

# Serious road crime

# 23

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CONSULTATION  
PAPER

December 2023

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# Participants

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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.

*[Dated 10 November 2022]*



# Questions

## 2. Offences

### Question 2.1: Vehicular manslaughter

Should NSW have a new offence of “vehicular manslaughter/homicide”? If so, what should the elements and maximum penalty of any new offence be?

### Question 2.2: Dangerous driving occasioning death or grievous bodily harm

- (1) Are the circumstances of dangerous driving (*Crimes Act 1900* (NSW) s 52A(1), s 52A(3)) appropriate? What, if any, circumstances should be added?
- (2) Does the law adequately deal with situations in which a person voluntarily drove dangerously before their actions became involuntary (and they were driving involuntarily at the time of impact)? If not, how could this be resolved?
- (3) Do any other elements of the dangerous driving offences (*Crimes Act 1900* (NSW) s 52A(1), s 52A(3)) require amendment? If so, what needs to change?

### Question 2.3: Circumstances of aggravation for dangerous driving

- (1) Should the element of “very substantially impaired” (*Crimes Act 1900* (NSW) s 52A(7)(d)) be amended to remove the word “very”? Why or why not?
- (2) Should the circumstance of aggravation related to speeding (*Crimes Act 1900* (NSW) s 52A(7)(b)) be amended? If so, what should the threshold be?
- (3) Are any other changes needed to the circumstances of aggravation? If additional circumstances are needed, how should they be expressed?

### Question 2.4: Dangerous driving causing actual bodily harm

Should there be new offences to capture driving that causes actual bodily harm? If so, what should these new offences be, and what should be their maximum penalties?

### Question 2.5: Wanton or furious driving

Should the offence of “injuries by furious driving etc” (*Crimes Act 1900* (NSW) s 53) be repealed or amended? What, if anything, should replace this offence if it is repealed?

### Question 2.6: Potential new offences for driving causing death or grievous bodily harm

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

### **Question 2.7: Failing to stop and assist**

Are any reforms needed to the offence of failing to stop and assist after a vehicle impact causing death or grievous bodily harm (*Crimes Act 1900* (NSW) s 52AB)? If so, what should change?

### **Question 2.8: Police pursuits**

Are any reforms needed to the offence of failing to stop and driving recklessly or dangerously in response to a police pursuit (*Crimes Act 1900* (NSW) s 51B)? If so, what should change?

### **Question 2.9: Predatory driving**

Are any reforms needed to the offence of predatory driving (*Crimes Act 1900* (NSW) s 51A)? If so, what should change?

### **Question 2.10: A new serious road crimes Act**

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

### **Question 2.11: Accessorial liability for serious road crime offences**

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

## **3. Penalties**

### **Question 3.1: Maximum penalties for offences involving death**

- (1) Are the maximum penalties for the following serious road crime offences involving death appropriate:
  - (a) dangerous driving occasioning death (*Crimes Act 1900* (NSW) s 52A(1)), and
  - (b) aggravated dangerous driving occasioning death (*Crimes Act 1900* (NSW) s 52A(2))?If not, what should the maximum penalties be?
- (2) Should s 67 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) be amended so intensive correction orders cannot be imposed for any serious road crime offences that involve death?

### **Question 3.2: Maximum penalties for offences involving bodily harm**

- (1) Are the maximum penalties for the following serious road crime offences involving bodily harm appropriate:

- (a) dangerous driving occasioning grievous bodily harm (*Crimes Act 1900* (NSW) s 52A(3))
  - (b) aggravated dangerous driving occasioning grievous bodily harm (*Crimes Act 1900* (NSW) s 52A(4)), and
  - (c) injuries by furious driving etc (*Crimes Act 1900* (NSW) s 53)?
- If not, what should the maximum penalties be?

### **Question 3.3: Maximum penalties for other serious road crime offences**

Are the maximum penalties for the following serious road crime offences appropriate:

- (a) failing to stop and assist after a vehicle impact causing death (*Crimes Act 1900* (NSW) s 52AB(1))
- (b) failing to stop and assist after a vehicle impact causing grievous bodily harm (*Crimes Act 1900* (NSW) s 52AB(2))
- (c) predatory driving (*Crimes Act 1900* (NSW) s 51A), and
- (d) failing to stop and driving recklessly or dangerously in response to a police pursuit (first and second or subsequent offence) (*Crimes Act 1900* (NSW) s 51B(1))?

If not, what should the maximum penalties be?

### **Question 3.4: Default and minimum licence disqualification periods**

Is the licence disqualification scheme for serious road crime offences appropriate? If not, how should it change?

### **Question 3.5: Mandatory minimum sentences**

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

## **4. Sentencing principles and procedures**

### **Question 4.1: General sentencing principles and procedures**

Are any issues relevant to serious road crime offences not adequately addressed by the general sentencing framework? If so, what specific reforms could address this?

### **Question 4.2: Guideline judgment for dangerous driving offences**

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

### **Question 4.3: Standard non-parole periods**

Should any of the dangerous driving offences (*Crimes Act 1900* (NSW) s 52A) have standard non-parole periods? If so, what should the standard non-parole periods be?

## 5. Jurisdictional issues

### Question 5.1: Table offences

- (1) Should any serious road crime offences in the *Crimes Act 1900* (NSW) that are currently listed in Table 1 and Table 2 of schedule 1 of the *Criminal Procedure Act 1986* (NSW) be made strictly indictable?
- (2) Should the offence of negligent driving occasioning death (*Road Transport Act 2013* (NSW) s 117(1)(a)) be made indictable or strictly indictable?

### Question 5.2: Serious children's indictable offences

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

## 6. The experiences and rights of victims

### Question 6.1: Existing rights, victim impact statement and support schemes

Is there a need to improve the existing rights, victim impact statement and support schemes for victims of serious road crimes and their families? If so, what could be done?

### Question 6.2: Restorative justice

- (1) Should restorative justice be made widely available for serious road crime offences? If so, at what stage in the criminal justice process should restorative justice be available?
- (2) If restorative justice was to be made available pre-sentence, should an offender's participation be taken into account in sentencing?
- (3) Should restorative justice processes for serious road crimes be supported by legislation? If so, what legislative safeguards and processes would be appropriate?

# 1. Introduction

**In brief**

In this consultation paper, we consider aspects of the law relating to serious road crime offences and sentencing for these offences. We also consider the experiences and rights of victims, and their families, in the criminal justice system. We seek your views on whether the law needs to change and, if so, how.

**Content warning:** This consultation paper deals with content that some may find distressing, including discussions about road trauma. Our website lists the details of free services you can contact if you need support.<sup>1</sup>

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- 1.1 On 10 November 2022, we received terms of reference asking us to review aspects of the law relating to serious road crime offences. In this consultation paper, we seek your views on whether the law needs to change.

## The need for this review

- 1.2 Road trauma has a significant impact on our community. In NSW, someone is killed or hospitalised every 46 minutes because of a road traffic crash.<sup>2</sup> In 2022, 288

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1. NSW Law Reform Commission, *Serious Road Crime: Preliminary Submissions* <<https://lawreform.nsw.gov.au/current-projects/serious-road-crime.html>> (retrieved 21 November 2023).

2. Transport for NSW, *Preliminary Submission PRC48*, 1; Transport for NSW, “Towards Zero: 2026 Road Safety Action Plan” (2022) <<https://towardszero.nsw.gov.au/roadsafetyplan>> (retrieved 21 November 2023).

people were killed and 9711 people were seriously injured on NSW roads.<sup>3</sup> In 2023, to date, 332 lives have been lost.<sup>4</sup>

- 1.3 The effects of road trauma throughout the community are “profound, catastrophic and enduring”.<sup>5</sup> In addition to the thousands of individuals who are directly harmed in crashes, road trauma has far-reaching effects on their families, friends, first responders and the broader NSW community.
- 1.4 A recent research report commissioned by the Road Trauma Support Group emphasised the extreme mental, emotional and physical damage from deaths caused by road crimes.<sup>6</sup> One study estimated that the annual social cost of fatal road crashes in NSW between 2016–2020 was \$1.033 million, and \$2.349 million for road crashes involving hospitalised injury.<sup>7</sup>
- 1.5 Members of the NSW community have questioned whether the law could do more to prevent road trauma and to respond appropriately when it occurs. In this context, we have been asked to examine the law on serious road crime offences, sentencing for these offences, and the rights and experiences of victims and their families in the criminal justice system.

## The scope of this review

- 1.6 Under the terms of reference, we have been 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.

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3. Transport for NSW, “Towards Zero: NSW Road Toll Progress: Preliminary Provisional Data as at 1 January 2023” <[www.transport.nsw.gov.au/system/files/media/documents/2023/NSW%20Road%20Toll%20Progress%20Report%20-%202022.pdf](http://www.transport.nsw.gov.au/system/files/media/documents/2023/NSW%20Road%20Toll%20Progress%20Report%20-%202022.pdf)> (retrieved 21 November 2023); Transport for NSW, “Serious Injury Trends” (2023) <[www.transport.nsw.gov.au/roadsafety/statistics/interactive-crash-statistics/serious-injury-trends](http://www.transport.nsw.gov.au/roadsafety/statistics/interactive-crash-statistics/serious-injury-trends)> (retrieved 21 November 2023).
  4. Transport for NSW, “Statistics” (3 December 2023) <[www.transport.nsw.gov.au/roadsafety/statistics](http://www.transport.nsw.gov.au/roadsafety/statistics)> (retrieved 4 December 2023).
  5. Road Trauma Support Group NSW and fiftyfive5, *The Unheard Trauma of Fatal Road Crimes in NSW* (2023) 5.
  6. Road Trauma Support Group NSW and fiftyfive5, *The Unheard Trauma of Fatal Road Crimes in NSW* (2023) 5. See also Transport for NSW, *Preliminary Submission PRC48*, 1.
  7. R Steinhauser and others, *Social Cost of Road Crashes: Report for the Bureau of Infrastructure and Transport Research Economics*, Final Report (Australian National University, 2022) [7.2.3], table 7.75.

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.

## **This review focuses on certain *Crimes Act* offences**

- 1.7 The terms of reference cover the following offences in the *Crimes Act 1900* (NSW) (*Crimes Act*) (the “serious road crime offences”):
- manslaughter<sup>8</sup>
  - dangerous driving occasioning death or grievous bodily harm (GBH), and the aggravated versions of these offences<sup>9</sup>
  - causing actual bodily harm by wanton or furious driving, racing or other misconduct or by wilful neglect<sup>10</sup>
  - failing to stop and assist after a vehicle impact causing death or GBH<sup>11</sup>
  - failing to stop and driving recklessly or dangerously in response to a police pursuit,<sup>12</sup> and
  - predatory driving.<sup>13</sup>
- 1.8 The review also includes accessorial liability offences in the context of serious road crimes. While the *Crimes Act* recognises the accessorial liability offences, the elements come from the common law.<sup>14</sup>
- 1.9 The serious road crime offences in the *Crimes Act* are part of a complex framework of driving offences, road rules and regulations.<sup>15</sup> The *Road Transport Act 2013* (NSW) (*RTA*) contains related offences, including offences that can be charged where a driver has caused death or serious harm. While these *RTA* offences are not the focus of this review, we refer to them where necessary to present a complete picture of how serious road crime offences are structured.

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

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

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

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

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

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

14. See, eg, *Quinn v R* [2023] NSWCCA 229 [103].

15. Transport for NSW, *Preliminary Submission PRC48*, 1–2.

- 1.10 In a background paper, issued on 28 November 2022, we suggested that a wide range of offences might inform the review.<sup>16</sup> These included *RTA* offences relating to driving under the influence of alcohol and prohibited drugs.
- 1.11 We acknowledge there are community concerns about these offences, which may require in-depth examination.<sup>17</sup> However, this consultation paper does not examine this wider range of offences.
- 1.12 This is because our terms of reference require a focus on serious road crime offences in the *Crimes Act* and accessorial liability. The former government intended to initiate a broader parliamentary inquiry into the *RTA* to complement our review.<sup>18</sup> We are persuaded that expanding our review may overwhelm or detract from the concerns about serious offending that prompted it.<sup>19</sup>

### **Some important issues are beyond the scope of this review**

- 1.13 We also acknowledge some other important issues, raised in preliminary submissions, that are not within the scope of our review.
- 1.14 In particular, this consultation paper does not consider the law regarding bail. We understand there is community concern about bail being granted to people accused of serious road crime offences.<sup>20</sup> Recently, a petition calling for tougher bail laws for serious road crimes causing death was presented to the NSW Legislative Assembly with 7545 signatures.<sup>21</sup>
- 1.15 While we acknowledge these concerns, bail is not within our present terms of reference. It is a matter for government to review the *Bail Act 2013 (NSW) (Bail Act)* and, if necessary, refer it to a relevant body for further consideration. Our

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16. NSW Law Reform Commission, “Background Note: What are ‘Serious Road Crime’ Offences?” <[www.lawreform.nsw.gov.au/current-projects/serious-road-crime/background-note.html](http://www.lawreform.nsw.gov.au/current-projects/serious-road-crime/background-note.html)> (retrieved 5 December 2023).

17. See, eg, B Snape, *Preliminary Submission PRC03*; D Heilpern, *Preliminary Submission PRC12*, 1–2; Law Society of NSW, *Preliminary Submission PRC59*, 2; Justice Support Centre (South West Sydney Community Legal Service), *Preliminary Submission PRC63*; Aboriginal Legal Service (NSW/ACT) Ltd, *Preliminary Submission PRC88*, 1–2.

18. NSW Liberals, “Parliamentary Inquiry into Road Safety” (22 November 2022) <<https://nswliberal.org.au/news/parliamentary-inquiry-into-road-safety>> (retrieved 21 November 2023). See also Transport for NSW, *Preliminary Submission PRC48*, 2.

19. Legal Aid NSW, *Preliminary Submission PRC78*, 1–2. But see Transport for NSW, *Preliminary Submission PRC48*, 2.

20. See, eg, Road Trauma Support Group NSW, *Preliminary Submission PRC72*, 1–2.

21. NSW, Legislative Assembly, “Justice for James: Changing the Law for Serious Road Crimes” (22 August 2023) *Petitions* <[www.parliament.nsw.gov.au/la/petitions/Pages/tabled-paper-details.aspx?pk=186307](http://www.parliament.nsw.gov.au/la/petitions/Pages/tabled-paper-details.aspx?pk=186307)> (retrieved 21 November 2023).



2022 report into aspects of the *Bail Act* outlined key principles and factors that could inform such a review.<sup>22</sup>

- 1.16 Other preliminary submissions suggested that we examine non-legal mechanisms to reduce road trauma.<sup>23</sup> We understand the need for a system-wide approach to reduce road trauma, where the criminal law works together with other measures to make our roads safer.<sup>24</sup> The criminal law is part of a range of legal, regulatory and policy responses that all play a role in preventing and addressing road trauma. However, our review is limited to the law and to the serious road crime offences listed above, as well as accessorial liability.

## Our process

- 1.17 This consultation paper draws together the views that we have heard in preliminary submissions and consultations.
- 1.18 To help us identify issues and concerns relevant to the review, we invited preliminary submissions on the terms of reference on 29 November 2022. We received 91 preliminary submissions (appendix D), many of which are available on our website. Some have not been published in line with our privacy and information management policy, including where the author requested confidentiality.<sup>25</sup>
- 1.19 We conducted 10 preliminary consultations to clarify issues and seek further information (appendix E).
- 1.20 We thank everyone who took the time to provide a written submission and/or meet with us. We especially thank and acknowledge the victims, family members and other community members who told us about the impact serious road crime has had on their lives. Many of them have faced the devastation of losing a loved one in sudden and tragic circumstances. We heard firsthand accounts of the trauma and profound grief caused by these crimes. We also heard that the criminal justice process often compounds this trauma.
- 1.21 We are grateful to the NSW Bureau of Crime Statistics and Research for its expert assistance in providing statistics and advice. We also appreciate the assistance of the Courts, Tribunals and Service Delivery branch (NSW Department of Communities and Justice), the NSW Office of the Director of Public Prosecutions,

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22. NSW Law Reform Commission, *Bail: Firearms and Criminal Associations*, Report 150 (2022) ch 2.

23. See, eg, NSW, Advocate for Children and Young People, *Preliminary Submission PRC87*, 2.

24. See, eg, Australasian College for Road Safety, *Preliminary Submission PRC70*, 2–3; Transport for NSW, *Preliminary Submission PRC48*, 1–2.

25. NSW Law Reform Commission, “Privacy and Information Management Policy” (5 October 2023) *Policy Documents* <[www.lawreform.nsw.gov.au/about-us/policy-documents/privacy-information-management.html](http://www.lawreform.nsw.gov.au/about-us/policy-documents/privacy-information-management.html)> (retrieved 23 November 2023).

and Transport for NSW for the data and analysis they each provided. We also acknowledge the excellent work of the Judicial Commission of NSW in maintaining the Judicial Information Research System.

## An outline of this consultation paper

- 1.22 **Chapter 2 – Serious road crime offences** provides an overview of the serious road crime offences in the *Crimes Act*, manslaughter and the law on accessorial liability. We seek your views on these offences.
- 1.23 **Chapter 3 – Penalties** outlines the maximum penalties for serious road crime offences and the related scheme of licence disqualification. We ask whether they are appropriate, and also raise for consideration the option of mandatory minimum sentences.
- 1.24 **Chapter 4 – Sentencing principles and procedures** explains key principles in sentencing law, focusing on issues raised in preliminary submissions. It considers whether the guideline judgment on dangerous driving offences should be updated, and the possible reform option of introducing standard non-parole periods for the dangerous driving offences. We invite comment on whether reforms are necessary.
- 1.25 **Chapter 5 – Jurisdictional issues** considers the jurisdiction of the Local Court of NSW and the Children’s Court of NSW over serious road crime offences, which is relevant to the issue of sentencing. We ask if certain serious road crime offences should continue to be heard and determined in the Local Court and the Children’s Court in certain circumstances.
- 1.26 **Chapter 6 – Rights and experiences of victims** focuses on the experiences of victims of serious road crimes and their families in the criminal justice system. It considers the support available to victims and their families, their rights, and their opportunities to provide victim impact statements and participate in restorative justice processes. We ask whether changes could be made to any of these areas to improve victims’ experiences.
- 1.27 **Appendix A** contains summaries of NSW Court of Criminal Appeal sentence appeals involving vehicular manslaughter, 2016–2023.
- 1.28 **Appendix B** contains a glossary of sentencing outcomes and statistical concepts.
- 1.29 **Appendix C** contains a table of the average head sentences for the dangerous driving offences<sup>26</sup> that resulted in sentences of imprisonment (1995–2000). These statistics form the basis for the graphs in chapter 4.

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

- 1.30 **Appendix D** lists the preliminary submissions received and **Appendix E** lists the preliminary consultations conducted.

## How to contribute

- 1.31 We seek your views on the issues raised in this consultation paper. You can answer some or all of the consultation questions. You can also raise other issues that you consider relevant to the terms of reference.
- 1.32 Please email submissions to **nsw-lrc@dcj.nsw.gov.au** by **1 March 2024**.
- 1.33 We generally publish submissions on our website and refer to them in our publications. Please let us know if you do not want us to publish your submission, or if you want us to treat all or part of it as confidential.
- 1.34 We will do our best to keep your information confidential if you ask us to, but we cannot promise to do so. Sometimes the law or the public interest says we must disclose your information to someone else. In particular, we may be required to disclose your information under the *Government Information (Public Access) Act 2009* (NSW).
- 1.35 Our website contains further information on how to make a submission, and our privacy and information management policy.<sup>27</sup>

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27. NSW Law Reform Commission, “Contribute to Law Reform” <[www.lawreform.nsw.gov.au/contribute-to-law-reform.html](http://www.lawreform.nsw.gov.au/contribute-to-law-reform.html)> (retrieved 23 November 2023).



## 2. Serious road crime offences

### In brief

The *Crimes Act 1900* (NSW) includes a range of serious road crime offences, which vary in seriousness based on the offender’s conduct and the harm caused. We ask if these offences are fit for purpose and, if not, what needs to change.

