law should be changed.
- 0.6 The review was informed in part by the experiences of victims and their families. We recognise the profound trauma and enduring suffering caused by serious road crimes, which is often compounded by the criminal justice process.
- 0.7 In addition to considering the lived experience of victims, we consider important law reform principles. These include that any reform should be principled and evidence-based, and capable of operating within the broader criminal framework. We also recognise that the criminal law is just one measure, among many, to address road safety, and may not be the most effective deterrent of risky driving behaviour.
- 0.8 We consider unintended consequences of reform proposals. This includes any potential disproportionate impact on particular groups in the community, including Aboriginal and Torres Strait Islander peoples. Any change that could negatively affect progress towards Closing the Gap targets should not be recommended without clear and compelling justification.

Vehicular homicide/manslaughter (Chapter 2)

- 0.9 Chapter 2 considers whether a new, specific offence of vehicular homicide/manslaughter should be introduced into the serious road crime offence hierarchy.
- 0.10 While we acknowledge that a new offence could have an important symbolic role, we conclude that a vehicular homicide/manslaughter offence should not be introduced. We do not think a new offence is necessary, where the existing manslaughter offence, in combination with other serious road crime offences, appropriately covers the wide range of conduct and criminality of driving that causes death. There is a risk that introducing a new offence could result in symbolic criminalisation only, without leading to more manslaughter charges, or the harsher sentencing outcomes that some submissions desired.
- 0.11 A new vehicular manslaughter offence could also cause confusion. It may be unclear how this offence would interact with the general manslaughter offence, particularly if the new offence had different or overlapping elements. It could cause confusion about where the new offence sat in the hierarchy of driving offences, and whether the existing offence would still have a role to play in the context of serious road crimes.
- 0.12 We recommend that the NSW Government introduce a new Law Part Code to record instances where the offence of manslaughter involves driving a motor vehicle. A Law Part Code is a unique code used to identify certain types of offending, and in some cases, the circumstances of an offence. It would allow for better data collection to inform policy in the future.
- 0.13 We do not consider legislative reform an appropriate way to address the common law rule that regulatory breaches, like traffic violations, cannot be an “unlawful act” for the offence of manslaughter by unlawful and dangerous act. We recognise the concerns raised about the restrictive nature of the rule, but consider that appellate courts are best placed to address any issues arising from the rule. Legislative reform could also have a broader impact on the general offence of manslaughter, beyond manslaughter offences that involve a motor vehicle.

Offences causing death or bodily harm (Chapter 3)

- 0.14 Chapter 3 considers whether the elements of the serious road crime offences that cause death or bodily harm are appropriate and operating effectively.
- 0.15 We do not recommend any reform to the elements of the offences of dangerous driving occasioning death and dangerous driving causing grievous bodily harm (GBH). In our view, the elements are clear and appropriate. The offences sufficiently cover

the spectrum of dangerous driving conduct and are broad enough to be applied flexibly, on a case-by-case basis.

- 0.16 We recommend adding participation in an unlawful street race or speed trial as a circumstance of aggravation for aggravated dangerous driving offences. The aggravated offence, and the higher maximum penalty, would apply where a person causes death or harm to another while participating in an unlawful race or speed trial. This recognises the high level of criminality involved in the conduct, and the significant danger it poses.
- 0.17 We also recommend that the NSW Government review the aggravating circumstance of speed and consider other models for determining what the speed threshold should be for aggravated dangerous driving offences. The law currently requires a person to have been travelling more than 45km/h above the speed limit at the time of impact, for the aggravated offences to apply.
- 0.18 We heard that the current single set limit does not reflect the varying degrees of risk of speeding in different areas. We consider several proposals for models to address this concern, including a percentage model, or a hybrid percentage and threshold speed. The NSW Government should consult with experts to determine the appropriate model and limit.
- 0.19 We conclude there should not be any other reforms to the circumstances of aggravation for aggravated dangerous driving offences.
- 0.20 We recommend introducing two new offences: dangerous driving occasioning actual bodily harm (ABH), and an aggravated version of that offence. These offences would improve the logic and coherence of the serious road crime hierarchy, and address concerns that the offence of wanton or furious driving, which is often charged in response to impacts causing ABH, is outdated.
- 0.21 The new offences would cover some, but not all, of the conduct currently captured by the wanton or furious driving offence. We recommend that the offence be amended and modernised, to make its scope and application clearer. It should continue to cover conduct that is not captured by any new dangerous driving occasioning ABH offence, such as horse riding related offending.
- 0.22 We discuss but do not recommend other proposals that were raised, including a new specially aggravated dangerous driving offence, and a new mid-tier offence such as reckless driving.
- 0.23 Finally, we outline why we determine that negligent off-road driving is outside the scope of the review.

Other serious road crime offences (Chapter 4)

- 0.24 Chapter 4 considers the elements of other serious road crime offences, and accessorial liability provisions.
- 0.25 If the recommended new offences of dangerous driving occasioning ABH are introduced, we recommend introducing a new offence of failing to stop and assist after a vehicle impact causing ABH. Currently, the *Crimes Act* offences of failing to stop and assist only apply if a victim died or suffered GBH. The proposed new offence would maintain consistency in the offence hierarchy and align with the new dangerous driving offences. There should not be any amendments to existing offences.
- 0.26 We do not recommend amendments to the offence of police pursuit or the offence of predatory driving. These offences remain fit for purpose.
- 0.27 We also consider general accessorial liability provisions, as they apply to serious road crime offences. Many victims felt a strong sense of injustice that people who may have had a role in a serious road crime were not held criminally responsible for their actions. They argued that there should be new accessory offences that captured this conduct.
- 0.28 However, we conclude that new accessory offences that apply to passengers and other people who may have had a role in a serious road crime should not be introduced. New accessory offences would be a significant and undesirable extension of criminal responsibility. Existing accessorial liability provisions, as well as other general offences, are already available in appropriate circumstances. We are also concerned that new accessory offences would carry a risk of over-reach, and disproportionately impact particular groups, including Aboriginal and Torres Strait Islander peoples and people in regional and remote areas.

Penalties (Chapter 5)

- 0.29 Chapter 5 considers whether the maximum penalties for serious road crime offences are appropriate, as well as other proposals relating to penalties for these offences.
- 0.30 We heard concerns that the penalties available for serious road crime offences did not adequately reflect the seriousness of the conduct, or effectively deter offending. Some suggested that these penalties had contributed to inadequate sentencing outcomes for the offences. Some groups proposed reforms to address concerns, including increasing maximum penalties, introducing mandatory minimum sentences, removing the availability of ICOs as a sentencing option, and increasing mandatory and default licence disqualification periods.
- 0.31 While we acknowledge these views, we do not recommend any changes to the current penalty regime. In our view, the regime is appropriate, and allows sentencing

courts scope to impose sentences that adequately reflect the criminality covered by the offences.

- 0.32 In our view, the current maximum penalties appropriately reflect the gravity of each serious road crime offence and provide courts sufficient scope to sentence offenders for a broad range of conduct. The maximum penalties are broadly consistent with those in other Australian jurisdictions.
- 0.33 Higher maximum penalties are unlikely to have any additional deterrent effect, but may disproportionately impact particular groups, such as Aboriginal and Torres Strait Islander peoples, young people and those in rural and regional communities.
- 0.34 Mandatory minimum sentences should not be introduced for any serious road crime offences. Introducing mandatory minimum sentences may reduce the number of early guilty pleas and lead to further delays in the criminal justice process. They may also inappropriately constrain judicial discretion and lead to inconsistent and skewed sentencing outcomes. Research shows that mandatory minimum sentences may not be effective at deterring crime, and could instead lead to cycles of reoffending through increased exposure to the custodial system.
- 0.35 Intensive correction orders (ICOs) should also remain available for all serious road crime offences except manslaughter (for which an ICO is already unavailable). Serious road crime offences cover a broad spectrum of criminality, and ICOs are an appropriate sentencing option in some cases. Removing ICOs as a sentencing option could unduly restrict the discretion of sentencing courts and in practice, could lead to both inappropriately harsh or lenient sentences being imposed. If more sentences of imprisonment are imposed, the risk of reoffending may increase.
- 0.36 We conclude that mandatory driver rehabilitation programs should not be introduced as a condition of sentence. Targeted rehabilitation programs can play an important part in improving driving behaviour and attitudes. The NSW Government should consider increasing the availability of these programs. While we consider that the programs have significant benefits, we do not think they should be made mandatory as condition of sentence. They may not be an appropriate option in every case and should be a matter for judicial discretion.
- 0.37 We outline the diverse views about the licence disqualification scheme, but do not make any recommendations for reform. Any change to the licence disqualification scheme would need to be considered in a wider review, as it would impact offences beyond serious road crime offences.

Sentencing principles and procedures (Chapter 6)

- 0.38 Chapter 6 considers proposed changes to sentencing principles and procedures that apply to serious road crime offences.

- 0.39 Many victims felt a strong sense of injustice at the sentencing outcomes of serious road crime offences. They did not think that the sentences imposed for serious road crimes appropriately reflected the seriousness of the offences, or adequately recognised the devastating harm caused to victims, their families and the wider community. To address these concerns, some submissions proposed reforms to general sentencing principles and procedures.
- 0.40 While we acknowledge the concerns we heard about the general sentencing framework, broad reforms to this framework are outside the scope of the review. As these changes would affect the sentencing of offences other than serious road crimes, they would need to be considered in a wider review relating to all offence types.
- 0.41 We also conclude that there should be no change to specific sentencing principles and procedures that apply to serious road crime offences. This includes amending aggravating factors covering the use of a weapon and violence, taking into account prior traffic offences as criminal convictions, implementing regular reviews of judicial decisions, and introducing a statutory scheme of sentencing guidelines for serious road crime offences in NSW.
- 0.42 There were mixed views about the *Whyte* guideline judgment that applies to dangerous driving offences. Some considered that it was outdated and out of step with community expectations, while others considered that it remained appropriate, relevant and workable.
- 0.43 A guideline judgment may only be reviewed, changed, or revoked by the Court of Criminal Appeal, either on its own motion or following an application by the Attorney General. We outline the views we heard in our review, which may inform any future consideration of this issue.
- 0.44 Finally, we conclude that standard non-parole periods (SNPPs) should not be introduced for dangerous driving offences. SNPPs represent the non-parole period that is in the middle of the range of seriousness for a particular offence, viewed objectively. However, dangerous driving offences cover a wide range of conduct, so it is difficult to identify such a mid-range.
- 0.45 Moreover, in circumstances where the NSW Sentencing Council recently raised significant concerns about the SNPP scheme as a whole and recommended it be reviewed, we do not consider it appropriate to recommend any expansion.

Legislative structure and jurisdiction (Chapter 7)

- 0.46 Chapter 7 considers proposed changes to the legislative structure of serious road crime offences, and the courts in which these offences can be heard.

- 0.47 Some submissions argued that a new, standalone road crimes Act would have an important symbolic and educative role. Though we conclude that a new serious road crimes Act should not be introduced, we do recommend that a new serious road crimes division be created in the *Crimes Act*. This change would improve the clarity and organisation of the offences in the Act, and could improve understanding.
- 0.48 Some argued that serious road crime offences were too serious to be heard in the Local Court, and should be removed from Table 1 and Table 2 of the *Criminal Procedure Act 1986* (NSW). While we acknowledge the seriousness of these offences, we conclude that there should not be any change to the existing Table offence classifications.
- 0.49 There are significant benefits in allowing scope for some offences to be heard in the Local Court, including that it can offer a quicker resolution of matters. The Local Court has sufficient sentencing scope to consider offences that fall toward the lower end of the spectrum of criminal culpability. The current Table offence classifications provide flexibility, and the prosecution (and in some cases the accused) can elect for the most serious cases to be heard in the District Court. This change could also reduce the scope for plea negotiations in some cases.
- 0.50 We heard suggestions that negligent driving occasioning death, which is currently a summary offence, should become indictable or strictly indictable. Some considered this would appropriately reflect the seriousness of the offence, while others suggested it would allow more flexibility and offer practical and operational benefits.
- 0.51 However, we conclude that negligent driving occasioning death should remain a summary offence. This appropriately reflects the level of criminal fault in the offence. Although making the offence indictable would allow a longer time for the investigation and charging process, we do not consider these operational benefits alone justify reform. Further, sentencing statistics suggest that the Local Court has adequate scope to properly sentence offenders for this offence.
- 0.52 Some submissions suggested that dangerous driving offences under s 52A of the *Crimes Act* were too serious to be heard in the Children's Court. Though these offences are serious, we conclude that dangerous driving offences should not be made serious children's indictable offences so that they are excluded from the Children's Court jurisdiction.
- 0.53 In all but the most serious cases, the Children's Court is best placed to deal with young persons, as a specialist court with a tailored framework for dealing with children. Dangerous driving offences cover a broad spectrum of criminality, and it would be undesirable if cases that fell at the lower end of the spectrum of seriousness were deprived of the Children's Court's specialist approach. There is already scope for judicial officers in the Children's Court to transfer the most serious offences to the District Court.

- 0.54 This change is unlikely to have a deterrent effect on young people and may have other unintended consequences. For example, it may disproportionately impact Aboriginal and Torres Strait Islander children and contribute to the overrepresentation of these young people in detention.

The experiences and rights of victims (Chapter 8)

- 0.55 Chapter 8 considers the concerns raised by serious road crime victims and their families about their rights and experiences in the criminal justice system. While we conclude that no laws should change in response to the terms of reference, we raise a number of important issues for NSW Government consideration.
- 0.56 There are a number of areas in which victims' experiences throughout the criminal justice process could be improved. The term "accident" is distressing to road crime victims, and should be avoided in connection with criminal proceedings for these offences. There is a clear need for more trauma-informed victim support services, particularly for victims in rural and remote areas. We heard concerns about the lack of information provided to victims about the criminal process, and the lack of available counselling. Some victims found the compulsory third-party scheme inadequate and inaccessible.
- 0.57 Some of the issues raised by victims may be considered in the Department of Communities and Justice ongoing review of the *Victims Rights and Support Act 2013* (NSW). Recent amendments to this Act also extend counselling under the Victims Support Scheme to family victims of road crime. This is in addition to the trauma support service, which provides immediate counselling and psychological support.
- 0.58 The NSW Government should consider whether restorative justice processes should be made more widely available. There was overwhelming support for restorative justice processes in the context of serious road crime offences, due to its potential benefits for both victims and offenders. There was also some support for Victim Impact Panels. These processes could meet some needs that are not met by the traditional criminal justice system.
- 0.59 While there are clear benefits to restorative justice, it is desirable that the NSW Government consider making these processes available for a wider range of offences, not only for serious road crimes. We outline the views we heard in the review, which may inform this consideration. Issues may include when restorative justice should be available in the criminal justice process, whether participation should be taken into account on sentence, and whether restorative justice should have a legislative basis.
- 0.60 Finally, we conclude that there should be no change to the victim impact statement scheme, and the remote evidence in chief provisions. In our view, the current scope of these laws is appropriate in the context of serious road crime offences.

Recommendations

2. Vehicular homicide/manslaughter

Recommendation 2.1: New Law Part Code

There should be a Law Part Code for manslaughter where the commission of the offence involves the accused person driving a motor vehicle.

3. Offences causing death or bodily harm

Recommendation 3.1: The aggravating circumstance of speed should be reviewed

The NSW Government should review the circumstance of aggravation relating to speed in s 52A(7)(b) of the *Crimes Act 1900* (NSW), to consider whether the limit should be lowered, or whether other models for identifying excessive speed should be adopted, such as nominating a percentage above the applicable speed limit.

Recommendation 3.2: Participation in an unlawful race or unlawful speed trial should be a circumstance of aggravation

Participation in an unlawful race or unlawful speed trial should be added as a circumstance of aggravation in s 52A(7) of the *Crimes Act 1900* (NSW).

Recommendation 3.3: New offences of dangerous driving occasioning actual bodily harm and amending wanton or furious driving

- (1) An offence of dangerous driving occasioning actual bodily harm should be inserted into s 52A of the *Crimes Act 1900* (NSW). The elements of this offence should be consistent with the offences of dangerous driving occasioning death and dangerous driving occasioning grievous bodily harm. It should carry a maximum penalty of 2 years' imprisonment.
- (2) An offence of aggravated dangerous driving occasioning actual bodily harm should also be inserted into s 52A of the *Crimes Act 1900* (NSW). The circumstances of aggravation in s 52A(7), amended to include unlawful street racing, should apply to this offence. It should carry a maximum penalty of 4 years' imprisonment.
- (3) Both offences should be Table 1 offences, in Schedule 1 of the *Criminal Procedure Act 1986* (NSW).
- (4) The offence of dangerous driving occasioning actual bodily harm should be available as an alternative verdict to the aggravated form of the offence.
- (5) The offence of wanton and furious driving in s 53 of the *Crimes Act 1900* (NSW) should be updated, so it only covers conduct that is not addressed by these new offences. The language of the offence also should be modernised.

4. Other serious road crime offences

Recommendation 4.1: Extend fail to stop and assist to impacts causing ABH

If new dangerous driving occasioning actual bodily harm offences are introduced, a new offence of failing to stop and assist after a vehicle impact causing actual bodily harm should be inserted into s 52AB of the *Crimes Act 1900* (NSW).

7. Legislative structure and jurisdiction

Recommendation 7.1: A new serious road crimes division

There should be a new division in the *Crimes Act 1900* (NSW) that incorporates the existing serious road crime offences contained in that Act.

1. Introduction

In brief

This report recommends some changes to certain serious road crime offences in NSW, the creation of certain new serious road crime offences that cover impacts causing actual bodily harm, and a new serious road crimes division in the *Crimes Act 1900* (NSW). However, we conclude that the serious road crimes framework is otherwise operating appropriately and does not require more significant reform. This chapter describes the scope of the review, and our review process. It also outlines the content of the report.

Background to the review	3
The scope of the review	4
The review focuses on certain <i>Crimes Act</i> offences	4
Some issues are beyond the scope of the review	5
Our approach to this review	7
The experiences of victims	8
Reform should be evidence based and principled	11
The criminal law is just one measure to address road safety	11
We consider unintended consequences	13
Our process	14
Chapter outline	15
1.1	On 10 November 2022, the NSW Attorney General asked us to review and report on aspects of the law relating to serious road crime. This report presents our conclusions in response to the terms of reference.
1.2	At the outset of the report, we acknowledge the profound, devastating and enduring impact serious road crime has on victims and their families. We were deeply moved by the personal stories of loss and grief we heard over the review. The harm serious road crime offences cause to victims, families and the community cannot be overstated.
1.3	In the report, we recommend changes to some serious road crime offences, and the creation of certain new serious road crime offences. These include:

- introducing new offences to cover vehicular impacts that cause actual bodily harm (ABH), and amending and modernising the offence of wanton or furious driving,¹ and
 - reviewing the circumstance of aggravation for dangerous driving offences that relates to speed,² and adding a new circumstance that captures unlawful racing or unlawful speed trial.
- 1.4 Another change we recommend is the introduction of a new division in the *Crimes Act 1900* (NSW) (*Crimes Act*) that incorporates the existing serious road crime offences contained in that Act.
- 1.5 These changes aim to improve the structure and clarity of the serious road crime offence hierarchy, and appropriately recognise the criminality of this conduct.
- 1.6 We also recommend introducing a Law Part Code for manslaughter,³ where the commission of the offence involves an accused person driving a motor vehicle. A Law Part Code is a unique code for offences dealt with in NSW, which are used in court statistics. This reform is intended to improve data collection for these offences.
- 1.7 We acknowledge the view, from victims and other groups, that the current framework does not appropriately recognise the seriousness of serious road crime offences, or the harm caused to victims.
- 1.8 While we understand this perspective, we conclude that, aside from the changes we recommend, the law governing serious road crime offences is generally appropriate and operating effectively.
- 1.9 However, we heard significant concerns about the experience of road crime victims and their families in the criminal justice system, and a number of suggestions for how this could be improved. These should be considered further by the NSW Government. We outline these concerns in chapter 8.
- 1.10 This chapter provides some background to the review, as well as outlining its scope and the approach we take to reform.

1. *Crimes Act 1900* (NSW) s 53.

2. *Crimes Act 1900* (NSW) s 52A(7)(b).

3. *Crimes Act 1900* (NSW) s 18(1)(b).

Background to the review

- 1.11 Road trauma continues to be a significant problem in NSW. In 2024, the preliminary data shows that 343 people lost their lives on NSW roads.⁴ Over the 12-month period ending June 2024, 10,596 people suffered serious injuries because of road crashes.⁵ Someone is killed or hospitalised every 50 minutes because of a crash on NSW roads.⁶
- 1.12 The Road Trauma Support Group (RTSG), the peak road crime victims' advocacy group in NSW, stated that "NSW is in the midst of a road crime and road trauma crisis".⁷
- 1.13 There are "unique stressors associated with losing a loved one due to fatal road crimes".⁸ A report commissioned by the RTSG described the experience as follows:
- The sudden, violent, and criminal nature of road trauma deaths brings a tidal wave of mental, emotional and physical damage to the victims' families, friends and the community.⁹
- 1.14 While suffering the grief and trauma of losing a loved one, family victims must also deal with the criminal justice process. At the same time, they may be contending with other financial and legal processes, media involvement and insurance schemes. These processes are often re-traumatising, and can impede victims' ability to move through the grieving process and heal.¹⁰
- 1.15 Against this backdrop, questions have been raised as to whether the law in NSW is appropriately dealing with serious road crimes, and whether victims' experiences in the criminal justice system could be improved.

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4. NSW Government, "Road Fatalities for NSW" (21 January 2025) *Towards Zero* (retrieved 22 January 2025).
5. Transport for NSW, *Quarterly Bulletin of Serious Injury Crash Data: Quarter Ending June 2024* (2024) preliminary, 2.
6. Transport for NSW, "2026 Road Safety Action Plan" (2025) *Towards Zero* <<https://towardszero.nsw.gov.au/roadsafetyplan>> (retrieved 22 January 2025).
7. Road Trauma Support Group NSW, *Submission RC16*, 7. We also received submissions from a large number of individual members of the RTSG in support of its reform proposals: See, eg, T Dibben, *Submission RC07*. Although we only cite the RTSG's submission in support of its reform proposals, we have noted and taken into account the support of its members.
8. Road Trauma Support Group NSW and fiftyfive5, *The Unheard Trauma of Fatal Road Crimes in NSW* (2023) 5.
9. Road Trauma Support Group NSW and fiftyfive5, *The Unheard Trauma of Fatal Road Crimes in NSW* (2023) 5.
10. Road Trauma Support Group NSW and fiftyfive5, *The Unheard Trauma of Fatal Road Crimes in NSW* (2023) 5–6.

The scope of the review

- 1.16 The terms of reference and our expertise as a law reform body guide this review's considerations and recommendations.

The review focuses on certain *Crimes Act* offences

- 1.17 Under the terms of reference, we were asked to review and report on:
1. Whether the existing provisions of the Crimes Act 1900 (NSW) dealing with serious road and dangerous driving offences (in particular in Part 3 Division 6 and manslaughter) (serious road crime) and accessorial liability provisions remain fit for purpose.
 2. Whether the maximum sentences available for serious road crimes remain appropriate.
 3. Relevant sentencing principles in statute and the common law for serious road crimes.
 4. The experiences and rights of victims of serious road crime and their families within the criminal justice system.
 5. Any other matter the Commission considers relevant.
- 1.18 The terms of reference require us to consider serious road crime offences in the *Crimes Act*. These include:
- manslaughter¹¹
 - dangerous driving occasioning death or grievous bodily harm (GBH), and the aggravated versions of these offences¹²
 - causing ABH by wanton or furious driving, racing or other misconduct or by wilful neglect¹³
 - failing to stop and assist after a vehicle impact causing death or GBH¹⁴
 - failing to stop and driving recklessly or dangerously in response to a police pursuit,¹⁵ and
 - predatory driving.¹⁶
- 1.19 The review also includes accessorial liability provisions in the context of serious road crime.

11. *Crimes Act 1900* (NSW) s 18(1)(b).

12. *Crimes Act 1900* (NSW) s 52A.

13. *Crimes Act 1900* (NSW) s 53.

14. *Crimes Act 1900* (NSW) s 52AB.

15. *Crimes Act 1900* (NSW) s 51B.

16. *Crimes Act 1900* (NSW) s 51A.

- 1.20 Where it is necessary to present a complete picture of how serious road crime offences are structured, we also look at comparable offences in the *Road Transport Act 2013* (NSW) (*RTA*).
- 1.21 We acknowledge that some submissions raised concerns about the operation of road crime offences in the *RTA*, and the penalties for those offences.¹⁷ However, as offences under the *RTA* are not within the scope of our terms of reference, we only consider them to the extent that they impact or overlap with serious road crime offences in the *Crimes Act*.

Some issues are beyond the scope of the review

General reforms that would impact criminal offences more broadly

- 1.22 In this report, we do not recommend broader reforms that are not specific to serious road crime offences, or that would affect the criminal law more broadly. We cannot recommend changes to these general laws and practice without research and consultation about the impact in relation to all offences, not just serious road crimes. These include, for example:
- reforms to the criminal justice process (for example, the rights of accused persons in criminal proceedings generally),¹⁸ and
 - reforms to the general sentencing framework (for example, to aggravating and mitigating factors and sentencing discounts).¹⁹
- 1.23 We outlined the general sentencing framework for serious road crime offences in a consultation paper, which we released for public comment in December 2023.²⁰

Issues that would impact all victims, not just road crime victims

- 1.24 We do not make recommendations regarding reforms that would impact victims of crime generally, rather than victims of serious road crimes specifically. These reforms would need to be considered in a review that explores the experience of all victims more broadly.
- 1.25 However, we think it is desirable that these issues be considered further by the NSW Government. For that reason, we have explored the issues further in chapter 8.

17. See, eg, S Garz, *Submission RC17*, 2; D Wakes-Miller, *Submission RC13*, rec 3c, 38–42.

18. See, eg, M Duke, *Submission RC48*, 10–15.

19. See, eg, D Wakes-Miller, *Submission RC13*, 47; Road Trauma Support Group NSW, *Submission RC16*, 28–29; NSW Police Force, *Submission RC40*, 7–8; F Gilroy, *Submission RC03*, 10–14; T Blake, *Submission RC19*, 10.

20. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [4.5]–[4.70].

Reforms to legislation other than the *Crimes Act*

- 1.26 Some submissions raised concerns about legislation other than the *Crimes Act*. These included the *Bail Act 2013* (NSW), the *Criminal Records Act 1991* (NSW), the *Crimes (Administration of Sentences) Act 1999* (NSW) and the Acts governing the operation of the Compulsory Third Party insurance scheme.²¹
- 1.27 While there may be issues with these Acts, we only consider serious road crime offences and accessorial liability in the *Crimes Act*, and victims' experiences in the criminal justice system. Changes to these Acts could also impact offences other than serious road crime offences, or the criminal justice system more broadly. These would need to be considered in relation to all offences.
- 1.28 Our consultation paper sought views about the licence disqualification scheme under the *RTA*, after it was raised by some preliminary submissions.²² On further consideration, the scheme falls outside the scope of the review. This is because our terms of reference focus on serious road crime offences in the *Crimes Act*. Moreover, any changes to the scheme would impact a wider range of offences, so would require broader consideration.

Matters of government policy, including resourcing and education

- 1.29 Addressing road safety requires a multi-pronged and system wide approach, in which the criminal law plays only one part. Non-legal mechanisms have a significant role to play. Some issues raised with us relate to wider NSW Government policies. These included:
- matters relating to the development of policy and other mechanisms to address road trauma, that go beyond the criminal justice response in the *Crimes Act*²³
 - resourcing of victim supports, including to justice agencies²⁴
 - creating community resources for victims of road crime²⁵
 - reporting of road deaths in NSW,²⁶ and
 - community education about road safety,²⁷ and measures to change attitudes about driving.²⁸

21. See, eg, D Wakes-Miller, *Submission RC13*, rec 8, rec 9; T Blake, *Submission RC19*, 11.

22. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [3.85]–[3.95].

23. See, eg, D Wakes-Miller, *Submission RC13*, 51; Road Trauma Support Group NSW, *Submission RC16*, rec 6; W Chen, *Submission RC31*, 10; NSW Police Force, *Submission RC40*, 2.

24. Law Society of NSW, *Submission RC12*, 1; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 20.

25. Road Trauma Support Group NSW, *Submission RC16*, 34.

26. Road Trauma Support Group NSW, *Submission RC16*, rec 7; D Wakes-Miller, *Submission RC13*, 15.

27. See, eg, K Griffith, *Submission RC35*, 9; NRMA, *Submission RC73*, 1.

28. Road Trauma Support Group NSW, *Submission RC16*, 8.

- 1.30 Without wishing to detract from their importance, we do not make specific recommendations about these wider policy and resourcing issues. However, to help inform future government decision-making, we raise some of these issues for the NSW Government's consideration in chapter 8.

Issues relating to investigations and prosecutions

- 1.31 In this report, we do not make recommendations concerning operational and policy issues concerning police and prosecutors, or legislative reform concerning police and prosecutorial powers. These issues either relate to pieces of legislation other than the *Crimes Act* or are appropriately dealt with by prosecutorial agencies. They include:
- the conduct of police investigations and criminal prosecutions, including policies and procedures in relation to the gathering of evidence²⁹
 - the enforcement of road rules, such as the use of technology to capture breaches³⁰ and policing of road crime³¹
 - police powers in relation to the investigation of serious road crime offences³²
 - the operation of the Witness Assistance Scheme by the Office of the Director of Public Prosecutions,³³ and
 - charging decisions of prosecutors in individual cases, and prosecutorial procedures.³⁴
- 1.32 However, we raise some of these issues for the NSW Government's consideration in chapter 8.

Individual cases

- 1.33 As a law reform body, we can only consider judicial decisions and sentencing outcomes to the extent that they are relevant to whether the law should be changed. This report does not comment on individual cases beyond that.

Our approach to this review

- 1.34 In this section, we outline how we approached the review.

29. See, eg, M Duke, *Submission RC48*, 10–15; L Woolston, *Submission RC05*, 3; D Wakes-Miller, *Submission RC13*, 10; Confidential, *Submission RC25*, 9; Confidential, *Submission RC29*, 14.

30. Road Trauma Support Group NSW, *Submission RC16*, 23, rec 3d.

31. See, eg, W J Chen, *Submission RC31*, 10; D Wakes-Miller, *Submission RC13*, 16; NRMA, *Submission RC73*, 1.

32. See, eg, NSW Police Force, *Submission RC40*, 8, 10.

33. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 20.

34. See, eg, M Duke, *Submission RC48*, 13.

- 1.35 The lived experiences of serious road crime victims were a key part of our consideration. Across the report, we use the term “victim” to refer to both direct victims (that is, the person directly harmed or killed) and family victims (surviving family members of deceased victims, both from immediate and extended families). Where necessary, we specify the type of victim we are talking about.
- 1.36 We were also guided by a number of important law reform principles. These include:
- any reform should be evidence based and principled, and capable of operating within the broader criminal law framework
 - the criminal law is just one way to address road safety, and may not be the most effective deterrent of risky driving behaviour, and
 - we consider unintended consequences of reform proposals, including the potential impact on Aboriginal and Torres Strait Islander peoples and progress towards Closing the Gap targets.

The experiences of victims

- 1.37 We would like to express our gratitude to the people who took the time to tell us their personal stories. We understand that the process of recounting these experiences was extremely difficult, and at times re-traumatising.
- 1.38 We acknowledge that there is no universal response to the trauma and grief caused by serious road crime offences. People’s experiences in the criminal justice system are unique and vary case by case. However, some common themes emerged in the submissions we received and the consultations we conducted as part of our review.
- 1.39 The accounts we heard evidenced the devastating and enduring impact of serious road crime offences. For family victims, their lives have been irrevocably changed.³⁵ Their grief is a life sentence.³⁶ Nothing can bring their loved ones back, and they carry this loss and trauma every day.³⁷
- 1.40 For direct victims, the injuries suffered can be debilitating and lifelong. In addition to their physical harm, they may face the loss of “independence, autonomy, income, future prospects, relationships and more”.³⁸ Their family and friends may face ongoing caregiving responsibilities, as well as the emotional toll of seeing their loved one suffer.³⁹

35. See, eg, Z Beleff, *Submission RC30*, 10.

36. See, eg, D and S McCann, *Submission RC52*, 9; S Hussein, *Submission RC55*, 9.

37. N Francisco, *Submission RC44*, 9.

38. RMIT University, Centre for Innovative Justice, *Preliminary Submission PRC80*, 2.

39. RMIT University, Centre for Innovative Justice, *Preliminary Submission PRC80*, 2.

- 1.41 We heard from parents, grandparents, siblings, partners, family members and friends of people who died as a result of a serious road crime offence. They told us about the profound sense of shock and disbelief they experienced when they found out about the sudden and violent death of their loved ones.⁴⁰ For example, a mother said that her “world imploded” when she found out about the death of her son.⁴¹
- 1.42 We heard that families and friends grieved not just for their loss, but also for the future that was taken from the deceased. This was particularly acute where the direct victim was a child, with so much of their life ahead of them.⁴² A cousin of a child killed in a crash described the grief her family experienced:
- The grief ... There is no correct word to describe it. It was unlike anything I had ever seen, witnessed, or endured. It was the deepest, ugliest, most awful type of grief. Everyone was broken. I did not even recognise my aunt, uncle, and cousins. It was like they were gone. I was staring at heartbroken creatures with the life dimmed out of their eyes.⁴³
- 1.43 Victims told us they often felt they had nowhere to turn for support in the immediate aftermath of the crash, and were left to grapple with the immense emotional and psychological challenges alone.⁴⁴ In the months and years that followed, many experienced significant mental health challenges that impacted every aspect of their lives.⁴⁵ This had ripple effects in communities and support networks, who had to grapple with their own trauma and grief while trying to provide support to the victim’s immediate family.⁴⁶
- 1.44 Many victims that we heard from were horrified by the criminal actions of the alleged offender. They hoped that the driver would be brought to justice through the criminal justice system.⁴⁷
- 1.45 However, we heard that the justice system did not offer the resolution that many were hoping for. The criminal proceedings were often protracted, and victims

40. See, eg, K Dokmanovic, *Submission RC11*, 11; C Walters, *Submission RC26*, 9; S Hussein, *Submission RC55*, 9; M Duke, *Submission RC48*, 10.

41. See, eg, T Blake, *Submission RC19*, 8.

42. See, eg, N Francisco, *Submission RC44*, 9; D and S McCann, *Submission RC52*, 9; Anonymous, *Submission RC54*, 9; Anonymous, *Submission RC59*, 9.

43. S Hussein, *Submission RC55*, 9.

44. See, eg, D Wakes-Miller, *Submission RC13*, 11; K Dokmanovic, *Submission RC11*, 11; T Blake, *Submission RC19*, 11.

45. See, eg, N Francisco, *Submission RC44*, 9.

46. See, eg, M Fogarty, *Submission RC65*, 9; C Walters, *Submission RC26*, 9; J Morgan, *Submission RC37*, 9; N Sinclair, *Submission RC39*, 8–9; M Pritchard, *Submission RC43*, 1; N Cox, *Submission RC56*, 9; V Popovic, *Submission RC60*, 9; Anonymous, *Submission RC68*, 8–9.

47. See, eg, K Dokmanovic, *Submission RC11*, 11.

relieved their trauma at each court appearance.⁴⁸ Some reported that they were not given enough information about the process.⁴⁹

- 1.46 We were also told that the uncertainty of the court outcome and continual re-traumatisation prevented some victims and families from finding closure while proceedings were on foot.⁵⁰ Many felt frustrated with aspects of the investigation and prosecution, noting that the rights of accused persons differed from those afforded to victims and their families.⁵¹ Some struggled to see accused persons released on bail and continuing with their lives, when their loved one had their life taken from them.⁵²
- 1.47 When it came to sentencing, some families told us they felt distressed that the proceedings focussed so strongly on the offender's personal circumstances, rather than on their loved one's life and the harm caused by the crime.⁵³ Some found it difficult to hear about the offender's subjective case and their mitigating factors, which were sometimes perceived as excuses for breaking the law.⁵⁴
- 1.48 Many victims and families expressed their utter devastation at the sentence that was ultimately handed down.⁵⁵ They struggled to reconcile the sentencing outcome with their lived experience of grief and loss. Some did not think it was fair that their lives had been altered forever, while serious road crime offenders only had their lives disrupted for the duration of their sentence.⁵⁶
- 1.49 Many said they could not comprehend the discrepancy between the charges and sentencing outcomes for serious road crimes causing death, compared with those for murder and manslaughter offences in other contexts. They felt their loved one's death had not been taken seriously by the criminal law, because of the circumstances in which it occurred.⁵⁷

48. See, eg, K Dokmanovic, *Submission RC11*, 11.

49. See, eg, M Duke, *Submission RC48*, 12–13; Road Trauma Support Group NSW, *Preliminary Submission PRC72*, 2.

50. See, eg, T Blake, *Submission RC19*, 10.

51. D Wakes-Miller, *Submission RC13*, 13; T Blake, *Submission RC19*, 10; M Duke, *Submission RC48*, 10–11.

52. See, eg, C McCrea, *Submission RC33*, 8.

53. See, eg, K Dokmanovic, *Submission RC11*, 11.

54. Victims of Crime Assistance League (Hunter), *Preliminary Submission PRC84*, 4; T Blake, *Submission RC19*, 10–11.

55. See, eg, K Dokmanovic, *Submission RC11*, 11; D Wakes-Miller, *Submission RC13*, 13–14; T Blake, *Submission RC19*, 11; M Duke, *Submission RC48*, 11.

56. See, eg, T Blake, *Submission RC19*, 11.

57. See, eg, K Dokmanovic, *Submission RC11*, 11; T Blake, *Submission RC19*, 9; Road Trauma Support Group NSW, *Submission RC16*, 3.

- 1.50 However, we also heard that other victims had more positive experiences in the criminal justice system. For some victims, the offender's acknowledgement of responsibility and the sentence imposed helped them find closure.⁵⁸ Some forgave the offender and hoped that they could also heal and move on from the crime. For example, in one case, the parents of a deceased child victim expressed that they had forgiven the offender and asked the court to consider alternatives to a prison sentence.⁵⁹
- 1.51 For those who had negative experiences in the criminal justice system, their strong sense of injustice at the law's response to serious road crimes has motivated their advocacy. They told us that they do not want others to go through what they did. The RTSG is seeking urgent legal, policy and social change. They are advocating to reduce the number of criminal road deaths, hold offenders accountable and improve the experience of victims.⁶⁰

Reform should be evidence based and principled

- 1.52 Any reform to serious road crime offences should be evidence based and consistent with established criminal law principles.
- 1.53 We carefully consider whether there is evidence to support each reform option we raise in our review. This includes consideration of whether the option would have the intended outcome, how it would work within the wider criminal justice framework, and whether it would have any unintended consequences.
- 1.54 Another important consideration is that serious road crimes exist within a broader framework of criminal offences. Like all criminal offences, they are subject to general criminal and sentencing principles, and must be able to operate consistently with those principles. It would not be appropriate or desirable for serious road crime offences to be subject to a different set of legal principles from other crimes in NSW.

The criminal law is just one measure to address road safety

- 1.55 The serious road crime offences in the *Crimes Act* are an important part of the road safety framework. However, the role of serious road crimes in improving road safety may be limited. There is evidence to suggest that other measures, including non-legal measures, may be more effective in achieving this objective.

58. RMIT University, Centre for Innovative Justice, *Preliminary Submission PRC80*, 3.

59. T Ibrahim, "Maha Al-Shennag Sentenced for Crashing Car into Greenacre School Classroom, Killing Two Boys" (5 October 2021) ABC News <<https://www.abc.net.au/news/2021-10-05/maha-al-shennag-sentenced-over-greenacre-school-crash/100514056>> (retrieved 6 December 2024).

60. See, eg, D Wakes-Miller, *Submission RC13*, 16–17; T Blake, *Submission RC19*, 9; Road Trauma Support Group NSW, *Submission RC16*, 6–7.

- 1.56 Reducing road trauma requires a multifaceted and system wide approach. For instance, the Safe Systems approach, which was adopted in the NSW 2026 Road Safety Action Plan, has four key elements: safe roads, safe speeds, safe vehicles and safe people.⁶¹
- 1.57 Evidence suggests that enforcement and policing of traffic offences (as opposed to serious road crimes) may have the greatest deterrent effect on driver behaviour. Researchers have found that the “most powerful deterrent effects on offending behaviour” arise where people perceive that they are very likely to be apprehended for breaking the law.⁶² This effect is most powerful when the punishment comes soon after the criminal act.⁶³
- 1.58 This research suggests that road safety can effectively be improved by measures that contribute to the perception that there is a high risk of being apprehended. These include visible policing operations, detection measures such as speed cameras and media campaigns about these measures. For example, the introduction of Random Breath Testing in Australia has been recognised as one of the “primary reasons” alcohol-related crashes have significantly reduced in Australia over time.⁶⁴
- 1.59 In the UK, it was found that criminal offences covering driving causing death, did little to promote general deterrence or improve road safety. Generally, dangerous or careless drivers thought that they were in control, and did not expect to cause any harm. If unsafe drivers did not think causing death or serious harm was a realistic possibility of their driving, they were not deterred by specific criminal offences that targeted driving causing death.⁶⁵
- 1.60 Moreover, the relationship between the severity of penalties and deterrence is unclear. While some research found that the perceived severity of sanctions reduced unlawful behaviours, this relationship was only weak. By contrast, other research found the severity of penalties did not have a significant deterrent effect,

61. Transport for NSW, “2026 Road Safety Action Plan” (2024) <<https://towardszero.nsw.gov.au/roadsafetyplan>> (retrieved 6 December 2024).

62. J D Davey and J E Freeman, “Improving Road Safety through Deterrence-Based Initiatives” (2011) 11 *SQU Medical Journal* 29, 30. See also S Cunningham, “Punishing Drivers Who Kill: Putting Road Safety First?” (2007) 27 *Legal Studies* 288, 303–304.

63. J D Davey and J E Freeman, “Improving Road Safety through Deterrence-Based Initiatives” (2011) 11 *SQU Medical Journal* 29, 30.

64. J D Davey and J E Freeman, “Improving Road Safety through Deterrence-Based Initiatives” (2011) 11 *SQU Medical Journal* 29, 34.

65. S Cunningham, “Punishing Drivers Who Kill: Putting Road Safety First?” (2007) 27 *Legal Studies* 288, 302–307.

with some even finding “crime rates actually increas[ed] with increases in the severity of the penalty”.⁶⁶

- 1.61 There was also evidence to suggest that increasing maximum penalties did not produce a corresponding increase in deterrence.⁶⁷ It has been recognised that “increased likelihood of punishment acts as a greater deterrent than increased severity”.⁶⁸
- 1.62 Of course, deterrence is just one of the purposes of sentencing, and the criminal law more broadly. However, one of the concerns that prompted this review was the need to improve road safety and reduce serious road crime. Against that background, these research findings are significant in considering whether proposed reforms would have the intended effect.

We consider unintended consequences

- 1.63 Another important consideration that we keep in mind is whether any reform option would have unintended consequences.
- 1.64 We are also concerned about unintended consequences for particular groups, including Aboriginal people and young people.
- 1.65 As outlined in the consultation paper, Aboriginal people are disproportionately over-represented in finalised charges for all serious road crime offences.⁶⁹
- 1.66 In our view, any change that could negatively affect progress towards Closing the Gap targets should not be recommended without a clear and compelling justification.⁷⁰ NSW, along with all other Australian governments, has committed to close the gap on incarceration rates and other key measures. This includes a commitment to reduce the rate of Aboriginal and Torres Strait Islander adults incarcerated by at least 15%, and to reduce the incarceration rate of Aboriginal and

66. J D Davey and J E Freeman, “Improving Road Safety through Deterrence-Based Initiatives” (2011) 11 *SQU Medical Journal* 29, 30.