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- 2.1 We have been asked to review the serious road crimes offences in the *Crimes Act 1900* (NSW) (*Crimes Act*), including manslaughter, and the law concerning accessorial liability.
- 2.2 There were mixed views in preliminary submissions about whether these offences remain fit for purpose. Some argued the offences are outdated, do not meet

community expectations, and fail to deter offending behaviour.<sup>1</sup> Others considered these offences adequately cover the broad range of offending conduct that arises in serious road crimes.<sup>2</sup>

- 2.3 In this chapter, we seek your views on these offences. The chapter begins by explaining the structure of the driving offences that cause death or bodily harm, before describing their elements. It then describes other serious driving offences that do not involve death or injury. Next, the chapter asks if these offences should be consolidated into a single Act. Finally, the chapter sets out the law on accessorial liability and its relationship to serious road crimes and asks if new offences are needed.

## Offences involving death or bodily harm

- 2.4 For victims and their family members, and for the community more generally, the consequences of serious road crimes cannot be underestimated. As we explore further in chapter 6, these crimes can have a significant, lasting impact on people affected by them.
- 2.5 However, under the relevant legislation, these offences vary in seriousness. The relative seriousness depends on the conduct involved, including how risky that conduct is, and the type of harm caused.
- 2.6 The *Crimes Act* contains a hierarchy of offences for driving that causes death or bodily harm. The *Road Transport Act 2013 (NSW) (RTA)* includes some similar, related offences.
- 2.7 Manslaughter “stands at the very pinnacle” of the “structure of offences dealing with the occasioning of death through driving”.<sup>3</sup> It is followed by aggravated dangerous driving occasioning death, and then dangerous driving occasioning death.<sup>4</sup> Negligent driving occasioning death, an offence contained in the *RTA*, is considered relatively less serious because it involves negligent, as opposed to dangerous, conduct.<sup>5</sup>
- 2.8 Other serious road crime offences deal with different degrees of bodily harm:

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1. See, eg, Road Trauma Support Group NSW, *Preliminary Submission PRC72*, 1, 2, 5; G Proctor, *Preliminary Submission PRC81*, 1; F Gilroy, *Preliminary Submission PRC85*, 2.

2. See, eg, Local Court of NSW, *Preliminary Submission PRC82*, 3; NSW Bar Association, *Preliminary Submission PRC83*, 1; Aboriginal Legal Service (NSW/ACT) Ltd, *Preliminary Submission PRC88*, 1.

3. *R v Borkowski* [2009] NSWCCA 102 [58]. Our terms of reference do not extend to considering murder.

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

5. *Road Transport Act 2013 (NSW)* s 117(1)(a).

- Grievous bodily harm (GBH) is any permanent or serious disfiguring of a person. This includes the destruction of a foetus.<sup>6</sup>
  - Actual bodily harm (ABH) is any hurt or injury that interferes with the health or comfort of a person.<sup>7</sup> The harm does not need to be permanent, but it does need to be more than “merely transient or trifling”.<sup>8</sup>
- 2.9 Of the serious road crimes that involve GBH, aggravated dangerous driving occasioning GBH is the most serious. It is followed by dangerous driving occasioning GBH.<sup>9</sup> Negligent driving occasioning GBH, in the *RTA*, is considered less serious.<sup>10</sup>
- 2.10 There is only one serious road crime offence specifically involving ABH. This is the offence of causing any bodily harm by “wanton or furious” driving, or other misconduct, or by “wilful neglect”.<sup>11</sup>
- 2.11 The NSW Court of Criminal Appeal (CCA) has described this as a “rational, logical and cohesive” hierarchy of offences.<sup>12</sup> However, as we explore below, some preliminary submissions questioned whether the legislation provides a comprehensive and adequate response to the devastating, and often life-changing, consequences of road crime.

## Manslaughter

- 2.12 “Vehicular manslaughter” is commonly used to describe manslaughter involving a motor vehicle. However, there is no separate offence of vehicular manslaughter in NSW. Instead, the broad, general offence of manslaughter can be charged in some circumstances involving motor vehicles, which we describe below.<sup>13</sup>
- 2.13 It is difficult to state how many vehicular manslaughter charges are decided by NSW courts each year. There are no specific court statistics for this type of manslaughter.<sup>14</sup>

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6. *Crimes Act 1900* (NSW) s 4(1) definition of “grievous bodily harm”.

7. *R v Donovan* [1934] 2 KB 498, 509; *McIntyre v R* [2009] NSWCCA 305 [44].

8. *R v Overall* (1993) 71 A Crim R 170, 173–174.

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

10. *Road Transport Act 2013* (NSW) s 117(1)(b).

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

12. *R v Borkowski* [2009] NSWCCA 102 [56], citing *R v Buttsworth* [1983] 1 NSWLR 658, 660.

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

14. This is because there is no “law part code” specifically for vehicular manslaughter. See Judicial Commission of NSW, “Lawcodes” <<https://lawcodes.judcom.nsw.gov.au/>> (retrieved 25 October 2023).

- 2.14 At best, we can provide an estimate of finalised vehicular manslaughter charges that we have identified based on a range of sources.<sup>15</sup> Our research suggests that, at least, an estimated 58 such charges were finalised between 2016 and 2022. This includes all charges that were finalised by the courts, regardless of the outcome. Of the charges we identified, 35 charges were proven; 18 charges were withdrawn and there were findings of guilty on other offences; and 5 charges resulted in a not guilty outcome and acquittal.

## The elements of involuntary manslaughter

- 2.15 The *Crimes Act* defines manslaughter as “every other punishable homicide” that is not murder.<sup>16</sup> The maximum penalty for manslaughter is 25 years’ imprisonment.<sup>17</sup>
- 2.16 This review focuses on “involuntary manslaughter”, which does not require proof that the accused person intended to harm the victim.<sup>18</sup> This is different to murder. To prove that offence, the prosecution must establish either that the offender:
- intended to kill or inflict GBH, or
  - knew, at the time they committed the act that caused death, that their act would probably cause death or GBH.<sup>19</sup>

## The two categories of involuntary manslaughter

- 2.17 There are two categories of involuntary manslaughter:
- manslaughter by criminal negligence, and
  - manslaughter by unlawful and dangerous act.
- 2.18 Manslaughter by criminal negligence involves an extreme form of negligence, described as “gross” or “wicked”.<sup>20</sup> The prosecution must prove, beyond reasonable

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15. Our research involved reviewing data provided by the Courts, Tribunal and Service Delivery division, Department of Communities and Justice, which listed finalised manslaughter charges that were charged along with at least one serious road crime charge. We supplemented this list with information provided by the Office of the Director of Public Prosecutions, information in published case law, and the table of sentencing decisions prepared by the NSW Public Defenders: The Public Defenders, “Manslaughter: Motor Vehicle” <[www.publicdefenders.nsw.gov.au/Documents/manslaughter-motor-vehicle.pdf](http://www.publicdefenders.nsw.gov.au/Documents/manslaughter-motor-vehicle.pdf)> (retrieved 24 November 2023). We checked case details against JusticeLink, the Judicial Commission’s Judicial Information System and media reports.

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

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

18. *DPP (UK) v Newbury* [1977] AC 500.

19. *R v Crabbe* (1985) 156 CLR 464, 469–470.

20. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (online, 24 November 2023) [5-6230].



doubt, that the accused person had a duty of care towards the victim.<sup>21</sup> This is generally easy to satisfy in vehicular manslaughter cases as all drivers have a duty of care to other people on or near the road.<sup>22</sup>

- 2.19 The prosecution must also show that the accused person's act or omission:
- caused the victim's death<sup>23</sup>
  - was negligent, which means the accused person breached their duty of care (that is, they fell short of the standard of care that a reasonable person in their position would have exercised),<sup>24</sup> and
  - this was such a significant breach of their duty of care, and involved such a high risk of death or GBH, that it deserves criminal punishment.<sup>25</sup>
- 2.20 For manslaughter by unlawful and dangerous act, the prosecution must prove, beyond reasonable doubt, that:
- an act of the accused person caused the victim's death<sup>26</sup>
  - that act was unlawful, and
  - that act was dangerous, being an act that a reasonable person in the accused person's position would have known exposed another person to an appreciable risk of serious injury.<sup>27</sup>

### **Vehicular manslaughter by unlawful or dangerous act is rare**

- 2.21 Vehicular manslaughter is generally charged as manslaughter by criminal negligence, and not as manslaughter by unlawful and dangerous act. This is because the CCA held in 1991 that a breach of a "statutory or regularly prohibition" (such as traffic laws) will not be considered an "unlawful act" for these purposes.<sup>28</sup>
- 2.22 The CCA held that manslaughter by unlawful and dangerous act can only be charged in exceptional cases.<sup>29</sup> Examples include where an offender:

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21. *R v Bateman* (1927) 19 C App R 8, 10; *Burns v R* [2012] HCA 35, 246 CLR 334 [97], [107]; *Lane v R* [2013] NSWCCA 317 [59]–[62].

22. *Andrews v DPP (UK)* [1937] AC 576, 583; *R v Taktak* (1988) 14 NSWLR 226.

23. *Lane v R* [2013] NSWCCA 317 [63]–[64].

24. *Nydam v R* [1977] VR 430, 445.

25. *Nydam v R* [1977] VR 430, 445; *R v Taktak* (1988) 14 NSWLR 226, 247; *R v Lavender* [2005] HCA 37, 222 CLR 67 [127]–[130].

26. *Lane v R* [2013] NSWCCA 317 [63]–[64].

27. *Wilson v R* (1992) 174 CLR 313; *Burns v R* [2012] HCA 35, 246 CLR 334 [75]; *Lane v R* [2013] NSWCCA 317 [57].

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

29. *Davidson v R* [2022] NSWCCA 153 [192]–[194].

- deliberately drove through a fence to evade police, killing an 18 month-old child<sup>30</sup>
  - intentionally hit a victim with a car in the context of an argument,<sup>31</sup> and
  - chased another car erratically and at high speeds, attempting to recover money lost in a drug deal, which caused a fatal crash.<sup>32</sup>
- 2.23 Some CCA judges have questioned this restrictive approach to manslaughter by unlawful and dangerous act.<sup>33</sup> The CCA has not resolved the issue.<sup>34</sup>
- 2.24 In its preliminary submission, the Office of the Director of Public Prosecutions (ODPP) observed that the distinction between the two types of manslaughter can influence decisions about which offence to charge, and shape the prosecution case.<sup>35</sup> However, no type of manslaughter is regarded as more serious than another. Sentencing in each case will come down to the individual circumstances and seriousness of the case.<sup>36</sup>

### **Should there be a new offence of “vehicular homicide”?**

- 2.25 There is concern, particularly among victims’ groups, that too few manslaughter charges are brought in NSW in the context of motor vehicle collisions. This is one reason why the Road Trauma Support Group (RTSG) stated that road crimes involving death are treated as a “lesser species” of homicide.<sup>37</sup>
- 2.26 Some preliminary submissions argued that drivers who cause the death of another person, especially where drugs or alcohol are involved, should be charged with murder and/or manslaughter, and not with lesser serious road crime offences.<sup>38</sup>
- 2.27 Indeed, there may be a fine line between manslaughter and dangerous driving offences, particularly aggravated ones. Justice N Adams recently recognised that, “[i]n some cases, it may well be a matter of prosecutorial discretion” as to whether an accused person is charged with aggravated dangerous driving occasioning death or manslaughter by criminal negligence.<sup>39</sup>

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30. *Chandler v R* [2023] NSWCCA 59.

31. *Lees v R* [2019] NSWCCA 65.

32. *R v Cook* [2023] NSWCCA 9.

33. *R v Borkowski* [2009] NSWCCA 102 [3] (Simpson J); *R v Nguyen* [2010] VSC 442 [28].

34. *Davidson v R* [2022] NSWCCA 153 [198].

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

36. *R v Cook* [2023] NSWCCA 9 [137]; *R v Borkowski* [2009] NSWCCA 102 [49].

37. Road Trauma Support Group NSW, *Preliminary Submission PRC72*, 1, 2, 4.

38. See, eg, R Zarb, *Preliminary Submission PRC36*; Anonymous, *Preliminary Submission PRC69*. See also Road Trauma Support Group NSW and fiftyfive5, *The Unheard Trauma of Fatal Road Crimes in NSW* (2023) 84.

39. *Davidson v R* [2022] NSWCCA 153 [208] (N Adams J).

## Does NSW need a new offence of vehicular manslaughter/homicide?

- 2.28 To emphasise the seriousness of road crimes involving death, some preliminary submissions supported the creation of a specific offence of “vehicular manslaughter” or “vehicular homicide”. They argued it would:
- reflect the seriousness and consequences of road crime
  - meet community expectations of justice where a person dies because of a driver’s behaviour and actions
  - send a strong message that society will not tolerate these acts, and
  - provide clear and transparent criteria for police and the judiciary when dealing with serious road crime.<sup>40</sup>
- 2.29 No other Australian state or territory has a specific offence of vehicular manslaughter or homicide.
- 2.30 However, this issue has recently arisen in the Australian Capital Territory (ACT). In a 2023 inquiry into dangerous driving, the ACT Legislative Assembly’s Standing Committee on Justice and Community Safety (ACT Standing Committee) recommended that the ACT Government consider:
- renaming the ACT offence of culpable driving causing death<sup>41</sup> to “vehicular manslaughter”, and
  - bringing the maximum penalties for culpable driving causing death (14 years for a basic offence, 16 years for an aggravated offence) up to the maximum penalties for manslaughter (20 years for a basic offence, or 28 years for an aggravated offence).<sup>42</sup>
- 2.31 The ACT Standing Committee considered that “culpable driving causing death is effectively the same thing as manslaughter”, so renaming the offence would “better reflect what it is”. In its view, raising the penalty would align “with the nature of the offence” and its impact on victims and families.<sup>43</sup>
- 2.32 The ACT Government has agreed to consider the appropriateness of the offence’s name, the benefits of renaming it, and the current penalties for the offence in the context of the penalties for manslaughter.<sup>44</sup>

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

41. *Crimes Act 1900* (ACT) s 29(2)–(3).

42. Australian Capital Territory, Legislative Assembly, Standing Committee on Justice and Community Safety, *Inquiry into Dangerous Driving*, Report 16 (2023) [2.52], rec 2; *Crimes Act 1900* (ACT) s 29(2)–(3), s 15.

43. Australian Capital Territory, Legislative Assembly, Standing Committee on Justice and Community Safety, *Inquiry into Dangerous Driving*, Report 16 (2023) [2.52].

44. Australian Capital Territory Government, *Legislative Assembly Standing Committee on Justice and Community Safety Report No 16: Inquiry into Dangerous Driving*, Government Response (2023) 8.

## What should the elements and maximum penalties of any new offence be?

- 2.33 The elements of any such new offence, and the maximum penalty it attracts, would require careful consideration.
- 2.34 One preliminary submission proposed that a new offence of “vehicular homicide”, carrying the same maximum penalty as manslaughter (25 years’ imprisonment), should 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
  - (iv) the accused was driving under the influence of a drug (other than intoxicating liquor) or a combination of drugs which thereby very substantially impaired his/ her ability to drive,
- And** at least one of the following elements also apply:
- (v) 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
  - (vi) the accused was suspended, disqualified, unlicensed, or never held a licence; or
  - (vii) the accused was using a mobile telephone or other device at the time of the collision; or
  - (viii) the accused drove with a known or perceived medical condition that would impair their ability to drive.<sup>45</sup>
- 2.35 This would build on existing offences. The elements suggested above at (i)–(iv) are the current circumstances of aggravation for dangerous driving offences.<sup>46</sup>
- 2.36 In addition, the elements outlined at (vii) and (viii) can already form the basis of liability for dangerous driving occasioning death, as we discuss below. As well, courts may already take into account the factors outlined at (v) and (vi) when sentencing for dangerous driving offences.<sup>47</sup>
- 2.37 However, under this proposal, a more serious offence of vehicular homicide would apply where:
- one of the elements listed at (i)–(iv) is present, and

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45. Confidential, *Preliminary Submission PRC91*, attachment A.

46. *Crimes Act 1901* (NSW) s 52A(7).

47. See, eg, *R v Russell* [2022] NSWCCA 294 [88]; *Spark v R* [2012] NSWCCA 140 [44]; *Moanau v R* [2022] NSWCCA 85 [84].

- at least one of the elements at (v)–(viii) is also present.
- 2.38 The requirement that at least one element listed at (v)–(viii) be present would limit the application of the offence. Statistics suggest that these factors are relatively uncommon in fatal and serious road crashes. From 2018–2022, 31,801 drivers and motorcycle riders were involved in fatal and serious crashes in NSW. Of these:
- 2367 (7%) were professional drivers/riders, and
  - 741 (2.33%) were unlicensed, 347 (1.09%) had suspended licences and 24 (0.08%) had cancelled licences.<sup>48</sup>
- 2.39 Between 2018–2022, there were 778 fatal and serious injury crashes where the chronic or sudden illness of a motor vehicle driver or motorcycle rider was involved. This represented 4% of the total fatal and serious injury crashes.<sup>49</sup>
- 2.40 In the same period, there were 47 fatal and serious injury crashes involving a motor vehicle driver or motorcycle rider using a hand-held phone. This represented 0.15% of all such crashes.<sup>50</sup>
- 2.41 Despite this, there could be arguments in favour of targeting these specific circumstances. For instance, some may consider that professional drivers should be held to a higher standard than other drivers, and this should be reflected in a more serious offence with a higher maximum penalty.
- 2.42 Others may not support limiting the offence to the situations listed in (v)–(viii), and seek an offence of wider application.
- 2.43 Another consideration is whether the emphasis on licencing in this proposed offence would adversely affect some members of the community. For instance, the Aboriginal Legal Service (NSW/ACT) Ltd emphasised the geographical, cultural, economic and social barriers that inhibit Aboriginal people from accessing driver licences.<sup>51</sup>
- 2.44 It has also been suggested that the proposed offence of vehicular homicide should be tried and sentenced by the NSW Supreme Court. One preliminary submission argued this would “highlight the criminality and community expectations of the most serious road crime causing the death at the hand of another”.<sup>52</sup>

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48. Transport for NSW, *NSW Law Reform Commission Review of Serious Road Crime: Request for Additional Data* (October 2023) 1.

49. Transport for NSW, *NSW Law Reform Commission Review of Serious Road Crime: Request for Additional Data* (October 2023) 2.

50. Transport for NSW, *NSW Law Reform Commission Review of Serious Road Crime: Request for Additional Data* (October 2023) 1.

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

52. Confidential, *Preliminary Submission PRC91*, attachment A.

2.45 However, manslaughter charges are generally tried in the District Court. A Supreme Court direction requires prosecutors to initiate trials for all but the most serious offences (including murder and treason) in the District Court, unless the Chief Justice of the Supreme Court grants an exemption following an application in a particular case.<sup>53</sup>

### Question 2.1: Vehicular manslaughter

Should NSW have a new offence of “vehicular manslaughter/homicide”? If so, what should the elements and maximum penalty of any new offence be?

## Dangerous driving offences

2.46 Section 52A of the *Crimes Act* contains the dangerous driving offences. Listed in order of the maximum penalty of imprisonment, these offences are:

- aggravated dangerous driving occasioning death: 14 years<sup>54</sup>
- aggravated dangerous driving occasioning GBH: 11 years<sup>55</sup>
- dangerous driving occasioning death: 10 years,<sup>56</sup> and
- dangerous driving occasioning GBH: 7 years.<sup>57</sup>

2.47 Between 2016 and 2022, the following volumes of charges were finalised for these offences:

- aggravated dangerous driving occasioning death: 49
- aggravated dangerous driving occasioning GBH: 162
- dangerous driving occasioning death: 345, and
- dangerous driving occasioning GBH: 1162.<sup>58</sup>

## Dangerous driving occasioning death or GBH

2.48 These offences apply if a person drives a vehicle that is involved in an impact causing the death of, or GBH to, another person. “At the time of the impact”, the person must be driving the vehicle:

- under the influence of intoxicating liquor or of a drug

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53. Supreme Court of NSW, *Practice Note SC CL 2: Criminal Proceedings*, 27 June 2023 [20]–[24]; *Criminal Procedure Act 1986* (NSW) s 128(1)–(3).

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

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

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

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

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

- at a speed dangerous to another person or persons, or
  - in a manner dangerous to another person or persons.<sup>59</sup>
- 2.49 For the person’s driving to be dangerous, it must be, objectively, a “serious breach” of how a vehicle should be driven.<sup>60</sup> Beyond a lack of care, the driving must put the public at a degree of risk over and above that ordinarily associated with driving a motor vehicle.<sup>61</sup> Their driving must be “in a real sense potentially dangerous” to others.<sup>62</sup>
- 2.50 As these are strict liability offences, there is no mental element (for example, there is no requirement to prove the accused person knew their driving was dangerous or intended it to be dangerous).<sup>63</sup> However, the accused person will not be guilty if they held an honest and reasonable mistake about the facts that, if true, would mean they did not commit the crime. For example, if they honestly and reasonably, but mistakenly, believed it was safe for them to drive.<sup>64</sup>
- 2.51 It is a defence if the death or GBH caused by the impact was not in any way attributable to:
- the fact that the accused person was under the influence of intoxicating liquor or drugs, or
  - the speed or manner in which the vehicle was driven.<sup>65</sup>

### **Is the element of “at the time of impact” too restrictive?**

- 2.52 Generally, a person will not be guilty of dangerous driving if they were asleep, unconscious or experiencing medical symptoms that made their actions involuntary at the time of impact.<sup>66</sup> The person must be driving dangerously, voluntarily, at the time of the collision.<sup>67</sup>
- 2.53 However, someone may be driving dangerously if they drive while knowing (or if they ought to know) they have a significant risk of falling asleep or having a medical episode (such as an epileptic seizure).<sup>68</sup> If they fall asleep or experience a seizure, their prior period of voluntary dangerous driving may be “sufficiently

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

60. *McBride v R* (1966) 115 CLR 44, 50.

61. *Jiminez v R* (1992) 173 CLR 572, 579.

62. *McBride v R* (1966) 115 CLR 44, 49–50.

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

64. See, eg, *Parker v R* [2023] NSWCCA 234 [45]–[47].

65. *Crimes Act 1900* (NSW) s 52A(8).

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

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

68. *Jiminez v R* (1992) 173 CLR 572, 578; *Gillet v R* [2006] NSWCCA 370 [10].



contemporaneous” to the impact that the person may still be guilty (provided the other elements are satisfied).<sup>69</sup>

- 2.54 Difficulties can arise if the period of involuntary driving was prolonged. The ODP provided a recent example in which an accused person drove voluntarily for two minutes after self-administering medication above their prescribed dosage. This caused a medical episode, which resulted in the accused person driving in a state of automatism for 16 minutes before the impact occurred. The trial judge held that the short period of voluntary driving, before entering the state of automatism, was not “so nearly contemporaneous” with the impact to be considered “at the time of impact”.<sup>70</sup>
- 2.55 The ODP questioned how this principle can be justified where the person’s dangerous driving caused the impact that resulted in death or GBH.<sup>71</sup>
- 2.56 One option might be to provide that a person is guilty of dangerous driving if the impact is:
- caused by the dangerous driving, and
  - a reasonably foreseeable consequence of that driving.
- 2.57 Another approach, outlined below, could be to expand the list of circumstances that constitute dangerous driving.

### **Should the list of what constitutes dangerous driving be expanded?**

- 2.58 As noted above, the circumstances of dangerous driving include where a person drives under the influence of an intoxicating liquor or drugs, at a dangerous speed, or in a dangerous manner.
- 2.59 One preliminary submission suggested the following circumstances should be added to this list:
- (iv) the person 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 vehicle, to include truck, bus, taxi and ride share operators), or
  - (v) the person was suspended, disqualified, unlicensed, or never held a licence, or
  - (vi) the person was using a mobile telephone or other visible display device at the time of the collision, or
  - (vii) the person drove with a known or perceived medical condition that would impair their ability to drive.<sup>72</sup>

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69. *Jiminez v R* (1992) 173 CLR 572, 578.

70. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PRC77*, 3–4, citing *R v Lidgard* [2022] NSWDC 445 [43].

71. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PRC77*, 3–4.

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



- 2.60 The same preliminary submission proposed that these circumstances be included in a vehicular homicide offence. We discuss these circumstances, and provide statistics on how often they are involved in serious crashes, above.
- 2.61 It may be the case that the existing dangerous driving offences already cover some of these circumstances. In one case, for instance, an offender was convicted of two counts of dangerous driving causing GBH after his mobile phone use led to inattention at the time of the collision.<sup>73</sup> In another case, it was held that driving against medical advice, due to a history of seizures and blackouts, constituted dangerous driving.<sup>74</sup>
- 2.62 Opinions may differ on whether adding a specific circumstance of dangerous driving regarding mobile phone use is justified. In its 2020 report on the sentencing of repeat traffic offenders, the NSW Sentencing Council considered this reform option, but did not recommend it. The Council found there was not enough evidence about driver distraction and the risk of phone use to justify the change.<sup>75</sup>
- 2.63 A further consideration is whether some of these circumstances would be better expressed as circumstances of aggravation, if they are to be inserted into s 52A.<sup>76</sup> This might include, for instance, the driver’s status as a professional driver.

#### Question 2.2: Dangerous driving occasioning death or grievous bodily harm

- (1) Are the circumstances of dangerous driving (*Crimes Act 1900* (NSW) s 52A(1), s 52A(3)) appropriate? What, if any, circumstances should be added?
- (2) Does the law adequately deal with situations in which a person voluntarily drove dangerously before their actions became involuntary (and they were driving involuntarily at the time of impact)? If not, how could this be resolved?
- (3) Do any other elements of the dangerous driving offences (*Crimes Act 1900* (NSW) s 52A(1), s 52A(3)) require amendment? If so, what needs to change?

### Aggravated dangerous driving occasioning death or GBH

- 2.64 These offences require the prosecution to prove, beyond reasonable doubt, that the accused person committed an offence of dangerous driving occasioning death or GBH “in circumstances of aggravation”.<sup>77</sup>

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

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

75. NSW Sentencing Council, *Repeat Traffic Offenders*, Report (2020) [0.13], [2.23].

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

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

- 2.65 This is defined in s 52A(7) of the *Crimes Act* as any circumstances at the time of the impact occasioning death or GBH in which:
- (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).<sup>78</sup>

### **Should the expression “very substantially impaired” be changed?**

- 2.66 One preliminary submission suggested the expression “very substantially impaired” in s 52A(7)(d) should instead say “substantially impaired”. In the ODP’s view, the existing term is confusing and may make this circumstance unnecessarily hard to prove.<sup>79</sup>

### **Should the offence refer to a different speed limit?**

- 2.67 Another issue is whether the speed limit in s 52A(7)(b) needs to be reconsidered. The reference to exceeding the speed limit “by more than 45km/h” reflects the definition of a “high range speed offence” in the *RTA*.<sup>80</sup>
- 2.68 However, there may be an argument for referring to a lower speed limit. As Transport for NSW observed, “[s]peeding is consistently the single most significant contributor to road trauma”.<sup>81</sup> Of the 1540 fatalities in NSW between 2018–2022, 622 (40%) occurred in crashes where speeding was involved.<sup>82</sup> Each 1% increase in speed raises the risk of fatal crashes by 4% and the risk of serious crashes by 3%.<sup>83</sup>
- 2.69 Similar offences in other states capture lower levels of speeding. In Queensland, driving more than 40 km/h over the speed limit is an aggravating factor for the

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78. *Crimes Act 1900* (NSW) s 52A(7). The “prescribed concentration of alcohol” is a blood alcohol concentration of 0.15 grammes or more per 100 millilitres of blood or 210 litres of breath: s 52A(9).

79. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PRC77*, 4.

80. *Road Transport Act 2013* (NSW) s 237(1) definition of “high range speed offence”.

81. Transport for NSW, *NSW Law Reform Commission Review of Serious Road Crime: Request for Additional Data* (October 2023) 3.

82. Transport for NSW, *NSW Law Reform Commission Review of Serious Road Crime: Request for Additional Data* (October 2023) 2.

83. Transport for NSW, *NSW Law Reform Commission Review of Serious Road Crime: Request for Additional Data* (October 2023) 3, citing World Health Organization, “Road Traffic Injuries” (20 June 2022) <[www.who.int/news-room/fact-sheets/detail/road-traffic-injuries#:~:text=Speeding,in%20the%20serious%20crash%20risk.](http://www.who.int/news-room/fact-sheets/detail/road-traffic-injuries#:~:text=Speeding,in%20the%20serious%20crash%20risk.)> (retrieved 26 October 2023).

offence of dangerous operation of a vehicle.<sup>84</sup> In Western Australia (WA), driving more than 30km/hour over the speed limit is an aggravating factor for the offence of dangerous driving causing death or GBH.<sup>85</sup>

- 2.70 One preliminary submission suggested that the NSW offence should instead refer to a percentage over the speed limit that applies to the road in question. It argued that a percentage would more accurately reflect the risk posed by speeding, taking the speed limit and the factors that underpin it into account.<sup>86</sup>
- 2.71 It might be possible to include both tests. It could be a circumstance of aggravation where an accused person either drives above the speed limit by more than the specified km/h, or by more than a certain percentage over the speed limit applicable to the road.
- 2.72 However, others may consider that the current speed limit is appropriate, and that the circumstances of aggravation should be reserved for the most serious instances of dangerous driving.

### **Should other aggravating factors be included?**

- 2.73 Some other states and territories include other aggravating factors in similar offences. For instance, where:
- family violence was involved<sup>87</sup>
  - the accused person was taking part in an unlawful race or speed trial<sup>88</sup>
  - the accused person knew the other person was killed or injured, and left the scene<sup>89</sup>
  - the accused person was driving the vehicle knowing they were disqualified from holding or obtaining a driver's licence, or that their licence was suspended<sup>90</sup>
  - the accused person was driving the vehicle without the consent of the owner,<sup>91</sup> and
  - the offence was committed as part of a prolonged, persistent and deliberate course of "very bad driving".<sup>92</sup>

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84. *Criminal Code* (Qld) s 328A(4)(b)(ii), s 328A(6) definition of "excessive speeding".

85. *Road Traffic Act 1974* (WA) s 59(1)(b), s 49AB(1)(b).

86. G Proctor, *Preliminary Submission PRC81*, 2–3.

87. *Crimes Act 1900* (ACT) s 29(2)–(5), s 48C(1)(j).

88. *Criminal Code* (Qld) s 328A(4)(b)(iii).

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

90. *Criminal Law Consolidation Act 1935* (SA) s 19A(1)–(3), s 5AA(1a)(b). See also *Road Traffic Act 1974* (WA) s 59, s 49AB(1)(aa)–(ac).

91. *Road Traffic Act 1974* (WA) s 59, s 49AB(1)(a).

92. *Criminal Law Consolidation Act 1935* (SA) s 19A, s 5AA(1a)(c).

### Question 2.3: Circumstances of aggravation for dangerous driving

- (1) Should the element of “very substantially impaired” (*Crimes Act 1900* (NSW) s 52A(7)(d)) be amended to remove the word “very”? Why or why not?
- (2) Should the circumstance of aggravation related to speeding (*Crimes Act 1900* (NSW) s 52A(7)(b)) be amended? If so, what should the threshold be?
- (3) Are any other changes needed to the circumstances of aggravation? If additional circumstances are needed, how should they be expressed?

## Should there be offences of dangerous driving causing ABH?

- 2.74 We have heard concerns that there is a gap in the law regarding dangerous driving that causes ABH, short of GBH.
- 2.75 There is no *Crimes Act* offence of dangerous driving occasioning ABH. The only offence in the *Crimes Act* specifically dealing with driving that causes ABH is the offence of “injuries by furious driving etc”. This has a maximum penalty of 2 years’ imprisonment.<sup>93</sup> However, as we discuss below, there are concerns that this offence is outdated and inadequate.
- 2.76 Some offences in the *RTA* could also be charged in situations involving ABH. However, their maximum penalties are lower than the dangerous driving and furious driving offences. One preliminary submission argued that these *RTA* offences insufficiently “recognise and penalise a person who was driving the vehicle in a dangerous manner”.<sup>94</sup>
- 2.77 In particular, the *RTA* offence of driving on a road furiously, recklessly or at a speed or in a manner dangerous to the public has the following maximum penalties:
- first offence: 9 months’ imprisonment and/or 20 penalty units (\$2200)
  - second or subsequent offence: 12 months’ imprisonment and/or 30 penalty units (\$3300).<sup>95</sup>
- 2.78 The maximum penalty for the *RTA* offence of negligent driving that does not occasion death or GBH is even lower (10 penalty units (\$1100)).<sup>96</sup>
- 2.79 One preliminary submission suggested that the following new offences could be considered:
- dangerous driving occasioning ABH
  - dangerous driving that does not cause death or GBH, or

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

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

95. *Road Transport Act 2013* (NSW) s 117(2).

96. *Road Transport Act 2013* (NSW) s 117(1)(c).

- negligent driving causing ABH.<sup>97</sup>
- 2.80 Some other states have offences for driving that causes ABH, including:
- in the ACT, negligent driving occasioning ABH<sup>98</sup>
  - in South Australia (SA), causing harm by the use of a vehicle,<sup>99</sup> and
  - in WA, dangerous driving causing bodily harm or careless driving causing bodily harm.<sup>100</sup>

#### Question 2.4: Driving offences causing actual bodily harm

Should there be new offences to capture driving that causes actual bodily harm? If so, what should these new offences be, and what should be their maximum penalties?

## Wanton or furious driving

- 2.81 Section 53 of the *Crimes Act* provides:
- 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.
- 2.82 Courts have interpreted various elements of this offence as follows:
- “wanton driving”: “an unrestrained disregard of the consequences of the act so far as the lives or safety of other persons are concerned”,<sup>101</sup> or driving that is reckless<sup>102</sup>
  - “furious driving”: driving at a speed or in a manner that causes danger to the life of the driver or other road users – for example, driving down a road with victims sitting on the bonnet of the car has been found to be furious driving,<sup>103</sup> and
  - “wilful neglect”: intentionally breaching the standard of care towards other road users, expected of a reasonable driver.<sup>104</sup>

97. Confidential, *Preliminary Submission PRC91*, 2, 3.

98. *Road Transport (Safety and Traffic Management) Act 1999* (ACT) s 6(1)(c).

99. *Criminal Law Consolidation Act 1935* (SA) s 19A(3).

100. *Road Traffic Act 1974* (WA) s 59A, s 59BA.

101. *R v Bolton* (Unreported, DCNSW, Cooper DCJ, 14 May 1981) 2.

102. *Aslan v R* [2015] NSWDC 185 [40].

103. *Aslan v R* [2015] NSWDC 185 [25], [39]–[40].

104. *Re Muntton v West* [1927] 1 Ch 262, 267, 274 See also *R v Sheppard* [1981] AC 394.

- 2.83 The offence has been part of the criminal law of NSW since the precursor of the *Crimes Act* was first enacted in 1883.<sup>105</sup> It has not been substantially amended.
- 2.84 In 1994, a parliamentary committee on road safety recommended that this offence be repealed. The committee considered the offence was framed in “obsolete terms”.<sup>106</sup> As one preliminary submission observed, the offence does not even mention motor vehicles specifically.<sup>107</sup>
- 2.85 The committee also believed the offence would become redundant if offences of negligent driving causing death or GBH were enacted.<sup>108</sup> Specific penalties for negligent driving causing death or GBH were introduced in 1994.<sup>109</sup>
- 2.86 Despite this, the offence remains in the *Crimes Act* and is still being used. Between 2016 and 2022, 952 charges of this offence were finalised in NSW courts.<sup>110</sup>
- 2.87 It could be that this offence is being charged because, as discussed above, there are few alternatives where the injuries do not amount to GBH or death. Consideration could be given to repealing s 53 if new offences of dangerous driving causing ABH and/or negligent driving causing ABH were enacted.
- 2.88 Another issue for consideration is whether repealing s 53 would create a gap regarding horse riding. Of the 952 charges finalised for the offence in 2016–2022, 23 involved carriages or horseback riding.<sup>111</sup> The definition of “vehicle” for the purpose of dangerous driving offences includes “a horse-drawn vehicle”, but not horse riding.<sup>112</sup> The offence of negligent driving is limited to “motor vehicles”.<sup>113</sup>

### Question 2.5: Wanton or furious driving

Should the offence of “injuries by furious driving etc” (*Crimes Act 1900 (NSW)* s 53) be repealed or amended? What, if anything, should replace this offence if it is repealed?

105. *Criminal Law Amendment Act 1883 (NSW)* s 38. It was taken from an earlier UK Act: *Offences Against the Person Act 1861 (UK)* s 35, see *Aslan v R* [2015] NSWDC 185.

106. Parliament of NSW, Joint Standing Committee on Road Safety (Staysafe), *Death and Serious Injury on New South Wales Roads*, Report 25 (1994) [10.15].

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

108. Parliament of NSW, Joint Standing Committee on Road Safety (Staysafe), *Death and Serious Injury on New South Wales Roads*, Report 25 (1994) [10.15].

109. *Traffic (Negligent Driving Offences) Amendment Act 1994 (NSW)* sch 1.

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

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

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

113. *Road Transport Act 2013 (NSW)* s 117, s 4 definition of “motor vehicle”.

## Should there be a new mid or lower tier offence?

- 2.89 Another issue is whether new offences are needed to address situations in which a driver causes death or GBH, but their conduct does not reach the threshold of dangerous driving. There may be gaps in the legislative structure where this conduct:
- is more serious than negligent driving, or
  - occurs off road (and is not covered by the *RTA*).

### Is there a need for a new mid-tier offence?

- 2.90 Where the conduct causing death or GBH does not reach the threshold of dangerous driving, the offences of negligent driving occasioning death or GBH in the *RTA* may be available.<sup>114</sup>
- 2.91 In determining whether a person is guilty of negligent driving, “[t]he question is essentially whether the driver was exercising that degree of care which the ordinary prudent driver would exercise in all the circumstances”.<sup>115</sup> These circumstances include:
- the nature, conditions and use of the road on which the offence is alleged to have been committed
  - the amount of traffic that is actually, or that might reasonably be expected to be on the road, and
  - any obstructions or hazards on the road.<sup>116</sup>
- 2.92 The maximum penalties for negligent driving are considerably lower than the dangerous driving offences (discussed above). Negligent driving has a tiered penalty structure depending on the nature of the harm and whether the driver is a repeat offender:
- death: 18 months’ imprisonment and/or 30 penalty units (\$3300) (first offence); 2 years’ imprisonment and/or 50 penalty units (\$5500) (second or subsequent offence)
  - GBH: 9 months’ imprisonment and/or 20 penalty units (\$2200) (first offence); 12 months’ imprisonment and/or 30 penalty units (\$3300) (second or subsequent offence), or
  - neither death nor GBH: 10 penalty units (\$1100).<sup>117</sup>

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114. *Road Transport Act 2013* (NSW) s 117(1).

115. *DPP (NSW) v Yeo* [2008] NSWSC 953 [29]; *R v Buttsworth* [1983] 1 NSWLR 665, 672.

116. *Road Transport Act 2013* (NSW) s 117(3).

117. *Road Transport Act 2013* (NSW) s 117(1).



- 2.93 One preliminary submission observed there is a gap in the offence hierarchy for “offending of a higher threshold than ‘negligence’ but which falls short of ‘dangerous driving’”.<sup>118</sup> The submission suggested the option of adding a mid-tier offence for driving occasioning death, ABH and GBH. The submission suggested the offence could be expressed as “reckless driving”.<sup>119</sup>
- 2.94 In July 2023, SA passed legislation to create a new mid-tier indictable offence of causing death or serious harm by careless use of a vehicle or vessel.<sup>120</sup> It was introduced to “allow for a more appropriate penalty range for serious driving conduct linked to the death or serious harm of another, where the conduct has not met the higher threshold of dangerous driving”.<sup>121</sup>
- 2.95 Upon commencement, this new offence will provide that a person is guilty if they:
- drive a vehicle or operate a vessel without due care or attention or without reasonable consideration for any person, and
  - by that conduct, cause the death of or serious harm to another person.<sup>122</sup>
- 2.96 The maximum penalties for the new offence will sit between the more serious offence of causing death or harm by dangerous use of a vehicle or vessel,<sup>123</sup> and the offence of aggravated driving without due care causing death.<sup>124</sup>
- 2.97 Where a motor vehicle is used in the commission of the new offence, the maximum penalties will be:
- basic offence: 5 years’ imprisonment and licence disqualification for 1 year (or longer if the court orders),<sup>125</sup> and
  - aggravated offence: 7 years’ imprisonment and licence disqualification for 3 years (or longer if the court orders).<sup>126</sup>

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

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

120. *Statutes Amendment (Serious Vehicle and Vessel Offences) Act 2023* (SA) s 5, to commence 1 January 2024.