67. D Ritchie, *Does Imprisonment Deter? A Review of the Evidence*, Sentencing Matters (Victoria, Sentencing Advisory Council, 2011) 2. See also Australian Capital Territory, *Legislative Assembly Standing Committee on Justice and Community Safety Report No 16: Inquiry into Dangerous Driving, Government Response* (2023) 2.

68. J R Brubacher and others, “Reduction in Fatalities, Ambulance Calls and Hospital Admissions for Road Trauma after Implementation of New Traffic Laws” (2014) 104 *American Journal of Public Health* 89, 89.

69. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [3.17], table 3.1.

70. Aboriginal Legal Service (NSW/ACT) Ltd, *Preliminary Submission PRC88*, 2.

Torres Strait Islander young people (10–17 years) by at least 30%, by 2031.⁷¹ Currently, these targets are not on track in NSW.⁷²

- 1.67 Young people are also disproportionately impacted by road crime offences.⁷³ For instance, data obtained by Youth Justice NSW found that driving offences were the fourth most common offence proceeded against young people over a ten year period.⁷⁴ It would be concerning if any reform was likely to increase the number of young people, including Aboriginal young people, in detention. As Youth Justice NSW pointed out:

Youth detention is closely associated with incarceration later in life as an adult, in addition to other negative welfare outcomes, so avoiding control orders for young people can positively change the life trajectory of a young person.⁷⁵

- 1.68 We carefully consider any reforms that could lead to harsher or longer sentences for these groups.
- 1.69 We also consider whether any reforms might lead to an undesirable increase in the complexity of the law or burden on the courts, or contribute to delays in the criminal justice process.

Our process

- 1.70 On 10 November 2022, we received terms of reference asking us to review aspects of the law relating to serious road crime offences.
- 1.71 On 28 November 2022, we released a short background note on serious road crime offences. We also invited preliminary submissions on issues relevant to the terms of reference.
- 1.72 We received 91 written preliminary submissions. We also conducted 10 preliminary consultations with leading stakeholders including victims, prosecutors, defence lawyers, police, senior judicial officers and restorative justice practitioners. Lists of the preliminary submissions received, and consultations conducted, are available at appendices **A** and **C** to this report.

71. Australia, *National Agreement on Closing the Gap* (Department of Prime Minister and Cabinet, July 2020) 32.

72. Australia, Productivity Commission, “Dashboard” (July 2024) *Closing the Gap: Information Repository* <<https://www.pc.gov.au/closing-the-gap-data/dashboard>> (retrieved 6 December 2024); NSW Bureau of Crime Statistics and Research, “Aboriginal Over-Representation in the NSW Criminal Justice System” (25 November 2024) <<https://bocsar.nsw.gov.au/topic-areas/aboriginal-over-representation.html>> (retrieved 6 December 2024).

73. Children’s Court of NSW, *Preliminary Submission PRC75*, 1. See also Youth Justice NSW, *Preliminary Submission PRC74*, 2.

74. Youth Justice NSW, *Preliminary Submission PRC74*, 1.

75. Youth Justice NSW, *Preliminary Submission PRC74*, 2.

- 1.73 On 11 December 2023, we released a consultation paper that provided background information to the review, discussed key issues and presented options for reform. The consultation paper asked whether the law needed to change, and presented a range of consultation questions for consideration.
- 1.74 We received 75 written submissions in response to the consultation paper. A list of the submissions received, is available at appendix **B** to this report. We also conducted two further consultations, with the RTSG and the NSW Police Force.
- 1.75 We thank everyone who took the time to meet with us and/or to provide a written submission. As we mention above, we are particularly grateful to those who told us their personal stories of how serious road crimes affected them. We appreciate how difficult this would have been.

Chapter outline

- 1.76 In this report:
- **Chapter 2** explains why we do not recommend the introduction of an offence of vehicular homicide/manslaughter or any other changes to the law in this area, and recommends the introduction of a Law Part Code for manslaughter offences that involve the use of a vehicle.
 - **Chapter 3** considers the elements of other serious road crime offences that cause death or bodily harm and recommends new dangerous driving offences to cover vehicle impacts that cause ABH, changes to the offence of wanton or furious driving and changes to the circumstances of aggravation for dangerous driving offences.
 - **Chapter 4** considers the elements of all other serious road crime offences and recommends reform to the offence of fail to stop and assist, to cover vehicle impacts that cause ABH.
 - **Chapter 5** explains why we do not recommend any change to penalties for serious road crime offences.
 - **Chapter 6** explains why we do not recommend any change to sentencing principles and procedures in relation to serious road crime offences.
 - **Chapter 7** explains why we do not recommend any change to the Table classifications of serious road crime offences, or to the list of serious children's indictable offences, and recommends a new division in the *Crimes Act* for existing serious road crimes.
 - **Chapter 8** explores victim experiences in the criminal justice system and suggests that this be considered further by the NSW Government.

- **Appendix A** lists the preliminary submissions received.
- **Appendix B** lists the submissions received in response to the consultation paper.
- **Appendix C** lists the consultations conducted as part of this review.

2. Vehicular homicide/manslaughter

In brief

We conclude that a new offence of vehicular homicide/manslaughter should not be introduced. We also conclude that there should not be legislative reform to address the common law rule that regulatory breaches, like traffic violations, cannot be an “unlawful act” for the offence of manslaughter by unlawful and dangerous act. To improve data collection, we recommend introducing a Law Part Code for manslaughter where the commission of the offence involves the accused person driving a motor vehicle.

Vehicular homicide/manslaughter	18
A new offence could have an important symbolic role	18
Models for a new vehicular homicide/manslaughter offence	19
We do not support a new homicide/manslaughter offence	20
Law Part Code for manslaughter involving a vehicle	24
The rule in <i>Pullman</i>	25
Some considered the rule overly restrictive	25
The rule should not be legislatively reformed	25

- 2.1 In this chapter, we consider the force of submissions calling for an offence of manslaughter within the serious road crime offence hierarchy. We consider two reform proposals raised by submissions:
 - whether a new offence of “vehicular manslaughter” or “vehicular homicide” should be introduced, to reflect the gravity of serious road crimes that cause death, and
 - whether the common law rule that a regulatory breach cannot be an “unlawful act” for manslaughter by unlawful and dangerous act, should be changed through legislation.
- 2.2 We acknowledge that appropriate criminal charges should reflect the seriousness of driving causing death. However, we conclude that there should not be any changes to the law of manslaughter in the context of serious road crimes.
- 2.3 We recommend the introduction of a Law Part Code for manslaughter where the commission of the offence involves the accused person driving a motor vehicle, to improve data collection for this type of offending.

Vehicular homicide/manslaughter

- 2.4 We recognise that a new offence of vehicular homicide/manslaughter could play an important role in signalling the gravity of serious road crimes causing death, and in recognising the devastating harm caused to victims and their families.
- 2.5 However, we conclude that a new offence should not be introduced. In our view, the current hierarchy of offences appropriately covers the field of criminality for serious road crimes causing death. A separate offence is not necessary, where the most serious offences can already be charged as manslaughter. Moreover, a new offence may introduce unnecessary complexity into the offence hierarchy and it may not impact sentencing and prosecutions for serious road crime offences overall.

A new offence could have an important symbolic role

- 2.6 We heard that a new offence of “vehicular homicide” would emphasise the gravity of serious road crimes causing death.¹
- 2.7 Victims told us that, although road crimes can be captured under other laws, this reform would send a message that criminal vehicular deaths are just as serious as other forms of homicide.² The Road Trauma Support Group (RTSG) argued that driving a vehicle while drunk, drug-affected, tired or speeding constituted reckless indifference to other people’s lives.³ An act or omission that is committed with reckless indifference to human life can support a charge of murder.⁴
- 2.8 While the RTSG recognised that existing law can capture offences causing road deaths, they advocated that a new offence of “vehicular homicide” was necessary to demonstrate the seriousness of this type of offending.⁵
- 2.9 We heard concerns that manslaughter was not charged frequently enough in driving matters.⁶ We heard that the more commonly charged dangerous driving occasioning death offences did not reflect the seriousness of these crimes.⁷ It was

1. Road Trauma Support Group NSW, *Submission RC16*, 13; Confidential, *Preliminary Submission PRC91*, 1; D Wakes-Miller, *Submission RC13*, 28–29.

2. Road Trauma Support Group NSW, *Submission RC16*, 13.

3. Road Trauma Support Group NSW, *Submission RC16*, 13. See also D Wakes-Miller, *Submission RC13*, 28.

4. *Crimes Act 1900* (NSW) s 18(1)(a).

5. Road Trauma Support Group NSW, *Submission RC16*, 13.

6. Confidential, *Submission RC69*, 1. See also Road Trauma Support Group NSW, *Submission RC16*, 13.

7. Confidential, *Submission RC29*, 15. See also T Blake, *Submission RC19*, 10; M Duke, *Submission RC48*, 13.

argued that “vehicular homicide” was a more appropriate label for the serious harm caused in cases of criminal road deaths.⁸

- 2.10 We heard that a new offence could provide clear criteria for police and the courts in dealing with such crimes.⁹ It could result in more charges being laid and increased sentences.
- 2.11 We also heard that a new offence would meet community expectations of justice where a death resulted from road crime.¹⁰ The RTSG reported support for charging drivers with vehicular manslaughter when they killed someone on the road.¹¹
- 2.12 Some submissions considered that a separate offence would better promote the purposes of sentencing, including adequate punishment, deterrence, community protection, accountability, denunciation, and recognition of harm.¹²

Models for a new vehicular homicide/manslaughter offence

- 2.13 We heard different proposals for a new vehicular homicide/manslaughter offence.
- 2.14 We outlined one model for a “vehicular homicide” offence in the consultation paper.¹³ This offence would have the same maximum penalty as manslaughter (25 years’ imprisonment)¹⁴ and would apply where:
- (i) the prescribed concentration of alcohol was present in the accused’s blood, or
 - (ii) the accused was driving the vehicle concerned on a road at a speed that exceeded, by more than 45 kilometres per hour, the speed limit (if any) applicable to that length of road, or
 - (iii) the accused was driving the vehicle to escape pursuit by a police officer, or the accused was driving under the influence of a drug (other than intoxicating liquor) or
 - (iv) a combination of drugs which thereby very substantially impaired his/ her ability to drive,

And at least one of the following elements also [applied]:

-
8. Confidential, *Preliminary Submission PRC91*, 1. See also Road Trauma Support Group NSW, *Submission RC16*, 13, 15.
9. Confidential, *Preliminary Submission PRC91*, 1.
10. Confidential, *Preliminary Submission PRC91*, 1.
11. Road Trauma Support Group NSW and fiftyfive5, *The Unheard Trauma of Fatal Road Crimes in NSW* (2023) 84; Road Trauma Support Group NSW and fiftyfive5, *The Human Impact of Fatal Road Crimes in NSW* (2024) 123, 128.
12. D Wakes-Miller, *Submission RC13*, 28–29; Road Trauma Support Group NSW, *Submission RC16*, 16.
13. Confidential, *Submission PRC91*, attachment A; NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [2.34].
14. *Crimes Act 1900* (NSW) s 24.

- (i) the accused was a professional driver (with a meaning similar to any person that receives payment for employment or offering a service involving the use of a motor vehicle, to include truck, bus, taxi and ride share operators); or
- (ii) the accused was suspended, disqualified, unlicensed, or never held a licence; or
- (iii) the accused was using a mobile telephone or other device at the time of the collision; or
- (iv) the accused drove with a known or perceived medical condition that would impair their ability to drive.¹⁵

2.15 Separately, the RTSG supported a new offence of “vehicular homicide” with clear definitions.¹⁶ Options for a new offence could include:

- creating a new offence of “vehicular homicide” with the same elements and maximum penalty as manslaughter (25 years’ imprisonment), plus the requirement that the offending involved driving a motor vehicle, or
- renaming the offence of dangerous driving occasioning death to “vehicular homicide” and increasing the maximum penalty to 25 years’ imprisonment.

2.16 The NSW Police Force (NSWPF) did not support a separate vehicular homicide/manslaughter offence. Instead, they preferred a specially aggravated dangerous driving offence.¹⁷ We discuss this proposal in chapter 3.

We do not support a new homicide/manslaughter offence

2.17 We acknowledge that serious road crimes causing death are grave offences with severe consequences for victims, families and communities, and that introducing a new vehicular homicide/manslaughter offence may emphasise this seriousness.

2.18 We recognise that, where a road crime causes death, the loss and devastation suffered by victims and their families is profound, irrespective of the circumstances of the crash. The impact of every fatal vehicular collision cannot be underestimated.

2.19 While not minimising the significance of this impact, the criminal law also must take into account other circumstances, including the seriousness of the offender’s conduct and their moral culpability. For the reasons below, we conclude that a new offence should not be introduced.¹⁸

15. Confidential, *Submission PRC91*, attachment A.

16. Road Trauma Support Group NSW, *Submission RC16*, 13.

17. NSW Police Force, *Submission RC75*, 1–2.

18. See Legal Aid NSW, *Submission RC08*, 7; Public Defenders, *Submission RC21*, 2; NSW Bar Association, *Submission RC27* [5]–[8]; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 6; Law Society of NSW, *Submission RC12*, 1; L McNamara, J Quilter, A Loughnan, R Hogg, D Brown and L Farmer, *Submission RC14*, 4; Confidential, *Submission RC69*, 1–2.

The current offences cover the field appropriately

- 2.20 We do not think a new offence is necessary, as the current serious road crime offence hierarchy adequately deals with the different conduct and levels of criminality involved in serious road crimes causing death.¹⁹ As the Court of Criminal Appeal commented, the current hierarchy is “rational, logical and cohesive”.²⁰
- 2.21 Manslaughter, the most serious offence in the current serious road crime offence hierarchy, can already be charged in appropriate cases, and can capture a wide range of driving-related conduct.²¹
- 2.22 Both categories of involuntary manslaughter (manslaughter by criminal negligence and manslaughter by unlawful and dangerous act) have been successfully prosecuted in cases involving vehicular deaths. We explained the elements of these categories in the consultation paper.²² We also provided examples of recent manslaughter cases involving vehicular deaths, which showed the breadth of circumstances captured by this offence.²³
- 2.23 As a result, introducing a new offence would not address any gaps in the law.²⁴ The ACT Law Reform and Sentencing Advisory Council recently reached a similar conclusion for its jurisdiction. It determined that a vehicular manslaughter offence would be unnecessary, for reasons including that the existing manslaughter offence appropriately captured a broad range of conduct.²⁵
- 2.24 The current hierarchy distinguishes between the severity of cases. While it is appropriate that manslaughter is charged in the most serious cases, we do not think that every criminal road death involves sufficient moral culpability, in legal terms, to warrant this charge.²⁶ For example, the moral culpability of a person speeding through a school zone under the influence of drugs can be distinguished from an

19. Legal Aid NSW, *Submission RC08*, 7; Public Defenders, *Submission RC21*, 2; NSW Bar Association, *Submission RC27* [6]; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 6; Confidential, *Submission RC69*, 2.

20. *R v Borkowski* [2009] NSWCCA 102 [56].

21. Law Society of NSW, *Submission RC12*, 1; Confidential, *Submission RC69*, 1. See also Legal Aid NSW, *Submission RC08*, 7; NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [2.12].

22. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [2.18]–[2.20].

23. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) appendix A.

24. L McNamara, J Quilter, A Loughnan, R Hogg, D Brown, L Farmer, *Submission RC14*, 4–5; Confidential, *Submission RC69*, 2.

25. ACT Law Reform and Sentencing Advisory Council, *Report into Dangerous Driving: Sentencing and Recidivism* (2024) 54–55.

26. NSW Bar Association, *Submission RC27* [7]; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 6.

otherwise responsible driver who has a momentary lapse in attention, even when the harm caused is the same.

- 2.25 For cases that do not meet the threshold of manslaughter but still involve driving that is dangerous, dangerous driving occasioning death and the aggravated offence are available.²⁷ These offences cover a broad range of offending and may be more appropriate in cases involving a lower level of criminality than manslaughter.²⁸ While less serious than manslaughter, these offences are still significant. They carry high maximum penalties (10 years' imprisonment, or 14 years for an aggravated offence), and are strictly indictable, which means, they can only be tried in a higher court such as the District Court.²⁹ We discuss these offences in more detail in chapter 3.

A new offence may not impact sentencing and prosecutions

- 2.26 There is a risk that introducing a new offence could result in only symbolic criminalisation without any change to sentencing and prosecutions, which could fail to address the more serious concerns outlined above.³⁰
- 2.27 Creating a specific offence of vehicular homicide/manslaughter might not lead to more serious charges in driving cases. If a new offence kept the existing elements of manslaughter in addition to new elements, prosecutors would still need to meet the existing legal threshold for manslaughter. As a result, the introduction of a new offence may not significantly change the way manslaughter is prosecuted for vehicular deaths.
- 2.28 In addition, a new offence may not result in more manslaughter prosecutions as police and prosecutors would continue to have discretion in selecting charges and negotiating pleas.³¹ If a new offence required the prosecution to prove multiple elements, or more elements than existing offences, it may be more difficult to prosecute and be charged less frequently. It may also create confusion about which offence should be charged, and result in charging inconsistencies.
- 2.29 It is also possible that a new offence would not result in significantly higher sentencing outcomes, even if it had the same maximum penalty as manslaughter (25 years' imprisonment).³² A maximum penalty is a guidepost, but only one factor, amongst many other factors that a sentencing court considers.³³ For instance, a

27. *Crimes Act 1900* (NSW) s 52A(1)–(2).

28. *R v Borkowski* [2009] NSWCCA 102 [58].

29. *Crimes Act 1900* (NSW) s 52A(1)–(2).

30. L McNamara, J Quilter, A Loughnan, R Hogg, D Brown and L Farmer, *Submission RC14*, 7–8.

31. See, eg, *Davidson v R* [2022] NSWCCA 153 [208].

32. *Crimes Act 1900* (NSW) s 24.

33. *Muldrock v R* [2011] HCA 39, 244 CLR 120 [27].

court must also consider the subjective factors personal to the offender, such as youth or a background of deprivation.³⁴

- 2.30 The maximum penalty for the offence of manslaughter, and for any other offence, is rarely imposed.³⁵ Of the sentences recorded on the Judicial Information Research System between 24 September 2018 and 31 March 2024, the maximum penalty was not imposed for any manslaughter case. There were also no cases where the maximum penalty was imposed or would have otherwise been imposed but was reduced by a discount given for a guilty plea.³⁶ Between 2016 and 2022, the average total sentence was 8 years and 2 months' imprisonment for proven court appearances where manslaughter was the principal, or most serious, offence.³⁷ The total sentence included both the non-parole and parole period.
- 2.31 The NSWPF proposed an alternative to a new offence. They suggested that instead, all dangerous driving offences occasioning death, including a new offence of specially aggravated dangerous driving, should be placed together under a new heading "vehicular homicide" in s 52A *Crimes Act 1900* (NSW) (*Crimes Act*).³⁸ We discuss the NSWPF proposal for a new specially aggravated offence further in chapter 3.
- 2.32 As with a new standalone manslaughter offence, our view is that placing dangerous driving offences under a new heading may not achieve intended outcomes. We acknowledge that the criminal law can play an important symbolic role in certain circumstances. However, simply regrouping dangerous driving offences under a heading of "vehicular homicide" may be perceived by the community as an inadequate symbolic gesture, with no effect on prosecutions. In addition, this new heading would be misleading as to the kind of offences it relates, which are dangerous driving offences, not vehicular homicide offences.

A new offence may lead to unnecessary complexity and confusion

- 2.33 Introducing a new vehicular homicide/manslaughter offence may cause confusion around the serious road crime offence hierarchy, as well as the role of the general offence of manslaughter. It is necessary to maintain a coherent structure of offences so that the law clearly identifies the conduct or circumstances relevant to each charge in the hierarchy.

34. See, eg, *Bugmy v R* [2013] HCA 37, 249 CLR 571 [40], [44]–[45]; *KT v R* [2008] NSWCCA 51 [22]–[26].

35. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [3.33]; *Chandler v R* [2023] NSWCCA 59 [99]–[101].

36. Judicial Commission of NSW, *Sentencing Statistics*, Judicial Information Research System (retrieved 12 December 2024).

37. NSW Bureau of Crime Statistics and Research, reference kf23-22929, table 1.

38. NSW Police Force, *Submission RC75*, 1; *Crimes Act 1900* (NSW) s 52A.

- 2.34 For example, renaming “dangerous driving occasioning death” to “vehicular manslaughter” would lead to inconsistency in the offence hierarchy. This is because, unless the elements of the offence also changed, the renamed offence and the current manslaughter offence would focus on different conduct but have similar names. Renaming the offence could lead to confusion about the nature of the new offence, and risk conflating the new and current offences. This may make the scheme of serious road crimes harder to understand.
- 2.35 There is also a risk that introducing a new offence would cause unnecessary complexity and inconsistency, especially because manslaughter is a common law offence. This means that the elements of manslaughter are not outlined in legislation, but have been developed over time through caselaw. We are concerned that legislatively amending a common law offence could have unintended impacts on manslaughter. For instance, caselaw could continue to develop the manslaughter offence, while vehicular manslaughter remained fixed and codified in legislation. This could result in inconsistent principles between the offences.

Law Part Code for manslaughter involving a vehicle

Recommendation 2.1: New Law Part Code

There should be a Law Part Code for manslaughter where the commission of the offence involves the accused person driving a motor vehicle.

- 2.36 We recommend that a Law Part Code be created for manslaughter where the commission of the offence involves the accused person driving a motor vehicle. A Law Part Code is a unique code for offences dealt with in NSW. As they are offence-specific, they can be used to identify certain types of offending, for example domestic violence offences. Law Part Codes enable justice sector agencies in NSW to “exchange information and improve the integrity of information about offences.”³⁹
- 2.37 This recommendation responds to concerns about research and data gaps in the criminal law response to vehicular deaths. As we discussed in the consultation paper, while manslaughter has its own Law Part Code, there is no specific code for manslaughter involving the driving of a motor vehicle.⁴⁰ This means there is no way to accurately identify charges and prosecutions for this type of manslaughter, and there are no specific court statistics about them.

39. Judicial Commission of NSW, “About Lawcodes” (2024) <<https://lawcodes.judcom.nsw.gov.au/help>> (retrieved 17 December 2024).

40. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [2.13].

- 2.38 Introducing a separate Law Part Code would enable the collection of information about manslaughter cases where the accused person was driving a motor vehicle. This would provide more accurate and transparent data to inform evidence-based laws and policies, which some submissions considered essential.⁴¹ This data could be used to identify the need for any future law reform. It could also inform road safety research and awareness campaigns and measures.

The rule in *Pullman*

- 2.39 We conclude that there should be no legislative change to address the rule in *R v Pullman (Pullman)*.⁴²
- 2.40 As we outlined in the consultation paper, the court in *Pullman* held that statutory or regulatory prohibition breaches, like traffic violations, cannot by that reason alone, be an “unlawful act” for manslaughter by unlawful and dangerous act.⁴³ Some judges have questioned the correctness of this rule and restrictive approach, but appellate courts have not directly considered it.⁴⁴

Some considered the rule overly restrictive

- 2.41 We heard concerns that *Pullman* was “unduly restrictive” and constrained manslaughter prosecutions to manslaughter by criminal negligence where the only unlawful and dangerous act was a traffic law breach.⁴⁵ The Office of the Director of Public Prosecutions (ODPP) noted that proper identification of the category of manslaughter provided clarity in the prosecution and sentencing of matters.⁴⁶ It raised whether legislative clarification would be appropriate.⁴⁷

The rule should not be legislatively reformed

- 2.42 We recognise concerns about the uncertainty and narrowness of the rule in *Pullman*. As expressed by Justice Simpson in *R v Borkowski*:

I am unable to see why such a breach [of a statutory or regulatory prohibition] could not form the basis of the “unlawfulness” of an act necessary for a conviction for manslaughter by unlawful and dangerous act. That is a composite

41. Road Trauma Support Group NSW, *Submission RC16*, 29; L McNamara, J Quilter, A Loughnan, R Hogg, D Brown and L Farmer, *Submission RC14*, 6–7.

42. *R v Pullman* (1991) 25 NSWLR 89.

43. *R v Pullman* (1991) 25 NSWLR 89, 97.

44. *R v Borkowski* [2009] NSWCCA 102 [3]; *R v Nguyen* [2010] VSC 442 [28]; *Davidson v R* [2022] NSWCCA 153 [195]–[198]; Office of the Director of Public Prosecutions NSW, *Preliminary Submission PRC77*, 4–5.

45. L McNamara, J Quilter, A Loughnan, R Hogg, D Brown and L Farmer, *Submission RC14*, 8; Office of the Director of Public Prosecutions NSW, *Preliminary Submission PRC77*, 5.

46. Office of the Director of Public Prosecutions NSW, *Preliminary Submission PRC77*, 5.

47. Office of the Director of Public Prosecutions NSW, *Preliminary Submission PRC77*, 5.

concept, and it is not every breach of traffic laws that would qualify – the act must also be dangerous, and sufficiently dangerous to justify the application of the criminal law.⁴⁸

- 2.43 However, for the following reasons, we do not think it would be appropriate to reform the rule through a legislative amendment.

There are issues with legislatively reforming a common law offence

- 2.44 As we discuss above, manslaughter is a common law offence that has been developed through caselaw. It is only described in the *Crimes Act* as “every other punishable homicide” that is not murder.⁴⁹ As a result, it could be difficult to formulate a legislative amendment that would override *Pullman*. Such an amendment would not sit easily within the *Crimes Act* provisions.
- 2.45 In our view, the appellate courts are best positioned to consider and address any issues arising from *Pullman*. We are not aware of the rule producing any anomalies that could not be resolved by the courts.
- 2.46 Moreover, changing a common law offence via legislative reform can have unintended impacts. Such amendments could cause wider inconsistencies with how manslaughter applies to other statutory breaches. We expand on this further below.

Manslaughter by gross criminal negligence remains available

- 2.47 Reforming the rule in *Pullman* may not be necessary. Prosecutors can still charge manslaughter by gross criminal negligence in cases involving death and serious traffic law breaches.⁵⁰ As the ODPP stated, this manslaughter category was generally used to prosecute “vehicular manslaughter” cases due to the uncertainty of *Pullman*.⁵¹ We provided several examples of such cases in the consultation paper.⁵²
- 2.48 This may mean that reforming the rule might not increase the number of manslaughter prosecutions for vehicular deaths. This is particularly so where, as Justice Simpson observed, unlawful and dangerous act is a composite concept – the act must be dangerous as well.⁵³ It may be that these types of cases are already captured by manslaughter by criminal negligence. We are not aware of any cases where this type of manslaughter was not successfully prosecuted on the basis that the alleged act was a traffic law breach.

48. *R v Borkowski* [2009] NSWCCA 102 [3].

49. *Crimes Act 1900* (NSW) s 18(1)(b).

50. See, eg, Office of the Director of Public Prosecutions NSW, *Preliminary Submission PRC77*, 5.

51. Office of the Director of Public Prosecutions NSW, *Preliminary Submission PRC77*, 5.

52. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) appendix A.

53. *R v Borkowski* [2009] NSWCCA 102 [3].

Reform may give rise to irregularities and uncertainties

- 2.49 Legislative reform to address the rule in *Pullman* could cause irregularities and uncertainties in the law.
- 2.50 Introducing a reform that would allow traffic law breaches in the *Road Transport Act 2013* (NSW) (*RTA*) to be “unlawful acts” in this context could create inconsistency in the law. For example, it might be unclear why breaches of the *RTA* qualified as unlawful acts, while breaches of other regulations (for example, breaches of the *Firearms Regulation 2017* (NSW)) did not.
- 2.51 Legislating for all regulatory or statutory breaches could have broader implications, beyond manslaughter involving a vehicle. This would need to be examined in a wider review that considered all manslaughter offences, which is beyond the scope of this reference.

3. Offences causing death or bodily harm

In brief

This chapter considers serious road crime offences in the *Crimes Act 1900* (NSW) that cover driving causing death or bodily harm. We recommend introducing new offences to cover vehicular impacts that cause actual bodily harm, and updating the offence of wanton and furious driving, to improve the structure and clarity of the offence hierarchy. We also recommend that the NSW Government review the circumstance of aggravation for dangerous driving offences relating to speed, and introduce a new circumstance to capture unlawful street racing.

Overview of the offence hierarchy	30
The circumstances of dangerous driving	31
Some proposed additional circumstances	31
Additional circumstances should not be added	32
Existing circumstances should not change	35
The element of “at the time of impact”	36
Some considered “at the time of impact” too restrictive	37
The law is clear and strikes the right balance	38
Circumstances of aggravation	39
Review the aggravating circumstance of speed	40
“Very substantial impairment” should not change	43
Some groups supported adding new aggravating circumstances	45
Unlawful street racing should be added	46
No further aggravating circumstances should be added	47
A new specially aggravated offence	50
The NSW Police Force proposed a new offence	50
A specially aggravated offence should not be introduced	51
Impacts causing actual bodily harm	52
There should be dangerous driving occasioning actual bodily harm offences	52
Section 53 should be amended and modernised	57
A new mid-tier offence	58

Some considered that a new mid-tier offence would fill a gap	58
There should not be a new mid-tier offence	59
Negligent off-road driving is outside our scope	60

- 3.1 This chapter considers whether the serious road crime offences in part 3, division 6 of the *Crimes Act 1900* (NSW) (*Crimes Act*), that involve driving conduct causing death or bodily harm, remain fit for purpose. The offences include:
- dangerous driving occasioning death, or grievous bodily harm (GBH)
 - aggravated dangerous driving occasioning death, or GBH, and
 - wanton or furious driving causing bodily injury.
- 3.2 We conclude that there should be limited reforms to these offences. In particular, we recommend reforms to:
- create new offences of basic and aggravated dangerous driving occasioning actual bodily harm (ABH), to clarify and simplify the offence hierarchy
 - review the circumstance of aggravation relating to speed in consultation with road safety experts, to more accurately reflect the criminality of speeding
 - include participating in an unlawful street race as a circumstance of aggravation, to recognise the criminality of this conduct, and
 - amend the offence of wanton or furious driving to modernise the language and account for the new dangerous driving occasioning ABH offence.
- 3.3 We conclude that beyond these recommendations for reform, the elements, and the offences themselves are appropriate and working well.
- 3.4 This chapter also considers other proposals that were put forward during our review, including introducing a mid-tier offence such as reckless driving, and an offence of specially aggravated dangerous driving. It explains why we do not recommend introducing these offences.

Overview of the offence hierarchy

- 3.5 In NSW, serious road crime offences that cause death or personal harm are organised in a hierarchy that covers a range of conduct. Where an offence sits in the hierarchy is dependent on the type of harm caused, the seriousness of the driving conduct (or in other words, the level of culpability, or fault attributable to the driver), and whether an aggravating circumstance was present.
- 3.6 For example, aggravated dangerous driving covers more serious criminal conduct, involving a higher level of culpability, than dangerous driving. Negligent driving covers a lower degree of fault than dangerous driving.

- 3.7 For victims, families of victims, and the community, any serious road crime offence is serious, no matter the harm. However, in legal terms, the word “seriousness” is used to establish where an offence sits within the hierarchy of road crime offences, and determines which charge, and maximum penalty, is applicable. When we refer to the “seriousness” of an offence in this chapter, we are referring to where an offence sits on the spectrum of serious road offending.
- 3.8 We discussed the serious road crime offence hierarchy, and the elements of each offence, in detail in our consultation paper.¹

The circumstances of dangerous driving

- 3.9 We conclude that it is not necessary to include any additional circumstances to the offences of dangerous driving occasioning death or GBH in s 52A(1) and s 52A(3) of the *Crimes Act*. We also determine that no amendments are required to the existing circumstances.
- 3.10 The existing circumstances or types of conduct that can be classed as “dangerous” are:
- driving under the influence of intoxicating liquor or of a drug
 - driving at a speed dangerous to another person or persons, or
 - driving in a manner dangerous to another person or persons.²
- 3.11 We provided more information about the circumstances of dangerous driving, and the elements of the offence more broadly, in our consultation paper.³

Some proposed additional circumstances

- 3.12 Some submissions argued that the list of circumstances should be expanded to include other conduct, including when a person was driving:
- while using a mobile phone or visual display device⁴
 - with a known medical condition that would impair their ability to drive⁵
 - with high fatigue⁶

1. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [2.4]–[2.150].

2. *Crimes Act 1900* (NSW) s 52A(1), s 52A(3).

3. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [2.46].

4. Confidential, *Submission RC25*, 10; NSW Police Force, *Submission RC40*, 2–3; Confidential, *Preliminary Submission PRC91*, 3.

5. NSW Police Force, *Submission RC40*, 2–3; Confidential, *Preliminary Submission PRC91*, 3.

6. NSW Police Force, *Submission RC40*, 2–3.

- while disobeying traffic signs or signals⁷
- as a professional driver (such as a truck, bus, taxi or ride share driver),⁸ and
- while unauthorised (suspended, disqualified or unlicensed).⁹

Additional circumstances should not be added

- 3.13 We conclude that no additional circumstances of dangerous driving should be added.
- 3.14 In our view, the existing circumstances are broad enough to capture relevant conduct. We also do not consider it appropriate to add circumstances that do not directly relate to a person’s manner of driving.

The existing circumstances are appropriately broad

- 3.15 In our view, the existing circumstances are appropriate, and broad enough to capture a wide range of conduct.¹⁰ In particular, “driving in a manner dangerous” covers a wide spectrum of conduct, and has been found to include, among other things:
- driving against medical advice,¹¹ or with a known condition that affects driving¹²
 - using a mobile phone while driving¹³
 - driving while fatigued, and¹⁴
 - momentary inattention.¹⁵
- 3.16 As these circumstances are already captured by the offence of “driving in a manner dangerous”, it is unlikely that specifically naming them in s 52A would lead to more prosecutions or convictions.¹⁶
- 3.17 We agree that the circumstances should not be expanded without evidence that they are currently too restrictive.¹⁷ We are not aware of, and no submissions raised,

7. NSW Police Force, *Submission RC40*, 2–3.

8. Confidential, *Preliminary Submission PRC91*, 3.

9. Confidential, *Preliminary Submission PRC91*, 3.

10. Legal Aid NSW, *Submission RC08*, 8; NSW Bar Association, *Submission RC27* [9]; Local Court of NSW, *Submission RC71*, 2.

11. *Zreika v R* [2021] NSWCCA 243 [21]–[23].

12. *Haynes v R* [2024] NSWCCA 12.

13. *Thornton v R* [2020] NSWCCA 257 [16], [18], [21].

14. *R v Manok* [2017] NSWCCA 232 [26], [30], [47]; *Nashed v R* [2010] NSWCCA 282.

15. *R v LKP* (1993) 69 A Crim R 159. See also *R v Jurisic* (1998) 45 NSWLR 209; *R v Khatter* [2000] NSWCCA 32; *R v Davies* [2000] NSWCCA 84.

16. *Crimes Act 1900* (NSW) s 52A(1)(c), s 52A(3)(c).

17. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 8.

any instance where the current circumstances were too narrow to allow a charge of dangerous driving to be prosecuted.

Broad circumstances allow flexibility

- 3.18 It is preferable to maintain the broad, general list rather than adding a number of further, more specific circumstances. The existing, broad categories, allow the offence to be applied flexibly and provide courts with discretion to consider conduct on a case-by-case basis. There is scope for argument about cases that are novel, or that fall toward the outer limits of the offences.
- 3.19 One submission expressed concern that adding further circumstances to the legislation could make the section overly particular. They cautioned that no matter how many categories were added there would always be cases that fell outside them, so the categories would never be complete.¹⁸
- 3.20 Offences that are too specific may lead to technical arguments about what is captured. This may increase rather than reduce the complexity of the law. There is also a concern that including even more circumstances may create an “arbitrary distinction” between the conduct that is specifically included in the offence, and that which is left out,¹⁹ or conduct that could fall within one of the more general categories.

The circumstances should relate to the manner of driving

- 3.21 Some of the proposed additional circumstances of dangerous driving do not relate to the manner of driving, such as the licence status of the driver (for example, unauthorised driving or being a professional driver).²⁰ These factors, without more, cannot cause an impact or injury in and of themselves. In our view, these factors are not appropriate circumstances to form the basis of liability for a dangerous driving charge.
- 3.22 Instead, they are more appropriately considered on sentence.²¹ For example, the fact that someone was a professional driver could be relevant to the objective seriousness of the offence, particularly if they were a driver of a heavy vehicle.²² A court may consider that, in those circumstances, it should give adequate weight to general deterrence because of the potential “catastrophic consequences” in a

18. L McNamara, J Quilter, A Loughnan, R Hogg, D Brown, L Farmer, *Submission RC14*, 11.

19. L McNamara, J Quilter, A Loughnan, R Hogg, D Brown, L Farmer, *Submission RC14*, 9, citing J Horder, “Rethinking Non-Fatal Offences Against the Person” (1994) 14 *Oxford Journal of Legal Studies* 335, 338.

20. NSW Bar Association, *Submission RC27* [12]; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 8.

21. NSW Bar Association, *Submission RC27* [11]–[12].

22. See, eg, *R v De Groot* [2016] NSWDC 93 [57]–[58].

collision involving a truck and another vehicle, and the onerous duty of drivers of heavy vehicles to drive safely and in accordance with road rules.²³ An offender's professional driver status may also be a circumstance that increases their moral culpability.²⁴

- 3.23 We acknowledge the argument that incorporating unauthorised driving as a circumstance could recognise the heightened risk that these drivers pose. Research has found that people who drive while disqualified may be more likely to commit other driving offences,²⁵ and some studies have found that disqualified or suspended drivers account for a disproportionate share of fatally injured drivers.²⁶
- 3.24 However, we do not think it is appropriate to include offence elements based only on the risk a particular class of people poses, rather than their driving conduct. In our view, this would be a significant, and unjustified extension of criminal responsibility.
- 3.25 It is particularly concerning because a driver's licence may be cancelled or suspended for a variety of reasons that are unrelated to driving conduct, including for non-driving offences, fine default, or medical conditions.²⁷ As the NSW Sentencing Council observed, "at least some unauthorised driving indicates lawlessness but not necessarily dangerousness."²⁸ For example, an unauthorised driver may not necessarily be a dangerous driver if they are suspended for a failure to pay fines.²⁹
- 3.26 For this reason, a driver's licence status is a factor more appropriately taken into account on sentence. On sentence, courts can consider the reason the driver is unauthorised and reflect the impact on the seriousness of the offence in the sentence imposed.
- 3.27 We are also concerned that including unauthorised driving as a basis for dangerous driving would have a disproportionate impact on some groups of the community. This includes Aboriginal and Torres Strait Islander peoples³⁰ and people of lower socio-economic status, who may have disproportionately higher rates of licence disqualification, including for reasons unrelated to driving. For instance, Aboriginal

23. *Preston v R* [2011] NSWCCA 25 [23]–[24]. See also *Morabito v R* [2007] NSWCCA 126 [53], [61].

24. See, eg, *R v Besant* [2003] NSWCCA 388 [7].

25. P Nelson, *Driving While Disqualified*, Bureau Brief, Issue Paper No 103 (NSW Bureau of Crime Statistics and Research, 2015) 4.

26. Victoria, Sentencing Advisory Council, *Driving while Disqualified or Suspended*, Report (2009).

27. P Nelson, *Driving While Disqualified*, Bureau Brief, Issue Paper No 103 (NSW Bureau of Crime Statistics and Research, 2015) 2.

28. NSW Sentencing Council, *Repeat Traffic Offenders*, Consultation Paper (2018) [5.76].

29. NSW Sentencing Council, *Repeat Traffic Offenders*, Consultation Paper (2018) [5.76].

30. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 8.

people are over-represented in licence suspension because of fine default.³¹ This may lead to a similar over-representation in conviction rates for dangerous driving offences.

Existing circumstances should not change

- 3.28 We conclude the terminology of the existing circumstances of dangerous driving should not change. The language is appropriately broad, and sufficiently reflects the criminality involved.

One submission supported clarifying terminology around drugs

- 3.29 One submission suggested changes to clarify some terminology for the offence of dangerous driving under the influence of drugs, to make it simpler to prove.³²
- 3.30 In particular, it raised that it may be difficult to prove a dangerous driving offence if an accused person was under the influence of more than one drug at the time. The current circumstance only explicitly covers being “under the influence of intoxicating liquor **or of a drug**” (emphasis added).³³ It was suggested that adding the words “**or a combination of drugs**” would address the issue.³⁴ This terminology is already used in the circumstance of aggravation in s 52A(7)(d) of the *Crimes Act*.
- 3.31 The submission also suggested amending the definition of “drug” to include the taking of prescription drugs above the recommended dose, to capture circumstances where that factor impaired a person’s driving.³⁵ This is because the current definition of “drug” may not cover substances that only impair an ordinary person’s faculties if taken in excess of the recommended doses.³⁶ In these circumstances, a charge of dangerous driving under the influence of drugs may not be available.³⁷
- 3.32 It was suggested that this issue could be addressed by amending the definition of “drug” as follows:

any other substance, that, when taken by an ordinary person **or when taken in a particular quantity by an ordinary person**, is reasonably likely to deprive the

31. Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper 84 (2017) [6.82].

32. Confidential, *Submission RC69*, 3.

33. *Crimes Act 1900* (NSW) s 52A(1)(a), s 52A(3)(a).

34. Confidential, *Submission RC69*, 3.

35. Confidential, *Submission RC69*, 3–4.

36. *Crimes Act 1900* (NSW) s 52A(9); *Road Transport Act 2013* (NSW) s 4(1)(d) definition of “drug”; *Road Transport (General) Regulation 2021* (NSW) cl 21, sch 3.

37. Confidential, *Submission RC69*, 3; *Crimes Act 1900* (NSW) s 52A(1)(a), s 52A(3)(a).

person of, or impair, his or her normal mental or physical faculties (whether temporarily or permanently).³⁸

The terminology should not change

- 3.33 We conclude that this terminology should not change. In our view, it is likely that the circumstance of driving under the influence “of a drug” could apply to a combination of drugs, even if the law does not explicitly refer to it. Generally, a reference to a word or expression in the singular form includes the plural form, unless a contrary intention is clear from the legislation.³⁹
- 3.34 In cases where taking a prescription drug in excess of the recommended dose leads to impaired driving that causes death or GBH, the conduct can instead be charged under the broad category of driving in a manner dangerous.⁴⁰ This circumstance of dangerous driving is also available in cases where there is any uncertainty about whether the accused person was under the influence “of a drug”.⁴¹
- 3.35 Though a person might be charged with driving in a manner dangerous rather than under the influence of a drug, the fact that they took medication that impaired their driving skills can be taken into account by a sentencing court, when assessing the person’s moral culpability for the offence.⁴²

The element of “at the time of impact”

- 3.36 We conclude that there should be no change to the element of dangerous driving that requires the dangerous conduct to occur “at the time of impact”.⁴³ In our view, the law strikes the right balance between ensuring people are only held criminally responsible for willed acts,⁴⁴ and holding offenders accountable for dangerous driving conduct.
- 3.37 Generally, an accused person’s driving must be both voluntary and dangerous at the time of impact.⁴⁵ If a person was asleep, unconscious, or experiencing medical symptoms at the time of impact, their actions would not be voluntary, and they could not be guilty of dangerous driving for this period.⁴⁶

38. Confidential, *Submission RC69*, 4 (emphasis added); *Crimes Act 1900* (NSW) s 52A(9). See *Road Transport Act 2013* (NSW) s 4(1)(d) definition of “drug”.