121. South Australia, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 30 November 2022, 1688–1689.

122. *Statutes Amendment (Serious Vehicle and Vessel Offences) Act 2023* (SA) s 5, to commence 1 January 2024.

123. *Criminal Law Consolidation Act 1935* (SA) s 19A, s 5AA(1a) (maximum penalty: 15 years’ imprisonment for the basic offence or life imprisonment for aggravated or subsequent offences, and licence disqualification of at least 10 years).

124. *Road Traffic Act 1961* (SA) s 45 (maximum penalty: 12 months’ imprisonment and 6 months’ licence disqualification).

125. *Statutes Amendment (Serious Vehicle and Vessel Offences) Act 2023* (SA) s 6(1) to commence 1 January 2024.

126. *Statutes Amendment (Serious Vehicle and Vessel Offences) Act 2023* (SA) s 6(2) to commence 1 January 2024.



## Should there be a new offence to capture conduct that occurs “off road”?

- 2.98 Another issue is whether there should be amendments to criminalise negligent driving that occurs on private land. The offence of negligent driving only covers driving that occurs on a “road”.<sup>127</sup> This includes “road related” areas, such as footpaths or nature strips adjacent to a road.<sup>128</sup> One preliminary submission observed this does not cover conduct that occurs on a rural property, creating a gap where the conduct does not reach the level of dangerous driving.<sup>129</sup>
- 2.99 However, a 2015 inquiry recommended against a new offence covering negligent driving occasioning death on private land for the following reasons:
- “the circumstances involved, including the activity, the place, and the people likely to be in the vicinity”, would make it extremely difficult to determine whether the driving on private land was negligent
  - criminalising negligent conduct “requires the most careful consideration”, particularly where the offence would apply only to conduct involving motor vehicles and not to other forms of conduct on private land, and
  - it would be impossible to exclude certain conduct on private land that “no one wants prosecuted”.<sup>130</sup>

### Question 2.6: Potential new offences for driving causing death or grievous bodily harm

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

## Failing to stop and assist

- 2.100 A person is guilty of the *Crimes Act* offence of failing to stop and assist after a vehicle impact causing death or GBH if:
- a vehicle being driven by them was involved in an impact occasioning the death of, or GBH to, another person
  - they knew, or ought reasonably to have known, that the vehicle was involved in an impact occasioning the death of, or GBH to, another person, and

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127. *Road Transport Act 2013* s 117(1), s 117(2), s 4(1) definition of “road”.

128. *Road Transport Act 2013* (NSW) s 4(1) definition of “road related area”, s 5.

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

130. W V Windeyer, *Review of Offences Relating to Fatal Car Accidents on Private Property* (2015) [8.1].

- they failed to stop and give any assistance that may have been necessary that was in their power to give.
- 2.101 The maximum penalties are 10 years’ imprisonment for offences involving death, and 7 years’ imprisonment for offences involving GBH.<sup>131</sup>
- 2.102 Between 2016–2022, there were 41 finalised charges of failing to stop and assist after a vehicle impact causing death, and 149 finalised charges of failing to stop and assist after a vehicle impact causing GBH.<sup>132</sup>
- 2.103 Fleeing the scene of a crash on foot has been found to be a failure to stop.<sup>133</sup> When the offence was introduced, the Minister said that “common-sense” should inform the level of assistance that drivers are expected to give. A driver is not expected to “perform first aid when they are not qualified to do so, or rescue someone from a burning car in dangerous circumstances”.<sup>134</sup>
- 2.104 This offence is limited to impacts causing death or GBH. It does not extend to impacts causing ABH. One preliminary submission argued that it should.<sup>135</sup>
- 2.105 If this offence were to be extended to include impacts causing ABH, consideration should be given to the relationship with the *RTA* offence of failing to stop and assist after a vehicle impact causing death or injury.<sup>136</sup> A person will be guilty of this offence if:
- a vehicle or horse being driven or ridden by the person on a road was involved in an impact occasioning the death of, or injury to, another person
  - the person knew, or ought reasonably to have known, that the vehicle or horse was involved in an impact occasioning injury to another person, and
  - the person failed to stop and give any assistance that may have been necessary and that was in their power to give.<sup>137</sup>
- 2.106 The maximum penalty for the *RTA* offence is 18 months’ imprisonment and/or 30 penalty units (\$3300) (first offence), or 2 years’ imprisonment and/or 50 penalty units (\$5500) (second or subsequent offence).<sup>138</sup>

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

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

133. *R v Cousley* [2018] NSWDC 112 [27], [30].

134. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 21 September 2005, 18124.

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

136. *Road Transport Act 2013* (NSW) s 146.

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

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

- 2.107 While the offences in the *Crimes Act* and the *RTA* are similar, the *RTA* offence extends to impacts causing “injury” more broadly, as opposed to GBH only. The *RTA* offence only requires the person to know (or to ought to know) that the impact caused injury (and not that it caused death or GBH). Another difference is that the *RTA* offence only applies to impacts that occur on a road (as defined).<sup>139</sup>
- 2.108 Another issue is whether these offences should extend beyond drivers. The ACT Standing Committee recommended that penalties for leaving the scene of an accident should cover passengers as well.<sup>140</sup> The committee observed that both drivers and passengers should stay at the scene until police arrive so that police can more effectively conduct investigations.<sup>141</sup> The ACT Government did not agree to this change, stating “it would fundamentally change the default nature and role of a passenger’s responsibility under the existing road transport legislation”.<sup>142</sup>

### Question 2.7: Failing to stop and assist

Are any reforms needed to the offence of failing to stop and assist after a vehicle impact causing death or grievous bodily harm (*Crimes Act 1900* (NSW) s 52AB)? If so, what should change?

## Police pursuits

- 2.109 For the offence of failing to stop and driving dangerously or recklessly in response to a police pursuit, the prosecution needs to prove, beyond reasonable doubt, that the accused person:
- was the driver of a vehicle
  - knew, ought reasonably to have known, or had reasonable grounds to suspect that police officers were pursuing the vehicle and they were required to stop
  - did not stop the vehicle, and
  - drove recklessly, or at a speed or in a manner dangerous to others.<sup>143</sup>
- 2.110 Between 2016 and 2022, 7743 charges of this offence were finalised.<sup>144</sup>

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139. *Road Transport Act 2013* (NSW) s 4 definition of “road”.

140. Australian Capital Territory, Legislative Assembly, Standing Committee on Justice and Community Safety, *Inquiry into Dangerous Driving*, Report 16 (2023) rec 13.

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

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

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

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

- 2.111 No issues about the elements of this offence were raised in preliminary submissions. However, there was some consideration of the maximum penalties, which we discuss in chapter 3.

### Question 2.8: Police pursuits

Are any reforms needed to the offence of failing to stop and driving recklessly or dangerously in response to a police pursuit (*Crimes Act 1900* (NSW) s 51B)? If so, what should change?

## Predatory driving

- 2.112 The offence of predatory driving applies where a person, while in pursuit of or travelling near another vehicle, engaged in a course of conduct that caused or threatened an impact involving the other vehicle. Unlike some other serious road crime offences, the person must have intended by that course of conduct to cause ABH to a person in the other vehicle.<sup>145</sup>
- 2.113 This offence was created in 1997 to “deal with the most serious incidents of road rage”.<sup>146</sup> The then Minister for Roads stated that, in some circumstances, predatory driving could be “akin to stalking with a motor vehicle”. An example may be where:
- a driver, perhaps in the course of a pursuit, in order to prevent another driver from completing a merging manoeuvre, swerves at the other driver’s vehicle, perhaps running it off the road. This is dangerous and life-threatening behaviour.<sup>147</sup>
- 2.114 This offence carries a maximum penalty of 5 years’ imprisonment.<sup>148</sup> Between 2016 and 2022, there were 288 finalised charges of this offence.<sup>149</sup>

### Should the offence cover conduct that does not cause or threaten impact?

- 2.115 An option may be to expand this offence to cover predatory driving that does not involve actual or threatened impact. This would reflect the view that “there are other ways of causing harm through predatory driving”.<sup>150</sup>
- 2.116 However, this conduct may already be covered by the menacing driving offences in the *RTA*.<sup>151</sup> These do not require proof of an impact or a threat of impact. Menacing

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

146. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 19 June 1997, 10720.

147. NSW, *Parliamentary Debates* Legislative Assembly, Second Reading Speech, 19 June 1999, 10720.

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

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

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

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

driving applies if a person drove a motor vehicle on a road in a manner that menaced another person:

- with the intention of menacing that other person, or
- if the person ought to have known that the other person might be menaced.<sup>152</sup>

2.117 Actions associated with tailgating have been held to be menacing for the purposes of this offence.<sup>153</sup> It is a defence if the person could not, in the circumstances, reasonably avoid menacing the other person.<sup>154</sup>

2.118 The menacing driving offences have lower maximum penalties than predatory driving (5 years' imprisonment).<sup>155</sup> For the offence involving an intention to menace, the maximum penalties range from 18 months' imprisonment and/or 30 penalty units (\$3300) (first offence) to 2 years' imprisonment and/or 50 penalty units (\$5500) (second or subsequent offence).<sup>156</sup>

2.119 For the menacing driving offence involving knowledge, the maximum penalties range from 12 months' imprisonment and/or 20 penalty units (\$2200) (first offence) to 18 months' imprisonment and/or 30 penalty units (\$3300) (second or subsequent offence).<sup>157</sup>

## Should the mental element be changed to recklessness?

2.120 Another suggestion is to change the existing mental element of predatory driving. One preliminary submission regarded the mental element of intention as "restrictive", and supported changing this to recklessness.<sup>158</sup> However, as noted above, the lesser offence of menacing driving captures situations in which the person "ought to have known" the other person might be menaced.

### Question 2.9: Predatory driving

Are any reforms needed to the offence of predatory driving (*Crimes Act 1900* (NSW) s 51A)? If so, what should change?

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

153. *Re Ho* [2006] NSWDC 72; *R v Davidson* [2021] NSWDC 164 [9], [53].

154. *Road Transport Act 2013* (NSW) s 118(4).

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

156. *Road Transport Act 2013* (NSW) s 118(1).

157. *Road Transport Act 2013* (NSW) s 118(2).

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

## Should there be a serious road crimes Act?

- 2.121 Some preliminary submissions suggested there should be new, standalone legislation specifically focused on serious road crimes.<sup>159</sup> This could involve moving the serious road crime offences from the *Crimes Act* to the new legislation. One preliminary submission argued that standalone legislation would “appropriately indicate the seriousness of these offences and reflect community expectations”.<sup>160</sup>
- 2.122 Consideration could also be given to shifting certain related *RTA* offences to this new legislation. Consolidating related offences in this way could assist to reduce complexity and set out the legislative hierarchy more clearly. It could provide an opportunity to review and amend related offences to remove any unnecessary duplication.
- 2.123 One preliminary submission suggested that a consolidation process may also provide an opportunity to introduce a “second and subsequent offence” provision.<sup>161</sup> Road crime offences in the *RTA* generally have higher maximum penalties for second or subsequent offences.<sup>162</sup> A “second or subsequent offence” is defined to include offences against the same provision, a former corresponding provision or an “equivalent offence”.<sup>163</sup> The *Crimes Act* does not have a similar provision defining the term, and there is only one serious road crime offence with a higher maximum penalty for a second or subsequent offence.<sup>164</sup> We discuss penalties in chapter 3.
- 2.124 Care would need to be taken to avoid any unintended consequences associated with restructuring the legislation. For instance, amendments may be required to avoid widening the jurisdiction of the Children’s Court by removing certain offences from the *RTA*, if this is not a desired outcome.<sup>165</sup> The Children’s Court does not generally have jurisdiction to hear or determine proceedings in respect of traffic offences under the road transport legislation, unless:
- the offence arose out of the same circumstances as another offence, and the young person is charged before the Children’s Court for the other offence, or

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159. Confidential, *Preliminary Submission PRC91*, 1; Road Trauma Support Group NSW, *Preliminary Submission PRC72*, 3; Confidential, *Preliminary Submission PRC76*, 3.

160. Confidential, *Preliminary Submission PRC91*, 1. See also Road Trauma Support Group NSW, *Preliminary Submission PRC72*, 3.

161. Confidential, *Preliminary Submission PRC91*, 5.

162. See, eg, *Road Transport Act 2013* (NSW) s 117(1), s 117(2), s 146(1).

163. *Road Transport Act 2013* (NSW) s 9(2).

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

165. But see NSW Law Reform Commission, *Penalty Notices*, Report 132 (2012) [12.81].

- at the time the offence was committed the child was not old enough to obtain a licence (that is, they were under 16 years old).<sup>166</sup>
- 2.125 We consider the jurisdiction of the Children’s Court further in chapter 5.
- 2.126 Another approach might be to restructure the existing *Crimes Act* offences into a new division of that Act.<sup>167</sup> This might lead to a more logical structure, as currently they are interspersed with unrelated offences in a division dealing generally with “acts causing danger to life or bodily harm”.<sup>168</sup>
- 2.127 If certain *RTA* offences were included in any such consolidation process, the question arises as to whether they should remain summary offences. In chapter 5, we raise the issue of whether one *RTA* offence, negligent driving occasioning death,<sup>169</sup> should remain a summary offence.

**Question 2.10: A new serious road crimes Act**

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

## Accessory liability

- 2.128 We have also been asked to consider whether the law of accessory liability is fit for purpose. Under this law, a person who helps or encourages another person to commit a crime, or to cover it up, can be held criminally responsible.
- 2.129 The accessory does not do the physical acts of this crime (that is, the “principal offence”) themselves. The other person (the “principal” or “primary” offender) commits the crime. However, the charge and maximum penalty for an accessory is often the same as for the principal offender.<sup>170</sup>

166. *Children (Criminal Proceedings) Act 1987* (NSW) s 28(2); *Road Transport (Driver Licensing) Regulation 2017* (NSW) cl 12(2). See also NSW Law Reform Commission, *Penalty Notices*, Report 132 (2012) [12.81].

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

168. *Crimes Act 1900* (NSW) div 6. Manslaughter is contained in a different division that deals with homicide: div 1.

169. *Road Transport Act 2013* (NSW) s 117(1)(a).

170. *R v Cramp* [1999] NSWCCA 324 [38]. See also *Crimes Act 1900* (NSW) pt 9.



- 2.130 Some preliminary submissions considered the law on accessorial liability to be appropriate.<sup>171</sup> Another saw it as “wholly inadequate” in the context of serious road crimes, and called for a stronger response when third parties contribute to driver behaviour resulting in death or serious harm.<sup>172</sup>

## Overview of the law on accessorial liability

- 2.131 There are three accessory offences – accessory before the fact; principal in the second degree (sometimes called accessory at the fact); and accessory after the fact.
- 2.132 The elements for the accessory offences come from the common law.<sup>173</sup> For each accessory offence, the prosecution must prove beyond reasonable doubt that the principal offence was committed.<sup>174</sup> Aside from this, the requirements for each offence differ.

### Accessory before the fact

- 2.133 This applies where a person encouraged or helped the principal offender before they committed the principal offence. Accessories before the fact are not present when the principal offence occurs.<sup>175</sup>
- 2.134 In summary, the prosecution must prove, beyond reasonable doubt, that the accused person:
- intentionally and actively encouraged the primary offender to commit the principal crime, or helped them prepare to commit the crime, with the intention that that crime would be committed,<sup>176</sup> and
  - knew all the essential facts of the principal offence,<sup>177</sup> including the offender’s intention.<sup>178</sup>

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171. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PRC77*, 6; NSW Bar Association, *Preliminary Submission PRC83*, 1; Aboriginal Legal Service (NSW/ACT) Ltd, *Preliminary Submission PRC88*, 1.

172. Road Trauma Support Group NSW, *Preliminary Submission PRC72*, 3.

173. See *Quinn v R* [2023] NSWCCA 229 [103].

174. *Giorgianni v R* (1985) 156 CLR 473, 491. A person can still be an accessory if the principal is acquitted: *Schultz v Pettitt* (1980) 25 SASR 427, 438.

175. *Osland v R* [1998] HCA 75, 197 CLR 316 [71].

176. *Giorgianni v R* (1985) 156 CLR 473, 493; *R v Phan* [2001] NSWCCA 29, 53 NSWLR 480 [69].

177. *Giorgianni v R* (1985) 156 CLR 473, 503–505.

178. *R v Stokes* (1990) 51 A Crim R 25, 38.



2.135 The accused person will not be guilty if they “withdrew” from the offence, or explicitly took back their encouragement or help, and took all reasonable actions to undo their participation before the crime was committed.<sup>179</sup>

2.136 The maximum penalty is the same as for the principal offence.<sup>180</sup>

### **Principal in the second degree**

2.137 This applies when an accused person did not commit the physical acts constituting the offence but:

- was present when the principal offence was committed
- intentionally and actively helped or encouraged the principal offender to commit the crime, and
- knew all the essential facts of the principal offence, including the principal offender’s intention.<sup>181</sup>

2.138 The maximum penalty is the same as for the principal offence.<sup>182</sup>

### **Accessory after the fact**

2.139 This covers situations where the principal offender had already committed the offence and:

- the accused person intentionally and actively helped the principal offender avoid criminal justice,<sup>183</sup> and
- they knew the essential facts of the principal offence, including the principal offender’s intention.<sup>184</sup>

2.140 For instance, this could involve driving the principal offender away from the crime scene or helping them get rid of incriminating evidence.<sup>185</sup>

2.141 The *Crimes Act* provides for a maximum penalty of 5 years’ imprisonment for accessories after the fact to serious indictable offences (that is, indictable offences punishable by imprisonment for life or for a term of 5 years or more).<sup>186</sup>

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179. *Dickson v R* [2017] NSWCCA 78, 94 NSWLR 476 [93]; *White v Ridley* (1978) 140 CLR 342, 348.

180. *Crimes Act 1900* (NSW) s 345, s 346, s 351, s 351B(1).

181. *Giorgianni v R* (1985) 156 CLR 473, 493.

182. *Crimes Act 1900* (NSW) s 345, s 346, s 351, s 351B(1).

183. *R v Levy* [1912] 1 KB 158, 161. See *Ewan v R* [2020] NSWCCA 85 [30].

184. *Ewan v R* [2020] NSWCCA 85 [33]; *R v Levy* [1912] 1 KB 158, 161.

185. *R v Holley* [1963] 1 WLR 199; *R v Stanford* [2016] NSWSC 1174 [3]; *Ewan v R* [2020] NSWCCA 85 [30]–[31]; *R v Levy* [1912] 1 KB 158, 161.

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

## Accessorial liability in the context of serious road crime

- 2.142 Accessorial liability charges do not often arise, even in other contexts. Overall, only 60 charges of accessorial liability offences were finalised between 2016 and 2022.<sup>187</sup> These statistics do not include the specific accessory offences for certain treason-related offences, murder, robbery with arms or in company, and kidnapping.<sup>188</sup>
- 2.143 We heard that accessorial liability charges are especially rare in the context of serious road crime offences.<sup>189</sup> In particular, we are not aware of any published decisions involving an accessory after the fact to a serious road crime.
- 2.144 However, accessorial liability could be relevant to serious road crimes offences in some situations. For instance, if someone encouraged another person to drive under the influence of alcohol, they could be an accessory to that offence.<sup>190</sup> The High Court of Australia has also held that someone who helps or encourages another person to drive dangerously can be responsible as an accessory if the vehicle causes death or GBH.<sup>191</sup>
- 2.145 Other offences may also be relevant in some situations involving serious road crimes. For instance, a passenger may be charged with the offence of concealing a serious indictable offence (such as manslaughter).<sup>192</sup> This applies where an adult:
- knew or believed that a serious indictable offence was committed by another person
  - knew or believed that they had information that might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for that offence, and
  - failed without reasonable excuse to bring that information to the attention of a member of the NSW Police Force or other appropriate authority.<sup>193</sup>
- 2.146 The maximum penalty for this offence ranges from 2 to 5 years' imprisonment, depending on the maximum penalty of the serious indictable offence in question.<sup>194</sup>

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187. NSW Bureau of Crime Statistics and Research, reference st23-22931, table 1.