39. *Interpretation Act 1987* (NSW) s 5(2), s 8(b).

40. *Crimes Act 1900* (NSW) s 52A(1)(c), s 52A(3)(c).

41. *Crimes Act 1900* (NSW) s 52A(1)(a), s 52A(3)(a).

42. *Rummukainen v R* [2020] NSWCCA 187 [23].

43. *Crimes Act 1900* (NSW) s 52A(1), s 52A(3).

44. *Ryan v R* (1967) 121 CLR 205.

45. *McBride v R* (1966) 115 CLR 44, 47, 51.

46. *Jiminez v R* (1992) 173 CLR 572, 577, 581.

- 3.38 However, in such a case, the court instead could consider whether the driving was dangerous before it became involuntary. An earlier period of voluntary driving could establish the offence if it was dangerous, “so nearly contemporaneous” with the impact, and in a practical sense, was the cause of the impact and death or GBH.⁴⁷ Even if all these requirements were satisfied, an accused person would not be guilty if they could prove that they honestly and reasonably believed it was safe to drive.⁴⁸

Some considered “at the time of impact” too restrictive

- 3.39 Even though the prosecution does not have to prove that the person’s actions were voluntary at the precise moment of the impact, the Office of the Director of Public Prosecutions (ODPP) submitted that the law relating to “at the time of impact” is too restrictive, particularly in cases of prolonged involuntary driving.⁴⁹
- 3.40 The ODPP pointed to a case where a truck driver who had a hypoglycaemic episode and drove involuntarily for a 15 minute period, was found not guilty of dangerous driving. In that case, the judge was not satisfied that the accused’s earlier, voluntary dangerous driving was sufficiently contemporaneous to the impact to be classed as dangerous “at the time of impact”, or that it was the cause of the impact.⁵⁰
- 3.41 In the ODPP’s view, the result of this case is incongruous with the objective of the legislation, to criminalise dangerous driving that causes death or GBH. It questioned why the law should distinguish between a short period of involuntary driving and a longer period if there was an earlier period of voluntary and dangerous driving and it was the operative cause of the impact.⁵¹
- 3.42 The Road Trauma Support Group (RTSG) suggested that all conduct prior to the impact is relevant and should be taken into account,⁵² not just the conduct that a court considers “so nearly contemporaneous with the impact”.
- 3.43 However, for the reasons expressed below, we do not recommend any change to the law in this area.

47. *Jiminez v R* (1992) 173 CLR 572, 577, 581.

48. *Jiminez v R* (1992) 173 CLR 572, 583.

49. Office of the Director of Public Prosecutions NSW, *Preliminary Submission PRC77*, 3.

50. *R v Lidgard* [2022] NSWDC 445 [91].

51. Office of the Director of Public Prosecutions NSW, *Preliminary Submission PRC77*, 3.

52. Road Trauma Support Group NSW, *Submission RC16*, 16. See also D Wakes-Miller, *Submission RC13*, 29.

The law is clear and strikes the right balance

- 3.44 The community holds an understandable expectation that drivers who cause death or harm are held responsible for their conduct. However, it is an important legal principle that people are only held criminally responsible for voluntary acts.⁵³
- 3.45 The “so nearly contemporaneous” test is clear and strikes the right balance. The test is broad enough that it can cover a range of factual scenarios.⁵⁴ There are several cases where a person was found guilty of dangerous driving, even though their driving at the exact time of impact was involuntary. Examples include:
- a driver who had a seizure and caused an impact that resulted in death, but drove knowing he was at risk of having seizures and that it was not safe to drive⁵⁵
 - a truck driver who fell asleep and caused an impact that resulted in several deaths and injuries, but drove knowing he was significantly sleep deprived and suffering microsleeps,⁵⁶ and
 - a truck driver who had a seizure and caused an impact that resulted in death and injury, but drove knowing he had a history of blackouts without warning and after being warned by doctors that it was unsafe.⁵⁷
- 3.46 These cases suggest that the current law is operating appropriately.⁵⁸ In our view, it is desirable that there be scope for argument on the facts of each case, with judicial discretion to consider cases on the margins.
- 3.47 The ODPP’s preliminary submission referred to a case involving complex evidence and a unique set of circumstances.⁵⁹ In that case, even if the earlier dangerous driving was sufficiently contemporaneous with the impact, the accused person would still not have been guilty of dangerous driving, because the judge found that he honestly and reasonably believed it was safe to drive.⁶⁰

53. *Ryan v R* (1967) 121 CLR 205, 213.

54. Law Society of NSW, *Submission RC12*, 1; Public Defenders, *Submission RC21*, 2; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 8. See also NSW Police Force, *Submission RC40*, 3; Local Court of NSW, *Submission RC71*, 2.

55. *Gillett v R* [2006] NSWCCA 370.

56. *R v Crockford* [2020] NSWDC 628.

57. *Zreika v R* [2021] NSWCCA 243.

58. *Jiminez v R* (1992) 173 CLR 572.

59. *R v Lidgard* [2022] NSWDC 445; Office of the Director of Public Prosecutions NSW, *Preliminary Submission PRC77*, 3–4.

60. *R v Lidgard* [2022] NSWDC 445 [106]–[119].

- 3.48 Finally, we are concerned that expanding the meaning of “at the time of impact” to cover all conduct prior to an impact could widen the net and capture unintended conduct,⁶¹ such as driving which is not causally related to the impact.

Circumstances of aggravation

- 3.49 We recommend that participating in an unlawful street race or speed trial should be added to s 52A(7) of the *Crimes Act* as a circumstance of aggravation capable of establishing an offence of aggravated dangerous driving. This would reflect the serious criminality inherent when this conduct results in death or GBH.
- 3.50 We also recommend a further review of the aggravating circumstance of speed. We conclude that the circumstances of aggravation and aggravated offences are otherwise appropriate and working well.
- 3.51 As we outlined in the consultation paper, an aggravated offence is a more serious version of a basic dangerous driving offence and has a higher maximum penalty.⁶² To establish an aggravated offence,⁶³ the prosecution must prove the elements of the basic offence, as well as one of the following circumstances of aggravation:
- (a) the prescribed concentration of alcohol was present in the accused’s breath or blood, or
 - (b) the accused was driving the vehicle concerned on a road at a speed that exceeded, by more than 45 kilometres per hour, the speed limit (if any) applicable to that length of road, or
 - (c) the accused was driving the vehicle to escape pursuit by a police officer, or
 - (d) the accused’s ability to drive was very substantially impaired by the fact that the accused was under the influence of a drug (other than intoxicating liquor) or a combination of drugs (whether or not intoxicating liquor was part of that combination).⁶⁴

61. Legal Aid NSW, *Submission RC08*, 8.

62. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [2.64].

63. *Crimes Act 1900* (NSW) s 52A(2), s 52A(4).

64. *Crimes Act 1900* (NSW) s 52A(7), s 52A(9) definition of “prescribed concentration of alcohol”.

Review the aggravating circumstance of speed

Recommendation 3.1: The aggravating circumstance of speed should be reviewed

The NSW Government should review the circumstance of aggravation relating to speed in s 52A(7)(b) of the *Crimes Act 1900* (NSW), to consider whether the limit should be lowered, or whether other models for identifying excessive speed should be adopted, such as nominating a percentage above the applicable speed limit.

- 3.52 We recommend that the NSW Government review the aggravating circumstance of speed in s 52A(7)(b) of the *Crimes Act*.⁶⁵ In particular, the Government should consider whether the threshold for this factor should be flexible and relative to the speed limit of the area where the offence occurs.
- 3.53 There was broad support for change to this circumstance of aggravation, either by lowering the threshold speed or making it flexible and relative to the speed limit, by nominating a percentage in excess of the speed limit that would make the aggravating circumstance available at different speeds, depending on the area.⁶⁶ For example, it could apply if a person was travelling 40% or 50% above the applicable speed limit at the time they caused death or bodily harm.
- 3.54 The majority of those in support of change preferred a flexible and relative speed threshold. They argued that this would better reflect the risk that speeding carries.⁶⁷
- 3.55 Speeding is the single greatest factor contributing to road trauma. Last year, it was involved in 25% of fatal and serious crashes.⁶⁸ Even a 1% increase in speed raises the risk of such a crash.⁶⁹
- 3.56 We consider that the wide support for reform, and reasons in support of change mean that this circumstance of aggravation warrants review. However, determining

65. *Crimes Act 1900* (NSW) s 52A(7)(b).

66. Legal Aid NSW, *Submission RC08*, 9; Road Trauma Support Group NSW, *Submission RC16*, 17; Public Defenders, *Submission RC21*, 2–3; NSW Bar Association, *Submission RC27* [18]; NSW Police Force, *Submission RC40*, 4; Confidential, *Submission RC69*, 4; Transport for NSW, *Submission RC72*, 2; D Wakes-Miller, *Submission RC13*, 44.

67. NSW Bar Association, *Submission RC27* [18]; Confidential, *Submission RC69*, 4–5; Public Defenders, *Submission RC21*, 2–3.

68. Transport for NSW, “Road Users by Behavioural Factors in Crashes” (2024) <<https://www.transport.nsw.gov.au/roadsafety/statistics/interactive-crash-statistics/road-users-by-behavioural-factors-crashes>> (retrieved 20 December 2024).

69. World Health Organization, “Road Traffic Injuries” (13 December 2023) <www.who.int/news-room/fact-sheets/detail/road-traffic-injuries#:~:text=Speeding,in%20the%20serious%20crash%20risk.> (retrieved 20 December 2024).

the appropriate model and limit is outside the Commission's expertise. We recommend that the NSW Government conduct further research and consult with road safety experts, such as Transport for NSW, to determine the most appropriate model and limits.

The current threshold may be too high and inflexible

- 3.57 We heard concerns that the current threshold was too high, particularly in slower speed zones. An aggravated offence based on speed can only be established if the accused person drove more than 45km/h over the speed limit. This threshold may not properly reflect the degree of risk relative to the speed limit.⁷⁰ For example, driving 45km/h over the limit in a 40km/h school zone may present different risks to driving 45km/h over the limit on a freeway with a limit of 110km/h, though the potential for harm could be similar.⁷¹ A flexible approach could better account for the risks in different contexts.
- 3.58 A variety of proposals, including introducing a percentage-based model, were put forward for our consideration. We discussed these options in our consultation paper, and further, below.⁷²

There was support for a percentage-based model

- 3.59 Several groups supported changing the threshold to a percentage-based model.⁷³ In this model, the aggravating circumstance could be established if the accused drove in excess of a nominated percentage above the speed limit. For example, an aggravated offence could equally apply if a person causes an impact resulting in death or GBH while driving 30% over a 40km/h speed limit (a speed of 52km/h) or 30% over a 110km/h speed limit (a speed of 143km/h). A percentage-based model would be more flexible, and more accurately reflect the danger of speeding relative to the set speed limit.
- 3.60 This model is already in use in the Australian Capital Territory (ACT) for the offence of aggravated furious, reckless, or dangerous driving (not causing any injury). In the ACT, a person may be guilty of an aggravated version of that offence if they were driving at a speed that exceeded the speed limit by more than 30%.⁷⁴
- 3.61 Others, including the NSW Police Force (NSWPF) and the Public Defenders, supported a hybrid model, in which both a percentage and a set speed were

70. Legal Aid NSW, *Submission RC08*, 9; Road Trauma Support Group NSW, *Submission RC16*, 17; Public Defenders, *Submission RC21*, 2–3; NSW Bar Association, *Submission RC27* [18].

71. See, eg, Legal Aid NSW, *Submission RC08*, 9; Confidential, *Submission RC69*, 4.

72. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [2.70].

73. NSW Bar Association, *Submission RC27* [18]; NSW Police Force, *Submission RC40*, 4; Confidential, *Submission RC69*, 4; Public Defenders, *Submission RC21*, 2–3.

74. *Road Transport (Safety and Traffic Management) Act 1999* (ACT) s 7A(1)(v).

nominated. The aggravating factor could be established if a person was speeding over a nominated speed or percentage over the speed limit, whichever was smaller.⁷⁵

3.62 Some expressed concern that only using a percentage model might be confusing for drivers. The NSW Bar Association generally supported a percentage-based model but proposed instead that the limits be set out clearly, as particular speeds. The Bar Association example of this model was:

- (a) In a 60 km/h zone, speeding in excess of 30 km/h over the limit;
- (b) In an 80 km/h zone, speeding 40 km/h over the limit;
- (c) In a 90, 100, or 110 km/h zone, speeding in excess of 45 km/h over the limit.⁷⁶

3.63 In our view, any model selected should allow the aggravating circumstance to apply at all speed limits. There does not appear to be any legal or policy justification for restricting application to higher speed zones. It is important that the aggravated offence continues to apply in lower speed zones, such as school or pedestrian areas or work zones. The greater number of pedestrians in these places means that dangerous driving can present high risk to those in the vicinity.

3.64 The NSWPF suggested that the government should consider whether a lower percentage should apply to learner or provisional drivers, to reflect the speed restrictions that are already placed on these drivers.⁷⁷

Others proposed lowering the nominated speed threshold

3.65 Some groups supported maintaining a single set speed threshold but submitted that it should be lowered.⁷⁸

3.66 Lowering the threshold speed could bring NSW into line with other states of Australia. NSW currently has the highest threshold speed out of the three states that have a similar offence.⁷⁹ The threshold is 40km/h in Queensland,⁸⁰ and 30km/h in Western Australia.⁸¹

3.67 However, one submission expressed concern that lowering the set speed rather than applying a percentage would be inappropriate, due to the significantly higher

75. NSW Bar Association, *Submission RC27* [18]; NSW Police Force, *Submission RC40*, 4; Confidential, *Submission RC69*, 4–5; Public Defenders, *Submission RC21*, 2–3.

76. NSW Bar Association, *Submission RC27* [18].

77. NSW Police Force, *Submission RC40*, 4.

78. Transport for NSW, *Submission RC72*, 2; D Wakes-Miller, *Submission RC13*, 44.

79. *Crimes Act 1900* (NSW) s 52A(7)(b).

80. *Criminal Code* (Qld) s 328A(4)(b)(ii), s 328A(6) definition of “excessively speeding”.

81. *Road Traffic Act 1974* (WA) s 59(1)(b), s 49AB(1)(b), s 49AAA definition of “above the speed limit”.

maximum penalty that applies to an aggravated offence.⁸² Another considered that lowering the speed would make the criminality of this circumstance of aggravation inconsistent with the level of criminality required for the other circumstances.⁸³ Lowering the speed threshold too much may risk this factor being considered less serious than the other forms of the offence.

“Very substantial impairment” should not change

- 3.68 We conclude that the circumstance of aggravation that “the accused’s ability to drive was very substantially impaired” by drugs or a combination of drugs, in s 52A(7)(d) of the *Crimes Act*, should not change.
- 3.69 Some submissions supported removing the word “very” from this circumstance of aggravation.⁸⁴ They argued that the term “very substantially impaired” is ambiguous,⁸⁵ and that it can be difficult to prove. Additionally, these groups considered that “very” and “substantially” are repetitive and convey the same meaning, so it is not necessary to include both.⁸⁶ It was also argued that the terms may be ambiguous and difficult for members of the community to understand.⁸⁷
- 3.70 Some submissions included suggestions that removing the word “very” would make s 52A(7) consistent with other provisions, including the driving under the influence (DUI) provisions in the *Road Transport Act 2013 (NSW) (RTA)*.⁸⁸
- 3.71 We acknowledge the concerns about the clarity of this expression. However, for the reasons below, we conclude there should be no change.

The terminology was adopted on advice of expert pharmacologists

- 3.72 The term “very substantially impaired” was specifically formulated to describe a certain degree of impairment, based on expert advice. It was included in the offence on the advice of leading pharmacologists. In 1997, the second reading speech for the Bill introducing s 52A(7) of the *Crimes Act* stated that formulation of the words for the aggravating circumstance:

was recommended to the criminal law review division of my department by two leading pharmacologists, Professor Graham Starmer and Dr Judith Perl. With

82. Law Society of NSW, *Submission RC12*, 2.

83. Local Court of NSW, *Submission RC71*, 2.

84. Road Trauma Support Group NSW, *Submission RC16*, 17; D Wakes-Miller, *Submission RC13*, 30; Confidential, *Submission RC69*, 4; NSW Bar Association, *Submission RC27* [16]; NSW Police Force, *Submission RC40*, 4.

85. D Wakes-Miller, *Submission RC13*, 30.

86. NSW Bar Association, *Submission RC27* [16]; NSW Police Force, *Submission RC40*, 4; Road Trauma Support Group NSW, *Submission RC16*, 17.

87. D Wakes-Miller, *Submission RC13*, 30.

88. Transport for NSW, *Submission RC72*, 2; *Road Transport Act 2013 (NSW)* s 112.

regard to intoxication by a drug or drugs, that formulation of words is designed to be a fair and accurate reflection of what 0.15 grams alcohol/100 millilitres blood expresses with regard to alcohol.⁸⁹

- 3.73 Changing the terminology by removing the word “very” could disturb the wording used by experts and courts. “Very substantially” describes a certain degree of impairment and is used in the expert reports that are used for charging and prosecution. The expression represents the most serious level of impairment in the scale, above “impairment” and “substantial impairment”.
- 3.74 In the absence of an identifiable and continuing difficulty with the terminology, we do not recommend change. We are not aware of, and no submissions drew our attention to, any case where this terminology caused practical difficulties.

The terminology distinguishes the serious aggravated offences

- 3.75 We consider that a high threshold is appropriate for this circumstance of aggravation. Due to the high maximum penalties that apply to aggravated offences, a high degree of criminality should be required to establish them. They should only be available in sufficiently serious cases.
- 3.76 The word “very” plays an important role, because it sets the circumstance of aggravation at an appropriately high level and clearly differentiates between the basic and aggravated forms of dangerous driving offences.⁹⁰ It is, as the Local Court submitted, a “critical modifier”.⁹¹
- 3.77 A similar distinction applies to dangerous driving under the influence of alcohol. Though the basic dangerous driving offence can be established if the driver was simply under the influence of intoxicating liquor,⁹² the aggravated version of the offence can only be made out if the concentration of alcohol in the driver’s breath or blood was 0.15 grammes or more in 210 litres of breath or 100 millilitres of blood.⁹³

Consistency with other unrelated offences is not necessary

- 3.78 We do not consider it desirable to change the terminology to mirror other offences. The provisions raised for our consideration are not directly comparable to aggravated dangerous driving. Consistency with these sections does not, of itself, make the case for change.

89. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 19 November 1997, 27.

90. Legal Aid NSW, *Submission RC08*, 8; Public Defenders, *Submission RC21*, 2; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 9; Local Court of NSW, *Submission RC71*, 2.

91. Local Court of NSW, *Submission RC71*, 2.

92. *Crimes Act 1900* (NSW) s 52A(1)(a), s 52A(3)(a).

93. *Crimes Act 1900* (NSW) s 52A(7)(a), s 52A(9) definition of “prescribed concentration of alcohol”.

- 3.79 Although the DUI offences in the *RTA* are driving offences, they involve a significantly lower criminality, reflected in the lower maximum penalty of 18 months' imprisonment for a first offence, and 2 years' imprisonment in the case of a second or subsequent offence.⁹⁴ Mirroring the "under the influence" language of these offences would also cause confusion, because it uses the same terminology as the basic dangerous driving offences.⁹⁵ This change could result in no meaningful difference between the basic and aggravated forms of the offence.

Some groups supported adding new aggravating circumstances

- 3.80 Some groups submitted that the list of aggravating circumstances should be further expanded, to reflect the seriousness of a wider range of driving conduct.
- 3.81 The RTSG stated that "the current list of factors provide too many loopholes that can result in lower sentencing".⁹⁶ Another submission suggested that including other factors would act as a deterrent for road users.⁹⁷
- 3.82 The NSWPF suggested a range of additional circumstances, such as:
- using a mobile phone
 - driving with a known medical condition that would impair driving
 - driving without a valid driver licence
 - driving a stolen vehicle, and
 - being a provisional driver.⁹⁸
- 3.83 One submission argued that failing to stop and assist following an impact causing death or GBH should also be a circumstance of aggravation.⁹⁹
- 3.84 As we outlined in the consultation paper, some other states and territories include further aggravating factors for similar offences.¹⁰⁰ For example, in South Australia (SA), the offences of dangerous or careless driving causing death or harm can be aggravated if the offender was driving knowing they were disqualified or suspended.¹⁰¹

94. *Road Transport Act 2013* (NSW) s 112.

95. *Crimes Act 1900* (NSW) s 52A(1)(a), s 52A(3)(a).

96. Road Trauma Support Group NSW, *Submission RC16*, 17.

97. Confidential, *Submission RC25*, 10.

98. NSW Police Force, *Submission RC40*, 4–5.

99. Confidential, *Submission RC25*, 9.

100. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [2.73].

101. *Criminal Law Consolidation Act 1935* (SA) s 19A, s 5AA(1a)(b), s 19ABA, s 5AA(1ab)(a).

Unlawful street racing should be added

Recommendation 3.2: Participation in an unlawful race or unlawful speed trial should be a circumstance of aggravation

Participation in an unlawful race or unlawful speed trial should be added as a circumstance of aggravation in s 52A(7) of the *Crimes Act 1900* (NSW).

- 3.85 We recommend adding participation in an unlawful race or unlawful speed trial as a circumstance of aggravation in s 52A(7) of the *Crimes Act*.¹⁰²

This conduct is sufficiently serious to be an aggravating circumstance

- 3.86 Some submissions drew our attention to the seriousness of participating in an unlawful race or speed trial, also referred to as “street racing”. The arguments raised in submissions suggested that the seriousness of this conduct justified its becoming a circumstance of aggravation.¹⁰³ In our view, this factor involves a similarly high level of criminality as the existing aggravating circumstances in s 52A(7).
- 3.87 An offender’s participation in an unlawful race or speed trial at the time they cause an impact resulting in the death of another person, is so serious that it has been, successfully charged as manslaughter,¹⁰⁴ which is the most serious offence in the hierarchy of driving offences.¹⁰⁵ Street racing poses a significant danger to both the drivers involved and other people in the vicinity because it involves two or more vehicles travelling at high speeds and in competition with each other.¹⁰⁶
- 3.88 The change would not be unprecedented, because this conduct is already a circumstance of aggravation for the equivalent offence in Queensland.¹⁰⁷

It would fill a gap in the law

- 3.89 Adding participation in an unlawful race or unlawful speed trial as a circumstance of aggravation would fill a gap in the law that arises when the offending does not reach the high threshold required for a charge of manslaughter, or when it causes GBH (but not death).
- 3.90 While street racing can form the basis of a manslaughter charge, there may be cases where the conduct does not meet the threshold for manslaughter. There may

102. *Crimes Act 1900* (NSW) s 52A(2), s 52A(4), s 52A(7); Confidential, *Submission RC69*, 5; NSW Police Force, *Submission RC40*, 4; Law Society of NSW, *Submission RC12*, 2.

103. Law Society of NSW, *Submission RC12*, 3.

104. See, e.g., *R v Borkowski* [2009] NSWCCA 102; *R v Cahill* [2020] NSWDC 224.

105. See, e.g., *R v Borkowski* [2009] NSWCCA 102; *R v Cahill* [2020] NSWDC 224.

106. Confidential, *Submission RC69*, 5.

107. *Criminal Code* (Qld) s 328A(2).

also be cases where the conduct does not satisfy any of the existing aggravating factors.¹⁰⁸ In these cases, there is a gap because the next available offence in the hierarchy is dangerous driving occasioning death, which may not always appropriately reflect the seriousness of the conduct.

- 3.91 Incorporating street racing as a circumstance of aggravation would make the aggravated offence available as an alternative verdict or charge option in cases where the accused's conduct does not meet the threshold for manslaughter.¹⁰⁹ This would address a gap in criminality and maximum penalty between manslaughter and basic dangerous driving offences.
- 3.92 Another benefit of adding this aggravating circumstance is that it would fill a gap in available charges when unlawful street racing results in an impact causing GBH, rather than death. Currently, the most serious charge for these cases is a basic dangerous driving occasioning GBH offence.¹¹⁰ This reform would allow the aggravated offence, with a higher maximum penalty, to be charged, which may better reflect the seriousness of the conduct.

No further aggravating circumstances should be added

- 3.93 We acknowledge that the availability of an aggravated offence may go some way to emphasising the serious harm caused to victims, their families, and the community. However, for the reasons below, we do not recommend that any further aggravating circumstances be added.

The proposed circumstances are not sufficiently serious

- 3.94 We do not consider any of the other proposed additional circumstances to be sufficiently serious to justify being added to s 52A(7).¹¹¹ Circumstances of aggravation should only include conduct that is distinct, and objectively more serious, than the conduct that is required for a basic offence of dangerous driving. The bar for aggravated offences should be set at a higher level because of the significant maximum penalties for these offences. The aggravated offence sits between dangerous driving and manslaughter within the serious road crime offence hierarchy, and this hierarchy should be maintained.
- 3.95 However, the criminality of some proposed factors, such as driving an unregistered vehicle, or contravening passenger restrictions as a P-plater, is considerably lower than that of the existing aggravating circumstances, such as driving while very substantially impaired by drugs.

108. Confidential, *Submission RC69*, 5.

109. *Crimes Act 1900* (NSW) s 52A(2), s 52A(7).

110. *Crimes Act 1900* (NSW) s 52A(3).

111. See also Local Court of NSW, *Submission RC71*, 3.

- 3.96 There is also concern that introducing additional circumstances may “dilute” the key criminality of the offence and reduce the value of aggravated offences.¹¹² Including conduct that is less objectively serious as a circumstance of aggravation could mean that the conduct captured by aggravated offences may be too similar to that which is caught by the basic dangerous driving offences. It could also result in the offences, and the sentences imposed for them, being difficult to distinguish.

Some proposed circumstances could support another criminal offence

- 3.97 Adding further aggravating circumstances is unnecessary because the current factors already cover the field of criminality.¹¹³ Although some conduct does not involve a sufficiently high level of criminality to be included as an aggravating circumstance, it instead forms the basis for another serious criminal offence.
- 3.98 A number of the proposed circumstances can already form the basis of a charge of dangerous driving. This includes factors such as using a mobile phone, exceeding a speed limit, or driving with a known medical condition.¹¹⁴ It would not be appropriate for conduct that can already form the basis of a basic offence to also be a circumstance of aggravation. This could lead to confusion, inconsistent charging practices, and difficulty in the sentencing process.
- 3.99 Other conduct, like failing to stop and assist following an impact, is not necessary for inclusion as a circumstance of aggravation because it is already covered by a separate standalone offence with a significant maximum penalty. This offence carries a maximum penalty of 10 years’ imprisonment if the impact caused death, or 7 years in the case of GBH, and can be charged alongside a dangerous driving offence.¹¹⁵
- 3.100 We acknowledge that in Queensland, knowing (or having ought reasonably to have known) that a person was killed or injured and failing to stop, is an aggravating factor for a similar offence.¹¹⁶ However, while Queensland also has a separate offence of failing to stop and assist, it carries a significantly lower maximum penalty than NSW of 3 years’ imprisonment for offences involving death or GBH.¹¹⁷ As the standalone offence in NSW carries a higher maximum penalty, we do not consider it necessary to incorporate failing to stop and assist as an aggravating circumstance.

112. Law Society of NSW, *Submission RC12*, 2; Local Court of NSW, *Submission RC71*, 3.

113. See, eg, Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 9, rec 2; Local Court of NSW, *Submission RC71*, 3.

114. NSW Police Force, *Submission RC40*, 4; *Crimes Act 1900* (NSW) s 52A(1), s 52A(3).

115. Legal Aid NSW, *Submission RC08*, 9; Law Society of NSW, *Submission RC12*, 2; NSW Bar Association, *Submission RC27* [22]; *Crimes Act 1900* (NSW) s 52AB.

116. *Criminal Code* (Qld) s 328A(4)(c).

117. *Transport Operations (Road Use Management) Act 1995* (Qld) s 92.

Aggravating circumstances should relate to the manner of driving

- 3.101 In our view, circumstances of aggravation should be limited to those that affect the manner of driving.¹¹⁸ A number of suggested factors, such as professional driver status, driving a stolen vehicle, or not holding a valid driver licence, are not factors that, of themselves, affect the manner of driving.¹¹⁹
- 3.102 These factors are more appropriately taken into account during sentencing (for example, in the assessment of the objective seriousness of the offence).¹²⁰

Introducing more circumstances may limit sentencing consideration

- 3.103 Including a significant number of additional aggravating circumstances in the aggravated dangerous driving offences could, in practice, limit the ability of a court to take these factors into account on sentence. This may not serve the community interest in properly recognising and reflecting the entirety of offending conduct in sentencing. It is possible that the positive symbolic effect of including additional circumstances of aggravation could be diminished in practice.
- 3.104 The operation of the *R v De Simoni (De Simoni)*¹²¹ principle could result in any additional aggravating factors, such as unauthorised or professional driver status, not being taken into consideration on sentence at all.
- 3.105 Ordinarily, courts should consider all relevant circumstances when sentencing an offender. However, the *De Simoni* principle provides that a sentencing court cannot take into account any fact that aggravates the offending, if it could have led to a conviction for a more serious offence. This reflects the important rule that an offender should not be punished for an offence of which they have not been convicted.¹²²
- 3.106 The practical effect of this rule is that if an offender pleads guilty, or is found guilty of a basic dangerous driving offence, a court cannot take into account any factors that could have supported an aggravated charge.¹²³
- 3.107 For example, if an offender pleads guilty to a basic offence of dangerous driving under s 52A(1), a court may take into account that they were speeding at the time of

118. Law Society of NSW, *Submission RC12*, 2.

119. NSW Police Force, *Submission RC40*, 4.

120. Legal Aid NSW, *Submission RC08*, 9; Law Society of NSW, *Submission RC12*, 2; NSW Bar Association, *Submission RC27* [12], [19].

121. *R v De Simoni* (1981) 147 CLR 383.

122. *R v De Simoni* (1981) 147 CLR 383, 389.

123. See, eg, *R v Booth* (Unreported, NSWCCA, 12 November 1993) 2, 5; *R v Channells* (Unreported, NSWCCA, 30 September 1997) 11; *R v JB* [1999] NSWCCA 93 [28]; *Hector v R* [2003] NSWCCA 196 [16]–[17].

impact, but could not consider the fact that they were driving to escape police pursuit. This is because that factor could have resulted in a conviction for an aggravated offence.¹²⁴

- 3.108 In practice, an offender can come to be sentenced for a basic dangerous driving offence in a number of ways, including where:
- an aggravated offence is withdrawn by the prosecution in exchange for a plea of guilty to a basic dangerous driving offence
 - a court finds an offender guilty of a basic offence, but not guilty of the aggravated offence, or
 - the offender is charged with a basic offence, but the facts and circumstances of the case could have supported an aggravated offence.

A new specially aggravated offence

- 3.109 We conclude that a new specially aggravated dangerous driving offence, that is more serious than an aggravated offence, should not be introduced. The existing offences adequately cover the field of criminality, and introducing a new offence to the hierarchy could cause undesirable confusion.

The NSW Police Force proposed a new offence

- 3.110 The NSWPF proposed a new offence of “specially aggravated dangerous driving occasioning death” as an alternative to a new vehicular homicide offence. They argued this would more appropriately fit in the existing structure of driving offences and better reflect offending with high levels of criminality. The proposed offence would have a maximum penalty of 25 years’ imprisonment and be triable only in the Supreme Court.¹²⁵
- 3.111 The proposed offence would add a third, more serious, level to the hierarchy of dangerous driving offences. It would require the prosecution to prove:
- each of the elements of dangerous driving occasioning death and
 - the existence of two or more aggravating factors.¹²⁶
- 3.112 The NSWPF considered that the aggravating factors should include:
- mobile phone use
 - street racing
 - driving with high fatigue

125. NSW Police Force, *Submission RC75*, 1, 2.

126. NSW Police Force, *Submission RC75*, 1.

- unauthorised driving
- driving with a known or perceived medical condition
- driving a stolen or unregistered vehicle
- driving a modified vehicle without a compliance certificate, and
- professional driver status.¹²⁷

A specially aggravated offence should not be introduced

- 3.113 We acknowledge that this proposed offence may play an important role in signalling the gravity of the conduct covered. However, for the reasons below, we conclude that it should not be introduced.

The proposed offence does not cover significantly higher criminality

- 3.114 Some of the proposed factors of special aggravation do not carry a higher, or equivalent level of criminality than the existing aggravating factors in s 52A(7) of the *Crimes Act*, or even the basic dangerous driving offences.
- 3.115 The proposed offence would be inconsistent with other specially aggravated offences in the *Crimes Act*. Kidnapping and break and enter offences are currently the only offences in the *Crimes Act* with a “specially aggravated” version available.¹²⁸ The specially aggravated versions of these offences involve significantly more serious conduct than the aggravated and basic versions. For example, a break and enter can only be “specially aggravated” if the offender wounds or causes GBH to the victim or is armed with a dangerous weapon.¹²⁹
- 3.116 Introducing a new offence that does not involve a higher level of criminality than aggravated dangerous driving, but has a significantly higher maximum penalty, is not desirable. A maximum penalty of 25 years’ imprisonment should only apply to conduct with much higher criminality than the existing offences.
- 3.117 However, we recognise that street racing does carry a higher level of criminality than some other factors. For that reason, we recommend it becomes a circumstance of aggravation, as we discuss above.
- 3.118 Many of the proposed specially aggravating factors are, by themselves, unrelated to the manner of driving (for example, factors such as unlicensed driving or professional licence status). As we discuss above, these types of factors should not be elements of any dangerous driving offences and are more appropriately considered on sentence.

127. NSW Police Force, *Submission RC75*, 2.

128. *Crimes Act 1900* (NSW) s 86(3), s 109(3), s 111(3), s 112(3).

129. *Crimes Act 1900* (NSW) s 105A(1).

The proposed offence would cause confusion about the hierarchy

- 3.119 A new specially aggravated offence would cause confusion as to the nature of the offence and introduce inconsistencies in the serious road crime offence hierarchy.
- 3.120 Introducing a specially aggravated dangerous driving offence, with the same maximum penalty as manslaughter but triable only in higher courts, could cause confusion for the community and the courts. It may be unclear whether this offence or manslaughter, is the most serious offence in the hierarchy.
- 3.121 An offence that is triable only in the Supreme Court must be of significant gravity. In this way, the proposed offence would be more serious than manslaughter, which can be tried in the District Court.
- 3.122 The proposed offence also does not meaningfully differ from the existing dangerous driving offences. If the same conduct can be charged as different offences, or if there is overlap between the conduct that can be subject of both a basic dangerous driving and a specially aggravated offence, selecting the appropriate charge may be difficult. This could lead to unfair and inconsistent charging practices.
- 3.123 There is also a possibility that introducing the proposed offence could limit the ability of a court to take the proposed specially aggravating factors into account on sentence for a lesser offence.¹³⁰ As we discuss above, a court cannot take into account any circumstance that aggravates the offence if it could have resulted in a conviction for a more serious offence.¹³¹ If an offender is sentenced for an offence of basic or aggravated dangerous driving, a court would be prevented from considering any factor of special aggravation when determining the seriousness of the offence.

Impacts causing actual bodily harm

There should be dangerous driving occasioning actual bodily harm offences

Recommendation 3.3: New offences of dangerous driving occasioning actual bodily harm and amending wanton or furious driving

- (1) An offence of dangerous driving occasioning actual bodily harm should be inserted into s 52A of the *Crimes Act 1900* (NSW). The elements of this offence should be consistent with the offences of dangerous driving occasioning death and dangerous driving occasioning grievous bodily harm. It should carry a maximum penalty of 2 years' imprisonment.

130. *R v De Simoni* (1981) 147 CLR 383, 389.

131. *R v De Simoni* (1981) 147 CLR 383, 389.

- (2) An offence of aggravated dangerous driving occasioning actual bodily harm should also be inserted into s 52A of the *Crimes Act 1900* (NSW). The circumstances of aggravation in s 52A(7), amended to include unlawful street racing, should apply to this offence. It should carry a maximum penalty of 4 years' imprisonment.
- (3) Both offences should be Table 1 offences, in Schedule 1 of the *Criminal Procedure Act 1986* (NSW).
- (4) The offence of dangerous driving occasioning actual bodily harm should be available as an alternative verdict to the aggravated form of the offence.
- (5) The offence of wanton and furious driving in s 53 of the *Crimes Act 1900* (NSW) should be updated, so it only covers conduct that is not addressed by these new offences. The language of the offence also should be modernised.

- 3.124 We recommend introducing two new offences to cover instances of dangerous driving that cause ABH:
- dangerous driving occasioning ABH, and
 - an aggravated version of this offence.
- 3.125 To maintain consistency with the existing dangerous driving occasioning GBH offences, we recommend that both proposed new offences be Table 1 offences.¹³²
- 3.126 We suggest that the proposed offence of dangerous driving occasioning ABH have a maximum penalty of 2 years' imprisonment, which is consistent with the maximum penalty of the existing offence of wanton or furious driving.¹³³ We also suggest a maximum penalty of 4 years' imprisonment for the aggravated version of the offence. However, we accept that there is an argument that the maximum penalties could be higher than we have proposed, having regard to the penalties for the existing dangerous driving offences in s 52A.
- 3.127 We also recommend amending the offence of wanton or furious driving in s 53 of the *Crimes Act* so it only covers conduct that is not captured by the proposed offences. As part of this process, the language of that section should be modernised.
- 3.128 There are currently no dangerous driving offences that apply to impacts resulting in ABH. Instead, this conduct is often charged as an offence of wanton or furious driving, or negligent driving.¹³⁴
- 3.129 In our view, these changes would improve the logic and coherence of the hierarchy of serious road crime offences in the *Crimes Act*, and address concerns that s 53 is

132. *Criminal Procedure Act 1986* (NSW) sch 1, table 1.

133. *Crimes Act 1900* (NSW) s 53.

134. *Crimes Act 1900* (NSW) s 53; *Road Transport Act 2013* (NSW) s 117(1).

outdated. New offences would accurately and consistently reflect the criminality of driving conduct that is dangerous but causes ABH rather than GBH or death.

It would address concerns about the outdated language in s 53

- 3.130 A new offence of dangerous driving occasioning ABH would partially replace the offence of wanton or furious driving in s 53 of the *Crimes Act*.
- 3.131 Although s 53 is still regularly used in relation to impacts causing ABH, it is widely considered outdated, and some consider it no longer fits community expectations.¹³⁵ The section currently reads:

Whosoever, being at the time on horseback, or in charge of any carriage or other vehicle, by wanton or furious riding, or driving, or racing, or other misconduct, or by wilful neglect, does or causes to be done to any person any bodily harm, shall be liable to imprisonment for two years.

- 3.132 The offence has been referred to, both by courts and submissions to this review as obsolete, outdated, archaic and vague,¹³⁶ and using the “verbiage ... of the late 19th century”.¹³⁷
- 3.133 Most submissions agreed that s 53 should be modernised. We discuss reforms to this offence below. However, adopting the modern and clear language of s 52A in the proposed new offence would, in part, address concerns about the outdated s 53 when it is applied to situations of ABH, and improve the clarity of the offence structure.¹³⁸

It would improve the structure and coherence of the hierarchy

- 3.134 The proposed new offences would improve the structure and coherence of the hierarchy of serious road crime offences in the *Crimes Act* and make the criminal law response to dangerous driving clear and consistent.
- 3.135 The proposed new offences should be incorporated into the existing hierarchy of s 52A of the *Crimes Act*. The elements of the offences, with the exception of the type of injury, should be consistent with the elements of the existing dangerous driving offences. This would make driving offences that cause ABH simpler to prosecute, and easier for juries and members of the public to understand.

135. Law Society of NSW, *Submission RC12*, 2–3; NSW Bar Association, *Submission RC27* [21]; Confidential, *Submission RC69*, 5; Local Court of NSW, *Submission RC71*, 3; Road Trauma Support Group NSW, *Submission RC16*, 18; NSW Police Force, *Submission RC40*, 6.

136. See, eg, Law Society of NSW, *Submission RC12*, 2–3; NSW Bar Association, *Submission RC27* [21]; Local Court of NSW, *Submission RC71*, 3; Road Trauma Support Group NSW, *Submission RC16*, 18.

137. *Aslan v R* [2015] NSWDC 185, 21 DCLR (NSW) 101 [38].

138. Law Society of NSW, *Submission RC12*, 2.

- 3.136 A logical and consistent hierarchy of dangerous driving offences that covers impacts causing death, GBH, and ABH, is likely to be simpler to use in practice. Such a reform could be particularly beneficial in cases where a single impact causes varying degrees of injury to multiple people.
- 3.137 Currently, cases where a single impact causes different harms to different people, for example death or GBH to one person and ABH to another, are often prosecuted through a combination of offences. A charge of dangerous driving causing GBH may relate to injuries to one victim, while a s 53 offence may cover injuries to another, even though they were injured by the same impact.¹³⁹ A new offence with the existing dangerous driving elements could streamline these cases, by reducing the number of different elements the prosecution must prove and the jury must comprehend. For example, a jury would need to assess whether the accused's driving was dangerous for all charges relating to the same impact, rather than deciding whether it was also furious or wanton for some of them.

The proposed new offences would more accurately label and categorise driving conduct

- 3.138 The proposed new offences would more accurately and consistently label the degree of criminal fault for driving that is both dangerous and causes ABH. This would also acknowledge the seriousness of the conduct and outcome. By adopting the existing language and elements of dangerous driving offences in s 52A, the new offence would better reflect where this conduct sits within the hierarchy of dangerous driving offences.
- 3.139 The wide, varied, and outdated language used in s 53 means that it can be difficult to understand how the fault element of the offence fits within the serious road offence hierarchy. For example, one District Court judge observed that the wanton or furious driving offence involved a “high degree of criminal fault”, which may be a slightly higher standard than dangerous driving.¹⁴⁰ By contrast, a different judge considered that dangerous driving offences involved more serious conduct than s 53.¹⁴¹
- 3.140 We acknowledge that some submissions considered that the combination of s 53, and the offence of negligent driving, sufficiently covered impacts that caused ABH.¹⁴² The combination and availability of these offences means that it is unlikely that a person would avoid criminal liability just because the impact caused ABH, rather than GBH or death.

139. *Crimes Act 1900* (NSW) s 52A, s 53; Confidential, *Submission RC69*, 5.

140. *R v Bolton* (Unreported, NSWDC, Cooper DCJ, 14 May 1981) 2.

141. *Aslan v R* [2015] NSWDC 185, 21 DCLR (NSW) 101 [35].

142. Legal Aid NSW, *Submission RC08*, 9; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 7.

- 3.141 However, the current offence structure leads to inconsistency in how driving conduct is labelled and charged, depending on the harm caused. Even if an accused person was driving “dangerously” they could not be guilty of a dangerous driving offence if the injury caused fell just slightly short of GBH. Driving that caused an impact resulting in ABH, such as some bone fractures,¹⁴³ must be given a different label, such as negligent, furious, wanton, or misconduct, even if it could be otherwise classed as “dangerous”. This may not properly recognise the degree of criminal fault inherent in the conduct.

There should be an aggravated form of the offence

- 3.142 To maintain consistency with the existing dangerous driving offences, we recommend introducing an aggravated version of dangerous driving causing ABH, with a maximum penalty of 4 years’ imprisonment. The circumstances of aggravation in s 52A(7) should be amended to include unlawful street racing and should apply to this offence.
- 3.143 An aggravated offence, with a higher maximum penalty, would accurately reflect the more serious criminality involved in these circumstances and better address cases where the culpability of the accused person was high.
- 3.144 There are currently no aggravated versions of s 53, or of negligent driving offences.¹⁴⁴ The existence of a circumstance of aggravation, such as being substantially impaired by a drug, can only be taken into account on sentence.¹⁴⁵
- 3.145 An aggravated dangerous driving occasioning ABH offence could address the gap between the maximum penalties that apply to existing offences covering ABH (such as s 53, and negligent driving), and the dangerous driving offences. The maximum penalty for an offence under s 53 is 2 years’ imprisonment, and the maximum penalty for negligent driving where no death or GBH is caused is a fine of \$1,100.¹⁴⁶ By contrast, the maximum penalties for the dangerous driving offences start at 7 years’ imprisonment for dangerous driving occasioning GBH.¹⁴⁷
- 3.146 Finally, we recommend that the basic version of the proposed dangerous driving occasioning ABH offence be available as an alternative verdict to a charge of aggravated dangerous driving occasioning ABH. This approach is consistent with the availability of alternative verdicts for dangerous driving causing death and GBH.¹⁴⁸

143. See, eg, *Swan v R* [2016] NSWCCA 79 [74], [77].

144. *Crimes Act 1900* (NSW) s 53; *Road Transport Act 2013* (NSW) s 117(1).

145. *Crimes Act 1900* (NSW) s 52A(7)(d).

146. *Crimes Act 1900* (NSW) s 53; *Road Transport Act 2013* (NSW) s 117(1)(c).

147. *Crimes Act 1900* (NSW) s 52A(3).

148. *Crimes Act 1900* (NSW) s 52AA(5).

We do not think there would be unintended consequences

- 3.147 In our view, it is unlikely that introducing these new offences would result in any significant net widening. This concern was raised by the Aboriginal Legal Service (ALS), who cautioned that introducing new offences could increase the resource burden on courts and lead to delays.¹⁴⁹ The ALS submitted that because the threshold for ABH is relatively low, the proposed offence would capture a significant number of less serious matters.¹⁵⁰
- 3.148 However, the conduct that would be covered by these new offences is already regularly prosecuted under existing offences, such as s 53. The proposed new offences are unlikely to capture any conduct that is not already covered. As the proposed new basic offence would have the same maximum penalty as the existing s 53, it would be unlikely to cause any significant increase in the number of contested matters and consequential burden on courts.

Section 53 should be amended and modernised

- 3.149 We recommend that the NSW Government review and update s 53 so it continues to capture conduct that would not be covered by the new dangerous driving causing ABH offences. We also recommend that the offence be modernised.
- 3.150 As we discuss above, the offence is widely considered outdated. Although not all groups agreed with introducing new offences, there was broad support for modernising the language of s 53.¹⁵¹ Updating the language of the offence would make its scope and application clearer.¹⁵²
- 3.151 Some considered that s 53 should be abolished and replaced with a new dangerous driving causing ABH offence,¹⁵³ but we do not recommend this approach. Removing s 53 completely would leave gaps in the law.
- 3.152 For example, the offence continues to be used for horse riding related offending.¹⁵⁴ Of the 952 charges finalised for the offence in 2016–2022, 23 involved carriages or horseback riding.¹⁵⁵

149. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 7.

150. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 7.

151. Law Society of NSW, *Submission RC12*, 2–3; NSW Bar Association, *Submission RC27* [21]; Confidential, *Submission RC69*, 5; Road Trauma Support Group NSW, *Submission RC16*, 18.

152. Legal Aid NSW, *Submission RC08*, 9–10; Law Society of NSW, *Submission RC12*, 2; Confidential, *Submission RC69*, 5.

153. Confidential, *Submission RC69*, 5–6.

154. Confidential, *Submission RC69*, 6.

155. NSW Bureau of Crime Statistics and Research, kf23-22320, table 1a.

- 3.153 Section 53 also covers a range of conduct that may fall between negligence and dangerousness.¹⁵⁶ Though “wanton” and “furious” driving is likely to be captured by an offence of dangerous driving causing ABH, s 53 may continue to be of use in driving cases involving “misconduct” or “wilful neglect”. This conduct may fall below the threshold of “dangerous” but be considered more serious than that covered by the *RTA*. A higher degree of negligence is required to prove *Crimes Act* offences, compared with *RTA* offences.¹⁵⁷
- 3.154 Some of the conduct currently covered by the offence of wanton or furious driving would be captured by the proposed new offences. However, we recommend that s 53 remain as an offence, because it covers other conduct that may not be captured, such as cases of misconduct or wilful neglect, or those involving:
- being in charge of a carriage
 - horseback riding
 - a vehicle used on a railway or tramway, or
 - use of a vehicle that is propelled by human or animal power.¹⁵⁸
- 3.155 It is important that no legislative gaps are created in the process of making amendments to the offence. The NSW Government should closely consider the role that s 53 would continue to play alongside the proposed new offences.

A new mid-tier offence

- 3.156 We conclude that there should not be a new mid-tier offence, such as reckless driving, because the existing serious road offences already sufficiently cover the spectrum of criminal conduct.

Some considered that a new mid-tier offence would fill a gap

- 3.157 One submission raised concerns that there was a gap between negligent and dangerous driving offences involving death or GBH. It argued that the law did not adequately respond to cases where the accused’s conduct was objectively more serious than negligent driving but did not meet the threshold of “dangerous”.¹⁵⁹
- 3.158 This concern may have been due, in part, to the significant difference in maximum penalties between dangerous and negligent driving. For example, in a case involving the death of a victim, a maximum penalty of 10 years’ imprisonment

156. Legal Aid NSW, *Submission RC08*, 9.

157. W V Windeyer, *Review of Offences Relating to Fatal Car Accidents on Private Property* (2015) [2.7].

158. *Crimes Act 1900* (NSW) s 52A(9) definition of “vehicle”.

159. Confidential, *Preliminary Submission PRC91*, 1.

applies where the accused's conduct is dangerous, but only 18 months' imprisonment if the conduct is negligent (and it is the accused's first offence).¹⁶⁰

- 3.159 To address these concerns, the NSWPF suggested NSW follow the approach of SA and introduce a new offence of "reckless driving", to sit between negligent and dangerous driving in the hierarchy of driving offences.¹⁶¹ The aim in SA was to address the significant difference in penalties between these offences, which is also a feature of the NSW offence hierarchy.¹⁶²
- 3.160 A mid-tier offence may also provide a wider range of charging options to police and prosecutors and could more accurately label the criminality of the conduct.¹⁶³

There should not be a new mid-tier offence

- 3.161 For the reasons below, we do not consider a new mid-tier offence is necessary or desirable.

Mid-tier offences could have unintended consequences

- 3.162 There is a risk that introducing a mid-tier offence could increase inconsistent charging practices.¹⁶⁴ Given that several groups considered that the current hierarchy of offences covered the field of criminality, adding a new offence to the middle of the hierarchy could result in overlap with existing offences. This may lead to confusion and inconsistency in the charging process, particularly if the same conduct is capable of being charged as multiple, different offences.¹⁶⁵ It could also result in several charges being laid against the same person, for the same incident.
- 3.163 Introducing a mid-tier offence may have the unintended consequence of bringing more complexity and confusion to the current hierarchy. It may be difficult for victims, accused persons, and the community to understand the categories of the offences and where the line sits between them.¹⁶⁶ The existing offences cover a wide spectrum of conduct.

160. *Crimes Act 1900* (NSW) s 52A(1); *Road Transport Act 2013* (NSW) s 117(1).

161. NSW Police Force, *Submission RC40*, 2; *Criminal Law Consolidation Act 1935* (SA) s 19ABA.

162. *Crimes Act 1900* (NSW) s 52A(1); *Road Transport Act 2013* (NSW) s 117(1).

163. ACT Law Reform and Sentencing Advisory Council, *Report into Dangerous Driving: Sentencing and Recidivism* (2024) 52.

164. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 6.

165. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 6.

166. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 6.

- 3.164 In our view, a mid-tier offence is unnecessary, because the current offences appropriately cover the field of criminality.¹⁶⁷ The existing offences already cover a wide spectrum of conduct. For example, dangerous driving can extend, at its lower end, to cases of momentary inattention and at its highest end to a complete abandonment of responsibility.¹⁶⁸
- 3.165 Given the breadth of this offence, it may be unclear how a new offence would fit in between existing offences in the hierarchy, or meaningfully differ from negligent driving.¹⁶⁹ The RTSG observed that any conduct that exceeds the threshold of negligent driving should be classed as dangerous.¹⁷⁰
- 3.166 In circumstances where the existing offences cover the spectrum of driving conduct causing serious harm, there is no clear justification for creating a new tier of offences, particularly because there is a risk it could increase complexity.¹⁷¹

The seriousness of an offence is already reflected in sentencing

- 3.167 Some submissions expressed concern that the sentences that were imposed for driving offences were inadequate.¹⁷² However, introducing a new mid-tier offence would not necessarily address this concern. It may have little or no impact on the actual length of sentences that are imposed for the conduct.
- 3.168 This is because the maximum penalty is only one factor that a court considers when sentencing an offender.¹⁷³ As part of the sentencing process, the judge must also assess the objective seriousness of the offence. As a result, sometimes more serious charges can have less severe sentencing outcomes, compared with less serious charges, depending on the seriousness of the conduct involved. In our view, the existing offences and sentencing principles are flexible enough to cover the spectrum of conduct.

Negligent off-road driving is outside our scope

- 3.169 In our consultation paper, we asked whether the law responds adequately to off-road driving where death or GBH is caused, but the conduct does not meet the

167. See also Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 6; Confidential, *Submission RC69*, 6; Local Court of NSW, *Submission RC71*, 3; Law Society of NSW, *Submission RC12*, 3; Legal Aid NSW, *Submission RC08*, 10; Public Defenders, *Submission RC21*, 3.

168. Confidential, *Submission RC69*, 6; *R v Errington* [2005] NSWCCA 348 [27].

169. Confidential, *Submission RC69*, 6.

170. Road Trauma Support Group NSW, *Submission RC16*, 18.

171. NSW Bar Association, *Submission RC27* [20].

172. See, eg, T Blake, *Submission RC19*, 10; NSW Police Force, *Submission RC40*, 1.

173. *Muldock v R* [2011] HCA 39, 244 CLR 120 [27].

threshold of “dangerous” driving. We also asked whether negligent driving should be criminalised when it occurs “off-road”.¹⁷⁴

- 3.170 Currently, only *Crimes Act* offences are available for off-road driving conduct. *RTA* offences, including the negligent driving offences, cannot be charged where the conduct occurred on private land, such as on a rural property. As one submission observed, this may leave a gap in the law.¹⁷⁵
- 3.171 One submission supported introducing a new offence to criminalise negligent off-road driving or making amendments to extend the existing negligent driving offence to private land.¹⁷⁶ However, several groups did not support any change to the law in this area.¹⁷⁷
- 3.172 Having carefully considered this topic, the offences in the *RTA*, including negligent driving, are outside our terms of reference. As we mention in chapter 1, the terms of reference direct us to serious road crime offences in the *Crimes Act*.
- 3.173 However, the NSW Government may wish to further consider the adequacy of the provisions of the *RTA* and other laws to cover off-road driving offences.

174. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [2.98].

175. Confidential, *Preliminary Submission PRC91*, 1–2.

176. NSW Police Force, *Submission RC40*, 6.

177. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 7; Confidential, *Submission RC69*, 6; Law Society of NSW, *Submission RC12*, 3; Local Court of NSW, *Submission RC71*, 3.

4. Other serious road crime offences

In brief

This chapter considers whether other serious road crime offences in the *Crimes Act 1900* (NSW), and accessorial liability provisions, are fit for purpose. If new dangerous driving occasioning actual bodily harm offences are introduced, we recommend a new offence of failing to stop and assist after a vehicle impact causing actual bodily harm. We do not recommend any other changes to the provisions considered by this chapter.

Failing to stop and assist	64
There should be an offence that covers impacts causing ABH	64
The offence is otherwise operating appropriately	65
Police pursuit	66
The police pursuit offence should not change	66
An aggravated police pursuit offence should not be introduced	67
Predatory driving	68
Some groups supported amendments	68
The offence should not be amended	69
Accessorial liability	70
Some argued new offences would play an important role	70
There should be no new accessory offences	71

- 4.1 This chapter considers whether the serious road crime offences in Part 3, Division 6 of the *Crimes Act 1900* (NSW) (*Crimes Act*) that do not cause death or injury, along with accessorial liability provisions as they apply to serious road crimes, remain fit for purpose.
- 4.2 Some submissions advocated for amendments to these offences to better reflect the seriousness of the offences, and to act as a stronger deterrent. Some also suggested introducing new accessory offences, to hold non-drivers criminally accountable for playing a role in serious road crime offences.
- 4.3 However, most submissions did not support any change to these serious road crime offences, or the introduction of any new accessory offences.
- 4.4 We conclude that the elements of the offences, and the law on accessorial liability are operating appropriately. We recommend one change to the offence of failing to stop and assist, for consistency with our proposed new offences involving

dangerous driving occasioning actual bodily harm (ABH). Otherwise, we do not think there should be any change.

Failing to stop and assist

There should be an offence that covers impacts causing ABH

Recommendation 4.1: Extend fail to stop and assist to impacts causing ABH

If new dangerous driving occasioning actual bodily harm offences are introduced, a new offence of failing to stop and assist after a vehicle impact causing actual bodily harm should be inserted into s 52AB of the *Crimes Act 1900* (NSW).

- 4.5 In chapter 3 we recommend that new offences of dangerous driving occasioning ABH be introduced. If these offences are introduced, we recommend that a new offence of failing to stop and assist after a vehicle impact causing ABH be inserted into s 52AB of the *Crimes Act*. This would maintain consistency with the serious road crime offence hierarchy.
- 4.6 Failing to stop and assist after a vehicle impact causing ABH should be incorporated into the existing hierarchy of s 52AB of the *Crimes Act*. The elements of the new offence should be consistent with the existing offences of failing to stop and assist following an impact causing death or grievous bodily harm (GBH).¹ A new offence would be a logical addition to the serious road crime offence hierarchy.
- 4.7 The maximum penalty of the proposed fail to stop offence should be proportionate to the maximum penalties for the existing offences in s 52AB. To maintain consistency with the existing offences, the proposed offence should be a Table 1 offence.²
- 4.8 In NSW, it is an offence for the driver of a vehicle to fail to stop and assist if they are involved in an impact that caused the death of, or GBH to another person.³ A maximum penalty of 10 years' imprisonment applies to offences involving death, or 7 years' imprisonment for offences involving GBH.⁴ We outlined the elements of these offences in more detail in the consultation paper.⁵
- 4.9 While we acknowledge that the fail to stop and assist offence in s 146 of the *Road Transport Act 2013* (NSW) (RTA) covers impacts causing injury and could apply

1. *Crimes Act 1900* (NSW) s 52AB(1)–(2).

2. *Criminal Procedure Act 1986* (NSW) sch 1, table 1.

3. *Crimes Act 1900* (NSW) s 52AB(1)–(2).

4. *Crimes Act 1900* (NSW) s 52AB(1)–(2).

5. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [2.100].

where ABH is caused,⁶ we consider that it is desirable that any amendments to the hierarchy of the dangerous driving offences apply consistently across the *Crimes Act*.⁷

- 4.10 The *Crimes Act* offence of failing to stop and assist is often charged together with an offence of dangerous driving, to cover different aspects of conduct within the same incident. Inconsistent charging practices and outcomes could arise if a person must be charged under different Acts depending on the harm caused. For example, a person can be charged under the *Crimes Act* for both dangerous driving and failing to stop and assist if the impact caused GBH. On the other hand, without the proposed reform, a person who caused an impact resulting in ABH could be charged with the proposed new offence of dangerous driving causing ABH under the *Crimes Act*, but could only be charged under the *RTA* for failing to stop and assist following an impact causing injury.
- 4.11 A new offence of failing to stop and assist following an impact causing ABH would use consistent language to describe the type of injury caused. This means it might be simpler to prosecute and easier for juries to consider together with the proposed new dangerous driving offences.

The offence is otherwise operating appropriately

- 4.12 The Road Trauma Support Group (RTSG) suggested that the fail to stop and assist offences could be expanded to apply to passengers and other people at the scene. They considered the offence to be very serious, “akin to a vehicular homicide offence”.⁸
- 4.13 A similar recommendation was made by the Australian Capital Territory (ACT) Standing Committee in 2023. The Committee considered it important that both drivers and passengers remain at the scene to assist with an investigation, and that penalties should extend to passengers who leave the scene.⁹ However, the ACT Government did not agree to this change, because it would “fundamentally change the default nature and role of a passenger’s responsibility under the existing road transport legislation”.¹⁰
- 4.14 While we recognise the importance of denouncing the act of failing to stop and assist after a crash, we hold similar concerns as those expressed by the ACT

6. *Road Transport Act 2013* (NSW) s 146(1).

7. *Crimes Act 1900* (NSW) s 52A.

8. Road Trauma Support Group NSW, *Submission RC16*, 18.

9. Australian Capital Territory, Legislative Assembly, Standing Committee on Justice and Community Safety, *Inquiry into Dangerous Driving*, Report 16 (2023) [3.3].

10. Australian Capital Territory, Legislative Assembly, *Standing Committee on Justice and Community Safety Report No 16: Inquiry into Dangerous Driving*, Government Response (2023) 20.

Government.¹¹ Such an expansion would significantly change the role of a passenger, and the nature of their responsibility.¹² Passengers have different legal responsibilities from drivers under the *RTA* and the *Road Rules 2014* (NSW) (*Road Rules*).¹³ Expanding the offence may also capture conduct or people it should not cover, such as children or vulnerable persons.¹⁴

- 4.15 This does not mean that a passenger can never be charged. In an appropriate case, a passenger could be charged as an “accessory” to the driver’s conduct.¹⁵ We discuss accessorial liability in more detail below.
- 4.16 We conclude there should be no other changes to these offences. Most submissions considered that reform or expansion of the offence was unnecessary,¹⁶ and that there was no evidence supporting the need for change.¹⁷ In the Local Court’s view, the offences struck the right balance between community expectations and the objectives of the criminal justice system.¹⁸

Police pursuit

The police pursuit offence should not change

- 4.17 We conclude that there should be no change to the offence of failing to stop and driving recklessly or dangerously in response to a police pursuit in s 51B of the *Crimes Act*.¹⁹ We outlined the elements of this offence in more detail in the consultation paper.²⁰
- 4.18 The NSW Police Force (NSWPF) supported reform to police pursuit offences to increase the deterrent effect of the legislation and to better align with community

11. Australian Capital Territory, Legislative Assembly, *Standing Committee on Justice and Community Safety Report No 16: Inquiry into Dangerous Driving*, Government Response (2023) 20–21.

12. Law Society of NSW, *Submission RC12*, 3.

13. Australian Capital Territory, Legislative Assembly, *Standing Committee on Justice and Community Safety Report No 16: Inquiry into Dangerous Driving*, Government Response (2023) 20; *Road Rules 2014* (NSW).

14. Australian Capital Territory, Legislative Assembly, *Standing Committee on Justice and Community Safety Report No 16: Inquiry into Dangerous Driving*, Government Response (2023) 20–21.

15. Confidential, *Submission RC69*, 6.

16. Law Society of NSW, *Submission RC12*, 3; Legal Aid NSW, *Submission RC08*, 10; Public Defenders, *Submission RC21*, 3; NSW Bar Association, *Submission RC27* [20]; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, rec 3, 10.

17. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 10.

18. Local Court of NSW, *Submission RC71*, 3.

19. *Crimes Act 1900* (NSW) s 51B.

20. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [2.109].

expectations.²¹ However, no other submissions considered change was required or suggested any reforms.²²

An aggravated police pursuit offence should not be introduced

- 4.19 The NSWPF suggested introducing an aggravated form of the police pursuit offence. They considered that this, among other amendments, might increase the deterrent effect of the law.²³ They proposed that the same aggravating factors that apply to dangerous driving offences should also apply to police pursuits. This included driving while under the influence of a prescribed concentration of alcohol, substantially impaired by drugs, or in excess of 45km/h above the speed limit.²⁴
- 4.20 We do not consider that an aggravated form of the offence is necessary. Each of the factors can already be charged as a separate offence, such as driving with a prescribed concentration of alcohol in breath or blood,²⁵ driving with the presence of prescribed illicit drug in oral fluid, blood, or urine,²⁶ and speeding.²⁷ If an offender was not charged separately for this conduct, the court could take it into account when determining the objective seriousness of the police pursuit offence.
- 4.21 We acknowledge that these factors are available to establish an offence of aggravated dangerous driving causing death or GBH.²⁸ Aggravated dangerous driving offences were introduced in 1994 as part of significant reforms to the culpable driving provisions. A major reason for the amendment of the earlier offences was to bridge the significant gap that existed between the penalty for culpable driving and that for manslaughter, and better reflect the seriousness of dangerous driving.²⁹
- 4.22 However, we are not aware of any evidence that points to a need for an aggravated police pursuit offence or indicates that the current offence and maximum penalty insufficiently reflect the criminality of this conduct.

21. NSW Police Force, *Submission RC40*, 7.

22. Legal Aid NSW, *Submission RC08*, 11; Law Society of NSW, *Submission RC12*, 3; Public Defenders, *Submission RC21*, 3; NSW Bar Association, *Submission RC27* [22]; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 9–10, rec 3; Confidential, *Submission RC69*, 7; Local Court of NSW, *Submission RC71*, 4.

23. NSW Police Force, *Submission RC40*, 7.

24. *Crimes Act* (NSW) s 52A(7).

25. *Road Transport Act 2013* (NSW) s 110.

26. *Road Transport Act 2013* (NSW) s 111.

27. *Road Rules 2014* (NSW) r 10-2.

28. *Crimes Act 1900* (NSW) s 52A(2), s 52A(4), s 52A(7).

29. NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 27 October 1994, 4792–4794.

- 4.23 The NSWPF also suggested making the police pursuit offence a serious indictable offence and increasing the maximum penalties.³⁰ We discuss these proposals in chapters 5 and 7.

Predatory driving

- 4.24 We conclude that there should be no change to the elements of predatory driving in s 51A of the *Crimes Act*.³¹

Some groups supported amendments

- 4.25 Some submissions proposed changes to this offence. For instance, a confidential preliminary submission suggested that the offence may not address the range of ways that harm can be caused by predatory driving.³² The offence currently captures instances where a person, while in pursuit of or travelling near another vehicle, engages in a course of conduct that causes or threatens an impact involving the other vehicle, while intending to cause ABH to a person in the other vehicle.³³
- 4.26 We outlined the elements of the offence in more detail in the consultation paper.³⁴
- 4.27 The NSWPF submitted that the offence should cover a threatened impact with anything, not just a threat of impact with another vehicle,³⁵ while the RTSG supported removing the requirement for an actual or threatened impact entirely.³⁶
- 4.28 Another submission advocated expanding the offence to cover instances where the driver intended to cause the victim to fear any physical or mental harm, instead of ABH.³⁷ It considered this would address concerns that requiring proof of an intention to cause ABH to a person in the other vehicle, is too high a bar.³⁸
- 4.29 Some submissions also proposed changes to the mental element. For instance, the NSWPF suggested that the offence should be expanded to cover reckless

30. NSW Police Force, *Submission RC40*, 7.

31. *Crimes Act 1900* (NSW) s 51A.

32. Confidential, *Preliminary Submission PRC91*, 2.

33. *Crimes Act 1900* (NSW) s 51A(1).

34. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [2.112].

35. NSW Police Force, *Submission RC40*, 7.

36. Road Trauma Support Group NSW, *Submission RC16*, 18.

37. Confidential, *Submission RC69*, 7.

38. Confidential, *Submission RC69*, 7.

conduct.³⁹ One preliminary submission regarded the mental element of intention as “restrictive”.⁴⁰

The offence should not be amended

- 4.30 We do not recommend any reform to the offence. In our view, it covers a sufficiently broad range of conduct. Conduct that falls short of predatory may instead be captured by the offence of menacing driving.⁴¹ For this reason, most submissions did not consider that any change to the offence was required.⁴²
- 4.31 Menacing driving offences do not require proof of an intention to cause ABH, or that there be an impact or a threat of an impact. Rather, a person may be guilty of an offence under s 118 of the *RTA* if they drive a motor vehicle on a road in a manner that menaces another person either:
- with the intention of menacing that other person, or
 - if the person ought to have known that the other person might be menaced.⁴³
- 4.32 The offence of predatory driving was intended to deal with the most serious incidents of road rage.⁴⁴ For this reason, we do not consider it desirable to lower the threshold of the offence, particularly where other alternative offences such as those included in s 118 of the *RTA* are available.

There should not be an aggravated offence

- 4.33 The NSWPF proposed introducing an aggravated version of the offence that could be established if the accused was in a domestic relationship with the victim at the time of the offence. They submitted that a higher maximum penalty, of 7 years’ imprisonment, should be applied to such an offence.⁴⁵
- 4.34 We acknowledge that this conduct, within a domestic relationship, is very serious. However, in our view, this factor already can be taken into account appropriately on sentence.

39. NSW Police Force, *Submission RC40*, 7.

40. Confidential, *Preliminary Submission PRC91*, 2.

41. *Road Transport Act 2013* (NSW) s 118.

42. Legal Aid NSW, *Submission RC08*, 11; Law Society of NSW, *Submission RC12*, 4; NSW Bar Association, *Submission RC27* [22]; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 9–10; Local Court of NSW, *Submission RC71*, 4.

43. *Road Transport Act 2013* (NSW) s 118(1)–(2).

44. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 19 June 1997, 10720; *Crimes Act 1900* (NSW) s 51A.

45. NSW Police Force, *Submission RC40*, 7.

Accessorial liability

- 4.35 Many victims felt a strong sense of injustice that people who may have had a role in a serious road crime were not held criminally responsible for their actions. Some argued that there should be a stronger criminal law response when third parties contributed to or played a role in serious road crimes resulting in death or serious harm.⁴⁶
- 4.36 However, other submissions raised strong and compelling arguments against introducing new accessory offences.⁴⁷ For the reasons below, we conclude that there should be no new offences.

Some argued new offences would play an important role

- 4.37 The RTSG submitted that the law on accessorial liability is “wholly inadequate” when it comes to serious road crimes. They considered that new accessory offences would emphasise accountability, foster responsible behaviour and provide a strong deterrent against facilitating or encouraging criminal driving.⁴⁸
- 4.38 The RTSG suggested that accessorial liability provisions should capture people who were involved before, during or after a road crime (for example, by fleeing the scene).⁴⁹ In their view, new accessory offences should cover behaviour including:
- encouraging dangerous driving (for example, by passengers)
 - failing to try to prevent criminal driving
 - failing to give immediate assistance by calling emergency services, and
 - failing to responsibly serve alcohol in public venues and private homes (for example, adults who allow underage drinking in their homes).⁵⁰
- 4.39 The NSWPF proposed new accessory offences that captured:
- passengers and/or those filming and disseminating images of serious road crime offences
 - granting permission to use a vehicle knowing the driver is unlicensed, disqualified or suspended where GBH or death occurs, and

46. Road Trauma Support Group NSW, *Preliminary Submission PRC72*, 3; NSW Police Force, *Submission RC40*, 7–8.

47. Legal Aid NSW, *Submission RC08*, 12; Law Society of NSW, *Submission RC12*, 4; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 10–11; Confidential, *Submission RC69*, 7.

48. Road Trauma Support Group NSW, *Submission RC16*, 18–19.

49. Road Trauma Support Group NSW, *Submission RC16*, 19.

50. Road Trauma Support Group NSW, *Submission RC16*, 18–19.

- encouraging and/or counselling the driver to commit an offence, for example encouraging the driver to carry out dangerous acts.⁵¹

There should be no new accessory offences

- 4.40 For the reasons below, we conclude there should be no new accessory offences to capture non-driver behaviour.
- 4.41 Changes to the general law of accessorial liability, that impact all offences, are beyond the scope of this review. We did not hear any specific reform proposals to accessorial liability principles that would affect only serious road crime offences. We agree that any reforms to accessorial liability should be done with a view to reforming accessorial liability generally as it applies to all offences, not particular categories of offences.⁵²

Other offences, including accessorial liability provisions, are available

- 4.42 In appropriate cases, non-drivers that contribute to a road crime offence can be held liable under accessorial liability provisions or other criminal offences.⁵³ Much of the conduct proposed to be covered by new accessory offences is already covered by existing provisions. For instance, in appropriate circumstances, existing accessorial liability provisions may apply as follows:
- accessory before the fact provisions could capture encouraging dangerous driving (including encouraging dangerous acts), if that person is not present at the scene
 - principal in the second degree provisions could capture passengers and others who encourage the offender to commit a serious road crime, and
 - accessory after the fact provisions could capture helping the offender flee from the scene of the crash.
- 4.43 We outlined the elements of the accessorial liability provisions in the consultation paper.⁵⁴
- 4.44 Additionally, it is already an offence to supply alcohol to minors.⁵⁵ Licensed venues have a number of obligations in relation to the responsible service of alcohol, and various criminal offences apply if these are not met.⁵⁶

51. NSW Police Force, *Submission RC40*, 7–8.

52. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 10; Public Defenders, *Submission RC21*, 3.

53. Legal Aid NSW, *Submission RC08*, 11–12.

54. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [2.133]–[2.136], [2.139]–[2.142].

55. *Liquor Act 2007* (NSW) s 117.

56. See *Liquor Act 2007* (NSW) s 124(1); *Liquor Regulation 2018* (NSW) cl 50(1)–(2).

- 4.45 Other offences are available to capture non-driver behaviour related to serious road crimes. These include:
- a person responsible for a vehicle, failing to comply with a request to disclose the identity of a driver alleged to have committed an *RTA* offence while driving that vehicle⁵⁷
 - concealing a serious indictable offence⁵⁸ (a serious indictable offence is an indictable offence punishable by imprisonment for life or for a term of 5 years or more)⁵⁹
 - hindering the investigation, discovery of evidence, or apprehension of an alleged offender, in relation to a serious indictable offence,⁶⁰ and
 - perverting the course of justice.⁶¹
- 4.46 Finally, the offences of failing to stop and assist after a vehicle impact causing death, GBH or injury in the *Crimes Act* and *RTA* cover drivers who fail to render assistance following a crash.⁶² As we discuss above, we do not think it would be appropriate to extend this offence to passengers.

New offences would significantly extend criminal responsibility

- 4.47 The proposed new accessory offences (that are not already covered by existing offences) would be a significant extension of criminal responsibility and could contradict established criminal law principles.
- 4.48 It is a fundamental principle of the criminal law that a person should only be held responsible for their “own moral wrongdoings and shortcomings”. In most offences, this is reflected by the fact that the person who committed the physical acts of the crime must also have had criminal intent.⁶³ While there are some exceptions to this, such as accessorial liability provisions, they are limited.
- 4.49 We agree with the submissions that suggested criminalising people for failing to prevent dangerous driving would be an unjustified extension of criminal liability.⁶⁴ We also do not think it would be appropriate to criminalise people for failing to serve alcohol responsibly, or knowingly granting permission to an unlicensed or

57. *Road Transport Act 2013* (NSW) s 177.

58. *Crimes Act 1900* (NSW) s 316.

59. *Crimes Act 1900* (NSW) s 350.

60. *Crimes Act 1900* (NSW) s 315.

61. *Crimes Act 1900* (NSW) s 319.

62. *Crimes Act 1900* (NSW) s 52AB; *Road Transport Act 2013* (NSW) s 146.

63. NSW Law Reform Commission, *Complicity*, Report 129 (2010) [1.17]; *Gillard v R* [2003] HCA 64, 219 CLR 1 [47].

64. Law Society of NSW, *Submission RC12*, 4; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 10.

disqualified driver to drive a vehicle, where that person then goes on to commit a serious road crime.

- 4.50 We also do not think that passenger behaviour not covered by any existing accessorial liability provisions should be the subject of a separate accessory offence. We agree that such offences would “criminalise the actions of passengers who may have little to no control or influence over what a driver is doing”.⁶⁵ This is equally the case for the other proposed accessory offences discussed in this section.
- 4.51 Finally, while we do not condone filming and disseminating images of serious road crime offences, we do not think this conduct should be the subject of a separate criminal offence.
- 4.52 This proposal is similar to the existing “post and boast” performance crime offences, that were recently inserted into the *Crimes Act*.⁶⁶ These offences apply where an offender commits a motor theft offence or a break and enter offence, and then disseminates material to advertise their involvement in the offence, or the acts or omission that made up the offence.⁶⁷
- 4.53 The offences were introduced in response to high profile incidents and reports from communities about performance crime in relation to these specific offence types. The Government emphasised that this conduct may encourage others to commit similar crimes, send a message that criminal acts are acceptable, and provide people with information or ideas about how to commit these crimes.⁶⁸
- 4.54 We recognise that filming and disseminating material advertising serious road crime offences may have these negative consequences. However, we are not aware of, nor did any submissions point us to, a similar pattern of “posting and boasting” conduct in the context of serious road crimes. In the absence of any evidence pointing to a need to deter this conduct specifically, we conclude there should be no new offences of this kind.
- 4.55 We also have concerns about potential over-reach and unintended consequences of such a reform (for example, to young people who may not appreciate the gravity of their conduct). This particularly would be the case if the offence were to apply to people who did not commit the crime, but filmed and disseminated it. We note that the existing performance crime offences only apply where a person committed a

65. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 10.

66. *Crimes Act 1900* (NSW) s 154K, as inserted by *Bail and Crimes Amendment Act 2024* (NSW) sch 2 [1].

67. *Crimes Act 1900* (NSW) s 154K.

68. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 12 March 2024, 17.

relevant crime, and then disseminated material themselves, to advertise that crime.⁶⁹

New offences would have unintended consequences

- 4.56 We are concerned that new accessory offences would carry risks of over-reach, and disproportionately impact particular groups. For instance, the proposed offence of knowingly giving permission to someone who is unlicensed, disqualified or suspended from driving would disproportionately affect Aboriginal and Torres Strait Islander communities. As we discuss in chapter 3, Aboriginal people are disproportionately represented among those who are unlicensed, or have had their licences disqualified or suspended.
- 4.57 There is also a risk of new accessory offences disproportionately impacting regional and remote communities, where a person's licensing status can be impacted by various factors including poverty, lack of access to driving tuition, and an inability to pay fines. Pressure can often be placed on people who own a vehicle to allow others to drive it, due to a lack of public transport, geographical distance to services and financial pressures.⁷⁰
- 4.58 Finally, new accessory offences may carry risks of criminalising victims of domestic and family violence for the actions of perpetrators.⁷¹

69. *Crimes Act 1900* (NSW) s 154K(1).

70. Legal Aid NSW, *Submission RC08*, 12.

71. Legal Aid NSW, *Submission RC08*, 12.

5. Penalties

In brief

This chapter considers the penalty regime for serious road crime offences. We conclude there should be no changes to any maximum penalties. Mandatory minimum sentences should not be introduced, and intensive correction orders should remain available for all serious road crime offences. While we support more rehabilitation programs, it should not be mandatory for courts to impose them as a condition of every sentence.

Maximum penalties	76
Support for increasing maximum penalties	77
The maximum penalties should not change	80
Mandatory minimum penalties	86
Some supported mandatory minimum sentences	87
There are strong arguments against mandatory sentences	88
Intensive correction orders	89
Some considered ICOs should not be available	90
ICOs should remain available	90
Rehabilitation programs as a sentence condition	94
Some supported rehabilitation programs	95
Programs should not be mandatory	95
Licence disqualification is outside the scope	96
Some supported changes to disqualification periods	96

- 5.1 In this chapter, we consider whether the maximum penalties for serious road crime offences are appropriate. We also consider other proposals relating to penalties, including the availability of intensive correction orders (ICOs), mandatory minimum sentences and conditions on sentence.
- 5.2 Some submissions, from victims and other groups, expressed concern that the penalties available for serious road crime offences do not adequately reflect their seriousness, or deter offending. These groups proposed reforms to address their concerns, including increasing maximum penalties, introducing mandatory minimum sentences, removing the availability of ICOs as a sentencing option, and increasing mandatory and default licence disqualification periods.

- 5.3 We also heard concerns that sentencing options were insufficient to address offender rehabilitation. Submissions proposed introducing mandatory rehabilitation programs as part of serious road crime sentences and licence disqualifications.¹
- 5.4 Submissions raised a range of different viewpoints on the issue of whether the maximum penalties should be changed. We heard that sentencing outcomes were inadequate as the maximum penalty was rarely imposed.²
- 5.5 As noted in chapter 1, we can only recommend reform on issues raised within the scope of the terms of reference.³ The application of the law is a matter for the courts. We can only consider sentencing outcomes or individual cases to the extent that they are relevant to whether the law should be changed.
- 5.6 We conclude that the current penalty regime is appropriate and provides sentencing courts with sufficient scope to reflect the criminality for each of the offences in the serious road crime offence hierarchy.⁴ While we acknowledge that mandatory minimum sentences could result in sentencing outcomes that better meet some community expectations, there are strong policy reasons against this proposal.
- 5.7 We agree that there is merit in introducing targeted rehabilitation programs as a condition of sentence. However, we do not think it should be mandatory for courts to impose this as a condition of every sentence.
- 5.8 Issues relating to licence disqualification in the *Road Transport Act 2013* (NSW) (RTA) fall outside the scope of our review. Our terms of reference direct our consideration to the *Crimes Act 1900* (NSW) (*Crimes Act*). In addition, reforming licence disqualification periods would impact offences beyond serious road crime offences.

Maximum penalties

- 5.9 Some submissions expressed concerns that the maximum penalties for serious road crime offences inadequately reflected the seriousness of these crimes.⁵ As we discussed in the consultation paper, maximum penalties play an important role in reflecting the seriousness of an offence, by signalling the highest penalty a court

1. D Wakes-Miller, *Submission RC13*, 32, 34, 38; Road Trauma Support Group NSW, *Submission RC16*, 22–23.

2. Road Trauma Support Group NSW, *Submission RC16*, 20.

3. *Law Reform Commission Act 1967* (NSW) s 10(1).

4. Legal Aid NSW, *Submission RC08*, 13; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 11.

5. See, eg, D Wakes-Miller, *Submission RC13*, 23; Road Trauma Support Group NSW, *Submission RC16*, 20–22.

may impose when sentencing an offender for a particular offence.⁶ We discussed the role of maximum penalties in the context of serious road crimes in more detail in the consultation paper.⁷

- 5.10 The criminal law has an important role to play in dealing with serious road crime offences, and ensuring criminal behaviour on the road is denounced and deterred.
- 5.11 In our view, the current maximum penalties appropriately reflect the seriousness of serious road crime offences, and provide courts adequate scope to sentence offenders. The maximum penalties are also broadly consistent with other Australian jurisdictions. We are concerned that increasing the maximum penalties may disproportionately impact particular communities. Finally, increasing maximum penalties may not fully address concerns about inadequate sentences, as the difference between maximum penalties and actual sentences imposed would remain.

Support for increasing maximum penalties

- 5.12 Some submissions considered that the maximum penalties for serious road crime offences were inadequate and should be increased.
- 5.13 The Road Trauma Support Group (RTSG) argued that the maximum penalties for serious road crimes did not adequately reflect the prevalence, risk and seriousness of offending, and did not meet community expectations.⁸ The maximum term of imprisonment that can be imposed for serious road crime offences covered by this review are set out below:
- aggravated dangerous driving occasioning death: 14 years⁹
 - aggravated dangerous driving occasioning grievous bodily harm (GBH): 11 years¹⁰
 - dangerous driving occasioning death: 10 years¹¹
 - failing to stop and assist after vehicle impact causing death: 10 years¹²
 - dangerous driving occasioning GBH: 7 years¹³
 - failing to stop and assist after vehicle impact causing GBH: 7 years¹⁴

6. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [3.6]–[3.9].

7. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [3.6]–[3.84].

8. Road Trauma Support Group NSW, *Submission RC16*, 20–21.

9. *Crimes Act 1900* (NSW) s 52A(2).

10. *Crimes Act 1900* (NSW) s 52A(4).

11. *Crimes Act 1900* (NSW) s 52A(1).

12. *Crimes Act 1900* (NSW) s 52AB(2).

13. *Crimes Act 1900* (NSW) s 52A(3).

14. *Crimes Act 1900* (NSW) s 52AB(2).

- predatory driving: 5 years¹⁵
 - police pursuit (second or subsequent offence): 5 years¹⁶
 - police pursuit (first offence): 3 years,¹⁷ and
 - wanton or furious driving etc: 2 years.¹⁸
- 5.14 The RTSG considered that these maximum penalties should be increased as a way of holding offenders accountable, and better addressing the purposes of sentencing, including adequate punishment, deterrence, community protection, recognition of harm and denunciation.¹⁹
- 5.15 Increasing maximum penalties could also address concerns about inadequate sentencing outcomes. As we explained in the consultation paper, when parliament increases a maximum penalty, courts generally interpret this to indicate that sentences for that offence should increase in line with parliament's intention.²⁰ The consultation paper also provided sentencing statistics for serious road crime offences. The RTSG argued that imposing significant sentences is necessary to deter offending and send a message to the community that serious road crimes will result in significant punishment.²¹

Proposals to increase maximum penalties for certain offences

- 5.16 Some submissions proposed that maximum penalties should be increased for certain offences.
- 5.17 There was some support for increasing the maximum penalties for dangerous driving offences under s 52A. For instance, the RTSG submitted that dangerous driving occasioning death offences should have the same maximum penalties as homicide offences, to appropriately reflect their seriousness.²² These maximum penalties are 25 years' imprisonment for manslaughter, and life imprisonment for murder.
- 5.18 The NSW Police Force (NSWPF) also proposed increases to maximum penalties for dangerous driving occasioning death offences, as follows:

15. *Crimes Act 1900* (NSW) s 51A(1).

16. *Crimes Act 1900* (NSW) s 51B(1)(b).

17. *Crimes Act 1900* (NSW) s 51B(1)(a).

18. *Crimes Act 1900* (NSW) s 53.

19. Road Trauma Support Group NSW, *Submission RC16*, 16.

20. *Muldock v R* [2011] HCA 39, 244 CLR 120 [31]; *R v Slattery* (1996) 90 A Crim R 519, 524. See also Local Court of NSW, *Preliminary Submission PRC82*, 4.