188. *Crimes Act 1900* (NSW) s 348, s 349.

189. Local Court of NSW, *Preliminary Submission PRC82*, 4; NSW Bar Association, *Preliminary Submission PRC83*, 1; NSW Office of the Director of Public Prosecutions, *Preliminary Submission PRC77*, 6.

190. *R v Cramp* [1999] NSWCCA 324 [98].

191. *Giorgianni v R* (1985) 156 CLR 473, 478.

192. *Crimes Act 1900* (NSW) s 316, see Local Court of NSW, *Preliminary Submission PRC86*, 3.

193. *Crimes Act 1900* (NSW) s 316(1).

194. *Crimes Act 1900* (NSW) s 316(1).

- 2.147 Some situations involving multiple people may be covered by the offence of joint criminal enterprise. This can arise where two or more people agreed to commit a crime, and then followed through with it.<sup>195</sup> Everyone who agreed will be responsible for the physical acts of the crime as a primary offender, even if they did not do those acts themselves.<sup>196</sup>
- 2.148 For example, joint criminal enterprise to manslaughter has been found where:
- A driver and a passenger pursued a car at a high speed to try and intimidate one of the passengers for financial gain, causing a fatal collision.<sup>197</sup>
  - One of three vehicles involved in a street race crashed into another vehicle, killing two people. All three drivers were speeding excessively, and at least one driver had alcohol and cannabis in his system.<sup>198</sup>

### **Are new offences needed?**

- 2.149 There is a view that the law does not adequately capture non-driver behaviour that enables or encourages drivers to engage in serious road crimes. In particular, the RTSG questioned whether the law responds adequately when non-drivers (such as passengers) contribute to driver behaviour that results in death or serious injury.<sup>199</sup>
- 2.150 We received suggestions that new offences are required to cover situations in which:
- a person encourages a driver to carry out dangerous acts (for example, bonnet surfing or recording criminal acts for social media)
  - passengers do not attempt to prevent a driver who is under the influence from driving
  - adults ignore their children's illegal behaviour, or
  - the owner of a vehicle permits a driver to use a vehicle, while knowing the driver is unlicensed, disqualified or suspended.<sup>200</sup>

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195. *McAuliffe v R* (1995) 183 CLR 108, 114; *Miller v R* [2016] HCA 30, 259 CLR 380.

196. *R v Tangye* (1997) 92 A Crim R 545, 557; *Osland v R* [1998] HCA 75, 197 CLR 361 [73].

197. *R v Butler* [2021] NSWDC 666 [14].

198. *R v Borkowski* [2009] NSWCCA 102 [59].

199. Road Trauma Support Group NSW, *Preliminary Submission PRC72*, 2, 3.

200. Confidential, *Preliminary Submission PRC91*, 2; Road Trauma Support Group NSW, *Preliminary Submission PRC72*, 2.

### **Question 2.11: Accessorial liability for serious road crime offences**

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

# 3. Penalties

## In brief

In this chapter, we ask if the maximum penalties and the licence disqualification regime for serious road crimes are appropriate. We also seek your views on whether these offences should have mandatory minimum sentences.

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- 3.1 This chapter considers the maximum penalties for the serious road crime offences. In preliminary submissions, opinions differed on whether these maximum penalties should increase.
- 3.2 Some preliminary submissions considered that the maximum penalties were appropriate and provided enough scope for courts to deal with a broad range of

offending behaviour.<sup>1</sup> However, some road crime victims and other members of the public thought the maximum penalties were inadequate, particularly for offences involving death.<sup>2</sup> Others expressed concern that the actual sentences imposed did not approach the maximum.<sup>3</sup>

- 3.3 To further inform discussion, this chapter compares the NSW maximum penalties with the maximum penalties for similar offences in other Australian states and territories. We also outline the sentencing outcomes for serious road crime offences in the *Crimes Act 1900* (NSW) (*Crimes Act*), drawing on data supplied by the NSW Bureau of Crime Statistics and Research and the Judicial Commission’s Judicial Information Research System (JIRS). For comparative purposes, we also set out the outcomes for some related offences in the *Road Transport Act 2013* (NSW) (*RTA*).
- 3.4 The glossary to this consultation paper, set out at appendix B, contains a list of relevant sentencing options that courts can consider. It also explains some of the statistical terms and concepts used throughout this chapter.
- 3.5 We also invite comment on some related reform options that were raised in preliminary submissions. This includes suggestions about changing the licence disqualification regime and introducing mandatory minimum sentences.

## What is a “maximum penalty”?

- 3.6 The maximum penalty for an offence is the highest penalty a court may impose for that offence. The offence’s maximum penalty is an important guidepost that courts consider in the sentencing process.<sup>4</sup> However, as we outline in chapter 4, other sentencing principles and factors are also important.
- 3.7 Maximum penalties are set out in legislation. They express the parliament’s views about how serious the offence is.<sup>5</sup>

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1. Law Society of NSW, *Preliminary Submission PRC59*, 1; NSW Bar Association, *Preliminary Submission PRC83* [5]; Aboriginal Legal Service (NSW/ACT) Ltd, *Preliminary Submission PRC88*, 1; NSW Office of the Director of Public Prosecutions, *Preliminary Submission PRC77*, 6; Local Court of NSW, *Preliminary Submission PRC82*, 3–4. See also NSW Sentencing Council, *Standard Non-Parole Periods for Dangerous Driving Offences*, Report (2011) 39.
  2. T S, *Preliminary Submission PRC04*, 1; Anonymous, *Preliminary Submission PRC69*, 1; G Proctor, *Preliminary Submission PRC81*, 2; Victims of Crime Assistance League (Hunter), *Preliminary Submission PRC84*, 3.
  3. Anonymous, *Preliminary Submission PRC01*, 2; T Blake, *Preliminary Submission PRC69*, 2; Road Trauma Support Group NSW, *Preliminary Submission PRC72*, 1–2, 3; Victims of Crime Assistance League (Hunter), *Preliminary Submission PRC84*, 3.
  4. *Muldock v R* [2011] HCA 39, 244 CLR 120 [27].
  5. *R v H* (1980) 3 A Crim R 53, 65; *R v Moon* [2000] NSWCCA 534 [67].

- 3.8 The maximum penalty is not intended to be imposed in all cases. The *Crimes (Sentencing Procedure) Act 1999* (NSW) allows a court to impose a penalty that is less than the maximum.<sup>6</sup> It is not necessarily concerning if an offence does not regularly attract the maximum penalty. This is because maximum penalties are reserved for cases in which the nature of the crime and the circumstances of the offender are so serious that they justify the maximum penalty. This does not mean, however, that the maximum penalty can only be applied to the worst possible case imaginable.<sup>7</sup>
- 3.9 Parliament can legislate to increase a maximum penalty if there are concerns that it is too lenient. Increases in the maximum penalty can reflect changing community standards about the appropriate sentence for that offence. 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.<sup>8</sup>

## Considerations when reviewing maximum penalties

- 3.10 A range of considerations may inform views on whether maximum penalties are appropriate. In this section, we set out two key considerations that were highlighted in preliminary submissions.

### Are the maximum penalties an effective deterrent?

- 3.11 An important question is whether the current maximum penalties are sufficient to deter people from committing serious road crimes. Views differ on this question.
- 3.12 Some preliminary submissions stated that the current maximum penalties provide a sufficient deterrent.<sup>9</sup> The NSW Bar Association argued that increasing maximum penalties would not meaningfully deter serious road crime offences, particularly in cases that do not involve planning, such as those involving momentary inattention.<sup>10</sup>

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6. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21.

7. *R v Kilic* [2016] HCA 48, 259 CLR 256 [18]–[20].

8. *Muldrock 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.

9. See, eg, NSW Bar Association, *Preliminary Submission PRC83* [6]; M I, *Preliminary Submission PRC02*, 1.

10. NSW Bar Association, *Preliminary Submission PRC83* [6].

- 3.13 Indeed, some studies suggest that increasing maximum penalties for offences generally does not produce a corresponding increase in the deterrent effect.<sup>11</sup> In a recent review of sentencing of repeat traffic offenders, the NSW Sentencing Council did not recommend increasing maximum penalties for serious road crime offences. The Council instead suggested options beyond the criminal law that could address the road toll more effectively.<sup>12</sup>
- 3.14 However, there may be a strong view in the community that more should be done to deter road crime and that increasing the maximum penalties should form part of this response. Some preliminary submissions argued that more severe penalties are needed to act as a deterrent.<sup>13</sup> For instance, the Victims of Crime Assistance League (Hunter) (VOCAL) and the Road Trauma Support Group (RTSG) submitted that the existing maximum penalties are inadequate to effectively deter serious road crimes.<sup>14</sup> In VOCAL's view, this contributed to recidivism.<sup>15</sup>

### **Would an increase have any unintended consequences?**

- 3.15 Another consideration is whether increasing maximum penalties could have unintended consequences for disadvantaged groups. For instance, Youth Justice NSW raised concerns that increasing maximum penalties could increase both the number of young people (including Aboriginal young people) in youth detention, and the negative life outcomes that this entails.<sup>16</sup>
- 3.16 An increase to the maximum penalty for these offences could also affect progress towards the Closing the Gap targets for reducing the youth and adult incarceration rates for Aboriginal people.<sup>17</sup>
- 3.17 Aboriginal people comprise 3.4% of the population in NSW.<sup>18</sup> As the table below shows, Aboriginal people are disproportionately over-represented in the finalised

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11. D Ritchie, *Does Imprisonment Deter? A Review of the Evidence*, Sentencing Matters (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.

12. NSW Sentencing Council, *Repeat Traffic Offenders*, Report (2020) [1.57]–[1.65].

13. See, eg, Anonymous, *Preliminary Submission PRC01*, 1; Road Trauma Support Group NSW, *Preliminary Submission PRC72*, 2; Victims of Crime Assistance League (Hunter), *Preliminary Submission PRC84*, 3.

14. Victims of Crime Assistance League (Hunter), *Preliminary Submission PRC84*, 4; Road Trauma Support Group, *Preliminary Submission PRC72*, 2.

15. Victims of Crime Assistance League (Hunter), *Preliminary Submission PRC84*, 4.

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

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

18. Australian Bureau of Statistics, "New South Wales: Aboriginal and Torres Strait Islander Population Summary" (released 1 July 2022) <[www.abs.gov.au/articles/new-south-wales-aboriginal-and-torres-strait-islander-population-summary](http://www.abs.gov.au/articles/new-south-wales-aboriginal-and-torres-strait-islander-population-summary)> (retrieved 27 November 2023).



charges for each of the serious road crime offences. In light of this, the impact of any increase in maximum penalties needs to be considered carefully.

**Table 3.1: Finalised charges by Aboriginality of defendant, 2016–2022<sup>19</sup>**

Offence	Aboriginal	Non-Aboriginal	Unknown	Total
Dangerous driving occasioning death	21 (9%)	149 (63%)	68 (29%)	238
Aggravated dangerous driving occasioning death	6 (14%)	31 (70%)	7 (16%)	44
Dangerous driving occasioning grievous bodily harm (GBH)	70 (12%)	332 (58%)	166 (29%)	568
Aggravated dangerous driving occasioning GBH	13 (12%)	73 (67%)	23 (21%)	109
Injuries by furious driving etc	81 (18%)	262 (58%)	108 (24%)	451
Failing to stop and assist after vehicle impact causing death or GBH	20 (18%)	82 (75%)	8 (7%)	110
Predatory driving	32 (39%)	49 (59%)	2 (2%)	83
Failing to stop and driving dangerously or recklessly in response to a police pursuit	2553 (44%)	3068 (53%)	150 (3%)	5771

Source: NSW Bureau of Crime Statistics and Research, reference st23-22811, table 3

## Serious road crime offences involving death

3.18 As explained in chapter 2, the *Crimes Act* includes a range of serious road crime offences causing death. Listed in order of maximum penalty, these are:

- manslaughter: 25 years' imprisonment<sup>20</sup>
- aggravated dangerous driving occasioning death: 14 years' imprisonment,<sup>21</sup> and
- dangerous driving occasioning death: 10 years' imprisonment.<sup>22</sup>

19. *Crimes Act 1900* (NSW) s 52A(1), a 52A(2), s 52A(3), s 52A(4), s 53, s 52AB, s 51A, s 51B.

20. *Crimes Act 1900* (NSW) s 18(1)(b), s 24.

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

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

- 3.19 Although not the focus of this review, the offence of negligent driving occasioning death in the *RTA* has a lower maximum penalty. This reflects the lesser seriousness of the conduct element of offence:
- first offence: 18 months' imprisonment and/or 30 penalty units (\$3,300), and
  - second or subsequent offence: 2 years' imprisonment and/or 50 penalty units (\$5,500).<sup>23</sup>
- 3.20 In preliminary submissions, some victims and other individuals considered that all road crime offences causing death should have the same maximum penalty as manslaughter. These submissions argued that killing a person with a vehicle should not be treated differently to killing a person by other means, as the impact and grief are the same.<sup>24</sup> The RTSG commented that the current system places “far too little value on human life lost as a direct consequence of serious road crimes, particularly when compared to other homicides and serious criminal offences”.<sup>25</sup>
- 3.21 VOCAL noted that dangerous driving occasioning death, aggravated dangerous driving occasioning death and manslaughter all involve involuntary killing. It advocated for increased maximum penalties for these dangerous driving offences, although did not have a view on what these should be. VOCAL considered that an increase would improve deterrence and offender accountability, and better align with community expectations.<sup>26</sup>
- 3.22 Others considered that the maximum penalties allow courts enough discretion to reflect the level of intention and the risk associated with the conduct covered by each offence.<sup>27</sup>

## How do these maximum penalties compare?

### Examples of other NSW offences involving death

- 3.23 The maximum penalties for dangerous driving offences are lower than for some other offences involving death in the *Crimes Act*. These include the offences of:
- murder: life imprisonment,<sup>28</sup> and

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23. *Road Transport Act 2013* (NSW) s 117(1)(a).

24. See, eg, G Proctor, *Preliminary Submission PRC81*, 1; Road Trauma Support Group NSW, *Preliminary Submission PRC72*, 1, 2.

25. Road Trauma Support Group NSW, *Preliminary Submission PRC72*, 2.

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

27. Bar Association of NSW, *Preliminary Submission PRC83* [5]; NSW Office of the Director of Public Prosecutions, *Preliminary Submission PRC77*, 6.

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

- assault causing death: 20 years' imprisonment, or 25 years' imprisonment if the accused person was intoxicated.<sup>29</sup>
- 3.24 Unlike these offences, dangerous driving offences do not involve an intention to harm the victim.<sup>30</sup> This goes some way to explaining the differences in maximum penalties.

### **Maximum penalties in other states and territories**

- 3.25 One way of assessing the maximum penalties of serious road crimes that cause death in NSW is to compare these with similar offences in other states and territories. While we have selected offences with similar elements for the purpose of this comparison, it is important to keep in mind that there are often differences between these offences. For this comparison, we have focused on terms of imprisonment. However, most offences also include licence disqualification periods.
- 3.26 The maximum penalties for serious road crime offences involving death in NSW are broadly consistent with similar offences in other Australian states and territories, although NSW is at the lower end of the range for some offences.
- 3.27 Across Australia, the maximum penalties of imprisonment for manslaughter range from 20 years to life.<sup>31</sup> This compares to the NSW maximum penalty of 25 years' imprisonment.<sup>32</sup>
- 3.28 The maximum penalty for dangerous driving occasioning death in NSW (10 years' imprisonment) is within the range found in other states and territories. The maximum penalty of imprisonment for similar offences in several other states is also 10 years.<sup>33</sup>
- 3.29 However, in South Australia (SA) the maximum penalty for the offence of causing death by driving a vehicle culpably, in a negligent manner, recklessly, or at a dangerous speed or in a dangerous manner is 15 years' imprisonment for a first or basic offence, or life imprisonment for an aggravated or subsequent offence.<sup>34</sup>
- 3.30 In the Australian Capital Territory (ACT), the offence of culpable driving causing death has a maximum penalty of 14 years' imprisonment, with 16 years for the

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29. *Crimes Act 1900* (NSW) s 25A(1), s 25A(2).

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

31. *Crimes Act 1900* (ACT) s 15(2) (20 years), s 15(3), s 48A(1)–(2), s 48C (28 years for an aggravated offence); *Criminal Code* (Qld) s 310 (life); *Criminal Law Consolidation Act 1935* (SA) s 13 (life); *Criminal Code* (WA) s 280(1) (life); *Criminal Code Act 1983* (NT) s 160, s 161 (life); *Criminal Code* (Tas) s 159 (21 years).

32. *Crimes Act 1900* (NSW) s 18(1)(b), s 24.

33. *Crimes Act 1958* (Vic) s 319(1); *Criminal Code* (Qld) s 328A(4)(a); *Road Traffic Act 1974* (WA) s 59; *Criminal Code Act 1983* (NT) s 174F(1).

34. *Criminal Law Consolidation Act 1935* (SA) s 19A(1).

aggravated offence.<sup>35</sup> As noted in chapter 2, the ACT Government recently agreed to consider whether these maximum penalties are appropriate.<sup>36</sup>

- 3.31 There is more variation in maximum penalties for aggravated offences. The NSW offence of aggravated dangerous driving occasioning death has a maximum penalty of 14 years' imprisonment. In other states and territories, the maximum penalties for comparable offences range from 14 years to life imprisonment.<sup>37</sup>
- 3.32 The maximum penalty for negligent driving occasioning death in NSW is broadly consistent with comparable offences in other states and territories. The maximum penalties of imprisonment range from 1 to 3 years, and most offences also include maximum fine amounts.<sup>38</sup>

## Sentencing outcomes for offences involving death in NSW

### Vehicular manslaughter

- 3.33 When considering sentencing outcomes for vehicular manslaughter, it is important to recognise that the maximum penalty for the general offence of manslaughter (25 years' imprisonment) is rarely imposed. Justice N Adams recently identified that the maximum penalty has only been applied in one case since sentencing statistics have been kept on JIRS.<sup>39</sup> This 2008 case involved the sexual assault and death of a child, and the defendant's subjective circumstances did not justify a lesser sentence.<sup>40</sup>
- 3.34 However, almost all proven court appearances for manslaughter result in a sentence of imprisonment. Between 2016 and 2022, 96% of all proven court appearances where manslaughter was the principal, or most serious, offence resulted in a sentence of imprisonment.<sup>41</sup> In this period, the average head sentence

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35. *Crimes Act 1900* (ACT) s 29(2), s 29(3).

36. Australian Capital Territory Government, *Legislative Assembly Standing Committee on Justice and Community Safety Report No 16: Inquiry into Dangerous Driving*, Government Response (2023) rec 2, 8.

37. *Criminal Code* (Qld) s 328A(4) (14 years); *Crimes Act 1900* (ACT) s 29(3) (16 years); *Road Traffic Act 1974* (WA) s 59(3) (20 years); *Criminal Law Consolidation Act 1935* (SA) s 19A(1) (15 years for a first offence or life for an aggravated or subsequent offence).

38. *Transport Operations (Road Use Management) Act 1995* (Qld) s 83 (1 year or 80 penalty units); *Road Traffic Act 1961* (SA) s 45(1)–(3)(a) (1 year); *Traffic Act 1925* (Tas) s 32(2A) (2 years' imprisonment and 10 penalty units for a first offence or 3 years' imprisonment and 20 penalty units for a subsequent offence); *Traffic Act 1987* (NT) s 30B(1) (2 years' imprisonment or 60 penalty units); *Road Transport (Safety and Traffic Management) Act 1999* (ACT) s 6(1)(a) (2 years' imprisonment and/or 200 penalty units); *Road Traffic Act 1974* (WA) s 59BA (3 years' imprisonment or 720 penalty units).

39. *Chandler v R* [2023] NSWCCA 59 [99]–[101] (Na).

40. *Clare v R* [2008] NSWCCA 30 [48].