21. Road Trauma Support Group NSW, *Submission RC16*, 20.

22. Road Trauma Support Group NSW, *Submission RC16*, 21–22. See also D Wakes-Miller, *Submission RC13*, 34.

- aggravated dangerous driving occasioning death: 20 years' imprisonment (from 14 years),
 - dangerous driving occasioning death: 15 years' imprisonment (from 10 years),²³
 - aggravated dangerous driving occasioning GBH: 12 years' imprisonment (from 11 years), and
 - dangerous driving occasioning GBH: 9 years' imprisonment (from 7 years).²⁴
- 5.19 The Victims of Crime Assistance League argued in their preliminary submission that maximum penalties should be increased for dangerous driving occasioning GBH and the aggravated offence, to acknowledge the “life changing physical, psychological and financial impact on victim-survivors of road crimes”.²⁵
- 5.20 The NSWPF supported increasing the maximum penalties for police pursuit offences. In their view, this would reflect the seriousness of the offences, the risks that police pursuits pose for police and community safety, and the need to deter this type of offending. They proposed increasing the maximum penalty for a first offence to 5 years' imprisonment (from 3 years), and for a second offence, 7 years' imprisonment (from 5 years).²⁶ This increase would also have the effect of making a first offence of police pursuit a serious indictable offence.²⁷
- 5.21 The NSWPF also suggested increasing the maximum penalty for wanton or furious driving under s 53 of the *Crimes Act*. In their view, the current penalty of 2 years' imprisonment did not adequately reflect the seriousness of the offence.²⁸
- 5.22 There was some support for increasing the maximum penalties for failing to stop and assist after impact causing death or GBH. The NSWPF stated that, while the maximum penalties were appropriate, they should be increased in some circumstances. In their view, the maximum penalty should match the penalty of any substantive “at fault” offence it was charged alongside, if that penalty was higher.²⁹ For example, if an accused was charged with aggravated dangerous driving occasioning death and failing to stop and assist after a vehicle impact causing death, the maximum penalty of the failing to stop and assist offence would increase from 10 years to 14 years' imprisonment.

23. NSW Police Force, *Submission RC40*, 9.

24. NSW Police Force, *Submission RC75*, 2.

25. Victims of Crime Assistance League (Hunter), *Preliminary Submission PRC84*, 3.

26. NSW Police Force, *Submission RC40*, 7.

27. *Crimes Act 1900* (NSW) s 4 definition of “serious indictable offence”.

28. NSW Police Force, *Submission RC40*, 9.

29. NSW Police Force, *Submission RC40*, 9.

- 5.23 The RTSG submitted that failing to stop and assist after a vehicle impact causing death should have also the same maximum penalty as homicide offences, to reflect its seriousness.³⁰
- 5.24 The RTSG also supported increased maximum penalties for predatory driving, on the basis that risky driving was increasing and needed to be more effectively deterred.³¹
- 5.25 Finally, some submissions supported increased penalties for repeat offenders.³²

The maximum penalties should not change

- 5.26 Serious road crime offences have profound, devastating and enduring consequences for victims. This is the case no matter the circumstances of the offence or the degree of fault of the driver. No sentence can bring back a loved one, or adequately capture the significance of victims' loss.
- 5.27 While we acknowledge the seriousness of serious road crimes and the extreme harm this type of offending causes, we conclude that the current maximum penalties should not change.
- 5.28 In our view, the penalties appropriately reflect the gravity of each serious road crime offence and provide sentencing courts with sufficient scope for different levels of criminality and moral culpability.³³
- 5.29 Increasing maximum penalties may also not achieve deterrence or improved road safety, given that evidence suggests increasing maximum penalties, such as terms of imprisonment, does not effectively deter crime.³⁴
- 5.30 We are also concerned that it could have unintended consequences, including disproportionately impacting particular groups.³⁵

30. Road Trauma Support Group NSW, *Submission RC16*, 18, 22.

31. Road Trauma Support Group NSW, *Submission RC16*, 18.

32. D Wakes-Miller, *Submission RC13*, 43–44; Road Trauma Support Group NSW, *Submission RC16*, 24–25.

33. Legal Aid NSW, *Submission RC08*, 13; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 11.

34. Legal Aid NSW, *Submission RC08*, 13. See also Law Society of NSW, *Submission RC12*, 4; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 11; Transport for NSW, *Submission RC72*, 2.

35. NSW Bar Association, *Submission RC27* [31]; Law Society of NSW, *Submission RC12*, 4; Youth Justice NSW, *Submission RC20*, 2; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 11–12.

Current maximum penalties appropriately reflect seriousness

- 5.31 While we can understand the view that the existing maximum penalties do not adequately reflect the seriousness of serious road crime offences, or the harm caused, we consider that the maximum penalties appropriately reflect the criminality of each offence in the serious road crime offence hierarchy.
- 5.32 As we outlined in the consultation paper, the purpose of a maximum penalty is to reflect parliament's view as to the seriousness of that offence.³⁶
- 5.33 Maximum penalties are scaled according to the level of harm caused and the level of blame or moral culpability of the offender, with more serious offences carrying higher maximum penalties.
- 5.34 For example, it is true that dangerous driving offenders make a deliberate decision to drive under the influence, at a dangerous speed or in a dangerous manner. In no circumstances can the drivers' accountability for the harm caused be minimised.
- 5.35 However, it is important to recognise that an intention to cause the victim harm is not an element of the offence. In many cases, offenders have no intention to cause any harm to the victim,³⁷ and some are deeply affected by the consequences of their actions.³⁸
- 5.36 While we do not condone dangerous driving in any way and recognise the extreme risk of this conduct, the culpability is not the same as that required for murder or manslaughter offences. As we observe in chapter 3, dangerous driving offences cover a range of conduct, from momentary inattention at one end, to a total abandonment of responsibility at the other. In our view, the maximum penalties allow sufficient scope to cover the range of criminality, and appropriately signal the upper limit of this range.
- 5.37 For serious road crime cases involving high culpability, murder and manslaughter charges are already available.³⁹ While we heard concerns that these charges were not laid frequently, charging and prosecutorial decisions are outside the scope of this review.

36. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [3.7].

37. Confidential, *Submission RC69*, 13.

38. Legal Aid NSW, *Submission RC08*, 21.

39. See, eg, *Bidner v R* [2024] NSWCCA 204; *R v Borkowski* [2009] NSWCCA 102.

Increasing maximum penalties may not increase deterrence

- 5.38 There is limited evidence that increasing maximum penalties and maximum terms of imprisonment alone have any significant deterrent effect on crime.⁴⁰ Many submissions agreed with this.⁴¹
- 5.39 That position also has been adopted by a number of law reform bodies. For instance, the NSW Sentencing Council (Sentencing Council) concluded that marginal increases to maximum terms of imprisonment were unlikely to deter high risk repeat offending.⁴² The ACT Law Reform Advisory Council (the ACT Council) recently did not support increased maximum penalties for serious driving offences. Among other considerations, it cited research that found that increased maximum penalties did not affect behavioural change.⁴³
- 5.40 In particular, when serious road crimes do not involve premeditation and result from momentary inattention, impulsive behaviour, poor judgement or driver error, increasing maximum penalties does not have a deterrent effect.⁴⁴ Rather, evidence shows that increasing the risk of apprehension has more deterrent value than increasing the severity of penalties.⁴⁵ As we outline in chapter 1, research demonstrates that the certainty of apprehension, coupled with “severe” and “swift” punishment, may have the greatest effect in reducing crime.⁴⁶ A person is less likely to offend if they believe they will likely be caught and receive harsh punishment that is efficiently carried out.⁴⁷

40. D Ritchie, *Does Imprisonment Deter? A Review of the Evidence*, Sentencing Matters (Sentencing Advisory Council, 2011) 2; NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [3.13].

41. Legal Aid NSW, *Submission RC08*, 13; Law Society of NSW, *Submission RC12*, 4; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 11; NSW Bar Association, *Submission RC27* [26]–[27]. See also Transport for NSW, *Submission RC72*, 2; Children’s Court of NSW, *Submission RC36*, 1.

42. NSW Sentencing Council, *Repeat Traffic Offenders*, Report (2020) [1.57].

43. ACT Law Reform and Sentencing Advisory Council, *Report into Dangerous Driving: Sentencing and Recidivism* (2024) 66–67.

44. NSW Bar Association, *Submission RC27* [26]; ACT Law Reform and Sentencing Advisory Council, *Report into Dangerous Driving: Sentencing and Recidivism* (2024) 67; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 11.

45. NSW Bar Association, *Submission RC27* [27]. See M J G Bun and others, “Crime, Deterrence and Punishment Revisited” (2020) 59 *Empirical Economics* 2303, 2329.

46. J D Davey and J E Freeman, “Improving Road Safety through Deterrence-Based Initiatives” (2011) 11 *SQU Medical Journal* 29, 29–30. See ACT Law Reform and Sentencing Advisory Council, *Report into Dangerous Driving: Sentencing and Recidivism* (2024) 66; NSW Bar Association, *Submission RC27* [27].

47. S Moffat and S Poynton, *The Deterrent Effect of Higher Fines on Recidivism: Driving Offences*, Crime and Justice Bulletin No 106 (NSW Bureau of Crime Statistics and Research, 2007) 2.

- 5.41 As an alternative to increasing maximum penalties, there is evidence that “early intervention with place-based responses to youth involved in serious road crime are reducing the rates of young people being admitted to custody”.⁴⁸

There may be a disproportionate impact on particular groups

- 5.42 Increasing maximum penalties for serious road crime offences may have a disproportionate impact on particular groups, including Aboriginal and Torres Strait Islander people, young people and rural and regional communities.
- 5.43 Our consultation paper highlighted that Aboriginal people were over-represented in finalised charges for each of the serious road crime offences.⁴⁹ Offenders from regional areas are also over-represented in serious road crimes. In 2022, 41% (343) of 829 proven court appearances where a serious road crime was the principal offence, involved a defendant from a regional or remote area at charge date.⁵⁰
- 5.44 Raising maximum penalties could exacerbate the over-incarceration of Aboriginal people, impeding progress towards Closing the Gap targets which include reducing the rate of Aboriginal young people and adults in detention.⁵¹ This is because increasing maximum penalties may increase the number of custodial sentences for young people and Aboriginal young people, which is associated with negative welfare outcomes later in life.⁵²
- 5.45 Further, research indicates that incarceration has enduring negative impacts on individuals’ physical and mental health, housing stability, access to healthcare, and other essential services.⁵³ In addition, imprisoning young people is strongly linked to higher rates of adult re-imprisonment.⁵⁴ As the NSW Bar Association observed, “additional periods of incarceration are unlikely to have a positive impact on rates of reoffending, especially in relation to young people”.⁵⁵

The maximum penalties are broadly consistent with other jurisdictions

- 5.46 While there are some slight variances, NSW’s maximum penalties for serious road crime offences are broadly consistent with other Australian states and territories.⁵⁶

48. Youth Justice NSW, *Submission RC20*, 2.

49. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [3.17] table 3.1.

50. NSW Bureau of Crime Statistics and Research, *kc23-22320*, table 2c.

51. Youth Justice NSW, *Preliminary Submission PRC74*, 2; Law Society of NSW, *Submission RC12*, 4.

52. Youth Justice NSW, *Submission RC20*, 2.

53. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 11–12.

54. Youth Justice NSW, *Submission RC20*, 2.

55. NSW Bar Association, *Submission RC27* [31].

56. Law Society of NSW, *Submission RC12*, 4; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 11; NSW Bar Association, *Submission RC27* [29].

We compared maximum penalties in the consultation paper.⁵⁷ This factor, of itself, is not determinative of whether maximum penalties are appropriate. However, it shows that NSW's understanding of the seriousness of serious road crimes is broadly in line with other jurisdictions, which tends to suggest that it is within an appropriate range.

Concerns may continue despite higher maximum penalties

- 5.47 We heard calls for significantly greater maximum penalties and suggestions that sentencing outcomes were inadequate as the maximum penalty was rarely imposed.⁵⁸ However, increasing maximum penalties for serious road crimes may not fully address the concerns held by some victims about general sentencing outcomes in the long term. This is because the sentencing framework and principles that apply to all offences will continue to operate.
- 5.48 Increasing maximum penalties generally results in higher sentences, as courts interpret this to reflect parliament's intention that sentences should also increase.⁵⁹ For example, in one case where the legislature tripled the maximum penalty, the Court of Criminal Appeal (CCA) said that existing sentencing patterns should move in a "sharply upward manner" to give effect to the legislature's intention.⁶⁰
- 5.49 However, increasing maximum penalties may not fully address concerns held by some victims that the actual sentences imposed are inadequate. An increase of the maximum penalty is unlikely to change how often courts impose the maximum penalty in practice. As we outlined in the consultation paper, the maximum penalty is not intended to be imposed in all cases, but is reserved for cases where the nature of the crime and the circumstances of the offender are so serious that they justify it.⁶¹ The maximum penalty is one factor of many that courts take into account when sentencing.⁶²
- 5.50 While we heard some concerns about inadequate sentences of imprisonment and sentences other than imprisonment being imposed,⁶³ increasing the maximum penalties, even significantly or sharply, may not change the difference between the

57. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [3.25]–[3.32], [3.53]–[3.56], [3.64]–[3.65], [3.78]–[3.79].

58. Road Trauma Support Group NSW, *Submission RC16*, 20–22. See also D Wakes-Miller, *Submission RC13*, 33–34.

59. *Muldock v R* [2011] HCA 39, 244 CLR 120 [31]; *R v Slattery* (1996) 90 A Crim R 519, 524. See also Local Court of NSW, *Preliminary Submission PRC82*, 4.

60. *R v Slattery* (1996) 90 A Crim R 519, 524.

61. *R v Kilic* [2016] HCA 48, 259 CLR 256 [18]–[20]. See also NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [3.8].

62. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [3.6].

63. See Road Trauma Support Group NSW, *Submission RC16*, 20, 21, 22; D Wakes-Miller, *Submission RC13*, 5, 13, 36, 37.

maximum penalties and the actual sentences imposed. For example, in 2011, the Australian Capital Territory (ACT) raised the maximum penalty for culpable driving causing death from 7 to 14 years' imprisonment.⁶⁴ The ACT Council recently reviewed sentences imposed for the ACT offence before and after the reforms were introduced. The sentences imposed before and after the reforms were found to be "comparable with each other in terms of the ratio of [total] sentence to available maximum penalty".⁶⁵

- 5.51 Despite this increased maximum penalty of 14 years' imprisonment (which is higher than the maximum penalty of 10 years' imprisonment for the equivalent offence in NSW), some sentences in the ACT have still been relatively short terms of imprisonment or non-custodial penalties. The ACT Council's report reviewed 12 sentences after the penalty increase.⁶⁶ Of these, five were partially suspended sentences, and seven were prison terms.⁶⁷ For the offences that resulted in imprisonment, one was significantly higher at 10 years and 9 months' imprisonment, which was an outlier on the data.⁶⁸ Disregarding that case, the range of sentences imposed was between 3 years and 1 months' imprisonment, and 5 years' imprisonment.⁶⁹
- 5.52 By comparison, the range of sentences imposed for dangerous driving causing death in NSW, which has a maximum penalty of 10 years' imprisonment, is broadly similar, although the NSW sample is larger. Of the 190 principal proven offences recorded on the Judicial Information Research System (JIRS) between 24 September 2018 and 31 March 2024, 63 (33%) did not receive a sentence of imprisonment. For the 127 (66%) who received a sentence of imprisonment, the length ranged from 18 months to 9 years 6 months.⁷⁰

64. *Crimes (Penalties) Amendment Act 2011* (ACT) s 10; *Crimes Act 1900* (ACT) s 29(2); ACT Law Reform and Sentencing Advisory Council, *Report into Dangerous Driving: Sentencing and Recidivism* (2024) 64.

65. ACT Law Reform and Sentencing Advisory Council, *Report into Dangerous Driving: Sentencing and Recidivism* (2024) 98.

66. ACT Law Reform and Sentencing Advisory Council, *Report into Dangerous Driving: Sentencing and Recidivism* (2024) 96–97.

67. ACT Law Reform and Sentencing Advisory Council, *Report into Dangerous Driving: Sentencing and Recidivism* (2024) 93.

68. ACT Law Reform and Sentencing Advisory Council, *Report into Dangerous Driving: Sentencing and Recidivism* (2024) 98; *Monfries v R* [2014] ACTCA 46; *R v Monfries* SCC No 187 of 2012.

69. ACT Law Reform and Sentencing Advisory Council, *Report into Dangerous Driving: Sentencing and Recidivism* (2024) 93.

70. Judicial Commission of NSW, *Sentencing Statistics*, Judicial Information Research System (retrieved 6 December 2024).

Sentencing courts do not appear to be constrained

- 5.53 Sentencing outcomes for serious road crime offences suggest that sentencing courts do not feel that the maximum penalties are inadequate. As we outlined in the consultation paper, the sentences imposed for serious road crimes, like those for most offences, were generally significantly below maximum penalties.⁷¹ This suggests that there are rare cases where courts may have wanted to impose a sentence higher than the maximum penalty allowed but that generally courts find the current maximum penalties adequate to deal with the different levels of criminality and moral culpability of serious road crime offences.

There are appeal options for inadequate sentences

- 5.54 If a serious road crime sentence is inadequate, it may be appealed to a higher court. The appeals process is an important safeguard, and avenue for review of individual sentences.⁷²
- 5.55 We identified only six successful crown appeals on sentence from 2018 to 2023 for serious road crime offences (excluding manslaughter) in the CCA. We did not locate any crown appeals in that period where the court upheld an appeal ground but decided not to re-sentence the offender. For the six successful appeals, all re-sentences remained significantly lower than the relevant maximum penalty.⁷³ This suggested it was not the maximum penalty that was the reason for the low sentences, but other sentencing factors.

Mandatory minimum penalties

- 5.56 Some submissions argued that mandatory minimum penalties should be introduced for certain serious road crimes, to address concerns about inadequate sentences.⁷⁴
- 5.57 A court's ability to impose a sentence below the maximum penalty is generally not limited. A mandatory minimum penalty is the lowest penalty a sentencing court can give for a particular offence. There is currently no serious road crime offence in NSW that has a mandatory minimum penalty, and only two offences in NSW that

71. See NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) ch 3.

72. See, eg, *Criminal Appeal Act 1912* (NSW) s 5D; *Crimes (Appeal and Review) Act 2001* (NSW) s 11(1).

73. *R v Shashati* [2018] NSWCCA 167; *R v Pullen* [2018] NSWCCA 264; *R v Andonakis* [2019] NSWCCA 123; *R v Irwin* [2019] NSWCCA 133; *R v Bortic* [2021] NSWCCA 138; *R v Russell* [2022] NSWCCA 294.

74. Road Trauma Support Group NSW, *Submission RC16*, 22; D Wakes-Miller, *Submission RC13*, 36; K Dokmanovic, *Submission RC11*, 11.

do.⁷⁵ We discussed what mandatory minimum sentences were and their potential advantages and disadvantages, in the consultation paper.⁷⁶

- 5.58 A large majority of submissions opposed mandatory minimum sentences, and expressed strong and compelling reasons as to why they should not be introduced.⁷⁷
- 5.59 While we acknowledge that mandatory minimum sentences are a way to increase sentences, we conclude they should not be introduced.

Some supported mandatory minimum sentences

- 5.60 Some submissions argued that minimum penalties are necessary to increase deterrence and impose adequate punishment for certain serious road crime offences.⁷⁸ As we outlined in the consultation paper, mandatory minimum sentences are usually introduced to increase sentences, “often because there is dissatisfaction with the current sentencing regime”.⁷⁹
- 5.61 For these reasons, the RTSG supported mandatory minimum sentences for serious road crimes involving death.⁸⁰ Additionally, the NSWPF argued that if mandatory minimum sentences were to be introduced, police pursuit offences would be the most appropriate serious road crime offence to be subject to this penalty.⁸¹
- 5.62 A mandatory minimum term of imprisonment for a serious road crime offence would remove non-custodial sentences as sentencing options, and reduce sentencing discretion in imposing custodial sentences.⁸² It is likely that the average length of custodial sentences would also increase. This is because a mandatory minimum penalty is a “yard stick that imposes an increased starting point for the appropriate term of imprisonment for the offence in the least serious circumstances”.⁸³ It

75. *Crimes Act 1900* (NSW) s 19B, s 25B.

76. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [3.96]–[3.102].

77. Legal Aid NSW, *Submission RC08*, 15–16; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 14–15; Law Society of NSW, *Submission RC12*, 6; Public Defenders, *Submission RC21*, 4; NSW Bar Association, *Submission RC27* [37]–[39]; Children’s Court of NSW, *Submission RC36*, 5.

78. Road Trauma Support Group NSW, *Submission RC16*, 38; Road Trauma Support Group NSW and fiftyfive5, *The Unheard Trauma of Fatal Road Crimes in NSW* (2023) 15, 101.

79. NSW Sentencing Council, *Assaults on Emergency Services Workers*, Report (2021) [8.8]. See also NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [3.98].

80. Road Trauma Support Group NSW, *Submission RC16*, 22; D Wakes-Miller, *Submission RC13*, 36.

81. NSW Police Force, *Submission RC40*, 10.

82. See Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report 133 (2018) [8.5]–[8.11].

83. *Hurt v R* [2024] HCA 8 [54].

therefore “operates to increase the appropriate term of imprisonment generally for that offence”.⁸⁴

There are strong arguments against mandatory sentences

- 5.63 Mandatory minimum sentences may address concerns about sentencing outcomes that are seen as inadequate and inconsistent, and may result in more severe sentencing outcomes. However, there are compelling reasons why mandatory minimum sentences should not be introduced for serious road crime offences.
- 5.64 We are concerned that mandatory minimum sentences would inappropriately constrain judicial discretion in serious road crime cases and limit the ability of sentencing courts to take individual circumstances into account and impose a sentence below the mandatory minimum.⁸⁵ Judicial discretion is important for serious road crime sentences, given these offences cover such a broad range of offending conduct and moral culpability.⁸⁶ There is no reason why judicial discretion should be limited for serious road crimes, and not for other types of offences.
- 5.65 Limiting judicial discretion in this way could result in “unjust, harsh and disproportionate sentences where the punishment does not fit the crime”. This could lead to inconsistent and skewed sentencing outcomes.⁸⁷
- 5.66 We are concerned about unintended consequences of this proposal. Mandatory minimum penalties would result in harsher and longer sentences that may disproportionately impact Aboriginal and Torres Strait Island communities and other groups that are over-represented in the criminal justice system.⁸⁸ It could also increase the number of prison sentences, which may not achieve rehabilitation.⁸⁹
- 5.67 We are also concerned that there may be impacts on the resolution of serious road crime matters. Mandatory minimum sentences can affect charging decisions, as prosecutors may take the minimum penalty into account when choosing the appropriate charge. Mandatory minimums may affect plea negotiations. For example, someone might be hesitant to plead guilty to an offence with a mandatory minimum sentence.⁹⁰ This could reduce early guilty pleas, lead to more contested

84. *Hurt v R* [2024] HCA 8 [54].

85. Legal Aid NSW, *Submission RC08*, 16; Law Society of NSW, *Submission RC12*, 6. See also Children’s Court of NSW, *Submission RC36*, 5; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 14. See also NSW Sentencing Council, *Assaults on Emergency Services Workers*, Report (2021) [8.23].

86. NSW Bar Association, *Submission RC27* [38].

87. NSW Bar Association, *Submission RC27* [39].

88. Legal Aid NSW, *Submission RC08*, 16; Law Society of NSW, *Submission RC12*, 6; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 14.

89. NSW Bar Association, *Submission RC27* [39].

90. NSW Sentencing Council, *Assaults on Emergency Services Workers*, Report (2021) [8.23].

proceedings before the courts and strain criminal justice resources.⁹¹ An increase in contested matters would also cause further delays for the court system.⁹²

- 5.68 Moreover, mandatory minimum sentences may not improve road safety or reduce road crime, as they have been shown not to be an effective deterrent.⁹³ Mandatory minimum sentences can be associated with increased offending. Putting an offender into the prison system can provide a criminogenic environment, and disrupt employment and family connections, without providing any rehabilitative benefit.⁹⁴
- 5.69 Another consideration is that mandatory minimum sentences may breach Australia's international human rights obligations, such as the prohibition against arbitrary detention.⁹⁵
- 5.70 For similar reasons, the Australian Law Reform Commission, the NSW Law Reform Commission and the Sentencing Council have all previously opposed the introduction of mandatory minimum sentences in various contexts.⁹⁶

Intensive correction orders

- 5.71 Some submissions argued that ICOs should not be available for serious road crimes involving death, to reflect the seriousness of the offences.⁹⁷ As we explained in the consultation paper, ICOs were an alternative to full-time imprisonment. An ICO is a custodial sentence that is served in the community under strict conditions.⁹⁸ Currently, ICOs are available for every serious road crime offence, except manslaughter.⁹⁹ Though ICOs are not available for cases of murder or

91. Legal Aid NSW, *Submission RC08*, 16; Law Society of NSW, *Submission RC12*, 6.

92. D Kumaraswamy, "Mandatory Sentencing: The Individual and Social Costs" (2001) 7(2) *Australian Journal of Human Rights* 7, 14–15.

93. Legal Aid NSW, *Submission RC08*, 16; Law Society of NSW, *Submission RC12*, 6; NSW Bar Association, *Submission RC27* [39]; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 15.

94. Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report 133 (2018) [8.13]–[8.14]. See also, Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (2014) [39].

95. Law Society of NSW, *Submission RC12*, 6; NSW Bar Association, *Submission RC27* [39].

96. See, eg, NSW Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) [6.50]; Australian Law Reform Commission, *Sentencing*, Report 44 (1988) 29; NSW Sentencing Council, *Assaults on Emergency Services Workers, Report* (2021) [8.24]–[8.25]; Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper 84 (2017) [4.33]; NSW Sentencing Council, *Firearms, Knives and Other Weapons, Report* (2024) [7.2]–[7.17].

97. Road Trauma Support Group NSW, *Submission RC16*, 21–22.

98. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7, pt 5.

99. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 67.

manslaughter, there are other offences in the *Crimes Act* involving death, for which an ICO is an available sentencing option.¹⁰⁰

- 5.72 Most submissions argued that ICOs should remain available for serious road crimes, including offences involving death.¹⁰¹ For the reasons below, we conclude that ICOs should be available for all serious road crime offences.

Some considered ICOs should not be available

- 5.73 Some submissions argued that ICOs should not be available for serious road crimes involving death.¹⁰² These groups said that excluding ICOs as a sentencing option for these offences would recognise their seriousness, by aligning them with the exclusion that applies to murder and manslaughter.¹⁰³
- 5.74 We also heard that the availability of ICOs for these offences did not reflect community expectations.¹⁰⁴ For instance, one member of the RTSG stated that ICOs did not achieve punishment, deterrence or rehabilitation, and were “ineffective and disrespectful to victims of road crime”.¹⁰⁵
- 5.75 Some suggested that ICOs should be replaced with mandatory driver rehabilitation programs.¹⁰⁶ We discuss this further below.

ICOs should remain available

- 5.76 While we acknowledge some views that ICOs do not generally reflect the seriousness of serious road crimes involving death, we think that ICOs have an important place in sentencing and should continue to be available for serious road crime offences, in appropriate cases.

ICOs are appropriate in some cases

- 5.77 In our view, ICOs are an appropriate option in some serious road crime cases. Excluding ICOs as a sentencing option for serious road crimes may inappropriately restrict the discretion of sentencing courts.¹⁰⁷

100. See, eg, *Crimes Act 1900* (NSW) s 22A, s 25A, s 25C.

101. Legal Aid NSW, *Submission RC08*, 14; Public Defenders, *Submission RC21*, 4; NSW Bar Association, *Submission RC27* [32]–[33]; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 13–14.

102. Road Trauma Support Group NSW, *Submission RC16*, 21–22.

103. NSW Police Force, *Submission RC40*, 9.

104. Road Trauma Support Group NSW, *Submission RC16*, 21–22.

105. Road Trauma Support Group NSW, *Submission RC16*, 21. See also D Wakes-Miller, *Submission RC13*, 36–37.

106. D Wakes-Miller, *Submission RC13*, 37.

107. NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [9.41].

- 5.78 A court may only sentence an offender to imprisonment if no penalty other than imprisonment is appropriate.¹⁰⁸ If a court determines that no penalty other than imprisonment is appropriate, it can then consider whether an ICO is an appropriate sentencing option. This is because an ICO is a custodial sentence and can only be imposed where a court is satisfied that this threshold is met.¹⁰⁹
- 5.79 However, if a case meets this threshold, but an ICO is not available, the sentencing court will be left only one custodial option, full-time imprisonment. This may not always be the most appropriate outcome, depending on the circumstances of the case.
- 5.80 As the NSW Bar Association observed, courts are best placed to determine whether ICOs are appropriate based on the circumstances of the case and the offender.¹¹⁰ For instance, ICOs can play an important role in rehabilitating offenders. When a court is deciding whether to impose an ICO, community safety is the paramount consideration.¹¹¹ It has been recognised that, in some cases, community safety may be better served if the offender can be rehabilitated in the community through supervision and access to community-based programs.¹¹² As a result, when considering community safety, the sentencing court is to assess whether making an ICO or a sentence of full-time detention is more likely to address the offender's risk of reoffending.¹¹³
- 5.81 As we discuss in chapter 3, dangerous driving offences cover a wide range of conduct. Given this breadth of conduct, a wider range of sentencing options, including ICOs, may also be appropriate to cover cases with lower levels of culpability, such as a brief lapse of attention.¹¹⁴
- 5.82 Sentencing trends show that courts impose both custodial and non-custodial sentences for dangerous driving occasioning death.¹¹⁵ Of the sentences recorded on JIRS between 24 September 2018 and 31 March 2024, 36% (57) matters received an ICO and 60% (95) received full-time imprisonment. The imposition of both custodial and non-custodial sentences reflects the wide spectrum of conduct covered by each offence and the different circumstances of individual offenders.

108. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(1).

109. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(1), s 7.

110. NSW Bar Association, *Submission RC27* [33].

111. *Crimes (Sentencing Procedure) Act* (NSW) s 66(1).

112. *R v Pullen* [2018] NSWCCA 264 [84].

113. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 66(2).

114. See, eg, *R v Lindrea* [2024] NSWDC 148 [43].

115. See NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [3.39], table 3.2; *Crimes Act 1900* (NSW) s 52A(1).

There are appropriate restrictions on imposing ICOs

- 5.83 The availability of ICOs in appropriate cases is already limited by a number of important legislative requirements.¹¹⁶
- 5.84 Courts have a broad sentencing discretion that allows consideration of the circumstances of each case to determine whether an ICO is suitable. As we mention above, community safety is the paramount consideration when deciding whether to make an ICO. However, the court must also consider the purposes of sentencing, and any common law sentencing principles it considers relevant. That means that courts may determine that an ICO is not suitable if it does not appropriately serve the purposes of sentencing, including adequate punishment, denunciation of the conduct and recognition of the harm.¹¹⁷
- 5.85 There may be some cases where the conduct and circumstances of an offender would mean that an ICO would be an inadequate penalty.¹¹⁸ Even though ICOs are sentences of imprisonment, they have some degree of leniency because they do not involve immediate incarceration.¹¹⁹
- 5.86 The imposition of an ICO is also subject to considerable legislative restrictions. An ICO cannot be imposed for sentences where the term of imprisonment is more than 2 years (for a single offence) and 3 years (for multiple offences).¹²⁰
- 5.87 The requirement that community safety is the paramount consideration when a court is deciding whether to impose an ICO is another legislative requirement that helps to limit ICOs to appropriate cases.¹²¹

Removing ICOs may have unintended consequences

- 5.88 We are concerned that removing the availability of ICOs for any serious road crime offences may have unintended consequences, such as distorting sentencing outcomes.
- 5.89 The Sentencing Council recently compared sentencing outcomes from before and after reforms that excluded ICOs as an available option for certain offences. The data showed that the exclusions led to offenders receiving either more lenient

116. Public Defenders, *Submission RC21*, 4.

117. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 66(3), s 3A. See also *R v Fangaloka* [2019] NSWCCA 173 [63]–[68].

118. See, eg, *R v Fangaloka* [2019] NSWCCA 173 [67].

119. *R v Pogson* [2012] NSWCCA 225, 82 NSWLR 60 [108].

120. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 68(1)–(2).

121. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 66(1).

sentences (for example, a CCO or less) or harsher sentences (imprisonment) for these excluded offences, when compared with outcomes before the reforms.¹²²

- 5.90 The data showed that removing ICOs as an option for a certain offence may influence or distort sentencing practices.¹²³ The Sentencing Council noted that previous reports raised issues with ICO exclusions that were applied inflexibly for non-custodial sentencing options.¹²⁴ Similarly, we are concerned that in cases where an ICO may be the most appropriate sentencing option but is not available, the imposition of a non-custodial sentence could be overly lenient or the imposition of full-time imprisonment could be overly harsh.
- 5.91 Removing availability of an ICO may lead to more sentences of full-time imprisonment being imposed. We are concerned that this could increase the risk of reoffending, and not achieve community safety. Research shows that people who receive community-based penalties are significantly less likely to be convicted of another offence within the next 12 months, compared with those who receive sentences of full-time imprisonment. Other evidence suggests that even short periods of incarceration may be linked with later contact with the criminal justice system.¹²⁵ A term of imprisonment served as an ICO may better promote community safety and rehabilitation.¹²⁶

ICOs allow courts to impose stringent conditions

- 5.92 ICOs are a valuable sentencing option because they enable courts to impose stringent conditions while allowing offenders to serve their sentences within the community.
- 5.93 The CCA stated that stringent conditions:
- ensure that an offender subject to such an order is not living a carefree existence amongst the community. An ICO deprives an offender of his or her liberty in a real and not merely fictional sense".¹²⁷
- 5.94 Supervision is a mandatory condition of an ICO.¹²⁸ Offenders are monitored and held accountable for any breaches or further offending. It is a mandatory condition of an ICO that an offender not commit any new offence.¹²⁹

122. NSW Sentencing Council, *Sentencing Trends and Practices: Annual Report 2023 (2024)* [4.12], [4.15].

123. NSW Sentencing Council, *Sentencing Trends and Practices: Annual Report 2023 (2024)* [4.38].

124. NSW Sentencing Council, *Sentencing Trends and Practices: Annual Report 2023 (2024)* [4.39]–[4.44].

125. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 11.

126. *R v Pullen* [2018] NSWCCA 264 [84].

127. *R v Pogson* [2012] NSWCCA 225, 82 NSWLR 60 [111].

128. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 73(2)(b).

129. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 73(2)(a).

- 5.95 A court also has discretion to tailor ICO conditions to suit the specific needs and risks of an offender. Conditions can include for example, electronic monitoring, home detention and curfews.¹³⁰ ICOs may be an appropriate sentencing option where rehabilitation of the offender and community safety can be achieved. A court can require an offender to participate in rehabilitation programs to address the underlying causes of offending.¹³¹ Research has shown that ICOs can be effective in reducing reoffending.¹³²
- 5.96 The conditions available on a CCO are not as stringent as an ICO. For example, electronic monitoring and home detention are not available for CCOs.¹³³
- 5.97 In addition, if a person breaches an ICO, they are immediately imprisoned until the NSW State Parole Authority decides if the ICO should be revoked. If it is revoked, the offender serves the rest of the ICO period in custody.¹³⁴ Breaching a CCO does not lead to immediate imprisonment, but the offender is resentenced later.¹³⁵ Data compiled by the Sentencing Council showed that in 2023, when a CCO for any offence was breached, the most common outcome (52.7%) was that the sentencing court took no further action. The next most common outcome was an amended CCO (22.7%). In only 11.5% of breaches was an offender sentenced to a term of imprisonment.¹³⁶
- 5.98 As stated above, we are concerned that excluding any serious road crime offence from being able to receive an ICO may make CCOs a more likely penalty, which in some circumstances could be considered inappropriately lenient.

Rehabilitation programs as a sentence condition

- 5.99 Two submissions supported the introduction of mandatory driver rehabilitation programs as part of serious road crime sentences, to address repeated risky driving behaviour.¹³⁷

130. *Crimes (Sentencing Procedure) Act* (NSW) s 73A(2).

131. *Crimes (Sentencing Procedure) Act* (NSW) s 73A(2)(e).

132. N Donnelly and others, *Have the 2018 NSW Sentencing Reforms Reduced the Risk of Re-Offending?* Crime and Justice Bulletin No 246 (NSW Bureau of Crime Statistics and Research, 2022) 4.

133. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 89(3), s 90(2)(b).

134. *Crimes (Administration of Sentences) Act 1999* (NSW) s 91(1).

135. *Crimes (Administration of Sentences) Act 1999* (NSW) s 107C(5).

136. NSW Sentencing Council, *Sentencing Trends and Practices: Annual Report 2023* (2024) [1.67]–[1.69], 110.

137. D Wakes-Miller, *Submission RC13*, 32, 34, 38; Road Trauma Support Group NSW, *Submission RC16*, 22–23.

- 5.100 We see potential benefits in rehabilitation programs aimed at addressing attitudes to risky driving behaviour. However, for the reasons below, it should not be mandatory for a court to make participation in a rehabilitation program a condition of every court-imposed penalty.

Some supported rehabilitation programs

- 5.101 Some supported introducing driver rehabilitation programs as part of serious road crime sentences, which would be completed prior to offenders getting their licences back.¹³⁸ One submission stated that the programs should be mandatory within all serious road crime sentences.¹³⁹
- 5.102 These programs could be designed to address driving behaviour and ensure that offenders were “fit to regain a licence”,¹⁴⁰ and could “return to driving confidently and with the skills, knowledge and attitude to be safe”.¹⁴¹ Submissions suggested that the programs could include education, driver re-training and technology like alcohol interlocks and black box monitoring.¹⁴²
- 5.103 Introducing such rehabilitation programs would require amendments to the *RTA* and the *Crimes (Administration of Sentences) Act 1999* (NSW). As a result, these proposals are outside the scope of our review.
- 5.104 We acknowledge the importance of rehabilitating road crime offenders and can see merit in a targeted rehabilitation program aimed at driving behaviour and attitudes. The Sentencing Council in 2020 made a similar recommendation.¹⁴³ The design and implementation of any such program would be a matter for the NSW Government.

Programs should not be mandatory

- 5.105 We are concerned about the implication of a mandatory sentencing condition on judicial discretion. It may be more effective for such a program to be an optional addition to a term of licence disqualification. Where serious road crime offences cover such a diverse range of conduct and offenders have very different circumstances, judicial discretion may be important in determining whether a rehabilitation program is necessary or appropriate.

138. D Wakes-Miller, *Submission RC13*, 32, 34, 38; Road Trauma Support Group NSW, *Submission RC16*, 22–23.

139. D Wakes-Miller, *Submission RC13*, 32, 34, 38.

140. Road Trauma Support Group NSW, *Submission RC16*, 22. See also D Wakes-Miller, *Submission RC13*, 38, 55.

141. D Wakes-Miller, *Submission RC13*, 55.

142. D Wakes-Miller, *Submission RC13*, 34, 38; Road Trauma Support Group NSW, *Submission RC16*, 21.

143. NSW Sentencing Council, *Repeat Traffic Offenders*, Report (2020) rec 3.1.

- 5.106 While a rehabilitation program may be suitable in some cases, it may not be appropriate in every case involving serious road crime. In some cases where the offender has demonstrated remorse, rehabilitation may have already occurred and an additional program would not be required.

Licence disqualification is outside the scope

- 5.107 In the consultation paper, we asked about the licence disqualification scheme.¹⁴⁴ As mentioned in chapter 1, we conclude that this is outside the scope of this review.
- 5.108 In this section, we outline the views we heard about licence disqualification to assist the NSW Government in any future consideration of this issue.

Some supported changes to disqualification periods

- 5.109 Some victims and the NSWPF argued that minimum disqualification periods should be increased because they did not meet community expectations or effectively deter and educate drivers.¹⁴⁵ One submission also advocated for increased disqualification periods for second and subsequent offences.¹⁴⁶
- 5.110 On the other hand, some submissions argued that no increases in disqualification periods were warranted. These groups argued the current scheme was appropriate, and expressed concerns about the impact increases would have on particular groups, including Aboriginal and Torres Strait Islander peoples and regional or remote communities. Submissions also observed that licence disqualification periods have been shown to be a weak deterrent and may undermine the 2017 reforms to the scheme.¹⁴⁷ For similar reasons, other submissions supported the removal of minimum disqualification periods.¹⁴⁸
- 5.111 One submission suggested reform of the disqualification process to better align with international children's rights and the primacy of rehabilitation and integration when sentencing children. It argued that lengthy disqualification periods prevented young people from accessing pro-social activities and positively engaging in communities, which impeded rehabilitation.¹⁴⁹

144. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [3.85]–[3.95], question 3.4.

145. NSW Police Force, *Submission RC40*, 10; D Wakes-Miller; *Submission RC13*, 37–38, 41; Road Trauma Support Group NSW, *Submission RC16*, 22–23.

146. D Wakes-Miller; *Submission RC13*, 37–38.

147. NSW Bar Association, *Submission RC37* [34]–[36]; Law Society of NSW, *Submission RC12*, 6. See also Transport for NSW, *Submission RC72*, 3.

148. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 14; Legal Aid NSW, *Submission RC08*, 15.

149. Children's Court of NSW, *Submission RC36*, 2.

- 5.112 Some submissions supported the Sentencing Council's 2020 recommendation that restricted licences be made available for offenders facing automatic disqualification but who required a licence for certain work, medical, cultural, education and personal care reasons. Submissions argued that a restricted licence scheme had the potential to reduce the disproportionate impact of licence disqualification on communities experiencing geographic and socioeconomic disadvantage.¹⁵⁰
- 5.113 The concerns raised in these submissions highlighted the diverse views regarding the licence disqualification scheme. These issues can be considered by the NSW Government in any future review.

150. NSW Sentencing Council, *Repeat Traffic Offenders*, Report (2020) rec 4.1; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 14; Legal Aid NSW, *Submission RC08*, 15; Public Defenders, *Submission R21*, 4.

6. Sentencing principles and procedures

In brief

This chapter considers sentencing principles and procedures for serious road crime offences. We conclude there should be no change to the general sentencing framework for these offences, and that it would not be appropriate to legislatively reform the guideline judgment for dangerous driving offences under s 52A of the *Crimes Act 1900* (NSW). We also conclude that standard non-parole periods should not be introduced for dangerous driving offences.

Some issues are outside the scope of our review	100
Changes to the general sentencing framework	101
Regular reviews of judicial decisions should not be introduced	101
The aggravating factors should not change	102
Previous road offences should not count as a criminal record	104
Sentencing guidelines should not be introduced	105
Guideline judgment for dangerous driving	108
There are concerns the guideline is outdated	108
Others considered <i>Whyte</i> was relevant and appropriate	110
Standard non-parole periods	111
Dangerous driving offences are not appropriate for SNPPs	111
There are concerns about the SNPP scheme as a whole	113
We do not see a need for further guidance in sentencing	114
There could be unintended consequences of imposing SNPPs	114

- 6.1 In this chapter, we discuss proposed reforms to sentencing principles and procedures for serious road crime offences.
- 6.2 As we discuss in chapter 1, many victims felt a strong sense of injustice at the sentencing outcomes of serious road crime offences. They did not think that the sentences imposed for serious road crimes appropriately reflected their seriousness, or adequately acknowledged the devastating harm caused to victims, their families and the wider community.
- 6.3 To address these concerns, some submissions proposed reform to sentencing principles and procedures. These included changes to the general sentencing

framework in the *Crimes (Sentencing Procedure) Act 1999* (NSW) (*Sentencing Procedure Act*), updating the guideline judgment for dangerous driving offences¹ and introducing standard non-parole periods (SNPPs) for dangerous driving offences.²

- 6.4 While we acknowledge that the proposed reforms could address some victims' concerns about inadequate sentencing outcomes, we conclude that the sentencing principles and procedures that apply to serious road crime offences should not change.³ In our view, the current framework is comprehensive and appropriately addresses the issues that arise in relation to serious road crimes.⁴

Some issues are outside the scope of our review

- 6.5 Some victims expressed concerns about general sentencing principles that apply to sentencing of all offences. For instance, some victims expressed concerns about the role of mitigating factors and sentencing discounts in serious road crime sentences.⁵ We explained these concepts, and outlined how the general sentencing framework worked, in the consultation paper.⁶
- 6.6 We also heard concerns about sentencing outcomes, both in particular cases and in relation to serious road crime offences more broadly. As we discuss in chapter 1, there was a strong view among victims that sentencing outcomes were inadequate.⁷ In particular, the sentences imposed for serious road crimes involving death often left victims feeling devastated, and as though their loved one's death was not taken seriously by the criminal law.⁸
- 6.7 While we acknowledge these concerns, broader reforms that would impact sentencing for all offences, and not just serious road crime offences, are beyond the scope of this review. These issues would need to be considered in a wider review, that considers sentencing more broadly in relation to all criminal offences.

1. *R v Whyte* [2002] NSWCCA 343, 55 NSWLR 252.

2. *Crimes Act 1900* (NSW) s 52A.

3. Legal Aid NSW, *Submission RC08*, 17; Law Society of NSW, *Submission RC12*, 6; Public Defenders, *Submission RC21*, 5; NSW Bar Association, *Submission RC27* [40]; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 15; Local Court of NSW, *Submission RC71*, 7; NSW Police Force, *Submission RC40*, 11.

4. NSW Bar Association, *Submission RC27* [40]; Law Society of NSW, *Submission RC12*, 6.

5. See, eg, T Blake, *Submission RC19*, 10; Road Trauma Support Group NSW, *Submission RC16*, 28–29; D Wakes-Miller, *Submission RC13*, 46–47.

6. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [4.5]–[4.70].

7. See, eg, Road Trauma Support Group NSW, *Submission RC16*, 3.

8. See, eg, K Dokmanovic, *Submission RC11*, 11; D Wakes-Miller, *Submission RC13*, 13–14; T Blake, *Submission RC19*, 11; M Duke, *Submission RC48*, 11.

- 6.8 Moreover, we can only consider judicial decisions and sentencing outcomes to the extent that they are relevant to whether the law should be changed. This chapter does not comment on individual cases beyond that.

Changes to the general sentencing framework

- 6.9 To address concerns about inadequate sentencing outcomes, victims suggested a number of changes to the sentencing framework for serious road crime offences. These included:
- implementing regular evaluations of sentencing decisions for serious road crimes, to ensure that they adhere to community expectations⁹
 - amending the aggravating factors where the offence involved the actual or threatened use of violence or a weapon, to explicitly capture committing road crimes while in charge of a vehicle, on the basis that a vehicle should be considered a weapon¹⁰
 - counting previous traffic offences as a criminal record for the purpose of sentencing serious road crime offenders, which could contribute to harsher sentences in some cases,¹¹ and
 - introducing sentencing guidelines for serious road crimes that cause death or serious injury.¹²
- 6.10 We acknowledge that these proposals could lead to more severe sentencing outcomes in some cases, which could address victims' concerns about inadequate sentences. However, for the reasons below, we conclude these options should not be introduced.

Regular reviews of judicial decisions should not be introduced

- 6.11 Some victims expressed concerns that serious road crime sentences are out of step with community expectations.¹³ To address those concerns, one submission proposed that there should be regular evaluations of judicial decisions, to ensure community expectations were upheld and to address sentences perceived to be inadequate.¹⁴

9. D Wakes-Miller, *Submission RC13*, 47.

10. Road Trauma Support Group NSW, *Submission RC16*, 28; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(b)–(c).

11. D Wakes-Miller, *Submission RC13*, 47.

12. D Wakes-Miller, *Submission RC13*, 46.

13. See, eg, Road Trauma Support Group NSW, *Submission RC16*, 3.

14. D Wakes-Miller, *Submission RC13*, 46–47.

- 6.12 While we acknowledge the importance of sentencing evolving to reflect changes in social attitudes, we are concerned that this proposal would undermine the independence of the judiciary. Judicial independence is crucial to the rule of law.¹⁵ Additionally, judicial officers have the appropriate expertise to apply the law impartially based on principles and evidence.
- 6.13 There is also already a mechanism to address inadequate sentences. These can be reviewed by higher courts, via the existing appeals process.¹⁶

The aggravating factors should not change

- 6.14 Some victims argued that a vehicle was a lethal weapon, and that this should be reflected in the sentencing framework. In particular, the Road Trauma Support Group (RTSG) stated that the aggravating factors relating to the actual or threatened use of violence or a weapon should be amended to explicitly capture committing a road crime while in charge of a vehicle.¹⁷ In support of this proposal, the RTSG cited a recent NSW Court of Criminal Appeal (CCA) decision where one judge commented that “[d]riving a motor vehicle is like driving a weapon”.¹⁸
- 6.15 We discussed what an aggravating factor was, and how these factors impacted sentencing, in the consultation paper.¹⁹
- 6.16 We acknowledge that vehicles have the potential to inflict serious and devastating consequences. However, for the reasons below, we do not think changing the aggravating factors relating to the use of a weapon and violence is necessary.

Using a vehicle as a weapon can be taken into account appropriately

- 6.17 Where a vehicle is deliberately used as a weapon with intention to injure or kill people, it can, in appropriate circumstances:
- result in a different and potentially more serious charge
 - increase the objective seriousness of the offence, or
 - be taken into account as an aggravating factor on sentence.
- 6.18 We expand on these below.

15. See, eg, J Debeljak, “Judicial Independence in the Modern Democratic State” (1999) 74 *Reform* 35, 36–37.

16. See, eg, *Criminal Appeal Act 1912* (NSW) s 5D(1); *Crimes (Appeal and Review) Act 2001* (NSW) s 23(1).

17. Road Trauma Support Group NSW, *Submission RC16, 28; Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(b)–(c).

18. Road Trauma Support Group NSW, *Submission RC16, 28; Davidson v R* [2022] NSWCCA 153 [215] (N Adams J).

19. See NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [4.31]–[4.46].

Using a vehicle as a weapon can result in a more serious charge

- 6.19 In cases where a vehicle is used as a weapon, the conduct may be charged as manslaughter by unlawful and dangerous act or murder.
- 6.20 In the context of manslaughter involving a vehicle, manslaughter by unlawful and dangerous act is only charged in exceptional cases.²⁰ We explained what manslaughter by unlawful and dangerous act was, and how it differed from manslaughter by criminal negligence, in the consultation paper.²¹ There were several examples of this type of manslaughter being charged where a vehicle was used as a weapon.²²
- 6.21 Moreover, in serious cases where there is an intention to inflict grievous bodily harm (GBH) or death, using a vehicle as a weapon can also result in a charge of murder, which carries a maximum penalty of life imprisonment.²³ If other harms result, such as GBH or actual bodily harm, other charges may also be available.²⁴

Using a vehicle as a weapon can increase objective seriousness

- 6.22 In some cases, using a vehicle as a weapon can increase the objective seriousness of the offence for the purpose of sentencing. We explained what objective seriousness was, and how it was taken into account in sentencing, in the consultation paper.²⁵
- 6.23 For example, in one manslaughter case, the offender intentionally hit the victim with a car in the context of an argument.²⁶ The sentencing judge found that the objective seriousness was “of a very high order” and that the case involved “an extremely serious unlawful act of assault” with an “extreme” level of dangerousness.²⁷ The court found the offender’s intention was “very close to that required for the offence of murder”, and the offence was considered to be “a very serious form of manslaughter”.²⁸
- 6.24 In another sentence involving an offence of murder, the use of a vehicle as a murder weapon was also found to increase the objective seriousness of the offence. In that case, the judge remarked:

20. *Davidson v R* [2022] NSWCCA 153 [192]–[194] (N Adams J).

21. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [2.17]–[2.24].

22. See, eg, *Lees v R* [2019] NSWCCA 65; *Britton v R* [2024] NSWCCA 138.

23. See, eg, *R v Bidner* [2023] NSWSC 8; *Crimes Act 1900* (NSW) s 19A(1).

24. See, eg, *Crimes Act 1900* (NSW) s 33(1), s 59(1); *R v Chisari* [2006] NSWCCA 19.

25. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [4.12]–[4.13].

26. *Lees v R* [2019] NSWCCA 65.

27. *Lees v R* [2019] NSWCCA 65 [42], [56].

28. *Lees v R* [2019] NSWCCA 65 [56]–[57].

in the overall context of how a murder may be affected, a 2-tonne motor vehicle makes for a formidable weapon, and one against which [the victim] could have had no defence.²⁹

- 6.25 This was one factor that contributed to the finding that the gravity of the crime was “most serious” and involved a “high” level of moral culpability.³⁰

Using a vehicle as a weapon can be aggravating in some circumstances

- 6.26 The existing aggravating factor concerning the use of a weapon may also be applicable where a car is used as a weapon, provided the use of a weapon is not an element of the offence. For example, in one case involving the offence of causing GBH with intent,³¹ the offender drove a car into the victim. The CCA held that, as using a weapon was not an element of the offence, the fact that the vehicle was used as a weapon was an aggravating factor.³²
- 6.27 As we explain below, where driving a vehicle is an element of the offence, taking this into account as an aggravating factor would result in double counting.

In other cases, considering this factor would result in double counting

- 6.28 Amending the aggravating factor relating to weapons may have little practical impact, as it could not be taken into account in a large number of serious road crime sentences. This is because a sentencing court cannot have additional regard to an aggravating factor if it is an element of the offence.³³
- 6.29 That means that, where driving a vehicle is an element of a serious road crime offence, it could not be counted as an aggravating factor on the basis that the vehicle was a weapon. Driving a vehicle is an element of a large majority of serious road crime offences, including all dangerous driving offences, police pursuits and fail to stop and assist offences.³⁴

Previous road offences should not count as a criminal record

- 6.30 Where an offender has a record of previous criminal convictions, it can be an aggravating factor on sentence in certain circumstances.³⁵ One submission argued that previous road or traffic offences should be counted as criminal offences for

29. *R v Bidner* [2023] NSWSC 880 [28].

30. *R v Bidner* [2023] NSWSC 880 [29]–[31].

31. *Crimes Act 1900* (NSW) s 33(1).

32. *R v Chisari* [2006] NSWCCA 19 [31].

33. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2).

34. *Crimes Act 1900* (NSW) s 51B, s 52A, s 52AB.

35. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(d). See also *Veen v R (No 2)* (1988) 164 CLR 465, 477; *Meis v R* [2022] NSWCCA 118 [49]–[50].

the purpose of serious road crime sentences, leading to higher sentences for offenders that have a traffic infringement history.³⁶

- 6.31 We acknowledge that a history of traffic infringements shows a disregard for road rules and a pattern of unsafe driving. However, we do not think the criminality involved in road and traffic offences is comparable to the criminality involved in offences for which a criminal conviction is recorded.
- 6.32 We are also concerned that this reform would lead to over-reach, as many people in our community have committed road and traffic infringements in different circumstances.
- 6.33 It could also undermine the penalty notice offence regime. Many traffic offences are penalty notice offences, which means that penalty notices or fines can be issued for the offence, instead of going to court. If the person pays the fine, no conviction is recorded for the offence. The person also has the option of not paying the fine and disputing the offence in court.³⁷
- 6.34 Penalty notice offences play an important role in the criminal justice system. They are intended to divert more minor matters from the courts, which has important resourcing benefits.³⁸ They are also a key diversionary measure that diverts more minor offenders away from the criminal justice system, and avoids the serious and often lifelong consequences associated with a criminal conviction.³⁹
- 6.35 If traffic offences could count as criminal offences, there may be little incentive to pay the penalty notice instead of going to court, especially in cases where courts regularly impose fines of lesser amounts.⁴⁰ This reform would also lead to significant unfairness, as penalty notice offences are not proven to the criminal standard.

Sentencing guidelines should not be introduced

- 6.36 To address concerns about inconsistent and inadequate serious road crime sentences, one submission suggested that NSW should introduce statutory sentencing guideline schemes, like those in use in England and Wales. NSW does not have statutory sentencing guidelines, but has guideline judgments which are decisions of the CCA. We discuss the guideline judgment for dangerous driving offences below.

36. D Wakes-Miller, *Submission RC13*, 47.

37. See, eg, *Road Transport Act 2013* (NSW) s 195(2); s 195(3); *Fines Act 1996* (NSW) pt 3 div 2.

38. NSW Law Reform Commission, *Penalty Notices*, Report 132 (2012) [1.5].

39. NSW Law Reform Commission, *Penalty Notices*, Report 132 (2012) [3.30], [12.30].

40. NSW Law Reform Commission, *Penalty Notices*, Report 132 (2012) [4.84].

- 6.37 In England and Wales, offenders are sentenced in accordance with statutory sentencing guidelines produced by the Sentencing Council for England and Wales,⁴¹ following extensive research and public consultation.⁴² There is a statutory guideline for serious road crimes offences.⁴³ Courts must follow any relevant sentencing guidelines when sentencing an offender or exercising a function relevant to sentencing.⁴⁴
- 6.38 The submission proposed sentencing guidelines in NSW should provide that deaths and serious injuries caused by serious road crimes should receive sentencing outcomes consistent with those for other offences causing death and serious injury. In the author's view, this would help ensure penalties corresponded to the seriousness of the offence and the harm caused.⁴⁵

The existing sentencing framework provides sufficient guidance

- 6.39 While we acknowledge concerns raised about inadequate and inconsistent sentencing, we do not consider that a statutory sentencing guideline scheme for serious road crime offences would be appropriate. We also do not think guidelines are necessary, where the existing general sentencing framework appears to be operating appropriately to guide judicial discretion in serious road crime sentences.⁴⁶
- 6.40 Sentencing courts already have some guidance in relation to dangerous driving offences, from the guideline judgment of *R v Whyte*.⁴⁷ We discuss this in more detail in the next section.

Guidelines undermine judicial discretion and individualised justice

- 6.41 More broadly, we have concerns about the implications of sentencing guidelines on judicial discretion and the principle of individualised justice. These principles may have particular significance in the context of serious road crime offences, which capture a diverse range of offending conduct and moral culpability. It is important

41. *Coroners and Justice Act 2009* (UK) s 120(3).

42. *Coroners and Justice Act 2009* (UK) s 120.

43. See, eg, UK, Sentencing Council, "Causing Death by Dangerous Driving" (1 July 2023) <<https://www.sentencingcouncil.org.uk/offences/crown-court/item/causing-death-by-dangerous-driving/>> (retrieved 5 December 2024).

44. *Sentencing Act 2020* (UK) s 59(1).

45. D Wakes-Miller, *Submission RC13*, 46.

46. Local Court of NSW, *Submission RC71*, 7. See also NSW Bar Association, *Submission RC27* [40]–[43]; Legal Aid NSW, *Submission RC08*, 17; Law Society of NSW, *Submission RC12*, 6; Public Defenders, *Submission RC21*, 5; NSW Police Force, *Submission RC40*, 11; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 15.

47. *R v Whyte* [2002] NSWCCA 343, 55 NSWLR 252.

that these diverse circumstances can be considered when determining appropriate sentences.

- 6.42 For similar reasons, the NSW Sentencing Council recently declined to recommend introducing definitive sentencing guidelines for fraud offences. In that review, submissions argued that existing principles were adequate, and considered that formal guidelines were inconsistent with existing sentencing principles.⁴⁸

It would be difficult to formulate guidelines that apply across the board

- 6.43 The wide range of criminality covered by serious road crime offences may also make it difficult to formulate guidelines that apply across the board, while still allowing sufficient flexibility to account for individual circumstances. While guidelines exist for serious road crimes in the UK,⁴⁹ there are significant differences in the legislative structure and the sentencing regime in NSW. For this reason, it is not necessarily comparable.

Guidelines may lead to unnecessary complexity and inconsistency

- 6.44 We are concerned that introducing sentencing guidelines in relation to serious road crime offences would create unnecessary complexity and would be inconsistent with the broader sentencing framework. We do not consider it would be justified to have a separate sentencing regime operating only for serious road crime offences.

Sentencing outcomes should not necessarily be consistent

- 6.45 If statutory guidelines were to be introduced, we do not think it would be appropriate for them to outline that sentencing outcomes for serious road crime offences that cause death or serious injury should be consistent with outcomes for other NSW crimes that cause the same type of harm. While the harm caused is an important aspect of sentencing, it is not the only factor a sentencing court has to consider.⁵⁰ Rather, the unique circumstances of the offence and offender also need to be taken into account and reflected in the ultimate sentence.
- 6.46 For instance, in some serious road crime cases, the harm may be catastrophic, but the level of culpability may be low (for example, arising from momentary

48. NSW Sentencing Council, *Fraud*, Report (2023) [7.6]–[7.8].

49. See, eg, UK, Sentencing Council, “Causing Death by Dangerous Driving” (1 July 2023) <<https://www.sentencingcouncil.org.uk/offences/crown-court/item/causing-death-by-dangerous-driving/>> (retrieved 5 December 2024); UK, Sentencing Council, “Causing Death by Careless Driving whilst under the Influence of Drink or Drugs: Causing Death by Careless Driving when under the Influence of Drink or Drugs or Having Failed either to Provide a Specimen for Analysis or to Permit Analysis of a Blood Sample: For Consultation Only” (1 July 2023) <<https://www.sentencingcouncil.org.uk/offences/crown-court/item/causing-death-by-careless-driving-whilst-under-the-influence-of-drink-or-drugs/>> (retrieved 6 December 2024).

50. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [4.19]–[4.70].

inattention).⁵¹ Other offences causing death or serious injury may involve a much higher level of criminality and culpability (for example, a murder offence where there was an intention to kill or inflict GBH).⁵² It is appropriate that differing levels of culpability are reflected in both the charges laid, and in the sentencing.

Guideline judgment for dangerous driving

- 6.47 Some submissions raised issues with *R v Whyte*⁵³ (*Whyte*), the guideline judgment for dangerous driving offences, including that it was outdated and had led to inadequate sentences.⁵⁴ Others considered that the guideline remained appropriate, relevant and workable.⁵⁵ We outlined how guideline judgments work, and the decision in *Whyte*, in more detail in the consultation paper.⁵⁶
- 6.48 Issues with guideline judgments cannot be resolved by legislative reform. This is because guideline judgments can only be reviewed, changed or revoked with another guideline judgment by the CCA.⁵⁷ There is no mechanism for them to be changed by legislation.
- 6.49 The Attorney General can seek an updated guideline judgment, if it is considered necessary as a matter of policy.⁵⁸ This is because the CCA can give a guideline judgment following an application from the Attorney General of NSW, or on its own motion in any proceedings it considers appropriate.⁵⁹
- 6.50 The balance of this section outlines the views we heard from submissions in the review, which may inform any future consideration of this issue.

There are concerns the guideline is outdated

- 6.51 It has been over 20 years since the decision was handed down, and aspects of *Whyte* are now outdated. In the consultation paper, we discussed the significant

51. Legal Aid NSW, *Submission RC08*, 21.

52. *Crimes Act 1900* (NSW) s 18(1).

53. *R v Whyte* [2002] NSWCCA 343, 55 NSWLR 252.

54. See, eg, Road Trauma Support Group NSW, *Submission RC16*, 7, 27–28; NSW Police Force, *Submission RC40*, 11; Victims of Crime Assistance League (Hunter), *Preliminary Submission PRC84*, 4.

55. Legal Aid NSW, *Submission RC08*, 17; Law Society of NSW, *Submission RC12*, 6; NSW Bar Association, *Submission RC27* [46]; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 15–16; Public Defenders, *Submission RC21*, 5.

56. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [4.71]–[4.80].

57. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 37B, s 36 definition of “Court”.

58. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 37.

59. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 37, s 37A.

factual and legal developments that have taken place since *Whyte* was decided in 2002.⁶⁰

- 6.52 As a result of these changes, the “typical case” outlined in *Whyte* may not apply to the majority of dangerous driving offences today. For instance, as the NSW Police Force (NSWPF) raised, while “young males” are over-represented in crash statistics, the demographic of dangerous driving offenders has broadened.⁶¹
- 6.53 In addition to changes in offender demographics, there have been substantial changes in the *Sentencing Procedure Act* and common law sentencing principles.⁶² One submission considered that the legal changes were meaningful enough to warrant an updated judgment. It raised that the overlap between concepts of moral culpability and objective seriousness in *Whyte* may contribute to courts falling into error.⁶³
- 6.54 We also acknowledge issues raised by the NSWPF and victim advocacy groups that *Whyte* is no longer in line with community expectations and has resulted in inadequate sentences.⁶⁴
- 6.55 For instance, the RTSG stated that a head sentence of three years for dangerous driving occasioning death is “disrespectful to the value of human life”.⁶⁵ *Whyte* provided that, in a “typical case”, where an offender’s moral culpability is high, a full time custodial head sentence (in other words, the total sentence) of less than 3 years’ imprisonment (for an offence causing death) or less than 2 years’ imprisonment (for an offence causing GBH) would generally not be appropriate.⁶⁶

60. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [4.88]–[4.102].

61. NSW Police Force, *Submission RC40*, 11.

62. See NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [4.93]; *R v Eaton* [2023] NSWCCA 125 [56]; *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 3 div 1A, inserted by *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* (NSW) sch 2 [4]. See also NSW Sentencing Council, *Standard Non-Parole Periods for Dangerous Driving Offences*, Report (2011) 33.

63. Confidential, *Submission RC69*, 11. See also *Stanton v R* [2021] NSWCCA 123 [29]; *Foaiaulima v R* [2020] NSWCCA 270 [27].

64. See, eg, Road Trauma Support Group NSW, *Submission RC16*, 7, 27–28; NSW Police Force, *Submission RC40*, 11; Victims of Crime Assistance League (Hunter), *Preliminary Submission PRC84*, 4.

65. Road Trauma Support Group NSW, *Submission RC16*, 3.

66. *R v Whyte* [2002] NSWCCA 343, 55 NSWLR 252 [229].

Others considered *Whyte* was relevant and appropriate

- 6.56 While some submissions expressed concerns about *Whyte* needing updating (which we discuss above), others considered that the guideline remained appropriate, relevant and workable.⁶⁷

***Whyte* remains relevant as a starting point**

- 6.57 Some groups argued that *Whyte* remained relevant as a guide or starting point for sentencing courts. These submissions argued that the guideline still allowed for judicial discretion to determine the appropriate sentence, taking into account all relevant factors.⁶⁸ The Aboriginal Legal Service (ALS) observed that, as the spectrum of conduct covered by dangerous driving offences was very broad, *Whyte* assisted by providing a starting point from which other cases could be distinguished.⁶⁹
- 6.58 We note that important sentencing principles and procedures apply to dangerous driving sentences to ensure they are adequate. For instance, any sentence for a dangerous driving offence must be proportionate or appropriate to the seriousness of the offender's conduct.⁷⁰ If a sentence is inadequate, there are options for the prosecution to appeal.⁷¹

Caselaw has clarified how to reconcile changes

- 6.59 Legal Aid NSW argued that, while there had been significant changes since *Whyte*, caselaw had clarified how these could be reconciled.⁷² For example, a recent case clarified that references in *Whyte* to moral culpability are in fact references to objective seriousness.⁷³
- 6.60 We note that sentencing courts are familiar with the *Sentencing Procedure Act*, and judicial officers are experienced in applying updated legislation alongside caselaw. Indeed, sentencing courts are required to apply guideline judgments alongside

67. Legal Aid NSW, *Submission RC08*, 17; Law Society of NSW, *Submission RC12*, 6; NSW Bar Association, *Submission RC27* [46]; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 15–16; Public Defenders, *Submission RC21*, 5.

68. Legal Aid NSW, *Submission RC08*, 17; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 15–16. See also NSW Bar Association, *Submission RC27* [45]; Law Society of NSW, *Submission RC12*, 6; Public Defenders, *Submission RC21*, 5.

69. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 16.

70. *Veen v R (No 2)* (1988) 164 CLR 465, 472; *DS v R* [2022] NSWCCA 156, 109 NSWLR 82 [68].

71. NSW Sentencing Council, *Standard Non-Parole Periods for Dangerous Driving Offences*, Report (2011) 46.

72. Legal Aid NSW, *Submission RC08*, 17.

73. *R v Eaton* [2023] NSWCCA 125 [56].

current laws.⁷⁴ Where there is an error in this application, the appeals process is available.

No single case could represent most dangerous driving cases

- 6.61 While some argued that *Whyte* no longer represented a typical case as it was based on offences over 20 years ago, the ALS raised that it was unlikely that any single case could represent most dangerous driving cases today. This was because of the wide array of offending conduct and moral culpability covered by these offences.⁷⁵

Standard non-parole periods

- 6.62 Some victims and the NSWPF supported introducing SNPPs for dangerous driving offences.⁷⁶ They argued it would promote consistency in sentencing, reflect the seriousness of the offences and better align with community expectations about punishment.⁷⁷ The NSWPF was also of the view that SNPPs would ensure adequate deterrence and punishment of dangerous driving offenders.⁷⁸
- 6.63 However, other submissions strongly opposed introducing SNPPs, and raised compelling arguments against this reform.⁷⁹ For the reasons below, we conclude that SNPPs should not be introduced for dangerous driving offences.
- 6.64 We explained what SNPPs were, and outlined some of the potential advantages and disadvantages of the SNPP scheme, in the consultation paper.⁸⁰

Dangerous driving offences are not appropriate for SNPPs

- 6.65 We do not think dangerous driving offences under s 52A are appropriate for inclusion in the SNPP scheme. As we explained in the consultation paper, SNPPs represented the non-parole period that was in the middle of the range of seriousness for the relevant offence, viewed objectively.⁸¹ Because of the wide range of circumstances covered by dangerous driving offences, it is difficult to

74. *Stanton v R* [2021] NSWCCA 123 [29]; *Foaiaulima v R* [2020] NSWCCA 270 [27].

75. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 16.

76. *Crimes Act 1900* (NSW) s 52A.

77. See, eg, Road Trauma Support Group NSW, *Submission RC16*, 32; NSW Police Force, *Submission RC40*, 12.

78. NSW Police Force, *Submission RC40*, 12.

79. Legal Aid NSW, *Submission RC08*, 17; Public Defenders, *Submission RC21*, 5–7; NSW Bar Association, *Submission RC27* [47]; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 16–17; Law Society of NSW, *Submission RC12*, 6.

80. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [4.103]–[4.111].

81. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54A(2); NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [4.107].

identify what is the middle of the range.⁸² For this reason, the NSW Sentencing Council (Sentencing Council) previously recommended against introducing SNPPs for dangerous driving offences.⁸³

6.66 In coming to this conclusion, we also consider the Sentencing Council's guidelines that help guide the decision of whether to include an offence in the SNPP scheme. While we take these guidelines into account, we acknowledge that there are concerns about the appropriateness of the current approach to SNPPs. We discuss this in more detail below.

6.67 The Sentencing Council outlined that it may be appropriate to introduce an SNPP for an offence if it:

- had a significant maximum penalty
- was a serious indictable offence
- involved elements of aggravation
- involved a vulnerable victim
- involved special risk of serious consequences to the victim and the community
- was prevalent
- was subject to a pattern of inadequate sentencing, and
- was subject to a pattern of inconsistent sentences.⁸⁴

6.68 Some of these factors are present for dangerous driving offences, while others are not. For example, all dangerous driving offences under s 52A involve a special risk of serious consequences to the victim and community. However, in legal terms, the offence does not necessarily involve a vulnerable victim. While the victim may in some cases be vulnerable, it is not a feature of the offences, in the way it is with, for example, child sexual offences.

6.69 Some of the factors outlined by the Sentencing Council were only present for some dangerous driving offences but not others, or were present to different degrees for different offences. For instance, while all maximum penalties were significant, they ranged from 7 years' imprisonment (dangerous driving occasioning GBH) to 14 years' imprisonment (aggravated dangerous driving occasioning death). The dangerous driving offences involving death were strictly indictable, while those involving GBH were not. While the aggravated offences involved elements of aggravation, the basic offences did not.

82. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 17.

83. NSW Sentencing Council, *Standard Non-Parole Periods for Dangerous Driving Offences*, Report (2011) 45–47. See NSW Sentencing Council, *Homicide*, Report (2021) [7.26]–[7.28].

84. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) rec 2.1.

- 6.70 The prevalence of the offences also varies. Between 2016 and 2022, the following volume of charges were finalised:
- aggravated dangerous driving occasioning death: 49
 - aggravated dangerous driving occasioning GBH: 162
 - dangerous driving occasioning death: 345, and
 - dangerous driving occasioning GBH: 1162.⁸⁵
- 6.71 Views also differed on whether these offences were subject to a pattern of inconsistent and/or inadequate sentencing. The NSWPF and victims argued that sentences for serious road crimes were inadequate.⁸⁶ The NSWPF raised that sentences were inconsistent.⁸⁷ By contrast, the Law Society of NSW argued that sentencing patterns for dangerous driving offences did not warrant introducing SNPPs.⁸⁸
- 6.72 While we acknowledge that some factors support SNPPs being imposed, on balance we do not think this would be appropriate, given the difficulty of identifying a mid-range of objective seriousness for dangerous driving offences. This is particularly so where, as we discuss below, there are significant concerns with the operation of the SNPP scheme as a whole.

There are concerns about the SNPP scheme as a whole

- 6.73 Given the significant concerns about the SNPP scheme and the recent NSW Sentencing Council recommendation that it be reviewed as a whole, we do not recommend that the scheme be expanded prior to any such review.
- 6.74 The Sentencing Council comprehensively outlined the concerns with the scheme in its recent review of firearms, knives and other weapons offences.⁸⁹ These included that:
- the scheme conflicted with important sentencing principles, such as individualised justice and instinctive synthesis, and undermined judicial discretion unnecessarily
 - the scheme may not be meeting its objectives, including to ensure adequacy and consistency in sentencing (in particular, there were concerns about different circumstances being treated similarly, and concerns about SNPPs not being applied)

85. NSW Bureau of Crime Statistics and Research, kf23-22320, table 1a.

86. NSW Police Force, *Submission RC40*, 11. See also Road Trauma Support Group NSW, *Submission RC16*, 3, 20, 27–28.

87. NSW Police Force, *Submission RC40*, 12.

88. Law Society of NSW, *Submission RC12*, 6.

89. NSW Sentencing Council, *Firearms, Knives and other Weapons Offences*, Report (2024).

- the scheme was inconsistent in the length of SNPPs, relative to respective maximum penalties (for example, some offences with the same maximum penalty had different SNPPs, or offences had disproportionately higher or lower SNPPs), and
- the principles for selecting SNPP offences and setting SNPPs were inappropriate (for instance, some questioned whether the starting point of an SNPP of 37.5% of the maximum penalty was justifiable).⁹⁰

6.75 These concerns were echoed in this review.⁹¹ Since the Sentencing Council concluded that these concerns were significant enough to warrant a general review of the SNPP scheme, expanding it may not be desirable.

We do not see a need for further guidance in sentencing

6.76 We do not see a need for further guidance (of the sort provided by SNPPs) for sentencing dangerous driving offences. Submissions argued that there was already sufficient guidance from *Whyte*, as well as the *Sentencing Procedure Act* and common law principles.⁹² It is important to maintain judicial discretion in sentencing, particularly where dangerous driving offences cover such a wide range of conduct.⁹³

6.77 Where most submissions reported that the sentencing framework was appropriate in the context of serious road crimes,⁹⁴ we are concerned that including SNPPs would introduce unnecessary complexity into sentencing for dangerous driving offences.⁹⁵

There could be unintended consequences of imposing SNPPs

6.78 We are concerned that imposing SNPPs for dangerous driving offences could lead to unintended consequences.

90. NSW Sentencing Council, *Firearms, Knives and other Weapons Offences*, Report (2024) rec 6.1, [6.23]–[6.54].

91. NSW Bar Association, *Submission RC27* [47]; Public Defenders, *Submission RC21*, 5–7; Legal Aid NSW, *Submission RC08*, 17; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 16–17.

92. Law Society of NSW, *Submission RC12*, 6; Local Court of NSW, *Submission RC71*, 7; NSW Bar Association, *Submission RC27* [40]–[42].

93. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 16. See also NSW Bar Association, *Submission RC27* [47].

94. NSW Bar Association, *Submission RC27* [40]–[43]; Law Society of NSW, *Submission RC12*, 6; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 15; Local Court of NSW, *Submission RC71*, 7. See also Legal Aid NSW, *Submission RC08*, 17; Public Defenders, *Submission RC21*, 5; NSW Police Force, *Submission RC40*, 11.

95. NSW Sentencing Council, *Standard Non-Parole Periods for Dangerous Driving Offences*, Report (2011) 45–47.

- 6.79 There is a risk that introducing SNPPs for dangerous driving offences could lead to inconsistent sentencing outcomes across the scheme of serious road crime offences.⁹⁶ When recommending against introducing SNPPs for dangerous driving offences, the NSW Sentencing Council commented that introducing an SNPP for just one subset of driving offences in the *Crimes Act 1900* (NSW) could “interfere with the consistent, logical approach that presently exists”.⁹⁷
- 6.80 Similarly, the ALS raised that SNPPs could “artificially inflate [sentences for] aggravated dangerous driving offences, potentially resulting in sentences for vehicular manslaughter receiving lesser sentences than sentences for dangerous driving”.⁹⁸
- 6.81 Introducing an SNPP for a subset of offences in the middle of the serious road crime offence hierarchy could also hinder the resolution of criminal matters.⁹⁹ This is because accused persons may be reluctant to plead guilty to dangerous driving offences with an SNPP. As the ALS pointed out, this would place an “additional burden on the court system” and result in more trials.¹⁰⁰
- 6.82 Finally, we are concerned that if SNPPs resulted in higher sentences, this could have flow on effect for Aboriginal incarceration rates, and impede progress towards the Closing the Gap target to reduce adult incarceration.¹⁰¹ As we outlined in the consultation paper, Aboriginal people are already disproportionately represented in the finalised charges for dangerous driving offences.¹⁰²

96. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 16–17.

97. NSW Sentencing Council, *Standard Non-Parole Periods for Dangerous Driving Offences*, Report (2011) 46.

98. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 17.

99. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 17.

100. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 17.

101. Australia, Productivity Commission, “Socio-Economic Outcome Area 10: Aboriginal and Torres Strait Islander Adults are Not Overrepresented in the Criminal Justice System” (30 June 2023) *Closing the Gap: Information Repository* <<https://www.pc.gov.au/closing-the-gap-data/dashboard/se/outcome-area10>> (retrieved 4 December 2024). SNPPs do not apply to offenders who were under the age of 18 at the time the offence was committed: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D.

102. NSW Bureau of Crime Statistics and Research, st23-22811, table 3; *Crimes Act 1900* (NSW) s 52A(1), s 52A(2), s 52A(3), s 52A(4), s 53, s 52AB, s 51A, s 51B; NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [3.17] table 3.1.

7. Legislative structure and jurisdiction

In brief

This chapter considers whether the legislative structure of serious road crime offences, and the courts in which these offences are heard, are appropriate. To improve the clarity and organisation of the *Crimes Act 1900* (NSW), we recommend that all existing serious road crime offences in that Act be grouped within a new division. There should not be any wider changes to the legislative structure, nor to the jurisdictions in which offences are heard.

A standalone serious road crimes Act	118
There was some support for a new Act	119
There should not be a standalone serious road crimes Act	119
A new division in the <i>Crimes Act</i>	121
There should be a new serious road crimes division	121
Serious road crime offences in the Local Court	122
Some argued serious road crimes should be strictly indictable	123
No Table offences should become strictly indictable	124
Negligent driving occasioning death	127
Some supported making it indictable or strictly indictable	127
The offence should not become indictable	128
Serious road offences in the Children's Court	130
Cases can be dealt with on indictment where appropriate	131
The Children's Court is appropriate for other cases	132
Only the most serious criminal offences should be SCIOs	132
Higher courts may not necessarily impose harsher sentences	133
The change may have unintended outcomes	133

- 7.1 In this chapter, we consider issues relating to the legislative structure of serious road crime offences, and the courts in which these offences can be heard.
- 7.2 Some submissions suggested changes to the legislative structure of serious road crime offences, to better reflect their seriousness and/or make the legislative scheme easier to understand and apply. Various proposals were put forward for our consideration, including:

- creating a new, standalone serious road crimes Act¹
- moving all serious road crime offences into a new division in the *Crimes Act 1900* (NSW) (*Crimes Act*),² and
- creating a new offence to consolidate all serious road crime offences.³

7.3 We conclude that there should not be any broad changes to the legislative scheme, such as introducing a new serious road crimes Act or a single consolidated serious road crime offence. However, we recommend that a new division of serious road crime offences be created in the *Crimes Act* to improve the clarity and organisation of these offences within the Act.

7.4 Some groups considered serious road crime offences too serious to be heard in the Local Court or Children’s Court.⁴ However, for the reasons outlined in this chapter, we conclude there should be no change to the Table offence classifications or the list of serious children’s indictable offences, in relation to serious road crime offences.

A standalone serious road crimes Act

7.5 Some submissions argued that a new, standalone serious road crimes Act should be introduced. This Act would consolidate the full hierarchy of road crime offences from the *Crimes Act* and the *Road Transport Act 2013* (NSW) (*RTA*).⁵ It was argued that a new Act would have an important symbolic and educative role, by emphasising that this conduct is not acceptable in our community.⁶

7.6 However, the majority of submissions did not support creating a new Act and raised compelling arguments against this reform.⁷ For the reasons we discuss below, we conclude there should not be a standalone Act.

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1. See, eg, Road Trauma Support Group NSW, *Submission RC16*, 9; D Wakes-Miller, *Submission RC13*, 6; Confidential, *Preliminary Submission PRC91*, 1.
 2. Confidential, *Preliminary Submission PRC91*, 1.
 3. Children’s Court of NSW, *Submission RC36*, 2–3.
 4. See, eg, Road Trauma Support Group NSW, *Preliminary Submission PRC72*, 4; Road Trauma Support Group NSW, *Submission RC16*, 32, 33; Victims of Crime Assistance League (Hunter), *Preliminary Submission PRC84*, 5.
 5. See, eg, Confidential, *Preliminary Submission PRC91*, 1; Road Trauma Support Group NSW, *Preliminary Submission PRC72*, 3; Confidential, *Preliminary Submission PRC76*, 3; D Wakes-Miller, *Submission RC13*, 29; Road Trauma Support Group NSW, *Submission RC16*, 9.
 6. Road Trauma Support Group NSW, *Submission RC16*, 9–12.
 7. Legal Aid NSW, *Submission RC08*, 11; Law Society of NSW, *Submission RC12*, 4; NSW Bar Association, *Submission RC27* [23]; NSW Police Force, *Submission RC40*, 7; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 10; Confidential, *Submission RC69*, 7; Public Defenders, *Submission RC21*, 3; Children’s Court of NSW, *Submission RC36*, 3.

There was some support for a new Act

- 7.7 Some submissions argued that a new Act could:
- influence societal attitudes and behaviours about serious road crimes, which would improve road safety and reduce serious injuries and fatalities⁸
 - improve the clarity of the law,⁹ and
 - streamline the legal process by reducing the complexity of the framework.¹⁰
- 7.8 The Road Trauma Support Group (RTSG) considered that a new Act would be a “major shift in law” that could raise social awareness of the seriousness of road crime and address escalating criminal conduct. The RTSG drew our attention to the 2007 domestic violence legislative reforms, which introduced a new standalone domestic violence Act.¹¹ In the RTSG’s view, a similar approach should be taken for serious road crime offences.¹²
- 7.9 Several submissions argued that restructuring the legislation could present an opportunity to introduce fresh offences and overhaul the sentencing procedure. For example, the RTSG considered that if a new Act was introduced, all offences could be redrafted, and a new offence of vehicular homicide could be included.¹³
- 7.10 One submission advocated for a new Act to legislate parts of the sentencing process for serious road crime offences, including guidelines for the assessment of objective seriousness, moral culpability, and aggravating and mitigating factors.¹⁴

There should not be a standalone serious road crimes Act

- 7.11 For the reasons we outline below, we conclude there should not be a standalone serious road crimes Act.

A new Act is unlikely to bring about significant change

- 7.12 The symbolic role of a new Act may be diminished in practice, particularly if the major changes to offence labelling and penalties, supported by some groups, were not adopted in the Act.

8. Road Trauma Support Group NSW, *Submission RC16*, 9; D Wakes-Miller, *Submission RC13*, 6, 27.

9. Local Court of NSW, *Submission RC71*, 4.

10. Road Trauma Support Group NSW, *Submission RC16*, 9.

11. Road Trauma Support Group NSW, *Submission RC16*, 10–11; *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

12. Road Trauma Support Group NSW, *Submission RC16*, 10–11.

13. See, eg, Road Trauma Support Group NSW, *Submission RC16*, 13, 16.

14. D Wakes-Miller, *Submission RC13*, 24.

- 7.13 Creating a new Act would not necessarily mean that new offences were introduced, or that all existing offences were redrafted. A new Act may simply consolidate the existing serious road crime offences.
- 7.14 A new Act would be unlikely to bring about significant change to criminal and sentencing procedure. Courts would continue to apply general criminal and sentencing principles. When dealing with either new offences, or offences moved from other Acts, courts would use existing case law based on the previous versions of the offences, to interpret and apply offences in a new Act.
- 7.15 We also do not consider that serious road crime offences should be subject to a separate sentencing regime, or separate criminal law principles. There is no justification for treating serious road crime offenders differently from other offenders.¹⁵ We discuss this conclusion further, in chapter 6.
- 7.16 In our view, the existing sentencing framework allows for sufficient judicial discretion to adequately address the unique issues arising from serious road crime offences. We note that there are no other NSW statutes that incorporate separate sentencing principles for particular offence categories.

A new Act is not necessary

- 7.17 Though a standalone serious road crimes Act might reflect community concern about the prevalence and seriousness of road offences, we do not consider a new Act is required, as no specific operational difficulties were raised by those working within the criminal justice system.
- 7.18 There are standalone Acts for other types of criminal offences, such as domestic violence and firearms, and these Acts were introduced, in part, to address areas of significant public concern.¹⁶ However, they are primarily to do with regulation of relevant activities and most of the offences in them are concerned with breaches of regulations or orders.
- 7.19 For example, the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) deals with specific domestic violence offences, but also regulates apprehended violence orders, associated court proceedings and police powers. Unlike the domestic violence provisions, there is no indication that the existing Acts regulating serious road crimes are difficult for practitioners to use. Instead, they are considered well understood and working appropriately.¹⁷

15. Public Defenders, *Submission RC21*, 3.

16. *Crimes (Domestic and Personal Violence) Act 2007* (NSW); *Firearms Act 1996* (NSW).

17. Legal Aid NSW, *Submission RC08*, 11; Law Society of NSW, *Submission RC12*, 4; NSW Bar Association, *Submission RC27* [23]; Children's Court of NSW, *Submission RC36*, 3; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 10.

- 7.20 Further, the standalone *Firearms Act 1996* (NSW) was introduced to respond to a major revision of gun laws and culture across Australia.¹⁸ The Act made significant changes to the regulation of licensing, monitoring, and storage of firearms. In circumstances where we conclude that no significant change should be made to the serious road crime offence scheme, we do not consider it necessary that a new Act be introduced.

The current legislation is well understood and remains fit for purpose

- 7.21 We acknowledge that creating a new Act may make the scheme easier for the community, victims, and accused people to understand. However, there does not appear to be a practical need for a new standalone Act.
- 7.22 A standalone domestic violence Act was considered beneficial because, among other things, it was to be a “one-stop legal manual” for legal practitioners and was intended to make the laws easier to use.¹⁹
- 7.23 However, groups that work in the criminal justice system did not raise any operational difficulties with the current serious road crime framework. Instead, these groups submitted that the existing hierarchy of offences across the *Crimes Act* and the *RTA* was well understood and working appropriately,²⁰ and the provisions remained fit for purpose.²¹
- 7.24 Extracting offences from the *Crimes Act* and the *RTA* may, without other discernible benefits, cause confusion and complexity for the courts.²² This would be a significant change, which may be unnecessary given that the current legislation remains operative.