41. NSW Bureau of Crime Statistics and Research, reference kf23-22320, table 3a.

for proven principal offences of manslaughter, overall, at first instance was 8 years and 2 months imprisonment.<sup>42</sup>

- 3.35 As we discuss in chapter 2, it is difficult to state precisely how many criminal proceedings for manslaughter involve vehicular manslaughter. However, we identified 26 proven court appearances for manslaughter, with charges finalised between 2016–2022, that could be described as vehicular manslaughter.<sup>43</sup> Twenty-five resulted in terms of imprisonment, while one involved detention in a mental health facility.<sup>44</sup>
- 3.36 While comparisons are difficult, the sentencing outcomes from our sample are slightly higher than sentencing outcomes for manslaughter overall. Across the 25 sentences of imprisonment we identified, the average head sentence was 9 years and 2 months at first instance.<sup>45</sup>
- 3.37 Some of these sentences were increased or decreased on appeal by the NSW Court of Criminal Appeal (CCA). Appendix A contains a table summarising vehicular manslaughter sentence appeals determined between 2016 and 2023. This table shows when certain sentences were increased or decreased on appeal, and why.
- 3.38 The CCA recently reviewed a number of published vehicular manslaughter sentences, including decisions from the District Court, Supreme Court and CCA. Of those cases, the highest sentence imposed for a single vehicular manslaughter offence was 15 years and 8 months' imprisonment.<sup>46</sup>

### **Other serious road crime offences involving death**

- 3.39 Table 3.2, below, sets out the sentencing outcomes (2016–2022) for aggravated dangerous driving occasioning death and dangerous driving occasioning death, where one of these were the defendant's principal proven offence. All aggravated offences, and most basic offences, received sentences of imprisonment.

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

43. Our research involved reviewing data provided by the Courts, Tribunal and Service Delivery division, Department of Communities and Justice, which listed finalised manslaughter charges that were charged along with at least one serious road crime charge. We supplemented this list with information provided by the Office of the Director of Public Prosecutions, information in published case law, and the table of sentencing decisions prepared by the NSW Public Defenders: The Public Defenders, "Manslaughter: Motor Vehicle" <[www.publicdefenders.nsw.gov.au/Documents/manslaughter-motor-vehicle.pdf](http://www.publicdefenders.nsw.gov.au/Documents/manslaughter-motor-vehicle.pdf)> (retrieved 24 November 2023). We checked case details against JusticeLink, the Judicial Commission's Judicial Information System and media reports.

44. *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) s 28.

45. That is, by the court that first imposes the sentence after trial.

46. *Chandler v R* [2023] NSWCCA 59 [107], [168]; *Davidson v R* [2022] NSWCCA 153 [246]–[273].

**Table 3.2: Sentencing outcomes for dangerous driving occasioning death offences, 2016–2022<sup>47</sup>**

Offence	Custody	Supervised community sentence	Unsupervised community sentence	Total proven court appearances
Aggravated dangerous driving occasioning death	36 (100%)	0	0	36
Dangerous driving occasioning death	136 (62%)	71 (32%)	14 (6%)	221

Source: NSW Bureau of Crime Statistics and Research, reference kf23-22320, table 3a

3.40 The sentencing profile for negligent driving occasioning death was different.<sup>48</sup> For the 223 proven court appearances in which this was the defendant’s principal offence:

- 5% received sentences of imprisonment
- 40% received supervised community-based sentences
- 52% received unsupervised community-based sentences, and
- 3% received a fine or other penalty.<sup>49</sup>

3.41 Unsurprisingly, the more serious road crime offences involving death attracted longer sentences of imprisonment on average. For proven court appearances that resulted in terms of imprisonment, the following average head sentences were imposed for the below offences, where these were the defendant’s principal offence:

- aggravated dangerous driving occasioning death: 5 years
- dangerous driving occasioning death: 3 years, and
- negligent driving occasioning death: 11 months.<sup>50</sup>

3.42 Of the sentences recorded on JIRS between 24 September 2018 and 31 December 2022, the maximum penalty was not imposed for aggravated dangerous driving, dangerous driving or negligent driving occasioning death.<sup>51</sup>

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

48. *Road Transport Act 2013* (NSW) s 117(1)(a).

49. NSW Bureau of Crime Statistics and Research, reference kf23-22320, table 3a.

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

51. Judicial Commission of NSW, *Sentencing Statistics*, Judicial Information Research System (retrieved 14 August 2023).

## Intensive correction orders

- 3.43 One preliminary submission suggested removing the availability of intensive correction orders (ICOs) for serious road crime offences involving death.<sup>52</sup> ICOs are custodial sentences that are served in the community under strict conditions.<sup>53</sup>
- 3.44 Currently, ICOs are available for every serious road crime offence, except vehicular manslaughter. ICOs are also unavailable for some other serious offences, including murder, certain terrorism offences, some serious sexual offences and some serious firearms offences.<sup>54</sup> There are no restrictions on the availability of any other non-custodial sentence for serious road crimes offences (or any other offence).
- 3.45 The submission argued that making ICOs unavailable for serious road crimes would recognise that deaths caused by such crimes are comparable to murder and manslaughter, for which ICOs are not available. The author argued this could better reflect community expectations.<sup>55</sup>

### Question 3.1: Maximum penalties for offences involving death

- (1) Are the maximum penalties for the following serious road crime offences involving death appropriate:
- (a) dangerous driving occasioning death (*Crimes Act 1900* (NSW) s 52A(1)), and
  - (b) aggravated dangerous driving occasioning death (*Crimes Act 1900* (NSW) s 52A(2))?
- If not, what should the maximum penalties be?
- (2) Should s 67 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) be amended so intensive correction orders cannot be imposed for any serious road crime offences that involve death?

## Offences involving bodily harm

- 3.46 The *Crimes Act* also creates a hierarchy of serious road crime offences involving serious bodily harm. The maximum penalties for those offences are:
- aggravated dangerous driving occasioning GBH: 11 years' imprisonment<sup>56</sup>
  - dangerous driving occasioning GBH: 7 years' imprisonment,<sup>57</sup> and

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52. Confidential, *Preliminary Submission PRC91*, 4–5.

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

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

55. Confidential, *Preliminary Submission PRC91*, 4–5.

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

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



- injuries by wanton or furious riding, driving, racing or other misconduct, or by wilful neglect (injuries by furious driving etc): 2 years' imprisonment.<sup>58</sup>
- 3.47 The RTA offence of negligent driving occasioning GBH has a lower maximum penalty:
- first offence: 9 months' imprisonment and/or 20 penalty units (\$2,200), and
  - second or subsequent offence: 12 months' imprisonment and/or 30 penalty units (\$3,300).<sup>59</sup>
- 3.48 Some victims and victims' advocacy groups submitted that the penalties for dangerous driving occasioning GBH, and the aggravated offence, should increase. VOCAL argued that increased penalties are needed to recognise the "life-changing physical, psychological and financial impact" these offences can have.<sup>60</sup> VOCAL also argued that sentencing outcomes from these offences are "grossly inadequate", being well below the maximum penalties.<sup>61</sup>
- 3.49 Some considered that the maximum penalty for the offence of "injuries by furious driving etc" is inadequate. As we discussed in chapter 2, there are concerns that the elements and language of that offence are outdated. One preliminary submission suggested that the maximum penalty for this offence should be increased to 10 years' imprisonment, to reflect the risks this behaviour poses.<sup>62</sup> Another submission also considered that the current penalty was inadequate and should increase, but did not specify what it should be increased to.<sup>63</sup>

## How do these maximum penalties compare?

### Examples of other NSW offences involving bodily harm

- 3.50 The dangerous driving occasioning GBH offences have lower maximum penalties than some other offences in the *Crimes Act* that involve GBH. These include the following offences:
- wounding or causing GBH with intent to cause GBH, or with intent to prevent lawful arrest or detention: 25 years' imprisonment<sup>64</sup>

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

59. *Road Transport Act 2013* (NSW) s 117(1)(b).

60. Victims of Crime Assistance League (Hunter), *Preliminary Submission PRC84*, 3; Anonymous, *Preliminary Submission PRC69*, 1.

61. Victims of Crime Assistance League (Hunter), *Preliminary Submission PRC84*, 2, 3.

62. Anonymous, *Preliminary Submission PRC69*, 1.

63. Confidential, *Preliminary Submission PRC91*, 4.

64. *Crimes Act 1900* (NSW) s 33(1)–(2).



- robbery with wounding or inflicting GBH, or armed robbery with wounding or inflicting GBH: 25 years' imprisonment<sup>65</sup>
  - break and enter and inflict GBH with intent to murder: 25 years' imprisonment<sup>66</sup>
  - wounding or causing GBH to a police officer, other law enforcement officer or frontline emergency or health worker while in the execution of duty, with recklessness as to causing ABH: 12 years' imprisonment, or 14 years' imprisonment where this is done during a public disorder,<sup>67</sup> and
  - recklessly causing GBH: 10 years' imprisonment, or 14 years' imprisonment where this is done in company.<sup>68</sup>
- 3.51 However, the maximum penalty for causing GBH by negligent act or omission (2 years' imprisonment)<sup>69</sup> is lower than that for the dangerous driving offences.
- 3.52 The offence of "injuries by furious driving etc" has a lower maximum penalty (2 years' imprisonment) than some other offences in the *Crimes Act* that involve ABH. These include:
- assaulting a police officer, other law enforcement officer or frontline emergency or health worker in execution of duty and causing ABH: 7 years' imprisonment, or 9 years' imprisonment where this is done during a public disorder,<sup>70</sup> and
  - assault occasioning ABH: 5 years' imprisonment, or 7 years' imprisonment where this is done in company or during a large-scale public disorder.<sup>71</sup>

### Maximum penalties in other states and territories

- 3.53 The maximum penalties for serious road crime offences causing bodily harm in NSW are broadly consistent with similar offences in other states and territories. For this comparison, we have focused on custodial penalties, and have included penalty units where relevant. The monetary amount of penalty units varies across states and territories.<sup>72</sup>

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65. *Crimes Act 1900* (NSW) s 96, s 98.

66. *Crimes Act 1900* (NSW) s 110.

67. *Crimes Act 1900* (NSW) s 60(3), s 60A(3), s 60(3A), s 60A(3A), s 60AD(6), s 60AD(7), s 60AE(6), s 60AE(7).

68. *Crimes Act 1900* (NSW) s 35(1)–(2).

69. *Crimes Act 1900* (NSW) s 54.

70. *Crimes Act 1900* (NSW) s 60(2), s 60A(2), s 60(2A), s 60A(2A), s 60AD(4), s 60AD(5), s 60AE(4), s 60AE(5).

71. *Crimes Act 1900* (NSW) s 59(1), s 59(2), s 59A(2).

72. *Penalties and Sentences Regulation 2015* (Qld) cl 3 (\$154.80); *Legislation Act 2001* (ACT) s 133(2)(a) (\$160); *Penalty Units Act 2009* (NT) s 4, s 5 (\$176); *Road Traffic (Administration) Act 2008* (WA) s 7 (\$50); *Penalty Units and Other Penalties Act 1987* (Tas) s 4A; *Tasmanian Government*

- 3.54 The maximum penalty for dangerous driving occasioning GBH (7 years' imprisonment) sits in the middle of the range for similar offences in other states and territories. Across Australia, maximum penalties range from 5–15 years' imprisonment.<sup>73</sup>
- 3.55 The maximum penalty for aggravated dangerous driving occasioning GBH in NSW, (11 years' imprisonment) is broadly consistent with similar aggravated offences in the ACT, Queensland and Western Australia (WA). Their maximum penalties range from 12–14 years' imprisonment.<sup>74</sup>
- 3.56 The maximum penalty for the NSW offence of negligent driving occasioning GBH<sup>75</sup> is lower than similar offences in most other states and territories:
- 1 year imprisonment (SA)<sup>76</sup>
  - 1 year imprisonment and 10 penalty units for a first offence or 18 months' imprisonment and 20 penalty units for a subsequent offence (Tasmania)<sup>77</sup>
  - 1 year imprisonment or 80 penalty units, or 2 years' imprisonment or 180 penalty units if the driver was unlicensed (Queensland)<sup>78</sup>
  - 1 year imprisonment and/or 100 penalty units (ACT)<sup>79</sup>
  - 18 months' imprisonment or 40 penalty units (Northern Territory (NT)),<sup>80</sup> and
  - 3 years' imprisonment or 720 penalty units (WA).<sup>81</sup>

## Sentencing outcomes for offences involving bodily harm

- 3.57 Table 3.3, below, sets out the sentencing outcomes (2016–2022) for road crime offences involving bodily harm, where these were the defendant's principal proven offence. The more serious offences attracted a higher percentage of sentences of

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*Gazette*, no 22 297, 17 May 2023, 329 (\$195); *Monetary Units Act 2004* (Vic) s 6; *Victoria Government Gazette*, no S 256, 23 May 2023 (192.31). South Australia does not have penalty units.

73. *Crimes Act 1958* (Vic) s 319(1A) (5 years); *Road Traffic Act 1974* (WA) s 59(3)(b)(ii) (7 years); *Criminal Code Act 1983* (NT) s 174F(2) (7 years); *Criminal Code* (Qld) s 328A(4)(a) (10 years); *Crimes Act 1900* (ACT) s 29(4) (10 years).

74. *Crimes Act 1900* (ACT) s 29(5) (12 years); *Criminal Code* (Qld) s 328A(4) (14 years); *Road Traffic Act 1974* (WA) s 59(3)(ii) (14 years).

75. *Road Transport Act 2013* (NSW) s 117(1)(b) (first offence: 9 months' imprisonment and/or 20 penalty units; second or subsequent offence: 12 months' imprisonment and/or 30 penalty units).

76. *Road Traffic Act 1961* (SA) s 45(1)–(2)(a), s 45(3)(a).

77. *Traffic Act 1925* (Tas) s 32(2B).

78. *Transport Operations (Road Use Management) Act 1995* (Qld) s 83(a)–(b).

79. *Road Transport (Safety and Traffic Management) Act 1999* (ACT) s 6(1)(b).

80. *Traffic Act 1987* (NT) s 30B(2).

81. *Road Traffic Act 1974* (WA) s 59BA.

imprisonment and a lower percentage of community-based sentences or other penalties (including fines).

**Table 3.3: Sentencing outcomes for offences involving bodily harm, 2016–2022<sup>82</sup>**

Offence	Custody	Supervised community sentence	Unsupervised community sentence	Other penalty, including fine	Total proven court appearances
Aggravated dangerous driving occasioning GBH	58 (71%)	20 (24%)	4 (5%)	0 (0%)	82
Dangerous driving occasioning GBH	131 (29%)	205 (45%)	104 (23%)	11 (2%)	451
Furious etc driving occasioning ABH	36 (21%)	67 (38%)	65 (37%)	7 (4%)	175
Negligent driving occasioning GBH	14 (1%)	191 (13%)	842 (57%)	424 (29%)	1471

Source: NSW Bureau of Crime Statistics and Research, reference kf23-22320, table 3a

3.58 Of the proven court appearances that resulted in a term of imprisonment, the more serious offences also attracted longer head sentences on average:

- aggravated dangerous driving occasioning GBH: 2 years and 11 months
- dangerous driving occasioning GBH: 1 year and 11 months
- injuries by furious driving etc: 1 year and 1 month, and
- negligent driving occasioning GBH: 6 months.<sup>83</sup>

3.59 None of the sentences recorded on JIRS between 24 September 2018 and 31 December 2022 for the *Crimes Act* offences causing bodily harm involved the maximum penalty. However, the maximum penalty was imposed for negligent driving occasioning GBH.<sup>84</sup>

82. *Crimes Act 1900* (NSW) s 52A(4), s 52A(3), s 53, s 117(1)(b).

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

84. Judicial Commission of NSW, *Sentencing Statistics*, Judicial Information Research System (retrieved 14 August 2023).

### Question 3.2: Maximum penalties for offences involving bodily harm

Are the maximum penalties for the following serious road crime offences involving bodily harm appropriate:

- (a) dangerous driving occasioning grievous bodily harm (*Crimes Act 1900* (NSW) s 52A(3))
  - (b) aggravated dangerous driving occasioning grievous bodily harm (*Crimes Act 1900* (NSW) s 52A(4)), and
  - (c) injuries by furious driving etc (*Crimes Act 1900* (NSW) s 53)?
- If not, what should the maximum penalties be?

## Other serious road crime offences

3.60 This section considers maximum penalties for:

- failing to stop and assist after a vehicle impact causing GBH or death<sup>85</sup>
- predatory driving,<sup>86</sup> and
- failing to stop and driving recklessly or dangerously in response to a police pursuit.<sup>87</sup>

### Failing to stop and assist offences

3.61 The *Crimes Act* offences of failing to stop and assist after a vehicle impact causing death and GBH have maximum penalties of imprisonment of:

- failing to stop and assist after a vehicle impact causing death: 10 years,<sup>88</sup> and
- failing to stop and assist after a vehicle impact causing GBH: 7 years.<sup>89</sup>

3.62 The *RTA* offence of failing to stop and assist after a vehicle impact causing death or injury attracts lower penalties:

- first offence: 18 months' imprisonment and/or 30 penalty units (\$3,300), or
- second or subsequent offence: 2 years' imprisonment and/or 50 penalty units (\$5,500).<sup>90</sup>

3.63 We describe the differences between these offences in chapter 2.

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

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

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

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

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

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

## Maximum penalties in other Australian states and territories

3.64 The maximum penalties for the failing to stop and assist offences are broadly consistent with similar offences in other states and territories.<sup>91</sup> In the NT and WA, the maximum penalties are:

- for offences involving death: 10 years' and 20 years' imprisonment,<sup>92</sup> and
- for offences involving serious harm: 7 years' and 14 years' imprisonment.<sup>93</sup>

3.65 Other states and territories have only one failing to stop and assist offence that covers vehicle collisions causing both death and serious injury. These offences have a broad range of maximum penalties, from 2 years' imprisonment and/or a fine of 80 penalty units, to 10 years' imprisonment or 1200 penalty units.<sup>94</sup>

## Sentencing outcomes in NSW

3.66 Sentencing outcomes were more severe for the failing to stop and assist offences involving a vehicle impact causing death, compared to GBH. The table below sets out sentencing outcomes where one of these *Crimes Act* offences was the defendant's principal proven offence. None resulted in a fine or other penalty.

**Table 3.4: Sentencing outcomes for failing to stop and assist offences, 2016–2022**<sup>95</sup>

Offence	Custody	Supervised community sentence	Unsupervised community sentence	Total proven court appearances
Failing to stop and assist after impact causing death	6 (67%)	2 (22%)	1 (11%)	9
Failing to stop and assist after impact causing GBH	7 (30%)	9 (39%)	7 (30%)	23

Source: NSW Bureau of Crime Statistics and Research, reference kf23-22320, table 3a

91. We have not considered the periods of any mandatory licence disqualifications in this comparison.

92. *Criminal Code Act 1983* (NT) s 174FA; *Road Traffic Act 1974* (WA) s 54(3)(a).

93. *Criminal Code Act 1983* (NT) s 174FA; *Road Traffic Act 1974* (WA) s 54(3)(b).

94. *Traffic Act 1925* (Tas) s 33 (2 years' imprisonment and/or 80 penalty units); *Transport Operations (Road Use Management) Act 1995* (Qld) s 92(1) (3 years' imprisonment or 120 penalty units); *Road Transport (Safety and Traffic Management) Act 1999* (ACT) s 16 (2 years' imprisonment and/or 200 penalty units); *Road Safety Act 1986* (Vic) s 61(3) (10 years' imprisonment or 1200 penalty units). See also *Criminal Law Consolidation Act 1935* (SA) s 19AB(1)–(2) (15 years' imprisonment for a first offence, or life imprisonment for a subsequent offence).

95. *Crimes Act 1900* (NSW) s 52AB(1), s52AB(2).

- 3.67 Of the proven court appearances that resulted in terms of imprisonment, the average head sentences were:
- failing to stop and assist after a vehicle impact causing death: 2 years and 11 months, and
  - failing to stop and assist after a vehicle impact causing GBH: 1 year and 6 months.<sup>96</sup>
- 3.68 The *RTA* offence attracted more lenient penalties. Only 15% of principal proven offences resulted in a sentence of custody.<sup>97</sup>
- 3.69 None of the sentences recorded on JIRS between 24 September 2018 and 31 December 2022 for the failing to stop and assist offences discussed in this section involved the maximum penalty.<sup>98</sup>

## Predatory driving

- 3.70 The *Crimes Act* offence of predatory driving has a maximum penalty of 5 years' imprisonment.<sup>99</sup>
- 3.71 The *RTA* menacing driving offences have lower maximum penalties:
- menacing driving with intent to menace: 18 months' imprisonment and/or 30 penalty units (\$3,300) (first offence); 2 years' imprisonment and/or 50 penalty units (\$5,500) (second or subsequent offence),<sup>100</sup> and
  - menacing driving with a possibility of menacing: 12 months' imprisonment and/or 20 penalty units (\$2,200) (first offence); 18 months' imprisonment and/or 30 penalty units (\$3,300) (second or subsequent offence).<sup>101</sup>
- 3.72 It is difficult to compare these offences with offences in other Australian states and territories, as the offence design and legislative structure varies significantly.

## Sentencing outcomes in NSW

- 3.73 The table below shows the sentencing outcomes for predatory driving, where that was the defendant's principal proven offence (2016–2022). Half resulted in a sentence of custody, with all others resulting in community sentences. None resulted a fine or other penalty.

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96. NSW Bureau of Crime Statistics and Research, reference ab23-22739, table 1.

97. NSW Bureau of Crime Statistics and Research, reference k23-22573, table 3a.

98. Judicial Commission of NSW, *Sentencing Statistics*, Judicial Information Research System (retrieved 14 August 2023).

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

100. *Road Transport Act 2013* (NSW) s 118(1).

101. *Road Transport Act 2013* (NSW) s 118(2).

**Table 3.5: Sentencing outcomes for predatory driving, 2016–2022**<sup>102</sup>

Offence	Custody	Supervised community sentence	Unsupervised community sentence	Total proven court appearances
Predatory driving	17 (50%)	11 (32%)	6 (18%)	34

Source: NSW Bureau of Crime Statistics and Research, reference kf23-22320, table 3a

- 3.74 Of the proven court appearances that resulted in a term of imprisonment, the average head sentence was 1 year and 2 months.<sup>103</sup>
- 3.75 The RTA menacing driving offences generally attracted more lenient sentencing outcomes. For instance, where a menacing driving offence was the defendant’s principal offence, the proportion of proven court appearances that resulted in custody between 2016–2022 were:
- menacing driving with intent to menace: 14%,<sup>104</sup> and
  - menacing driving with a possibility of menacing: 8%.<sup>105</sup>
- 3.76 None of the sentences for predatory driving or menacing driving recorded on JIRS between 24 September 2018 and 31 December 2022 involved the maximum penalty.<sup>106</sup>

### Police pursuit offences

- 3.77 The *Crimes Act* offences of failing to stop and driving recklessly or dangerously in response to a police pursuit have maximum penalties of:
- first offence: 3 years’ imprisonment, or
  - second or subsequent offence: 5 years’ imprisonment.<sup>107</sup>

### Maximum penalties in other Australian states and territories

- 3.78 Police pursuit offences are structured differently across Australia, and there is some variation in the elements of these offences. As the table below shows, some have different penalties for first or subsequent offences, others for basic and

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

103. NSW Bureau of Crime Statistics and Research, reference ab23-22739, table 1.

104. NSW Bureau of Crime Statistics and Research, reference k23-22320, table 3a.

105. NSW Bureau of Crime Statistics and Research, reference k23-22320, table 3a.

106. Judicial Commission of NSW, *Sentencing Statistics*, Judicial Information Research System (retrieved 14 August 2023).

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

aggravated offences, and some just have one offence that covers all offending conduct.

- 3.79 Although comparisons are difficult, the maximum penalties in NSW appear to be broadly consistent with similar offences in other states and territories. The maximum penalties range between 12 months' imprisonment and/or 100 penalty units, to 5 years' imprisonment.

**Table 3.6: Maximum penalties for police pursuit offences**

Location	Maximum penalty
ACT	<ul style="list-style-type: none"> <li>▪ 12 months' imprisonment and/or 100 penalty units for a first offence, or</li> <li>▪ 3 years' imprisonment and/or 300 penalty units for a subsequent offence<sup>108</sup></li> </ul>
Victoria	<ul style="list-style-type: none"> <li>▪ 3 years' imprisonment<sup>109</sup></li> </ul>
SA	<ul style="list-style-type: none"> <li>▪ 3 years' imprisonment, or</li> <li>▪ 5 years' imprisonment for an aggravated offence<sup>110</sup></li> </ul>
Queensland	<ul style="list-style-type: none"> <li>▪ 3 years' imprisonment or 200 penalty units, or</li> <li>▪ 5 years' imprisonment or 300 penalty units for an aggravated offence<sup>111</sup></li> </ul>
WA	<ul style="list-style-type: none"> <li>▪ 3 years' imprisonment or 720 penalty units (dangerous driving to avoid police), or</li> <li>▪ 5 years' imprisonment or 2 years' imprisonment for a summary conviction (driving at reckless speed or driving recklessly to avoid police)<sup>112</sup></li> </ul>
NT	<ul style="list-style-type: none"> <li>▪ 5 years' imprisonment<sup>113</sup></li> </ul>

108. *Road Transport (Safety and Traffic Management) Act 1999* (ACT) s 5C.

109. *Crimes Act 1958* (Vic) s 319AA.

110. *Criminal Law Consolidation Act 1935* (SA) s 19AC.

111. *Police Powers and Responsibilities Act 2000* (Qld) s 754(1)–(3). The offence also has a minimum penalty: 50 days' imprisonment served in a correctional services facility or 50 penalty units.

112. *Road Traffic Act 1974* (WA) s 61, s 60, s 60A, s 60B(4), s 49AB(1)(c). These offences carry a minimum sentence of 6 months' imprisonment: s 60B(5)(a).

113. *Criminal Code Act 1983* (NT) s 174FB(1).



Location	Maximum penalty
Tasmania	<ul style="list-style-type: none"> <li>▪ 2 years' imprisonment and/or 100 penalty units for first offence</li> <li>▪ 3 years' imprisonment and/or 100 penalty units for a second offence, or</li> <li>▪ 4 years' imprisonment and/or 100 penalty units for a third or subsequent offence.<sup>114</sup></li> </ul>

### Sentencing outcomes in NSW

3.80 The table below shows sentencing outcomes for police pursuit offences that were the defendant's principal proven offence, between 2016–2022.

**Table 3.7: Sentencing outcomes for police pursuit offences, 2016–2022<sup>115</sup>**

Offence	Custody	Supervised community sentence	Unsupervised community sentence	Fine and other penalty	Total proven court appearances
Police pursuit – first offence	1513 (46%)	1175 (35%)	511 (15%)	118 (4%)	3,317
Police pursuit – second offence	600 (83%)	109 (15%)	15 (2%)	2 (0%)	726

Source: NSW Bureau of Crime Statistics and Research, reference kf23-22320, table 3a

3.81 For proven court appearances that resulted in terms of imprisonment, second or subsequent offences resulted in slightly longer head sentences on average:

- first offence: 1 year, and
- second or subsequent offence: 1 year and 4 months.<sup>116</sup>

3.82 Of the sentences recorded on JIRS between 24 September 2018 and 31 December 2022, one sentence, involving a first offence, involved the maximum penalty of 3 years' imprisonment. No sentences involving second or subsequent offences involved the maximum penalty of 5 years' imprisonment.<sup>117</sup>

114. *Police Powers (Vehicle Interception) Act 2000* (Tas) s 11A(1).

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

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

117. Judicial Commission of NSW, *Sentencing Statistics*, Judicial Information Research System (retrieved 14 August 2023).

## Should the maximum penalties for these offences change?

- 3.83 One preliminary submission considered that maximum penalties of 10 years should apply to failing to stop and assist after a vehicle impact causing GBH, predatory driving, and failing to stop and driving recklessly or dangerously in response to a police pursuit.<sup>118</sup>
- 3.84 Another preliminary submission focused on the police pursuit offence. It argued that the maximum penalties should increase to 5 years' imprisonment for a first offence, and 7 years' imprisonment for a second or subsequent offence. In its view, this is required to deter this risky conduct.<sup>119</sup>

### Question 3.3: Maximum penalties for other serious road crime offences

Are the maximum penalties for the following offences appropriate:

- (a) failing to stop and assist after a vehicle impact causing death (*Crimes Act 1900* (NSW) s 52AB(1))
- (b) failing to stop and assist after a vehicle impact causing grievous bodily harm: (*Crimes Act 1900* (NSW) s 52AB(2))
- (c) predatory driving: (*Crimes Act 1900* (NSW) s 51A), and
- (d) failing to stop and driving recklessly or dangerously in response to a police pursuit (first and second or subsequent offence): (*Crimes Act 1900* (NSW) s 51B(1))?

If not, what should the maximum penalties be?

## Licence disqualification

- 3.85 Another issue is whether the default and minimum licence disqualification periods for serious road crime offences are appropriate.
- 3.86 For all serious road crime offences, the default licence disqualification period is 3 years for a first major offence, or 5 years for a second or subsequent major offence.<sup>120</sup> A disqualified person cannot hold or apply for any driver licence during the disqualification period.<sup>121</sup>
- 3.87 While the specified licence disqualification period applies by default, the sentencing court can vary it in appropriate cases.<sup>122</sup> However, the court cannot

118. Anonymous, *Preliminary Submission PRC69*, 1.

119. Confidential, *Preliminary Submission PRC91*, 4.

120. *Road Transport Act 2013* (NSW) s 205(2)(d), s 205(3)(d), s 4(1) definition of "major offence".

121. *Road Transport (Driver Licensing) Regulation 2017* (NSW) cl 53(3).

122. *Attorney General's Application No 3 of 2002* [2004] NSWCCA 303, 61 NSWLR 305 [126]. See also NSW Sentencing Council, *Repeat Traffic Offenders*, Consultation Paper (2018) [5.43]–[5.56].

order a period less than the minimum disqualification period. For serious road crime offences, that period is 12 months for a first offence, or 2 years for a second or subsequent offence.<sup>123</sup>

- 3.88 The current licence disqualification scheme came into effect in October 2017.<sup>124</sup> It replaced an earlier scheme that was heavily criticised for disproportionately affecting disadvantaged groups. The earlier scheme’s cumulative disqualification periods were particularly concerning.<sup>125</sup>
- 3.89 The 2017 reforms addressed some of these criticisms. The current scheme has shorter default disqualification periods, as well as shorter minimum disqualification periods. It allows multiple licence disqualifications to be served concurrently, rather than consecutively.<sup>126</sup> An early evaluation found that the new scheme reduced disqualification periods and imprisonment for unauthorised driving, but did not have any negative impact on road safety.<sup>127</sup>
- 3.90 Despite these reforms, concerns persist about the impact of the licence disqualification scheme. In 2020, the Sentencing Council noted research suggesting that lengthy disqualification periods are a weak deterrent. The Council also observed that disqualification adversely affects disadvantaged groups, as it can affect a person’s ability to maintain employment, access education, fulfil carer responsibilities and attend medical appointments.<sup>128</sup>
- 3.91 In its preliminary submission, the Aboriginal Legal Service (NSW/ACT) Ltd (ALS) noted that the effects of licence disqualification are felt disproportionately by Aboriginal people, particularly in regional or remote communities. Access to driver licences for Aboriginal people is inhibited by “geographical, cultural, economic and social barriers”, and there is a high rate of licence disqualification, suspension or cancellation. As the ALS observed:

The imperative to drive in communities with low levels of driver licensing can lead to unlicensed driving and subsequent fines, charges and imprisonment for unlicensed or disqualified driving, which leads to harmful impacts for Aboriginal communities.<sup>129</sup>

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123. *Road Transport Act 2013* (NSW) s 205.

124. *Road Transport Amendment (Driver Licence Disqualification) Act 2017* (NSW) sch 1.

125. NSW Sentencing Council, *Repeat Traffic Offenders*, Consultation Paper (2018) [5.70]; NSW Legislative Assembly, Committee on Law and Safety, *Driver Licence Disqualification Reform*, Report 3/55 (2013) ch 3 [3.22]–[3.24].

126. NSW Sentencing Council, *Repeat Traffic Offenders*, Consultation Paper (2018) [5.71].

127. NSW Sentencing Council, *Repeat Traffic Offenders*, Consultation Paper (2018) [5.72]–[5.74]; S Poynton and F Leung, *Early Indicators of the Impacts of the NSW Driver Licence Disqualification Reforms*, Bureau Brief No 135 (NSW Bureau of Crime Statistics and Research, 2018) 5.

128. NSW Sentencing Council, *Repeat Traffic Offenders*, Report (2020) [1.30]–[1.32].

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

- 3.92 However, many consider that the licence disqualification scheme is necessary for public safety. The CCA has commented that the scheme’s purpose is to protect the community from drivers who pose a safety risk on the roads.<sup>130</sup> The CCA has also remarked that the scheme promotes specific and general deterrence, and it should be a “real punishment” for driving offenders.<sup>131</sup>
- 3.93 Some argue the scheme does not go far enough. One preliminary submission suggested the following licence disqualification periods:
- negligent driving occasioning death: 5 years
  - police pursuit: 5 years
  - dangerous driving occasioning death: 7 years
  - aggravated dangerous driving occasioning death: up to 14 years, and
  - vehicular homicide (a suggested new offence, see chapter 2): up to 25 years.<sup>132</sup>
- 3.94 Consideration could also be given to whether subsequent offences should attract greater terms of disqualification.<sup>133</sup>
- 3.95 In 2020, the Sentencing Council outlined an option for addressing some concerns about the scheme, while maintaining its existence. The Council recommended that courts be permitted to grant restricted licences to disqualified drivers in some cases, such as where driving is necessary for medical treatment, cultural obligations or work. Restricted licences could be available for major offences, including driving offences involving death or injury.<sup>134</sup>

#### Question 3.4: Default and minimum licence disqualification periods

Is the licence disqualification scheme for serious road crime offences appropriate? If not, how should it change?

## Mandatory minimum sentences

- 3.96 If it is considered that sentences are too lenient, or inconsistent, one option may be to introduce mandatory minimum sentences. Some victims and their families have called for mandatory minimum sentences for serious road crime offences, particularly for those involving death.<sup>135</sup>

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130. *Hei v R* [2009] NSWCCA 87 [37]; *R v Greaves* [2014] NSWCCA 194 [70].

131. *R v Veatufunga* [2007] NSWCCA 54 [40].

132. Confidential, *Preliminary Submission PRC91*, 7.

133. Confidential, *Preliminary Submission PRC91*, 5.

134. NSW Sentencing Council, *Repeat Traffic Offenders*, Report (2020) [4.7] rec 4.1.

135. Anonymous, *Preliminary Submission PRC69*, 2; G Proctor, *Preliminary Submission PRC81*, 2; Road Trauma Support Group NSW, *Preliminary Submission PRC72*, 3.

- 3.97 A mandatory minimum sentence is the lowest possible sentence the court can impose when sentencing someone for a particular offence. Mandatory minimum sentences are relatively rare in Australia.<sup>136</sup> No serious road crime offence has such a penalty.
- 3.98 Mandatory minimum sentences are usually introduced to increase sentences, “often because there is dissatisfaction with the current sentencing regime”.<sup>137</sup> Some argue that mandatory minimum sentences improve deterrence, ensure offenders are adequately punished and better promote community protection.<sup>138</sup>
- 3.99 However, as the Sentencing Council has observed, concerns about mandatory minimum sentences include that they undermine judicial discretion and do not allow sentencing courts to take individual circumstances into account. They can have negative flow-on effects and may, for instance, disproportionately affect Aboriginal people.<sup>139</sup>
- 3.100 There can also be implications for the criminal justice system. Mandatory minimum sentences can affect charging decisions, as prosecutors may take the minimum penalty into account when choosing the appropriate charge to lay. They can also affect plea negotiations. For example, someone might be hesitant to plead guilty to an offence with a mandatory minimum sentence. There could also be implications for resourcing, including potential increases to the prison population.<sup>140</sup>
- 3.101 Some have argued that mandatory minimum sentences contradict important sentencing principles and laws, including the principle that imprisonment should be a last resort.<sup>141</sup> They may also be contrary to Australia’s human rights obligations. Others have questioned whether they work as a deterrent.<sup>142</sup>
- 3.102 Due to these concerns, the Australian Law Reform Commission, the NSW Law Reform Commission and the NSW Sentencing Council have previously recommended against the use of mandatory minimum sentences in various contexts.<sup>143</sup>

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136. For NSW, see *Crimes Act 1900* (NSW) s 19B, s 25B. See also NSW Sentencing Council, *Assaults on Emergency Services Workers*, Report (2021) [8.8]–[8.9].

137. NSW Sentencing Council, *Assaults on Emergency Services Workers*, Report (2021) [8.8].

138. NSW Sentencing Council, *Assaults on Emergency Services Workers*, Report (2021) [8.21].

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

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

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

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

143. 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].

**Question 3.5: Mandatory minimum sentences**

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

## 4. Sentencing principles and procedures

### In brief

This chapter outlines some key sentencing principles and procedures that apply to all offences, including serious road crime offences. We ask if the guideline judgment that applies to dangerous driving offences needs updating, and whether standard non-parole periods should be introduced for dangerous driving offences.

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4.1	Sentencing is a complex process. It requires courts to weigh up a range of considerations and principles found in legislation and in the common law.
4.2	Views can differ on whether the general sentencing framework is working well in the context of serious road crime offences. Some preliminary submissions, especially those from legal groups, considered the principles to be appropriate, clear and comprehensive, and to adequately cover the issues that arise in

sentencing serious road crime offences.<sup>1</sup> However, some victims and victims' advocacy groups submitted that certain principles were outdated and out of touch with community expectations, and that sentencing courts did not treat these offences seriously enough.<sup>2</sup>

4.3 This chapter explores issues regarding the application of the general sentencing framework to sentencing for serious road crime offences, based on concerns raised in preliminary submissions. It does not aim to explain the sentencing process comprehensively, or to cover all principles and procedures that govern sentencing.

4.4 The chapter then invites comment on two possible reforms that respond to the view that sentencing outcomes are inadequate for dangerous driving offences.<sup>3</sup> These are to update the guideline judgment of *R v Whyte*,<sup>4</sup> and to introduce standard non-parole periods for these offences.

## An overview of the sentencing process

4.5 In deciding a sentence, courts undertake a process known as “instinctive synthesis”. This requires the court to weigh up all relevant considerations and make a value judgment about the appropriate sentence.<sup>5</sup>

4.6 Once all the factors have been considered, sentencing courts will decide whether to impose a custodial or non-custodial sentence, as well as the length of any sentence. A court must not order imprisonment unless it is satisfied, having considered all possible alternatives, that no other penalty is appropriate.<sup>6</sup>

4.7 In this section, we introduce some important sentencing principles which we refer to throughout this chapter.

## Principles are set out in legislation and in the common law

4.8 Judges are required to apply sentencing principles and procedures set out in legislation and in the common law. The *Crimes (Sentencing Procedure) Act 1999*

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1. Law Society of NSW, *Preliminary Submission PRC59*, 1; Local Court of NSW, *Preliminary Submission PRC82*, 4; NSW Office of the Director of Public Prosecutions, *Preliminary Submission PRC77*, 7; NSW Bar Association, *Preliminary Submission PRC83*, 3; Aboriginal Legal Service (NSW/ACT) Ltd, *Preliminary Submission PRC88*, 1.
  2. See, eg, Road Trauma Support Group NSW, *Preliminary Submission PRC72*, 2; Victims of Crime Assistance League (Hunter), *Preliminary Submission PRC84*, 2; Anonymous, *Preliminary Submission PRC69*, 1.
  3. *Crimes Act 1900* (NSW) s 52A.
  4. *R v Whyte* [2002] NSWCCA 343; 55 NSWLR 252.
  5. *Markarian v R* [2005] HCA 25; 228 CLR 357.
  6. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(1).



(NSW) (*Sentencing Procedure Act*) contains principles and procedures that apply to sentencing for all offences, including for serious road crime offences.

- 4.9 As described later in this chapter, these include:
- the purposes of sentencing
  - aggravating and mitigating factors which, if present, may suggest a higher or lower sentence should be imposed, and
  - sentencing discounts, such as those in the regime for guilty pleas for offences dealt with on indictment.
- 4.10 Specific principles and sentencing options apply to the sentencing of children. We consider these principles in chapter 5.