A new division in the *Crimes Act*

There should be a new serious road crimes division

Recommendation 7.1: A new serious road crimes division

There should be a new division in the *Crimes Act 1900* (NSW) that incorporates the existing serious road crime offences contained in that Act.

18. NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 25 June 1996, 3557.

19. NSW, *Parliamentary Debates*, Legislative Assembly, Agreement in Principle Speech, 16 November 2007, 4327–4328.

20. Legal Aid NSW, *Submission RC08*, 11; Law Society of NSW, *Submission RC12*, 4.

21. NSW Bar Association, *Submission RC27* [23].

22. Legal Aid NSW, *Submission RC08*, 11; NSW Police Force, *Submission RC40*, 7; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 10.

- 7.25 We recommend that a new division be created in the *Crimes Act* that groups all serious road crime offences in that Act. The division should include the following provisions:
- predatory driving: s 51A
 - police pursuits: s 51B
 - dangerous driving: s 52A–52AA
 - failing to stop and assist: s 52AB, and
 - wanton or furious driving: s 53.
- 7.26 These offences are currently contained in an expansive division titled “acts causing danger to life or bodily harm”.²³ We suggest that a new serious road crimes division follows.
- 7.27 A dedicated division in the *Crimes Act* might improve community understanding of the range of serious road crime offences that are available.²⁴ It may also improve the clarity and organisation of offences without significantly changing the substance or operation of the laws. Several submissions preferred this option over a new serious road crimes Act.²⁵
- 7.28 While we acknowledge that this change may not achieve the symbolic and educative effect that some submissions sought in a standalone Act, keeping serious road crime offences in the *Crimes Act* could emphasise rather than diminish their seriousness. As one submission pointed out, certain road crime offences were contained in the *Crimes Act* alongside some of the most serious offences in NSW.²⁶ This highlighted their significant criminality.

Serious road crime offences in the Local Court

- 7.29 Some submissions argued that serious road crime offences were too serious to be heard in the Local Court and should be removed from Table 1 and Table 2 of the *Criminal Procedure Act 1986* (NSW). They would be no longer triable in the Local Court as “Table offences”. Instead, submissions suggested they should become “strictly indictable offences”.²⁷ These offences cannot be heard in the Local Court.

23. *Crimes Act 1900* (NSW) pt 3 div 6.

24. Confidential, *Submission RC69*, 7; Local Court of NSW, *Submission RC71*, 4.

25. NSW Police Force, *Submission RC40*, 7; Confidential, *Submission RC69*, 7; Law Society of NSW, *Submission RC12*, 4; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 10.

26. Confidential, *Submission RC69*, 7.

27. See, eg, Road Trauma Support Group NSW, *Preliminary Submission PRC72*, 4; Victims of Crime Assistance League (Hunter), *Preliminary Submission PRC84*, 5.

We explained the operation of Table offences and outlined the serious road crime offences that are Table offences, in our consultation paper.²⁸

- 7.30 However, the majority of submissions argued that there should be no change to the current classifications.²⁹ For the reasons outlined below, we conclude that no existing Table offences should be made strictly indictable.

Some argued serious road crimes should be strictly indictable

- 7.31 Some groups argued that some or all of the current serious road crime Table offences should become strictly indictable offences, so that they would be tried and sentenced exclusively in courts higher than the Local Court. These groups considered that the Local Court was not an appropriate forum for the finalisation of some or all serious road crime offences.³⁰
- 7.32 The RTSG argued that no serious road crime offences should be heard in the Local Court due to its sentencing limits.³¹ The Local Court can only sentence an offender to a maximum of 2 years' imprisonment for a single offence, or 5 years for multiple offences.³²
- 7.33 The Victims of Crime Assistance League raised concerns that offenders were “granted the security of lower sentencing penalties in the Local Court” and considered that making dangerous driving offences strictly indictable would increase deterrence and better acknowledge the harm to victims.³³
- 7.34 Another submission considered that making all offences strictly indictable would have the benefit of ensuring that the maximum penalty was an available option in every case.³⁴
- 7.35 Due to the Local Court sentencing limits, the NSW Police Force (NSWPF) submitted that consideration should be given to making dangerous driving occasioning grievous bodily harm, and the aggravated form of that offence, strictly indictable.³⁵ They also raised concerns that lower courts displayed a “systemic leniency”, and

28. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [5.6]–[5.10].

29. Law Society of NSW, *Submission RC12*, 6–7; Public Defenders, *Submission RC21*, 7; NSW Bar Association, *Submission RC27* [48]; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 17–18; Confidential, *Submission RC69*, 12.

30. See, eg, Road Trauma Support Group NSW, *Submission RC16*, 33; Victims of Crime Assistance League (Hunter), *Preliminary Submission PRC84*, 5.

31. Road Trauma Support Group NSW, *Submission RC16*, 33.

32. *Criminal Procedure Act 1986* (NSW) s 267(2), s 268(1A). The limit is applied after any discount for a guilty plea. See *Park v R* [2020] NSWCCA 90 [29].

33. Victims of Crime Assistance League (Hunter), *Preliminary Submission PRC84*, 5.

34. F Gilroy, *Submission RC03*, 22.

35. NSW Police Force, *Submission RC40*, 12.

that even if the maximum penalties were sufficient, the actual outcomes, in practice, were concerning.³⁶

No Table offences should become strictly indictable

- 7.36 However, for the reasons below, we conclude there should be no change to current Table offence classifications.

Serious cases can be tried in the District Court where appropriate

- 7.37 We do not consider it is necessary to make any additional serious road crime offences strictly indictable. This is because in more serious cases, the prosecutor and in some cases, the accused person, can elect to have the case transferred to the District Court to be dealt with on indictment.³⁷ There is no sentencing limit in the District Court.
- 7.38 The existing serious road crime Table offences cover a wide range of offending conduct, varying in seriousness.³⁸ For example, as we observe in chapter 3, an offence of dangerous driving covers a spectrum of conduct ranging from a moment of inattention at one end, to a complete abandonment of responsibility at the other.³⁹
- 7.39 Whether the Local Court's jurisdictional limit allows adequate scope for sentencing depends on the circumstances of the case, including the seriousness of the offender's conduct and their criminal history.
- 7.40 The current Table classification for these offences allows flexibility about where offences are finalised, to ensure cases are dealt with by a court with sufficient sentencing scope. Police can refer more serious cases to the Office of the Director of Public Prosecutions (ODPP) to consider whether there should be an election to deal with the case on indictment. In deciding whether to elect, one of the factors the ODPP considers is whether the offender can be appropriately sentenced within the Local Court limits.⁴⁰
- 7.41 Importantly, the serious road crime offences that sit at the top of the hierarchy of offences and involve the most serious criminal conduct (including dangerous driving occasioning death and manslaughter) are already strictly indictable offences.⁴¹

36. NSW Police Force, *Submission RC40*, 9.

37. *Criminal Procedure Act 1986* (NSW) sch 1 table 1, sch 1 table 2.

38. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 17–18.

39. *R v Errington* [2005] NSWCCA 348 [27]; *R v Khatter* [2000] NSWCCA 32 [31].

40. NSW Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2021) [6.2].

41. *Crimes Act 1900* (NSW) s 18, s 52A(1)–(2).

Higher courts may not necessarily impose more severe sentences

- 7.42 Making certain offences strictly indictable may have little practical effect on the actual sentences imposed, particularly if the maximum penalties do not change.
- 7.43 Although higher courts are not constrained by a jurisdictional limit, they must still consider the objective seriousness of the offence when formulating the sentence. Making all serious road crimes strictly indictable would not guarantee that heavier sentences were imposed, because higher courts apply the same sentencing principles as the Local Court.
- 7.44 While serious road crime Table offences generally result in more severe sentences when they are dealt with in a higher court, this could be because prosecutors may only elect for the most serious cases to be dealt with on indictment.⁴²
- 7.45 It does not appear that judicial officers in the Local Court have been restricted by the Court's jurisdictional limit when sentencing offenders for the serious road crime offences. As we observed in our consultation paper, between January 2019 and December 2022 very few cases with a serious road crime as the main offence resulted in a term of imprisonment close to the jurisdictional limit of 2 years' imprisonment.⁴³ This suggested that there were few cases where a judicial officer was constrained by the Court's sentencing limits.

The Local Court may offer a quicker resolution

- 7.46 The Local Court is more resource effective than the District Court and may offer a quicker resolution of criminal matters, without the stress of a jury trial for victims and witnesses, even in cases where the accused pleads not guilty. This is because of the differences between the types of matters and processes in the Local Court and the higher courts.⁴⁴ However, we acknowledge that some victims and families might prefer that a case be dealt with in the District Court, even if it involves a longer delay or lengthy trial process.
- 7.47 As we discussed in the consultation paper, the Local Court finalises the majority of Table offences.⁴⁵ Making some Table offences strictly indictable would result in a higher number of cases being dealt with in the District Court. This increase could mean that cases take longer to finalise because of the number of cases for the

42. NSW Bureau of Crime Statistics and Research, k23-22320, table 3b.

43. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [5.15]; Judicial Commission of NSW, *Sentencing Statistics*, Judicial Information Research System (retrieved 14 August 2023).

44. C Ringland, *The Second Tranche of the Table Offences Reform: Impacts on District and Local Court Finalisations, Time to Finalisation and Sentencing Outcomes*, Bureau Brief No 156 (NSW Bureau of Crime Statistics and Research, 2021) 2.

45. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [5.13].

court to consider, and because each strictly indictable offence must go through the early appropriate guilty plea (EAGP) process.⁴⁶ In addition, research has shown that where strictly indictable offences have later been changed to Table offences, (allowing the Local Court to finalise the charges), it has resulted in around a 6 month decrease from charge to finalisation for those offences.⁴⁷

- 7.48 Both strictly indictable and Table offences that have been elected to be dealt with on indictment must go through the steps of the EAGP process. Before a case can be listed for trial or sentence, the ODPP must review the evidence provided by police and “certify” or confirm the charges. The ODPP must also engage in discussions with the defence lawyers to determine whether the accused person will plead guilty to any charges.⁴⁸
- 7.49 Although the length of this process can vary, it generally takes a longer time for a case to reach a trial or sentence hearing in the District Court, compared with the Local Court.⁴⁹

This change could impact plea negotiations

- 7.50 As the Aboriginal Legal Service (ALS) observed, making all serious road crime offences strictly indictable could reduce the scope for plea negotiations in appropriate cases.⁵⁰
- 7.51 As part of the criminal process, prosecutors often engage in plea discussions with defence lawyers. Prosecutors may agree to withdraw a charge if the accused person agrees to plead guilty to another charge.⁵¹ In practice, this often involves an accused person pleading guilty to an offence that is less serious than the offence with which they were originally charged.
- 7.52 In cases where a Table offence has been charged already, or is an alternative option, defence lawyers may also negotiate with prosecutors to have the case proceed in the Local Court, instead of the District Court. The ALS described these

46. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 18.

47. C Ringland, *Evaluating the First Tranche of the Table Offences Reform: Impacts on District Court Finalisations, Time to Finalisation and Sentencing Outcomes*, Crime and Justice Bulletin No 231 (NSW Bureau of Crime Statistics and Research, 2020); C Ringland, *The Second Tranche of the Table Offences Reform: Impacts on District and Local Court Finalisations, Time to Finalisation and Sentencing Outcomes*, Bureau Brief No 156 (NSW Bureau of Crime Statistics and Research, 2021) 2, 8, 9.

48. *Criminal Procedure Act 1986* (NSW) ch 3 div 2–8.

49. See, eg, NSW Bureau of Crime Statistics and Research, *NSW Higher, Local and Children’s Criminal Courts January 2019–December 2023* (2024); Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 19.

50. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 18.

51. G J Samuels, *Review of The New South Wales Director of Public Prosecutions’ Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts*, Report (2002) 8.

negotiations as “key avenues for resolution”.⁵² There may be a risk that making all offences strictly indictable would increase the number of trials if accused people were unwilling to plead guilty to a strictly indictable offence.

- 7.53 Plea negotiations that result in a plea of guilty are not just beneficial to the accused person and the court. They may offer a quicker resolution of the case, and avoid the need for a trial, which means victims and witnesses do not have to give evidence.

Negligent driving occasioning death

- 7.54 Some groups suggested that the offence of negligent driving occasioning death should be made indictable or strictly indictable.⁵³ It is currently a “summary offence” that is heard in the Local Court, as are all offences in the *RTA*.⁵⁴
- 7.55 Negligent driving that causes death has devastating consequences for the family and friends of the victim and can affect the wider community. There could be operational benefits of the offence being indictable. However, for the reasons below, we conclude that there should be no change.
- 7.56 Throughout this report, we generally conclude that an examination of *RTA* offences is outside the scope of the review. However, we consider the proposal to change the summary status of negligent driving occasioning death because it raises broader issues about the serious road crime offence hierarchy.

Some supported making it indictable or strictly indictable

- 7.57 While several submissions supported making negligent driving occasioning death either indictable or strictly indictable, their reasons differed. For instance, the NSWPF argued that all driving offences involving death are so significant they should be dealt with in the District Court, either by becoming indictable or strictly indictable.⁵⁵
- 7.58 Youth Justice NSW supported making the offence indictable, to allow for flexibility around whether the Local or District Court heard the case, depending on the facts and circumstances of each case.⁵⁶ Currently, negligent driving occasioning death can only be heard in a higher court if it is a back-up charge to a more serious

52. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 18.

53. NSW Police Force, *Submission RC40*, 12; Youth Justice NSW, *Submission RC20*, 2; Legal Aid NSW, *Submission RC08*, 18; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 18; Confidential, *Submission RC69*, 12.

54. *Road Transport Act 2013* (NSW) s 200(1).

55. NSW Police Force, *Submission RC40*, 12.

56. Youth Justice NSW, *Submission RC20*, 2.

offence, or if it arises from substantially the same circumstances as another more serious offence with which the accused person is charged.⁵⁷

- 7.59 Others supported making negligent driving occasioning death indictable for practical and operational reasons.⁵⁸ For instance, the change could allow police more time to investigate and lay charges. All summary offence charges, including negligent driving occasioning death, must be laid no more than 6 months from the date of the alleged offence.⁵⁹ If a charge of negligent driving occasioning death is not laid in time, there may be no alternative resolution available.⁶⁰
- 7.60 We heard that this time limit could create problems when driving matters involved complex issues or required an extended investigation period, or where a person died because of injuries sustained in the impact, after a period on life-support.⁶¹

The offence should not become indictable

- 7.61 There could be practical and symbolic benefits of making negligent driving occasioning death indictable or strictly indictable. However, for the reasons below, we conclude there should be no change.

Negligent driving covers conduct involving lower moral culpability

- 7.62 Negligent driving occasioning death has severe and catastrophic consequences.⁶² Driving that causes the death of another person is inherently serious, and causes devastating and enduring consequences for victims, families and communities no matter the type of conduct of the accused person.
- 7.63 While we acknowledge the seriousness of this offence and the harm caused, we conclude that its classification as a summary offence appropriately reflects the conduct it covers. It is important that the criminal law appropriately reflects the seriousness of the accused person's conduct, including the degree of criminal fault. The offence of negligent driving covers situations where the driver was not "exercising the degree of care which the ordinary prudent driver would exercise in all the circumstances".⁶³ This generally involves a lower level of moral culpability, compared with other offences in the road crime hierarchy.⁶⁴

57. *Criminal Procedure Act 1986* (NSW) s 165 definition of "back up offence", s 166.

58. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 18; Confidential, *Submission RC69*, 12.

59. *Criminal Procedure Act 1986* (NSW) s 179(1).

60. Legal Aid NSW, *Submission RC08*, 18; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 18.

61. Confidential, *Submission RC69*, 12.

62. Legal Aid NSW, *Submission RC08*, 10; Law Society of NSW, *Submission RC12*, 7.

63. *DPP (NSW) v Yeo* [2008] NSWSC 953 [29]; *R v Buttsworth* [1983] 1 NSWLR 658, 672.

64. Legal Aid NSW, *Submission RC08*, 10; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 18.

- 7.64 Conduct that involves a greater degree of criminality can be charged under more serious offences, including dangerous driving occasioning death and manslaughter.⁶⁵
- 7.65 Further, as the ALS pointed out, criminal charges were not laid in every road incident, even if death resulted. There may have only been a small difference between conduct that was charged as negligent driving and conduct that was not charged at all.⁶⁶

Operational concerns alone do not justify reform

- 7.66 While we acknowledge there may be operational benefits of making this offence indictable, such as extending the time frame in which charges can be laid, we do not consider this issue alone justifies reform.
- 7.67 Operational concerns are not unique to this offence. Most summary offences have the same statutory limitation period.⁶⁷ This includes all offences contained in the *RTA*. If negligent driving occasioning death were made indictable only to address operational concerns, it may lead to questions of why other summary offences, such as some drug offences under the *Drug Misuse and Trafficking Act 1985* (NSW) should not also be made indictable. Any broader changes to the summary status of offences which involve complex investigations and difficult operational timeframes would require further review.
- 7.68 Further, there are a number of offences in the *RTA* that cover less serious, but similar conduct to the serious road crime offences in the *Crimes Act*. For example, the *RTA* offence of failing to stop and assist following an impact is a similar, but less serious version of the *Crimes Act* failing to stop and assist offence.⁶⁸
- 7.69 Similarly, there may be a question of whether all *RTA* offences with counterparts in the *Crimes Act* should become indictable. This would be a significant change, that could have broader implications changing the operation of the *RTA* and increasing the complexity and length of criminal proceedings.

The Local Court has sufficient sentencing scope

- 7.70 Although some considered that negligent driving occasioning death is too serious to be finalised in the Local Court, sentencing outcomes suggested that judicial officers in the Local Court had sufficient scope to properly sentence offenders for the offence.

65. *Crimes Act 1900* (NSW) s 18(1)(b), s 52A(1).

66. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 18.

67. *Criminal Procedure Act 1986* (NSW) s 179(1)–(2).

68. *Road Transport Act 2013* (NSW) s 146; *Crimes Act 1900* (NSW) s 52AB.

- 7.71 Over the period from July 2020 to June 2024, the most common sentence imposed for an offence of negligent driving occasioning death (first offence) was a community-based order, such as a community correction order or an intensive correction order. Only 8.8% of finalised cases resulted in a sentence of imprisonment.⁶⁹ Over the same period, there were only two recorded cases where the offence was a second or subsequent offence,⁷⁰ neither sentence of which was close to the maximum penalty. An intensive correction order was imposed in one of the cases.⁷¹
- 7.72 The fact that sentences imposed by the Local Court do not often approach the maximum penalty, and more often involve community-based orders may suggest that the criminality involved in this type of negligent conduct is appropriately dealt with in the Local Court.
- 7.73 As we discuss above, making negligent driving occasioning death an indictable offence would not necessarily mean that a heavier sentence would be imposed, because the District Court applies the same sentencing principles as the Local Court.

Serious road offences in the Children's Court

- 7.74 Some submissions argued that dangerous driving offences under s 52A of the *Crimes Act* should not be dealt with in the Children's Court and should only be heard in the higher courts.⁷² They supported making these offences "serious children's indictable offence[s]" (SCIOs).⁷³
- 7.75 SCIOs are designated offences that cannot be heard and determined in the Children's Court in any circumstance. Instead, they must be dealt with by a higher court, according to law.⁷⁴ There are a limited number of SCIOs.⁷⁵ Currently, the only serious road crime offence that is an SCIO is manslaughter.

69. Judicial Commission of NSW, *Sentencing Statistics*, Judicial Information Research System (retrieved 7 January 2025); *Road Transport Act 2013 (NSW)* s 117(1)(a).

70. Second or subsequent offences are determined by whether both the first offence and the second offence are certain prescribed offences, but they do not have to be the same type of offence. See *Road Transport Act 2013 (NSW)* s 9.

71. Judicial Commission of NSW, *Sentencing Statistics*, Judicial Information Research System (retrieved 7 January 2025); *Road Transport Act 2013 (NSW)* s 117(1)(a).

72. Road Trauma Support Group NSW, *Submission RC16*, 33; NSW Police Force, *Submission RC40*, 12.

73. NSW Police Force, *Submission RC40*, 12; *Children (Criminal Proceedings) Act 1987 (NSW)* s 3(1) definition of "serious children's indictable offence".

74. SCIOs do not include committal proceedings. See *Children (Criminal Proceedings) Act 1987 (NSW)* s 17, s 28(1)(a)–(b).

75. *Children (Criminal Proceedings) Act 1987 (NSW)* s 3(1) definition of "serious children's indictable offence".

- 7.76 It was argued that this change would better reflect the seriousness of these offences. The RTSG felt that the fact that serious road crime offences were prosecuted in the Children’s Court was a contributing factor to inadequate sentencing outcomes.⁷⁶
- 7.77 However, several groups cautioned against the change.⁷⁷ For the reasons below, we conclude that no additional serious road crime offences should become SCIOs.
- 7.78 We discussed the framework and principles that apply to the Children’s Court and criminal proceedings involving young people in more detail in the consultation paper.⁷⁸

Cases can be dealt with on indictment where appropriate

- 7.79 We consider that it is unnecessary to make any dangerous driving offences SCIOs because there is already a mechanism to transfer or “commit” more serious cases to a higher court in appropriate circumstances.⁷⁹ The decision to commit a case to a higher court is made by a judicial officer in the Children’s Court, who has specialised training and can properly assess the offending conduct of the young person within the context of their age and development.⁸⁰
- 7.80 The “most significant consideration” in deciding whether to commit a case to a higher court is whether the penalties available in the Children’s Court are appropriate for the particular case.⁸¹ The Court must also consider other factors, such as the seriousness of the offence, the age and maturity of the child, and the importance of reintegration and rehabilitation for young offenders.⁸²
- 7.81 The charge of manslaughter is also available for the most serious cases of driving causing death.⁸³ Manslaughter is already an SCIO.⁸⁴

76. Road Trauma Support Group NSW, *Preliminary Submission PRC72*, 3–4.

77. Legal Aid NSW, *Submission RC08*, 18; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 19; Law Society of NSW, *Submission RC12*, 7; Public Defenders, *Submission RC21*, 7; Children’s Court of NSW, *Submission RC36*, 5; NSW Bar Association, *Submission RC27* [51]–[52]; Youth Justice NSW, *Submission RC20*, 2.

78. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [5.24]–[5.33].

79. Children’s Court of NSW, *Submission RC36*, 5; *Children (Criminal Proceedings) Act 1987* (NSW) s 31(3), s 31(5).

80. Children’s Court of NSW, *Submission RC36*, 5.

81. *R v CL* [2022] NSWChC 5 [54].

82. *R v CL* [2022] NSWChC 5 [77]–[78]; *Children (Criminal Proceedings) Act 1987* (NSW) s 6.

83. Law Society of NSW, *Submission RC12*, 7.

84. *Children (Criminal Proceedings) Act 1987* (NSW) s 3(1) definition of “serious children’s indictable offence”.

The Children's Court is appropriate for other cases

- 7.82 In all but the most serious cases, the Children's Court remains the appropriate court to hear and determine serious road crime offences involving young offenders.
- 7.83 The Children's Court is best placed to deal with children charged with serious road crime offences, due to its specialist knowledge, experience and framework.⁸⁵ The Court was specifically developed to deal with matters involving children in recognition of the principle that children should be treated differently from adults, because they are less mature and often lack the ability to fully understand criminal proceedings.⁸⁶
- 7.84 It would not be desirable for offences that fall at the lower end of the spectrum of seriousness to be deprived of this specialist and tailored approach. SCIOs cannot be heard in the Children's Court, no matter the level of criminality involved, or age or maturity of the child.⁸⁷
- 7.85 Cases in the Children's Court may also be subject to less delay than those in higher courts. The ALS observed that there was often a significant delay in the higher courts. It was concerned that mandating that children's serious road crime offences be dealt with in higher courts would delay early intervention and rehabilitation, particularly if young offenders were on remand or subject to bail conditions for a long time.⁸⁸
- 7.86 Finally, there is no evidence to suggest that the Children's Court has inadequate sentencing scope. The ALS submitted that the fact that a number of dangerous driving offences finalised in the Children's Court resulted in the imposition of a custodial penalty meant that serious road crime offences were being treated seriously.⁸⁹ We outlined sentencing outcomes for serious road crime offences in the Children's Court in more detail in our consultation paper.⁹⁰

Only the most serious criminal offences should be SCIOs

- 7.87 We do not consider that dangerous driving occasioning death offences, or other serious road crime offences, necessarily involve a sufficiently high level of culpability to be SCIOs.
- 7.88 Given the important role of the Children's Court, it is appropriate for the list of SCIOs to be limited to offences with the highest level of criminality. This includes

85. NSW Bar Association, *Submission RC27* [52]; Law Society of NSW, *Submission RC12*, 7.

86. NSW Bar Association, *Submission RC27* [52].

87. *Children (Criminal Proceedings) Act 1987* (NSW) s 28(1)(a).

88. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 19–20.

89. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 19.

90. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [5.34]–[5.37].

homicides, which are punishable by imprisonment for 25 years or for life, and the most serious sexual and firearm offences, which have maximum penalties of 20 years' imprisonment (the lowest maximum penalty of all SCIOs).⁹¹

Higher courts may not necessarily impose harsher sentences

- 7.89 Although transferring a case from the Children's Court to a higher court may result in a more severe sentence being imposed, this will not necessarily occur. The higher court has the discretion to either deal with the case by applying the general sentencing framework or by applying the children's penalties outlined in the *Children (Criminal Proceedings) Act 1987 (NSW) (CCP Act)*.⁹²
- 7.90 Even if the court decided that the offence should be dealt with under the general sentencing framework, the sentencing process must still be guided by the principles that apply to all courts dealing with young offenders. This includes a greater focus on rehabilitation.⁹³
- 7.91 All SCIOs are sentenced according to law in a higher court.⁹⁴ Although this requires the court to apply the same sentencing framework that applies to adults, it is unlikely to result in a young person receiving an equivalent sentence to that of an adult offender. Even in SCIO cases, the guiding principles in s 6 of the *CCP Act* apply.⁹⁵

The change may have unintended outcomes

- 7.92 We are concerned that expanding the list of SCIOs may result in unintended consequences. We are particularly concerned that this change may disproportionately impact Aboriginal children.⁹⁶
- 7.93 Expanding the list of SCIOs could increase the overrepresentation of Aboriginal children and young people in detention.⁹⁷ Youth Justice NSW pointed out that in the period from 2018 to 2022, Aboriginal young people made up more than half of the

91. Legal Aid NSW, *Submission RC08*, 18; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 19.

92. *Children (Criminal Proceedings) Act 1987 (NSW)* s 18(1).

93. *Children (Criminal Proceedings) Act 1987 (NSW)* s 4, s 6. See, eg, *R v WKR* (1993) 32 NSWLR 447, 450–451; *R v DJD* [2023] NSWSC 1049 [88]–[89]; *R v SDM* [2001] NSWCCA 158, 51 NSWLR 530 [18].

94. *Children (Criminal Proceedings) Act 1987 (NSW)* s 17.

95. *Children (Criminal Proceedings) Act 1987 (NSW)* s 4, s 6. See, eg, *R v WKR* (1993) 32 NSWLR 447, 450–451; *R v DJD* [2023] NSWSC 1049 [88]–[89]; *R v SDM* [2001] NSWCCA 158, 51 NSWLR 530 [18].

96. Youth Justice NSW, *Submission RC20*, 2; Children's Court of NSW, *Submission RC36*, 5; Confidential, *Submission RC69*, 12.

97. Youth Justice NSW, *Submission RC20*, 2; Children's Court of NSW, *Submission RC36*, 5; Confidential, *Submission RC69*, 12.

admissions into custody for serious road crimes.⁹⁸ In 2021–2022, they were also more commonly sentenced than other young people, to a custodial sentence for serious road crimes.⁹⁹ This could negatively affect progress towards the Closing the Gap target for reducing Aboriginal young people in detention.¹⁰⁰

- 7.94 While deterrence has been recognised as a significant purpose of sentencing for young drivers,¹⁰¹ as we discuss in chapter 5, more severe penalties may not be the best way to achieve this aim.
- 7.95 Youth Justice NSW submitted that harsher sentences do not have a deterrent effect on young people, given the effect their stage of development has on consequential thinking, impulse control, and risk taking.¹⁰² More severe sentences, such as custodial penalties may instead increase the risk of a young person being incarcerated again later in life.¹⁰³

Broader reforms are outside of the scope of this review

- 7.96 Reforms that could impact offences other than serious road crimes, including broader amendments to the jurisdiction and operation of the Children’s Court, are outside the scope of this review. These include suggestions to:
- remove manslaughter from the list of SCIOs¹⁰⁴
 - extend the Children’s Court jurisdiction to all offences for people under 18,¹⁰⁵ and
 - allow the prosecution, rather than the Children’s Court, to determine which cases should be heard in a higher court.¹⁰⁶

98. Youth Justice NSW, *Preliminary Submission PRC74*, 1.

99. Youth Justice NSW, *Preliminary Submission PRC74*, 1.

100. Australia, *National Agreement on Closing the Gap* (Department of Prime Minister and Cabinet, July 2020) target 11, 32.

101. *SBF v R* [2009] NSWCCA 231 [151].

102. Youth Justice NSW, *Submission RC20*, 1–2.

103. Youth Justice NSW, *Submission RC20*, 2.

104. Public Defenders, *Submission RC21*, 7.

105. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 19.

106. Confidential, *Submission RC69*, 12.

8. Victims' experiences and their rights

In brief

This chapter considers the experiences and rights of serious road crime victims in the criminal justice system. While we conclude that no laws should change in response to the terms of reference for the review, we raise a number of important issues for the NSW Government's consideration. These include victims' concerns about the criminal justice process, and the overwhelming support for restorative justice processes to be more widely available for serious road crimes.

Victims felt their needs were not met	136
The term "accident" should be avoided	136
More trauma-informed victim support services are needed	137
Victims received insufficient information about proceedings	139
Counselling for road crime victims may not be sufficient	140
Victims found the CTP scheme inadequate and inaccessible	142
Restorative justice should be considered further	143
There was overwhelming support for restorative justice	145
Processes should be voluntary and contextual	146
There was some support for flexibility in timing	147
Some support for taking participation into account on sentence	148
Support for restorative justice legislation	149
Victim impact panels may have benefits	150
Some existing laws should not change	152
Victim impact statements should not change	152
Remote evidence laws should not extend to road crime victims	153

- 8.1 In this chapter, we consider the experiences and rights of serious road crime victims and their families in the criminal justice system.
- 8.2 The accounts we heard from victims highlighted the trauma, profound grief and enduring suffering caused by serious road crimes. Many serious road crime victims reported overwhelmingly negative experiences in the criminal justice system, and found that the process only compounded their trauma.
- 8.3 This chapter details the concerns we heard about victims' experiences. For the reasons we outline in chapter 1, many of the issues discussed below are beyond the

scope of this review. However, in our view, they raise important issues that merit further consideration by the NSW Government.

- 8.4 There is a clear need for more trauma-informed support for victims of serious road crime offences, and there are a number of areas where victims' experiences in the criminal justice system could be improved. Some of these issues cannot be addressed by legislative reform, or they may affect victims of crime more broadly (in other words, they are not specific to serious road crime victims).
- 8.5 There was overwhelming support for making restorative justice more widely available in the context of serious road crimes.¹ Submissions considered that restorative justice might meet the needs and expectations of victims that are not being met by the traditional court system.² There was also some support for victim impact panels,³ which could deliver important benefits to road crime victims and rehabilitation for some offenders.
- 8.6 We also conclude that the victim impact statement (VIS) scheme and existing remote evidence laws are sufficient to meet the needs of serious road crime victims.⁴

Victims felt their needs were not met

- 8.7 Victims told us that they did not feel adequately supported, informed or heard throughout the criminal justice process. In this section, we outline these concerns, and raise areas in which victims' experiences in the criminal justice system could be improved.

The term “accident” should be avoided

- 8.8 At the outset, we acknowledge that the term “accident” should be avoided in connection with criminal proceedings for serious road crime offences. This term is distressing for victims and their families, as it minimises the driver's accountability.⁵

1. F Gilroy, *Submission RC03*, 22; Legal Aid NSW, *Submission RC08*, 21; Law Society of NSW, *Submission RC12*, 7–8; L McNamara, J Quilter, A Loughnan, R Hogg, D Brown and L Farmer, *Submission RC14*, 11–12; NSW Bar Association, *Submission RC27* [60]–[64]; NSW Police Force, *Submission RC40*, 14; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 20–21.

2. L McNamara, J Quilter, A Loughnan, R Hogg, D Brown and L Farmer, *Submission RC14*, 11–12; NSW Bar Association, *Submission RC27* [60]–[64]; NSW Police Force, *Submission RC40*, 14.

3. Road Trauma Support Group NSW, *Submission RC16*, 30. See also D Wakes-Miller, *Submission RC13*, 47–49.

4. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 3 div 2; *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) s 5B.

5. D Wakes-Miller, *Submission RC13*, 26, 28.

The term does not accurately reflect that it was wrongdoing that caused the crash.⁶ The Road Trauma Support Group (RTSG) raised that changing the term would more accurately reflect the nature of serious road crimes and contribute to a change in public attitudes about these incidents.⁷

- 8.9 The NSW Government may wish to consider ways to ensure this term is not used at any stage through the criminal process for serious road crime offences.

More trauma-informed victim support services are needed

- 8.10 Victims and others raised significant concerns about the lack of support for victims in criminal proceedings.⁸ The RTSG raised that support is particularly hard to access for victims in rural and regional areas.⁹
- 8.11 Submissions supported additional, trauma-informed services to guide and assist victims throughout court proceedings.¹⁰ For instance, the NSW Bar Association raised that there should be appropriate referrals for assistance throughout the criminal justice process.¹¹ Similarly, the Aboriginal Legal Service (ALS) stated that there should be improved access to witness assistance services, and information should be provided to guide the expectations and experiences of victims and their families.¹²
- 8.12 The RTSG and their members also raised that victims should have greater access to legal and financial assistance following a serious road crime.¹³

These issues may be considered in a different review

- 8.13 Under the *Victims Rights and Support Act 2013* (NSW) (*VRS Act*), victims of certain types of crime can access support including financial assistance, recognition payments and counselling services. The Department of Communities and Justice is

6. Road Trauma Support Group NSW, *Submission RC16*, 11–12; D Wakes-Miller, *Submission RC13*, 26, 28; NSW Police Force, *Submission RC40*, 13; Office of the Director of Public Prosecutions NSW, *Preliminary Submission PRC77*, 9.

7. Road Trauma Support Group NSW, *Submission RC16*, 13. See also D Wakes-Miller, *Submission RC13*, 28.

8. See, eg, Road Trauma Support Group NSW, *Submission RC16*, 34; D Wakes-Miller, *Submission RC13*, 52.

9. Road Trauma Support Group NSW, *Submission RC16*, 34.

10. NSW Bar Association, *Submission RC27* [3], [55]. See also Public Defenders, *Submission RC21*, 7; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 20.

11. NSW Bar Association, *Submission RC27* [55].

12. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 20.

13. See, eg, Road Trauma Support Group NSW, *Submission RC16*, 34; D Wakes-Miller, *Submission RC13*, 52.

currently reviewing this Act.¹⁴ Some of the concerns about the support available for victims may be dealt with in that review.

- 8.14 Moreover, some submissions to this review raised specific issues relating to the *VRS Act*, which could also be considered in that review. These include:
- a proposal to incorporate victims of road crime into the Charter of Victims Rights,¹⁵ which is legislated in the *VRS Act*,¹⁶ or to create a separate charter of victims' rights for road crime¹⁷
 - making victims of domestic and family related acts of violence involving motor vehicles, eligible for support under the *VRS Act*,¹⁸ and
 - extending the Victim Support Scheme to victims of road crime¹⁹ (so that victims are not limited to support under the Compulsory Third Party (CTP) insurance scheme).²⁰
- 8.15 A recent reform may address some of these issues. On 1 February 2025 amendments to the *VRS Act* commenced, making counselling under the *VRS Act* available to family victims of road crime.²¹ We discuss this in more detail below.
- 8.16 The review of the *VRS Act* could also address concerns about the need for greater access to financial assistance for serious road crime victims, which was supported by some submissions.²² This may be important because, as we discuss below, some serious road crime victims struggled with the CTP process or could not access it.

14. NSW Department of Communities and Justice, "Review of the Victims Rights and Support Act 2013" (19 September 2024) <<https://dcj.nsw.gov.au/about-us/engage-with-us/past-consultations/statutory-reviews/review-of-the-victims-rights-and-support-act-2013.html>> (retrieved 6 December 2024).

15. Road Trauma Support Group NSW, *Submission RC16*, 34–35; D Wakes-Miller, *Submission RC13*, 51.

16. *Victims Rights and Support Act 2013* (NSW) s 6.

17. Road Trauma Support Group NSW, *Submission RC16*, 35.

18. Legal Aid NSW, *Submission RC08*, 20.

19. See, eg, Law Society of NSW, *Submission RC12*, 7; NSW Bar Association, *Submission RC27* [56].

20. *Victims Rights and Support Act 2013* (NSW) s 25(2); *Motor Accidents Compensation Act 1999* (NSW) s 3 definition of "motor accident". There is an exception if a primary victim has been intentionally killed and a person has been charged with murder, or if the act of violence was a terrorist act. See *Victims Rights and Support Act 2013* (NSW) s 25(2A)–(2B). See also NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [6.28]–[6.29].

21. *Victims Rights and Support Act 2013* (NSW) s 22(1A), s 23(5).

22. Road Trauma Support Group NSW, *Submission RC16*, 34–35; D Wakes-Miller, *Submission RC13*, 52. See also NSW Police Force, *Submission RC40*, 13.

Victims received insufficient information about proceedings

- 8.17 A number of submissions raised concerns about the lack of information provided to serious road crime victims about the criminal process.²³
- 8.18 Serious road crime victims generally felt that they did not have sufficient information about the proceedings.²⁴ For example, members of the RTSG reported a lack of communication around key decisions, milestones, and outcomes.²⁵ One family victim described being given late notice of a court hearing date,²⁶ while another told us they found it difficult to get answers to questions.²⁷ Without being given detailed information at each step of the process, it can be difficult for victims and families to understand charging decisions, or the outcomes of plea negotiations and sentence proceedings.
- 8.19 To address these concerns, the NSW Police Force (NSWPF) suggested that a statutory entitlement be introduced for victims to receive an explanation of the court process and how the sentence was determined.²⁸
- 8.20 Under the Charter of Victims Rights, all victims have a right to be informed about the investigation, prosecution and trial process.²⁹ They also have a right to be informed of the outcome of the criminal proceedings and any sentence imposed.³⁰ Options are available if a victim believes the Charter has not been complied with.³¹
- 8.21 However, the Charter does not include an explicit requirement to explain the court process or sentence imposed, to victims. Amending the Charter to include such requirements would affect victims of crime more broadly, so would need to be considered in a wider review.

23. See, eg, Road Trauma Support Group NSW, *Preliminary Submission PRC72*, 2.

24. See, eg, M Duke, *Submission RC48*, 12–13; Road Trauma Support Group NSW, *Preliminary Submission PRC72*, 2.

25. Road Trauma Support Group NSW, *Preliminary Submission PRC72*, 2.

26. M Duke, *Submission RC48*, 12.

27. M Duke, *Submission RC48*, 13.

28. NSW Police Force, *Submission RC40*, 13.

29. *Victims Rights and Support Act 2013* (NSW) s 6.4–6.6.

30. *Victims Rights and Support Act 2013* (NSW) s 6.5(1)(d).

31. *Victims Rights and Support Act 2013* (NSW) s 10(1)(d)–(f), s 13(2). See also NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [6.19].

Counselling for road crime victims may not be sufficient

- 8.22 Several submissions called for increased counselling services to be available for victims of road crime.³² Some suggested that this needed to be available in the immediate aftermath of a crash.³³
- 8.23 Counselling is essential for victims of road crime and should be widely available at all stages of the criminal process. The NSW Government has recently introduced two changes that may address some of these concerns.

The Trauma Support Service provides immediate support

- 8.24 The Trauma Support Service (TSS) aims to provide additional support for people who have been affected by the death or serious injury of a family member as a result of a road crash.³⁴ It is supported by legislation,³⁵ and was introduced to provide support to people in the period after a crash.³⁶
- 8.25 Under the scheme, eligible family members can access six sessions with a psychologist for grief and trauma support. They can be accessed immediately and are available regardless of whether any insurance claim has been made. Crisis counselling support is also accessible 24 hours a day, seven days a week.³⁷
- 8.26 The TSS is available in addition to the support under the CTP scheme. The CTP scheme includes support for both witnesses, and for certain close family members who lost a family member, if they suffered a psychological injury as a result of a

32. NSW Bar Association, *Submission RC27* [3], [56]; D Wakes-Miller, *Submission RC13*, 52; K Dokmanovic, *Submission RC11*, 10, 11; T Blake, *Submission RC19*, 8; K Burnes, *Submission RC53*, 9; Office of the Director of Public Prosecutions NSW, *Preliminary Submission PRC77*, 8.

33. K Dokmanovic, *Submission RC11*, 11; T Blake, *Submission RC19*, 11; K Burnes, *Submission RC53*, 9.

34. NSW, State Insurance Regulatory Authority, “For People who Have Lost a Family Member” (19 December 2024) <<https://www.sira.nsw.gov.au/theres-been-an-injury/what-to-do-first/motor-accidents/trauma-support-service>> (retrieved 8 January 2025).

35. *Motor Accident Injuries Act 2017* (NSW) s 11.1A, s 10.12(3)(h2).

36. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 19 October 2022, 8789.

37. NSW, State Insurance Regulatory Authority, “For People who Have Lost a Family Member” (19 December 2024) <<https://www.sira.nsw.gov.au/theres-been-an-injury/what-to-do-first/motor-accidents/trauma-support-service>> (retrieved 8 January 2025).

motor crash fatality.³⁸ The support includes covering medical treatment and expenses, including appointments with a psychologist.³⁹

- 8.27 The TSS came from a recommendation of a 2021 statutory review of the *Motor Accident Injuries Act 2017* (NSW).⁴⁰ The review recognised the extreme stress faced by family victims trying to access the CTP scheme. It recommended making available dedicated trauma specialists who could assist with trauma management, as well as early engagement with the CTP scheme. The review recognised that, during this period, it was difficult for family members to be faced with the burden of a CTP claim.⁴¹

Counselling under the Victim Support Scheme has been extended

- 8.28 On 1 February 2025 amendments to the *VRS Act* commenced, allowing immediate family members of people who died as a result of a road crime to access approved counselling under the Victim Support Scheme (VSS).⁴² One submission supported this reform,⁴³ while another suggested that our review should consider recommending that the counselling available under the TSS be made equivalent to the counselling provided under the VSS.⁴⁴
- 8.29 The VSS offers up to 22 hours of counselling.⁴⁵ Additional hours can be approved for exceptional reasons, or if the person was the victim of child sexual assault or of child physical abuse.⁴⁶

38. NSW, State Insurance Regulatory Authority, “A Guide for Families who Have Lost a Relative in a Motor Crash on NSW Roads” (22 November 2023) <<https://www.sira.nsw.gov.au/resources-library/motor-accident-resources/publications/injury-advice-centre/guide-for-people-who-have-lost-a-relative-in-a-motor-vehicle-accident>> (retrieved 8 January 2025); NSW, State Insurance Regulatory Authority, “For People who Have Lost a Family Member” (19 December 2024) <<https://www.sira.nsw.gov.au/theres-been-an-injury/what-to-do-first/motor-accidents/trauma-support-service>> (retrieved 8 January 2025).

39. NSW, State Insurance Regulatory Authority, “Personal Injury Benefits following a Motor Crash Fatality” (23 November 2023) <<https://www.sira.nsw.gov.au/resources-library/motor-accident-resources/publications/injury-advice-centre/guide-for-people-who-have-lost-a-relative-in-a-motor-vehicle-accident/personal-injury-benefits-following-a-motor-crash-fatality>> (retrieved 8 January 2025).

40. Clayton Utz, *Statutory Review of the Motor Accident Injuries Act 2017*, Report (2021) rec 45; NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 19 October 2022, 8789.

41. Clayton Utz, *Statutory Review of the Motor Accident Injuries Act 2017*, Report (2021) [3.12.2].

42. *Victims Rights and Support Amendment (Victims Support Counselling) Act 2024* (NSW) sch 1, amending *Victims Rights and Support Act 2013* (NSW) pt 4.

43. NSW Bar Association, *Submission RC27* [56].

44. Office of the Director of Public Prosecutions NSW, *Preliminary Submission PRC77*, 8.

45. *Victims Rights and Support Regulation 2019* (NSW) cl 5.

46. *Victims Rights and Support Regulation 2019* (NSW) cl 5(4), cl 7.

However, not all family members and friends can access counselling

- 8.30 There may be merit in considering whether other family members and loved ones should have access to counselling following a serious road crime. The definition of family, for the purpose of services, could be expanded beyond immediate and other family members,⁴⁷ to reflect the diversity of family structures and relationships that exist in NSW.
- 8.31 One submission made a similar suggestion in relation to insurance. In their view, the current definition of family members “may not adequately reflect the diverse family structures and support networks that exist today”. The author suggested the definition should be expanded to include those who play significant caregiving roles.⁴⁸
- 8.32 While a broader approach to family has been taken by the TSS, it does not necessarily cover all people with a significant caretaking role. Under that scheme, eligible family members may include:
- a parent or other person with parental responsibility, a spouse or partner, a child or stepchild or any other person for whom the person had parental responsibility, a brother, sister, half-brother or half-sister or stepbrother or stepsister.⁴⁹
- 8.33 The extension of counselling under the VRS Act applies to immediate family members of people who have died as a result of a road crime.⁵⁰ Immediate family members are automatically eligible for support under the VSS.⁵¹ In addition, the Commissioner of Victims Rights is able to authorise counselling for other relatives, if the Commissioner considers it appropriate.⁵² However, this may not capture all people with caretaking roles, or other loved ones who were not related to the primary victim.

Victims found the CTP scheme inadequate and inaccessible

- 8.34 Some victims reported significant difficulties with the CTP scheme. The scheme provides compensation for death or personal injury arising from motor vehicle

47. *Victims Rights and Support Act 2013* (NSW) s 22A(1A).

48. W J Chen, *Submission RC31*, 10.

49. NSW, State Insurance Regulatory Authority, “For People who Have Lost a Family Member” (19 December 2024) <<https://www.sira.nsw.gov.au/theres-been-an-injury/what-to-do-first/motor-accidents/trauma-support-service>> (retrieved 8 January 2025).

50. *Victims Rights and Support Act 2013* (NSW) s 22(1A), s 22(3), inserted by *Victims Rights and Support Amendment (Victims Support Counselling) Act 2024* (NSW) sch 1 [8]–[9].

51. *Victims Rights and Support Act 2013* (NSW) s 23(5), inserted by *Victims Rights and Support Amendment (Victims Support Counselling) Act 2024* (NSW) sch 1 [12].

52. *Victims Rights and Support Regulation 2019* (NSW) cl 4 definition of “relevant family member”, cl 5(6), amended by *Victims Rights and Support Amendment (Victims Support Counselling) Act 2024* (NSW) sch 2 [1]–[3].

collisions. It can cover the cost of any treatment and care, compensation for loss of earning, funeral expenses and, in some circumstances, damages.⁵³

- 8.35 Another concern was that not all family victims can claim compensation under the CTP scheme. Only close relatives who were dependent on a person who died in a motor vehicle crash, or who suffered a psychological injury, were able to claim compensation.⁵⁴ Another victim raised that the partner of his deceased teenage son was unable to access help under the CTP scheme.⁵⁵
- 8.36 We also heard that the claims process compounded the trauma suffered by victims as it was cumbersome and lacking in empathy.⁵⁶ Victims called for the CTP scheme to be simplified, more easily accessible and less of an administrative burden on claimants.⁵⁷ One submission called for a comprehensive review of the scheme to address these issues, as well as other matters including the scope of cover such as benefits for non-economic loss and privacy protections.⁵⁸

Restorative justice should be considered further

- 8.37 There was overwhelming support from submissions for making restorative justice processes more widely available in relation to serious road crime offences.⁵⁹
- 8.38 Restorative justice is a broad term, which refers to processes that offer an avenue for achieving a different form of justice, compared with what is offered by the traditional court system.⁶⁰ In contrast to the adversarial criminal justice system, restorative justice processes focus on understanding and repairing the harm done by the crime to individuals and communities.⁶¹

53. *Motor Accidents Compensation Act 1999* (NSW) ch 3; *Motor Accidents (Lifetime Care and Support) Act 2006* (NSW) s 4, s 11A; *Motor Accident Injuries Act 2017* (NSW) pt 3, pt 4.

54. NSW, State Insurance Regulatory Authority, “A Guide for Families who Have Lost a Relative in a Motor Crash on NSW Roads” (22 November 2023) <<https://www.sira.nsw.gov.au/resources-library/motor-accident-resources/publications/injury-advice-centre/guide-for-people-who-have-lost-a-relative-in-a-motor-vehicle-accident>> (retrieved 8 January 2025).

55. D Wakes-Miller, *Submission RC13*, 15.

56. D Wakes-Miller, *Submission RC13*, 15, 53.

57. See, eg, D Wakes-Miller, *Submission RC13*, 53–54.

58. D Wakes-Miller, *Submission RC13*, 53–54.

59. F Gilroy, *Submission RC03*, 22; Legal Aid NSW, *Submission RC08*, 21–22; Law Society of NSW, *Submission RC12*, 7; L McNamara, J Quilter, A Loughnan, R Hogg, D Brown and L Farmer, *Submission RC14*, 11–12; NSW Bar Association, *Submission RC27* [63]; NSW Police Force, *Submission RC40*, 14; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 20.

60. J Bolitho, “Putting Justice Needs First: A Case Study of Best Practice in Restorative Justice” (2015) 3 *Restorative Justice* 256, 257, 259.

61. S M Pfander, “Evaluating New Zealand’s Restorative Promise: The Impact of Legislative Design on the Practice of Restorative Justice” (2020) 15 *Kōtuitui: New Zealand Journal of Social Sciences Online* 170, 171.

- 8.39 Restorative justice can take a range of forms.⁶² It can include different types of communication depending on the needs of the participants. It can take the form of direct or indirect communication between the victim and offender.⁶³ Another form is victim impact panels, which we discuss in more detail below.
- 8.40 While Corrective Services NSW (CSNSW) offers a post-sentence restorative justice program in NSW, known as “Victim Offender Conferencing”, it has limited capacity.⁶⁴
- 8.41 Although some restorative justice processes are available under the *Young Offenders Act 1997* (NSW), they are not available for all serious road crime offences committed or allegedly committed by children (for example, they are not available for offences that result in death).⁶⁵ They are also primarily focussed on the offender. For instance, the purpose of a conference is to “make decisions and recommendations about” the young person and to develop an outcome plan, and victim participation is not a necessary feature of every conference.⁶⁶ So they may not have the same benefits to victims as other restorative justice processes.
- 8.42 We provided more information about restorative justice, including how it works, its potential benefits, and the service offered by CSNSW, in the consultation paper.⁶⁷
- 8.43 However, some of the issues raised in relation to restorative justice could have implications beyond serious road crime offences (for example, whether it should be supported by legislation, which we discuss below). It is only within the scope of this review to recommend restorative justice in relation to serious road crime offences. We do not think it would be appropriate or desirable to have separate restorative justice models for specific types of offending, and we do not see a justification for treating serious road crime offences differently from other criminal offences.
- 8.44 For those reasons, we suggest that the NSW Government consider restorative justice processes in relation to all offence types. This could include consideration of:
- whether restorative justice should be made more widely available in relation to other offence types, as well as serious road crime offences
 - when restorative justice should be available in the criminal justice process

62. J Bolitho, “Putting Justice Needs First: A Case Study of Best Practice in Restorative Justice” (2015) 3 *Restorative Justice* 256, 257.

63. NSW Government, *Restorative Justice Service: Policy* (28 November 2023) 7–8.

64. J Bolitho, “Putting Justice Needs First: A Case Study of Best Practice in Restorative Justice” (2015) 3 *Restorative Justice* 256, 277; J Bolitho and J Bruce, “Science, Art and Alchemy: Best Practice in Facilitating Restorative Justice” (2017) 20 *Contemporary Justice Review* 336, 340.

65. NSW Police Force, *Submission RC40*, 14; *Young Offenders Act 1997* (NSW) s 35, s 8(1)–(2).

66. *Young Offenders Act 1997* (NSW) s 34(1)–(2), s 47(1).

67. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [6.32]–[6.71].

- whether participation in restorative justice should be taken into account in sentencing, and if so, how, and
 - whether restorative justice should have a legislative basis, and if so, the appropriate legislative model.
- 8.45 If restorative justice is to apply more widely, more consultation may be required. For instance, the Law Society of NSW requested the opportunity to provide feedback on any proposed legislative amendments.⁶⁸ Similarly, Legal Aid indicated that it welcomed “further discussion and consultation about restorative justice models”.⁶⁹
- 8.46 Alternatively, the NSW Government could consider expanding the availability of existing restorative justice processes to more victims of serious road crimes. We note that Victoria has a specialist restorative justice program for people affected by road trauma.⁷⁰ A similar program could be an interim measure in NSW, prior to a more in-depth review.
- 8.47 In this section, we set out what we heard about restorative justice in the context of our review, which could inform any future consideration of the issue.

There was overwhelming support for restorative justice

- 8.48 Submissions focussed on the benefits of restorative justice processes to serious road crime victims. They raised that it could:
- meet serious road crime victims’ justice needs in ways that cannot be achieved by the criminal legal process⁷¹
 - support serious road crime victims’ healing processes,⁷² including by assisting them with processing the trauma arising from the crime,⁷³ and
 - give serious road crime victims an opportunity to explain to the offender the impact of the crime and to seek an explanation.⁷⁴
- 8.49 Studies of restorative justice programs have found important benefits to victims. Victims who participated felt significantly more satisfied than those who only went to court. They also reported experiencing positive emotional shifts and were able to

68. Law Society of NSW, *Submission RC12*, 8.

69. Legal Aid NSW, *Submission RC08*, 21.

70. RMIT University, Centre for Innovative Justice, *Submission RC24*, 1–2; Victoria, Transport Accident Commission, “Restorative Justice” <<https://www.tac.vic.gov.au/clients/supporting-your-recovery/restorative-justice>> (retrieved 8 January 2025).

71. L McNamara, J Quilter, A Loughnan, R Hogg, D Brown and L Farmer, *Submission RC14*, 12; Youth Justice NSW, *Submission RC20*, 3; NSW Bar Association, *Submission RC27* [60].

72. NSW Police Force, *Submission RC40*, 14.

73. NSW Bar Association, *Submission RC27* [61].

74. NSW Bar Association, *Submission RC27* [61].

process some of the emotions and trauma caused by the crime. We outlined some of the key findings from these studies in the consultation paper.⁷⁵

- 8.50 Restorative justice processes can also benefit communities, by working to repair social and communal ties. This can be particularly important when victims and offenders know each other, which is common for serious road crimes.⁷⁶
- 8.51 There are potential benefits for serious road crime offenders.⁷⁷ Legal Aid observed that offenders are often deeply affected by the impact of their crime. This may be especially the case where the offender's level of criminality or culpability was low but their actions resulted in catastrophic injuries or loss of life, or where the victim was a family member or friend.⁷⁸
- 8.52 Some submissions observed that young offenders could also benefit from restorative justice processes.⁷⁹ For instance, the NSWPF observed that "restorative justice provides opportunities for young offenders to take responsibility and recognise the consequences and harm caused by their decisions and actions".⁸⁰

Processes should be voluntary and contextual

- 8.53 We agree with submissions that suggested that participation in restorative justice processes should be voluntary.⁸¹ As the Law Society of NSW stated, "restorative justice is only likely to be effective where both the offender and the victim desire to participate in the process".⁸² The readiness of participants should be assessed before any such process.⁸³
- 8.54 We also agree that restorative justice processes should be contextual and tailored to meet the needs of the participants. There could be benefits of developing restorative justice models for certain cohorts, such as young offenders.⁸⁴ Transport for NSW said that it would welcome more detailed consideration of the research

75. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [6.37]–[6.45].

76. Law Society of NSW, *Submission RC12*, 7. See also Centre for Innovative Justice, *It's Healing to Hear Another Person's Story and also to Tell Your Own Story: Report on the CIJ's Restorative Justice Conferencing Pilot Program* (Victorian Legal Services Board, 2019) 24.

77. Youth Justice NSW, *Submission RC20*, 3; NSW Police Force, *Submission RC40*, 14.

78. Legal Aid NSW, *Submission RC08*, 21.

79. Youth Justice NSW, *Submission RC20*, 3; NSW Police Force, *Submission RC40*, 14.

80. NSW Police Force, *Submission RC40*, 14.

81. NSW Bar Association, *Submission RC27* [63]; Law Society of NSW, *Submission RC12*, 7–8.

82. Law Society of NSW, *Submission RC12*, 7–8.

83. Youth Justice NSW, *Submission RC20*, 3.

84. Confidential, *Submission RC04*, 1. See also NSW Police Force, *Submission RC40*, 14; Youth Justice NSW, *Submission RC20*, 2–4.

into effective restorative justice approaches and any opportunity to better target road crime offending as part of the youth justice framework.⁸⁵

There was some support for flexibility in timing

- 8.55 Some submissions supported flexibility in when restorative justice should be available in the criminal justice process. Some submitted that restorative justice should be available, on a voluntary basis, at multiple points through criminal proceedings, including pre or post-sentence.⁸⁶ For example, the NSWPF suggested that restorative justice should be available after a plea of guilty but prior to sentencing,⁸⁷ while another submission considered it more appropriate after criminal proceedings were finalised.⁸⁸
- 8.56 Other submissions argued that flexibility would allow participants to pursue restorative justice when they were ready.⁸⁹ It could also increase uptake,⁹⁰ which would particularly be the case if participation could be taken into account on sentence.⁹¹ We discuss this in more detail below. The ALS noted that flexibility in timing would align with recent recommendations from the New Zealand Ministry of Justice and the Victorian Law Reform Commission.⁹²
- 8.57 However, some groups did not support flexibility, due to concerns about pre-sentence restorative justice programs. Some considered that restorative justice should be limited to post-sentence, because:
- if participation could be taken into account in mitigation on sentence (which we discuss below), offenders may be motivated by that factor, rather than trying to make amends with victim⁹³
 - victims may feel reluctant to participate if it led to a sentencing discount for offenders, or if they doubted whether the offender's participation was genuine,⁹⁴ and

85. Transport for NSW, *Submission RC72*, 3.

86. Youth Justice NSW, *Submission RC20*, 3; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 20–21; RMIT University, Centre for Innovative Justice, *Submission RC24*, 3.

87. NSW Police Force, *Submission RC40*, 14.

88. Confidential, *Submission RC69*, 13.

89. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 20–21; RMIT University, Centre for Innovative Justice, *Submission RC24*, 3.

90. RMIT University, Centre for Innovative Justice, *Submission RC24*, 3.

91. RMIT University, Centre for Innovative Justice, *Submission RC24*, 3.

92. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 20–21; New Zealand, Ministry of Justice, *Restorative Justice Review: Findings Report* (Provider and Community Services, 2023) 25; Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) [7.306].

93. NSW Government, *Restorative Justice Service: Policy* (28 November 2023) 19–20.

94. Corrective Services NSW Restorative Justice Unit, *Preliminary Consultation PCR01*.

- it could lead to legal risks (for example, disclosures made in conferences being used against the accused in criminal proceedings).⁹⁵

- 8.58 One submission observed that, if there was a risk that restorative justice could compromise the criminal outcome, it may only be appropriate after criminal proceedings were finalised.⁹⁶
- 8.59 For similar reasons, the current restorative justice service run by CSNSW only operates post-sentence.⁹⁷

Some support for taking participation into account on sentence

- 8.60 Some submissions considered that courts should be able to take into account offender participation in any restorative justice process that took place pre-sentence.⁹⁸
- 8.61 Some groups argued that an offender's voluntary participation in a restorative justice process demonstrated remorse.⁹⁹ It could also be relevant to the offender's prospects of rehabilitation and likelihood of reoffending.¹⁰⁰ The ALS argued that judges should have discretion about how, and to what extent, they should take an offender's participation into account on sentence.¹⁰¹
- 8.62 As we mention above, allowing participation to be taken into account by a court at the sentencing stage could also improve uptake and increase the availability of restorative justice processes.¹⁰²
- 8.63 In the context of young offenders, Youth Justice NSW argued that a young person's participation should not have a significant impact on sentencing, but could be taken into account where the young person entered into the process voluntarily and with appropriate intention (as opposed to being motivated by an intention to reduce their sentence). In its view, if a young person was assessed not to be ready to participate, this should not negatively impact their sentence.¹⁰³

95. RMIT University, Centre for Innovative Justice, *Submission RC24*, 3–4.

96. Confidential, *Submission RC69*, 13.

97. NSW Government, *Restorative Justice Service: Policy* (28 November 2023) 19–20.

98. Youth Justice NSW, *Submission RC20*, 3; NSW Police Force, *Submission RC40*, 14; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 21; F Gilroy, *Submission RC03*, 22–23.

99. NSW Police Force, *Submission RC40*, 14; Confidential, *Submission RC69*, 13; Local Court of NSW, *Submission RC71*, 9; F Gilroy, *Submission RC03*, 22–23.

100. Confidential, *Submission RC69*, 13.

101. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission RC61*, 21.

102. RMIT University, Centre for Innovative Justice, *Submission RC24*, 3.

103. Youth Justice NSW, *Submission RC20*, 3.

- 8.64 However, incorporating participation into the sentencing process may be complex. The NSW Bar Association submitted that this “would require careful analysis”, particularly noting the potential for victims to be reluctant to participate if it resulted in a lighter sentence, as we mention above.¹⁰⁴ However, the RMIT Centre for Innovative Justice argued that the possibility of participation being taken into account did not preclude a positive outcome being achieved for victims.¹⁰⁵

Support for restorative justice legislation

- 8.65 Submissions widely agreed that restorative justice processes should be supported by legislation.¹⁰⁶ They argued that this would have several advantages, including:
- providing a framework for the processes¹⁰⁷
 - outlining participants’ rights¹⁰⁸
 - ensuring reforms were subject to legislative scrutiny, which was an important check on executive power¹⁰⁹
 - generating referrals from police and courts, increasing avenues for access,¹¹⁰ and
 - offering more certainty and clarity for participants.¹¹¹
- 8.66 Without legislation, restorative justice may face barriers to implementation. For instance, not having a legislative basis could limit opportunities to generate referrals to restorative justice processes. Legislating for restorative justice could address other barriers including a lack of understanding of about the process and concerns about the legal risks of participation.¹¹²
- 8.67 Submissions suggested that the legislation should include:
- timeframes for the process¹¹³

104. NSW Bar Association, *Submission RC27* [63].

105. RMIT University, Centre for Innovative Justice, *Submission RC24*, 3.

106. NSW Police Force, *Submission RC40*, 14; Youth Justice NSW, *Submission RC20*, 4; NSW Bar Association, *Submission RC27* [64]; F Gilroy, *Submission RC03*, 23; RMIT University, Centre for Innovative Justice, *Submission RC24*, 3–4.

107. Youth Justice NSW, *Submission RC20*, 4.

108. Youth Justice NSW, *Submission RC20*, 4.

109. NSW Bar Association, *Submission RC27* [64].

110. RMIT University, Centre for Innovative Justice, *Submission RC24*, 3.

111. Youth Justice NSW, *Submission RC20*, 4; RMIT University, Centre for Innovative Justice, *Submission RC24*, 3.

112. RMIT University, Centre for Innovative Justice, *Submission RC24*, 3–4.

113. Youth Justice NSW, *Submission RC20*, 4.

- a requirement to inform victims and offenders about restorative justice processes¹¹⁴
- the rights of participants, including that it is a voluntary process and requires informed consent¹¹⁵
- mechanisms for ensuring the free, voluntary and informed consent of participants¹¹⁶
- a mechanism to allow victims to request restorative justice and the option to adjourn a proceeding if necessary to enable the process to occur,¹¹⁷ and
- “broad, flexible, and victim-centred suitability criteria”, with legislative support for the development of detailed policy guidance around suitability and safeguards.¹¹⁸

Victim impact panels may have benefits

- 8.68 Victim impact panels are another form of restorative justice that could be considered further. These could be an important aspect of healing and restorative justice for serious road crime victims, as well as victims of other types of crime. In some circumstances, these panels could also play a role in rehabilitating and deterring serious road crime offenders.
- 8.69 Victim impact panels were suggested by the RTSG, as a way to support rehabilitation of offenders. At these panels, offenders would “hear from different people who have lost loved ones so that the offender can better understand the impact and consequences of their road crime”. In the RTSG’s view, these panels would help offenders understand the consequences of their crimes, hold them accountable for their actions and reduce recidivism. The RTSG called for victim impact panels to be a mandatory component of all sentences for serious and repeat road crime offenders.¹¹⁹
- 8.70 To our knowledge, there are no victim impact panels in Australia for serious road crime offences. However, they exist in other contexts. For example, the Victorian Government restorative justice program for victims of family violence includes victim impact panels as one of its processes. This allows victim survivors of family

114. Youth Justice NSW, *Submission RC20*, 4; RMIT University, Centre for Innovative Justice, *Submission RC24*, 3.

115. Youth Justice NSW, *Submission RC20*, 4.

116. RMIT University, Centre for Innovative Justice, *Submission RC24*, 4.

117. RMIT University, Centre for Innovative Justice, *Submission RC24*, 4.

118. RMIT University, Centre for Innovative Justice, *Submission RC24*, 3.

119. Road Trauma Support Group NSW, *Submission RC16*, 30. See also D Wakes-Miller, *Submission RC13*, 47–49.

violence to address an audience to share their experience and the impact of family violence, to help them “heal and move on”.¹²⁰

- 8.71 Additionally, the NSW Traffic Offender Intervention Program is a Local Court based program that targets offenders who have pleaded guilty to or been found guilty of a traffic offence.¹²¹ The course includes content relating to the physical and emotional impact of traffic offences or crashes on victims and the community.¹²²
- 8.72 Victim impact panels are also used internationally. For example, victim impact panels have been available for drink driving offences in the United States since the 1980s. As part of their sentence, people convicted of driving under the influence of alcohol (DUI) attend sessions where victims or family members who have lost loved ones, share their experiences. The panels aim to personalise victims' loss and allow them to “communicate the depth of [their] trauma and grief”. It demonstrates “the emotional, physical, and financial consequences of drinking and driving”.¹²³
- 8.73 Previous studies have had mixed findings on the effect of victim impact panels on recidivism.¹²⁴ However, a recent study into victim impact panels in the United States concluded that they have “slight recidivism reduction effects” for DUI offenders five to eight years post-sentence.¹²⁵
- 8.74 Research has demonstrated that DUI offenders report increased empathy towards victims after attending a victim impact panel, and say that they are less likely to drink and drive in the future.¹²⁶

120. Victoria, Justice and Regulation, *Restorative Justice for Victim Survivors of Family Violence: Framework* (2017) 4.

121. NSW, Department of Communities and Justice, “Factsheet: Traffic Offenders Intervention Program” <<https://localcourt.nsw.gov.au/documents/traffic-offenders-program/toip-factsheet.pdf>> (retrieved 5 December 2024); Local Court of NSW, “Traffic Offender Intervention Program” (4 March 2024) <<https://localcourt.nsw.gov.au/sentencing--orders-and-appeals/sentencing-in-criminal-cases/traffic-offender-intervention-program.html>> (retrieved 9 January 2025).

122. Road Sense Australia, “Programs We Offer: Traffic Offender Intervention Program” <<https://roadsense.org.au/services/traffic-offenders-intervention-program/>> (retrieved 6 December 2024).

123. K Thompson and S Joyce, “Do Victim Impact Panels Have Sustained Effects on DUI Recidivism?” (2022) 11 *Laws* 1, 1–2.

124. P Miller and others, “Effectiveness of Interventions for Convicted DUI Offenders in Reducing Recidivism: A Systematic Review of the Peer-Reviewed Scientific Literature” (2015) 41 *American Journal of Drug and Alcohol Abuse* 16, 18, 26, 27.

125. K Thompson and S Joyce, “Do Victim Impact Panels Have Sustained Effects on DUI Recidivism?” (2022) 11 *Laws* 1, 1.

126. K Thompson and S Joyce, “Do Victim Impact Panels Have Sustained Effects on DUI Recidivism?” (2022) 11 *Laws* 1, 2–3.

- 8.75 While we can see potential benefits to victim impact panels, we do not support their being mandatory. In particular, we are concerned about the risk of re-traumatising participants, or exposing them to vicarious trauma. In our view, the psychological safety of all participants would need to be considered carefully before they participated, and trauma-informed practice would be critical.
- 8.76 Similar to other forms of restorative justice, several issues may need to be considered before victim impact panels could be implemented. These include:
- whether they should be made available, and in relation to which offences
 - at what point they should be available in the criminal justice process
 - how to ensure the psychological safety of participants, and ensure panels are trauma-informed, and
 - whether participation should be taken into account on sentence.

Some existing laws should not change

- 8.77 We conclude that there should be no change to the VIS scheme and the remote evidence in chief provisions in response to the issues raised by our terms of reference. In our view, the scope of these laws is appropriate in relation to serious road crime proceedings.

Victim impact statements should not change

- 8.78 VISs play an important role in serious road crime sentencing. They are available in all serious road crime cases, with the exception of the offence of failing to stop and driving recklessly or dangerously in response to a police pursuit, which does not necessarily involve death or bodily harm, or an act of actual or threatened violence.¹²⁷
- 8.79 VISs can be made by:
- “primary victims”, including people against whom the offence was committed and witnesses of certain offences, who suffered personal harm as a result, and
 - “family victims”, including immediate family members of a person who died as a result of the offence.¹²⁸
- 8.80 We explained what VISs are, and when they are available, in more detail in the consultation paper.¹²⁹

127. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27(2)(a)–(b), s 27(4)(a).

128. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28, s 26 definition of “primary victim”, definition of “family victim”.

129. NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [6.20]–[6.27].

8.81 There was wide support for the use of VISs in serious road crime sentencing, and submissions considered that the current scheme was appropriate.¹³⁰ These submissions raised that VISs play an important role in serious road crime sentences, by:

- informing the court about the effects of crime on serious road crime victims¹³¹
- assisting the court to perform its functions under s 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW), which provides that one purpose of sentencing is to recognise the harm caused by the offence¹³²
- allowing road crime victims to participate in the sentencing process,¹³³ and
- providing an opportunity for victims to voice their experiences and be heard.¹³⁴

8.82 As Legal Aid raised, the VIS scheme was expanded after the NSW Sentencing Council's comprehensive review of victim involvement in sentencing in 2017–2018.¹³⁵

Remote evidence laws should not extend to road crime victims

8.83 The NSWPF suggested that audio visual link (AVL) or video evidence in chief provisions (such as those used for domestic violence or vulnerable persons) should be allowed for victims of serious road crimes. In their view, this would ease the burden of the court process for victims.¹³⁶

8.84 Road crime victims experience devastating and significant trauma, which can make giving evidence in criminal proceedings very difficult. However, we do not think these evidence provisions should be extended to victims of road crime.

8.85 The current video evidence in chief and AVL provisions apply in exceptional, limited circumstances. They cover domestic violence complainants, complainants of certain sexual offences (including child sexual offences) and other “vulnerable persons”, including children and cognitively impaired persons. These provisions allow classes of people to give their evidence in the form of a recorded statement or remotely in certain circumstances.¹³⁷

130. Legal Aid NSW, *Submission RC08*, 20; NSW Bar Association, *Submission RC27* [57]–[59]; Law Society of NSW, *Submission RC12*, 7.

131. Legal Aid NSW, *Submission RC08*, 20; NSW Bar Association, *Submission RC27* [57].

132. Legal Aid NSW, *Submission RC08*, 20; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(g).

133. NSW Bar Association, *Submission RC27* [57].

134. Legal Aid NSW, *Submission RC08*, 20; Law Society of NSW, *Submission RC12*, 7.

135. Legal Aid NSW, *Submission RC08*, 20; NSW Sentencing Council, *Victims' Involvement in Sentencing*, Report (2018).

136. NSW Police Force, *Submission RC40*, 13.

137. *Criminal Procedure Act 1986* (NSW) ch 6 pt 4B–6.

- 8.86 The laws recognise the particular vulnerability of these complainants and the unequal power dynamic between the complainant and the accused person. For instance, the introduction of the relevant provisions for domestic violence complainants recognised that the “power dynamic that typifies domestic violence does not stop at the courtroom door”.¹³⁸
- 8.87 These laws also recognise that domestic violence complainants may be subject to pressure from the accused person not to cooperate with the prosecution. Because of the nature of their relationship, the complainant often faces significant difficulties giving evidence in front of the accused.¹³⁹ These factors can impact complainants’ ability or willingness to give evidence, and may impact the quality of their evidence.
- 8.88 There are compelling reasons why witnesses should give evidence in person, where possible. In particular, some may consider that being able to observe a witness’s demeanour and body language is an important part of assessing their credibility. The credibility of a witness may be a factor that a judge or jury considers during the fact-finding exercise.
- 8.89 While in person evidence is generally preferable, we recognise that alternative evidence provisions are important and necessary for some road crime victims, to minimise the trauma of giving evidence. In appropriate circumstances, AVL evidence may already be available. The court may, either on its own motion or by application, permit a person to give evidence by AVL.¹⁴⁰ Under this law, the prosecutor can apply for road crime victims to give their evidence by AVL, if giving evidence in person is not appropriate.

138. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 21 October 2014, 1486.

139. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 21 October 2014, 1486.

140. *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) s 5B.

Appendix A: Preliminary submissions

PRC01	Anonymous, 19 December 2022
PRC02	M I, 20 December 2022
PRC03	Blake Snape, 20 December 2022
PRC04	Taira S, 20 December 2022
PRC05	Jamie Enright, 21 December 2022
PRC06	Adrian McCabe, 21 December 2022
PRC07	Simon Jeffrey, 22 December 2022
PRC08	Dicky Baker, 22 December 2022
PRC09	Terry George, 23 December 2022
PRC10	Confidential, 24 December 2022
PRC11	Confidential, 5 January 2023
PRC12	David Heilpern, 1 February 2023
PRC13	Gib Hoe, 5 February 2023
PRC14	Lee Wong, 5 February 2023
PRC15	Mo Bishop, 5 February 2023
PRC16	Lauren Carroll, 5 February 2023
PRC17	Deborah Edds, 5 February 2023
PRC18	Connor M Claridge, 5 February 2023
PRC19	Ben Reynolds, 5 February 2023
PRC20	Mark Simon, 5 February 2023
PRC21	Lynn and Mark Carroll, 5 February 2023
PRC22	Raelene Bussey, 5 February 2023
PRC23	Chantel Beetham, 5 February 2023
PRC24	Jackie Gaskin, 6 February 2023
PRC25	Kimberley Dunshea, 6 February 2023
PRC26	Nicole Micos, 6 February 2023
PRC27	Erin Carroll, 6 February 2023
PRC28	Angela Goulding, 7 February 2023
PRC29	Aileen Walton, 7 February 2023
PRC30	Dean McNulty, 7 February 2023

PRC31	Kimberley Miller, 7 February 2023
PRC32	Anonymous, 7 February 2023
PRC33	Jennifer Williams, 7 February 2023
PRC34	Paul Warburton, 7 February 2023
PRC35	Debra and Bill Reynolds, 7 February 2023
PRC36	Robert Zarb, 7 February 2023
PRC37	Kathleen Bruce, 7 February 2023
PRC38	Robert Bruce, 7 February 2023
PRC39	Vanessa Little, 7 February 2023
PRC40	Kylie Moses, 8 February 2023
PRC41	Stewart Edds, 8 February 2023
PRC42	Alana Weeks, 8 February 2023
PRC43	Renee Squires, 9 February 2023
PRC44	Ian Smith, 9 February 2023
PRC45	Adam Thompson, 9 February 2023
PRC46	Rhonda Lamont, 9 February 2023
PRC47	Anonymous, 10 February 2023
PRC48	Transport for NSW, 10 February 2023
PRC49	Anonymous, 11 February 2023
PRC50	Judy Smith, 11 February 2023
PRC51	Karthick Sivagurunathan, 12 February 2023
PRC52	Julie Bruce, 12 February 2023
PRC53	Sandy Collins, 13 February 2023
PRC54	Shane McFarlane, 14 February 2023
PRC55	Dhivya Bharathi, 15 February 2023
PRC56	Michael Duke, 15 February 2023
PRC57	Barbara Deery, 15 February 2023
PRC58	Bryonie Moore, 15 February 2023
PRC59	Law Society of NSW, 15 February 2023
PRC60	Lily Reynolds, 15 February 2023
PRC61	Lily Reynolds (supplementary submission), 15 February 2023
PRC62	Anonymous, 16 February 2023

PRC63	Justice Support Centre (South West Sydney Community Legal Service), 16 February 2023
PRC64	NSW Police Force, 16 February 2023
PRC65	Annette Wilson, 16 February 2023
PRC66	Julie McCroary, 16 February 2023
PRC67	James Buckenham, 16 February 2023
PRC68	Alicia Reynolds, 16 February 2023
PRC69	Anonymous, 16 February 2023
PRC70	Australasian College of Road Safety, 17 February 2023
PRC71	Sarah Coker, 17 February 2023
PRC72	Road Trauma Support Group NSW, 17 February 2023
PRC73	Australian Federal Police, 17 February 2023
PRC74	Youth Justice NSW, 17 February 2023
PRC75	Children's Court of NSW, 17 February 2023
PRC76	Confidential, 17 February 2023
PRC77	Office of the Director of Public Prosecutions NSW, 17 February 2023
PRC78	Legal Aid NSW, 17 February 2023
PRC79	Rebecca Jones, 17 February 2023
PRC80	RMIT University, Centre for Innovative Justice, 17 February 2023
PRC81	Gail Proctor, 17 February 2023
PRC82	Local Court of NSW, 20 February 2023
PRC83	NSW Bar Association, 17 February 2023
PRC84	Victims of Crime Assistance League (Hunter), 17 February 2023
PRC85	F Gilroy, 25 February 2023
PRC86	Ash Worthington, 3 March 2023
PRC87	NSW, Advocate for Children and Young People, 3 March 2023
PRC88	Aboriginal Legal Service (NSW/ACT) Ltd, 3 March 2023
PRC89	Larissa Clark, 11 March 2023
PRC90	Dan Bruton, 27 July 2023
PRC91	Confidential, 7 September 2023

Appendix B: Submissions

RC01	Amanda Hardman, 21 December 2023
RC02	Royal Australian and New Zealand College of Obstetricians and Gynaecologists, 24 January 2024
RC03	Frank Gilroy, 22 February 2024
RC04	Confidential, 4 March 2024
RC05	Loretta Woolston, 22 March 2024
RC05A	Loretta Woolston, 23 March 2024
RC05B	Loretta Woolston, 26 March 2024
RC06	Colin Edwards, 27 March 2024
RC07	Tara Dibben, 3 April 2024
RC08	Legal Aid NSW, 3 April 2024
RC09	Confidential, 3 April 2024
RC10	N Douglass, 3 April 2024
RC11	Katie Dokmanovic, 3 April 2024
RC12	Law Society of NSW, 4 April 2024
RC13	Duncan Wakes-Miller, 4 April 2024
RC14	Professor Luke McNamara, Professor Julia Quilter, Professor Arlie Loughnan, Honorary Professor Russell Hogg, Emeritus Professor David Brown, Professor Lindsay Farmer, 4 April 2024
RC15	Ian Rooney, 4 April 2024
RC16	Road Trauma Support Group NSW, 4 April 2024
RC17	Stephen Garz, 4 April 2024
RC18	Nigel and Jody Smith, 5 April 2024
RC19	Tracy Blake, 5 April 2024
RC20	Youth Justice NSW, 7 April 2024
RC21	Public Defenders, 8 April 2024
RC22	Anica Simic, 8 April 2024
RC23	Confidential, 10 April 2024
RC24	RMIT University, Centre for Innovative Justice, 11 April 2024
RC25	Confidential, 12 April 2024
RC26	Carly Jane Walters, 12 April 2024

RC27	NSW Bar Association, 12 April 2024
RC28	Confidential, 13 April 2024
RC29	Confidential, 13 April 2024
RC30	Zachary Beleff, 14 April 2024
RC31	Wen Jun Chen, 15 April 2024
RC32	Lana Coleman, 15 April 2024
RC33	Colleen McCrea, 15 April 2024
RC34	Sue Mirceski, 15 April 2024
RC35	Keryn Griffith, 15 April 2024
RC36	Children's Court of NSW, 16 April 2024
RC37	Josephine Morgan, 16 April 2024
RC38	Lisa Reid, 17 April 2024
RC39	Natasha Sinclair, 17 April 2024
RC40	NSW Police Force, 18 April 2024
RC41	Lauren Boyd, 18 April 2024
RC42	Melissa Mahony, 18 April 2024
RC43	Michelle Pritchard, 18 April 2024
RC44	Niall Francisco, 18 April 2024
RC45	Linda Posztos, 18 April 2024
RC46	Codie Rowsell, 18 April 2024
RC47	John Knezevic, 18 April 2024
RC48	Michael Duke, 18 April 2024
RC49	Confidential, 18 April 2024
RC50	Confidential, 18 April 2024
RC51	Confidential, 18 April 2024
RC52	David and Suzanne McCann, 19 April 2024
RC53	Katrina Burnes, 19 April 2024
RC54	Anonymous, 19 April 2024
RC55	Shafiq Hussain, 19 April 2024
RC56	Nikki Cox, 19 April 2024
RC57	Leonie Winner, 19 April 2024
RC58	James Winner, 19 April 2024

RC59	Anonymous, 19 April 2024
RC60	Vladica Popovic, 19 April 2024
RC61	Aboriginal Legal Service (NSW/ACT) Ltd, 19 April 2024
RC62	Jane Oakley, 19 April 2024
RC63	Gail Ann Proctor, 19 April 2024
RC64	Andrew McLean, 19 April 2024
RC65	Maddison Fogarty, 19 April 2024
RC66	Lazar Stojkov, 19 April 2024
RC67	Yasmeen Hussain, 19 April 2024
RC68	Anonymous, 19 April 2024
RC69	Confidential, 19 April 2024
RC70	Mark Aren, 26 April 2024
RC71	Local Court of NSW, 26 April 2024
RC72	Transport for NSW, 26 April 2024
RC73	NRMA, 10 May 2024
RC74	Todd Mason, 25 July 2024
RC75	NSW Police Force, 29 July 2024

Appendix C: Consultations

Restorative Justice Unit, Corrective Services NSW (PRCC01)

13 June 2023

Stephanie Wallace, Senior Manager

Dr Derek Brookes, Senior Policy and Program Officer

Restorative justice practitioners (PRCC02)

29 June 2023

Kelsey Field, Principal Advisor, Resolution and Services, New Zealand Ministry of Justice

Nathan Smith, Senior Advisor, Resolution and Services, New Zealand Ministry of Justice

Stephanie Wallace, Senior Manager, Victims Register and Restorative Justice Unit NSW

Dr Derek Brookes, Senior Policy and Program Officer, Victims Register and Restorative Justice Unit NSW

Restorative justice researchers and practitioners (PRCC03)

3 July 2023

Stan Winford, Associate Director, Research, Innovation and Reform, RMIT University Centre for Innovative Justice

Nareeda Lewers, Restorative Justice Manager/Convener, RMIT University Centre for Innovative Justice

Dr Jane Bolitho, Diana Unwin Chair in Restorative Justice for Te Ngāpara Centre, Victoria University of Wellington

ACT Restorative Justice Unit (PRCC04)

3 July 2023

Amanda O'Neil, Senior Convenor, ACT Restorative Justice Unit

NSW Director of Public Prosecutions (PRCC05)

10 July 2023

Frank Veltro SC, Deputy Director

James Dorney, Principal Legal Advisor

NSW Police Force (PRCC06)

14 July 2023

Sergeant Jason Tozer

Assistant Commissioner Scott Whyte

Assistant Commissioner Brett McFadden

Detective Inspector Jason Hogan

Inspector Paul Bousfield

Lisa Fitzroy, Senior Policy Officer, Legislation and Policy Branch, Office of the Commissioner

Marilyn Kourbelis, A/Policy Manager (Principal Officer)

Road Trauma Support Group NSW (PRCC07)

21 July 2023

Tom Daher

Duncan Wakes-Miller

Roxanne Arnold

David Vidal

Craig Mackenzie

District Court of NSW (PRCC08)

23 August 2023

Acting Chief Judge Sarah Huggett

Judge Nicole Noman SC

Judge Gina O'Rourke SC

Judge Craig Smith SC

Children's Court of NSW (PRCC09)

28 August 2023

Judge Ellen Skinner, President of the Children's Court

Olivia Taylor, Associate to Her Honour Judge Skinner

Legal Aid NSW and Aboriginal Legal Service (NSW/ACT) (PRCC10)

29 August 2023

Rhiannon McMillan, Senior Legal Project Officer, Crime, Legal Aid NSW

Amanda Coultas-Roberts, Solicitor in Charge, Indictable Team 1 (Central Sydney), Legal Aid NSW

Anna Pankhurst Solicitor in Charge, Indictable Appeals (Central Sydney), Legal Aid NSW

Steven Rees, Senior Trial Advocate, Aboriginal Legal Service (NSW/ACT)

Sascha Kelly, Policy Officer, Aboriginal Legal Service (NSW/ACT)

Victims' Roundtable (RCC01)

8 July 2024

Duncan Wakes-Miller (Road Trauma Support Group NSW)

Craig Mackenzie (Road Trauma Support Group NSW)

Michael Duke (Road Trauma Support Group NSW)

Katie Dokmanovic (Road Trauma Support Group NSW)

Sophie Wheeler (Victims of Crime Assistance League)

NSW Police Force (RCC02)

8 July 2024

Acting Assistant Commissioner Anthony Boyd, Traffic and Highway Patrol Command

Detective Inspector Jason Hogan, Traffic and Highway Patrol Command

Inspector Matthew Richards, Traffic and Highway Patrol Command

Superintendent Duane Carey, Police Prosecutions and Licensing Enforcement Command

Sergeant Corey Wolven, Police Prosecutions and Licensing Enforcement Command

Senior Constable Michael Houghton, Police Prosecutions and Licensing Enforcement Command

Sandrah Kotevski, Principal Policy Officer, Legislation and Policy Branch

Renee Austin, Policy Officer, Legislation and Policy Branch