### **The concepts of “objective seriousness” and “moral culpability”**

- 4.11 Two important sentencing concepts are:
- the “objective seriousness” of the offence, and
  - the “moral culpability” of the offender.<sup>7</sup>
- 4.12 Objective seriousness is a measure of the seriousness of the conduct that made up the offence, viewed objectively. For instance, the court might consider factors such as the degree of any violence involved and where the offence took place. The court will also consider any factors personal to the offender that caused or significantly contributed to them committing the offence, such as their motive.<sup>8</sup>
- 4.13 Courts frequently assess where the offender’s case lies in relation to the low, mid or high range of objective seriousness. This is assessed based on the range of objective seriousness for all instances of the offence.<sup>9</sup> A sentence must be proportionate or appropriate to the seriousness of the offender’s conduct, regardless of their moral culpability or subjective circumstances.<sup>10</sup>
- 4.14 Moral culpability is the offender’s blameworthiness for an offence. This involves consideration of both the objective seriousness, and the offender’s subjective and personal circumstances. These circumstances include, for example, factors that could impact the offender’s capacity and decision-making, such as mental illness, cognitive impairment or a “background of social deprivation”.<sup>11</sup>

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7. *Paterson v R* [2021] NSWCCA 273 [29].

8. *Muldock v R* [2011] HCA 39; 244 CLR 120 [27]. Also see, eg, *Tepania v R* [2018] NSWCCA 247 [112]; *Paterson v R* [2021] NSWCCA 273 [29].

9. See, eg, *Davidson v R* [2022] NSWCCA 153 [109].

10. *Veen v R (No 2)* (1988) 164 CLR 465, 472; *DS v R* [2022] NSWCCA 156, 109 NSWLR 82 [68].

11. *Bugmy v R* [2013] HCA 37, 249 CLR 571 [41], [44].

- 4.15 Appendix A to this consultation paper summarises how the NSW Court of Criminal Appeal (CCA) has assessed objective seriousness and moral culpability in recent vehicular manslaughter sentence appeals.

## **A general sentencing framework applies across offences**

- 4.16 Some of the fundamental sentencing principles outlined in this chapter apply generally to all offences, and not just to serious road crime offences. It is important to keep this in mind when considering potential legislative reforms to the general sentencing framework, in response to concerns about specific offences. Any changes may affect the way these principles apply across the board, and not just to the offences in this review.
- 4.17 For this reason, any such change would need to be considered in a wider review of sentencing for offences generally. It is beyond the scope of this review to recommend broader reforms that are not specific to serious road crime offences.
- 4.18 However, a relevant issue is whether there is anything about serious road crime offences that is not adequately addressed by the general sentencing framework and, if so, whether any specific reforms could address this. In the following section we focus on certain general principles that were raised in preliminary submissions, or that we are aware have caused community concern.

## **Principles and procedures that apply generally**

### **The purposes of sentencing**

- 4.19 When determining the appropriate sentence, courts must consider any “purposes of sentencing” that are relevant to the facts and circumstances of the case.<sup>12</sup> As set out in s 3A of the *Sentencing Procedure Act*, a court may impose a sentence to:
- ensure that the offender is adequately punished for the offence
  - prevent crime by deterring the offender (known as “specific deterrence”) and other persons (known as “general deterrence”) from committing similar offences<sup>13</sup>
  - protect the community from the offender
  - promote the rehabilitation of the offender
  - make the offender accountable for their actions
  - denounce the conduct of the offender, and

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12. *R v AS* [2006] NSWCCA 309 [25]; *R v Stunden* [2011] NSWCCA 8 [111].

13. *R v Harrison* (1997) 93 A Crim R 314, 320–321.

- recognise the harm done to the victim of the crime and the community.<sup>14</sup>

4.20 Sentencing purposes can sometimes overlap or pull in different directions. The High Court of Australia has expressed that “[g]iving weight to the conflicting purposes of punishment is what makes the exercise of the [sentencing] discretion so difficult”.<sup>15</sup>

### **Some purposes may be particularly relevant to serious road crimes**

4.21 In appendix A, we summarise examples of sentencing purposes considered in recent vehicular manslaughter sentence appeals.

4.22 Deterrence is one purpose that may be particularly relevant in sentencing for serious road crime offences. This purpose may be achieved by imposing sentences that are severe enough to act as a deterrent.<sup>16</sup>

4.23 Courts have recognised that the number of people on the roads, and the prevalence of risk-taking behaviour, means that general deterrence should be a significant factor in sentencing. The CCA has commented that the road toll in NSW is “far too high”, and that sentences for serious road crime offences should be a “real deterrent” to the public.<sup>17</sup> In a recent CCA vehicular manslaughter case, Justice N Adams explained:

Most adults drive a car at one time or another. ... Many people are dealt with daily for speeding or driving whilst intoxicated. ... [T]he numerous people every day dealt with for these offences may not fully comprehend that it was often only sheer luck that they too did not kill someone. Driving a motor vehicle is like driving a weapon. The public needs to be made aware that there will be stern punishment in the tragic event that one or more people are killed or incapacitated as a result of criminally negligent driving.<sup>18</sup>

4.24 Courts have recognised that young men, especially, may see themselves as “bullet-proof”, and that this perception is “a significant reason for general deterrence to be a prominent factor” in serious road crime sentencing.<sup>19</sup>

4.25 Specific deterrence can also play a significant role. This is particularly so where the offender has a poor driving record,<sup>20</sup> or where the offence was particularly serious.<sup>21</sup>

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14. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A.

15. *Bugmy v R* [2013] HCA 37, 249 CLR 571 [44].

16. *R v Harrison* (1997) 93 A Crim R 314, 320–321.

17. *Rummukainen v R* [2020] NSWCCA 187 [29].

18. *Davidson v R* [2022] NSWCCA 153 [215] (N Adams J).

19. *SBF v R* [2009] NSWCCA 231 [151].

20. See, eg, *Chandler v R* [2023] NSWCCA 59 [63]; *Zreika v R* [2021] NSWCCA 243 [75]; *Ellis v R* [2020] NSWCCA 303 [20], [59].

21. See, eg, *Byrne v R* [2021] NSWCCA 185 [120].

If an offender has a strong subjective case, this may reduce the need for specific deterrence.<sup>22</sup>

- 4.26 Another relevant purpose of sentencing is the recognition of harm to the victim, survivors, family members and the community. This can include recognition of the extent of any pain, injury or suffering caused by the offending.<sup>23</sup> This is important given the devastating consequences of serious road crimes, especially those involving injuries or death.<sup>24</sup> We reflect on the impact of serious road crimes on victims and their families, and their experiences in the criminal justice system, in chapter 6.
- 4.27 Finally, the purpose of adequate punishment can also be important in sentencing for serious road crime offences. This aims to ensure the offender receives an appropriate sentence.<sup>25</sup> The weight given to this purpose will depend on the offender’s manner of driving, the extent of any traffic law breaches and whether they were under the influence of alcohol or drugs.<sup>26</sup>

### **Views differ on the application of these purposes**

- 4.28 Preliminary submissions expressed different views on whether courts are giving appropriate weight to the various sentencing purposes when determining sentences for serious road crime offences.
- 4.29 One issue raised in preliminary submissions is whether the sentencing purpose of rehabilitation is given appropriate weight. For instance, the Law Society suggested that our review consider “the value of a rehabilitative focus in sentencing for serious road crimes”.<sup>27</sup> Others argued there was too much focus on rehabilitation, and that this detracted from the other sentencing purposes.<sup>28</sup> The Victims of Crime Assistance League (Hunter) (VOCAL) suggested this could be addressed by requiring courts to give equal weight to all sentencing purposes.<sup>29</sup>
- 4.30 There are also different views about the place of general deterrence in sentencing for serious road crime offences. In VOCAL’s experience, deterrence “appear[ed] to be non-existent” in sentencing serious road crime offenders.<sup>30</sup> Others have previously argued that a heavy emphasis on deterrence in serious road crime

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22. See, eg, *Peberdy v R* [2023] NSWCCA 144 [83].

23. *R v Dunn* [2004] NSWCCA 41 [47].

24. See, eg, *Davidson v R* [2022] NSWCCA 153 [138], [149].

25. *R v Scott* [2005] NSWCCA 152 [15].

26. *R v Dutton* [2005] NSWCCA 248 [26]; *R v AB* [2011] NSWCCA 229 [116].

27. Law Society of NSW, *Preliminary Submission PRC59*, 2.

28. See, eg, Victims of Crime Assistance League (Hunter), *Preliminary Submission PRC84*, 4; F Gilroy, *Preliminary Submission PRC85*, 4.

29. Victims of Crime Assistance League (Hunter), *Preliminary Submission PRC84*, 4–5, 7.

30. Victims of Crime Assistance League (Hunter), *Preliminary Submission PRC84*, 4.

sentences “may be inappropriate”, pointing to evidence that deterrence did not always achieve its aims.<sup>31</sup>

## **Aggravating, mitigating and other factors in sentencing**

- 4.31 Sentencing courts must assess each case individually, based on its unique circumstances. This involves considering any relevant aggravating, mitigating and other factors that affect the seriousness of the crime committed by the offender.
- 4.32 Section 21A of the *Sentencing Procedure Act* sets out a list of aggravating and mitigating factors that courts must take into account if they are relevant and known to the court. The court must also consider any other objective or subjective factor that affects the relative seriousness of the offence.<sup>32</sup>
- 4.33 Appendix A contains examples of aggravating, mitigating and other factors that affect the seriousness of the offence, which were considered in recent vehicular manslaughter sentence appeals.

### **Overview of aggravating and mitigating factors**

- 4.34 An “aggravating factor” tends to suggest that the sentence imposed for that offence should be more severe, while a “mitigating factor” tends to suggest that the sentence should be more lenient.
- 4.35 For example, violence is an aggravating factor that would increase the seriousness of an offence.<sup>33</sup> An offence that does not cause substantial harm would be considered less serious.<sup>34</sup>
- 4.36 In another example, the presence of a criminal record may be relevant as an aggravating factor.<sup>35</sup> It could show that the offender has an attitude of disobedience towards the law.<sup>36</sup> This could also affect their prospects of rehabilitation.<sup>37</sup> However, if the offender did not have a relevant criminal record, and showed remorse for the offence, they may be considered less morally culpable.<sup>38</sup>

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31. Shopfront Youth Legal Centre, Submission TR06 to the NSW Sentencing Council, Repeat Traffic Offenders review (5 April 2019) 2–3.

32. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(1)(c).

33. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(b).

34. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(a).

35. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(d).

36. *R v McNaughton* [2006] NSWCCA 242, 66 NSWLR 566 [26].

37. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(h).

38. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(e), s 21A(3)(i).

- 4.37 Other factors are aimed at ensuring the efficiency of the criminal justice system and promoting the administration of justice. One example is the mitigating factor of providing assistance to law enforcement authorities. This encourages offenders to provide information that may help investigations, or to be a witness in a criminal trial of another offender, for example.<sup>39</sup> As we outline below, such assistance may result in sentencing discounts.<sup>40</sup>
- 4.38 A court is not required to increase or reduce the sentence just because any aggravating or mitigating factor is relevant and known to it.<sup>41</sup> Also, the court must not have additional regard to any aggravating factor in sentencing if that factor is an element of the offence.<sup>42</sup>
- 4.39 Some consider the list of aggravating and mitigating circumstances in s 21A to be well-settled and appropriate. In its preliminary submission, the Local Court stated that the aggravating and mitigating factors in s 21A provide enough guidance for sentencing courts to determine appropriate sentences.<sup>43</sup>
- 4.40 However, we acknowledge there are long-standing concerns about the general operation of s 21A, including that it is too complicated and may be used as a checklist.<sup>44</sup> We also received one suggestion that the sentencing process should instead begin with the maximum penalty and apply discounts for any relevant mitigating factors.<sup>45</sup>
- 4.41 These wider considerations are beyond the scope of this review, as any general reforms to s 21A and the sentencing process would affect its application to all offences.

### **Aggravating and other factors that increase the relative seriousness of road crime offences**

- 4.42 Only one aggravating factor in the *Sentencing Procedure Act* is specific to serious road crimes. Where a child under 16 was a passenger in the offender's vehicle, a court must take this into account when determining the appropriate sentence for a prescribed traffic offence. This includes the offences of:

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39. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(m).

40. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(k), s 21A(3)(m), s 22, s 23.

41. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5).

42. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2).

43. Local Court of NSW, *Preliminary Submission PRC82*, 5.

44. NSW Sentencing Council, *Fraud*, Report (2023) [6.8]–[6.14]. See also NSW Law Reform Commission, *Sentencing*, Report 139 (2013) rec 4.1.

45. F Gilroy, *Preliminary Submission PRC85*, 7.

- dangerous driving occasioning death and grievous bodily harm (GBH), where the circumstance of dangerous driving involved driving under the influence of alcohol or drugs
  - aggravated dangerous driving occasioning death and GBH, where the circumstance of aggravation involved the prescribed concentration of alcohol, escaping police pursuit or driving under the influence of drugs, and
  - failing to stop and driving dangerously or recklessly in response to a police pursuit.<sup>46</sup>
- 4.43 Other aggravating factors listed in s 21A are not specific to serious road crime offences, but may be relevant depending on the specific facts of the case.
- 4.44 Published decisions provide insights into other factors that courts have regarded as increasing the relative seriousness of a road crime offence.<sup>47</sup> The courts have found that an offender’s crime may be more serious where, for example:
- the offender was speeding, although the significance of this will depend on the circumstances (for example, speeding close to cyclists may be more serious than in other situations)<sup>48</sup>
  - the offence involved street racing<sup>49</sup>
  - the offender consumed alcohol (this can be relevant even where the offender was under the legal limit, as it can show that the offender drove while “impaired to some extent”)<sup>50</sup>
  - the offender was of a mature age, as their “greater experience of life” means they can better understand the risk associated with dangerous driving, compared with a young person,<sup>51</sup> and
  - the driving involved a greater risk to the community and the safety of others, for example, because of the length of time or distance of the unsafe driving, the number of people put at risk or the number of vehicles that were involved.<sup>52</sup>
- 4.45 As we explain above, the court cannot take the above factors into account if they are also an element of the offence.<sup>53</sup> This avoids “double counting”. For example, an offender may be convicted of dangerous driving occasioning death if they were

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46. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(p), s 21A(6) definition of “prescribed traffic offence” (b)–(c).

47. See NSW Sentencing Council, *Repeat Traffic Offenders*, Consultation Paper (2018) [3.30]–[3.53].

48. *Kerr v R* [2016] NSWCCA 218 [96]–[97].

49. *R v Borkowski* [2009] NSWCCA 102 [57], [59].

50. *Rummukainen v R* [2020] NSWCCA 187 [29].

51. *R v Crane* [2023] NSWDC 315 [29].

52. *Byrne v R* [2021] NSWCCA 185 [113]–[115].

53. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2).



driving at a dangerous speed at the time of impact. In such a case, the fact that the offender was speeding cannot be considered an aggravating factor. For the same reason, the fact that the offender acted without regard for public safety is not an aggravating factor when sentencing for dangerous driving offences.<sup>54</sup>

4.46 Later in this chapter, we explore how the guideline judgment for dangerous driving offences outlines certain aggravating factors that are to be taken into account, where relevant.

### **Mitigating and other factors that reduce the relative seriousness of road crime offences**

4.47 There are no mitigating factors specific to serious road crimes in the *Sentencing Procedure Act*. Other factors that have been found to reduce the relative seriousness of serious road crime offences include, for example, where:

- the crime was caused by “omission and forgetfulness”, such as failing to properly maintain or repair a car, as opposed to a deliberate act<sup>55</sup>
- the offender experienced suffering because of their relationship with the victim,<sup>56</sup> for example, if the victim was a friend or family member<sup>57</sup>
- the offender suffered serious injuries, or developed a serious disability, due to the collision, which will make prison more onerous,<sup>58</sup> and
- the harm caused by the offence affected the offender through mental illness, shame and/or guilt.<sup>59</sup>

4.48 Other mitigating factors are less relevant for serious road crimes. For instance, serious road crime offenders are often of good character and do not have a criminal record.<sup>60</sup> The importance of general deterrence for serious road crime offences means these mitigating factors are given less weight.<sup>61</sup>

4.49 Some factors cannot be regarded as mitigating factors in sentencing for serious road crime offences. Courts cannot take into account any “contributory negligence” by victims in mitigation. This includes, for example, if the victim gets into a car

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54. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(l); *R v McMillan* [2005] NSWCCA 28 [37]–[39].

55. *Mansweto v R* [2018] NSWCCA 232 [77].

56. *R v Howcher* [2004] NSWCCA 179 [16]–[18].

57. See, eg, *R v Dutton* [2005] NSWCCA 248 [38]; *Hughes v R* [2008] NSWCCA 48 [21]; *Rosenthal v R* [2008] NSWCCA 149 [20]; *R v Glover* [2011] NSWDC 65 [31]–[32].

58. *R v Wright* [2013] NSWCCA 82 [60]; *Rosenthal v R* [2008] NSWCCA 149 [20].

59. *R v Koosmen* [2004] NSWCCA 359 [32].

60. See, eg, *Whelan v R* [2012] NSWCCA 147 [4]; *R v Manok* [2017] NSWCCA 232 [95].

61. *R v Price* [2004] NSWCCA 186 [45]; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(e), s 32A(3)(f).



knowing the driver was intoxicated or does not wear a seatbelt.<sup>62</sup> However, “‘contumacious’ or indeed criminal” victim conduct may be relevant to assessing objective seriousness and moral culpability.<sup>63</sup> This can include where the victim was speeding, ran red lights or otherwise breached road rules.<sup>64</sup>

- 4.50 The inexperience and immaturity of offenders aged over 17 also generally does not mitigate the seriousness of their offence. This is because of the importance of general deterrence, and because the courts have found that people who are old enough to hold a licence should be “mature enough to comply with its conditions and the traffic rules”.<sup>65</sup> Finally, there is a general rule that any self-induced intoxication cannot be taken into account in mitigation for any offence.<sup>66</sup>
- 4.51 As noted above, courts consider mitigating and other factors as part of the process of assessing each case individually. However, some victims find the focus on the offender’s subjective case in serious road crime sentences distressing.
- 4.52 VOCAL told us that victims were “generally appalled” at the weight given to such factors.<sup>67</sup> It regarded subjective factors, such as trauma or addiction, as “excuses for breaking the law” that “shift[ed] the focus away from the crime” and minimised the offender’s accountability.<sup>68</sup> Similarly, the RTSG submitted that the mitigating factor of remorse contributed to inadequate sentences for serious road crime offences.<sup>69</sup>

## Comparable cases

- 4.53 Courts may consider comparable cases (that is, sentencing cases involving the same or a similar offence or offences) when determining the appropriate sentence for serious road crime offences.<sup>70</sup>
- 4.54 Comparable cases can assist with achieving consistency in sentencing.<sup>71</sup> They can help ensure that like cases are treated alike, and different cases are treated

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62. *R v Errington* [1999] NSWCCA 18 [27]–[28]; *R v Berg* [2004] NSWCCA 300 [26].

63. *R v Janceski* [2005] NSWCCA 288 [28]–[29]; *R v Balla* [2021] NSWDC 487 [52].

64. *R v Janceski* [2005] NSWCCA 288 [5], [28]–[29]; *R v Balla* [2021] NSWDC 487 [57], [60].

65. *SBF v R* [2009] NSWCCA 231 [151]; *TG v R* [2010] NSWCCA 28 [33].

66. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5AA).

67. Victims of Crime Assistance League (Hunter), *Preliminary Submission PRC84*, 4.

68. Victims of Crime Assistance League (Hunter), *Preliminary Submission PRC84*, 4–5.

69. Road Trauma Support Group NSW, *Preliminary Submission PRC72*, 4.

70. See, eg, *Chandler v R* [2023] NSWCCA 59 [101]–[112]; *Davidson v R* [2022] NSWCCA 153 [13]–[34], [36]–[40].

71. *Barbaro v R* [2014] HCA 2, 253 CLR 58 [40].

differently.<sup>72</sup> Comparable cases may also be used in sentence appeals to assist in determining whether the initial sentence was manifestly excessive or inadequate.<sup>73</sup>

- 4.55 Other benefits of using comparable cases include that they can suggest sentencing patterns, and possibly show the existing range of sentences for similar offences. However, courts have recognised that this range is not necessarily correct, or determinative of the limits of sentencing.<sup>74</sup>
- 4.56 Difficulties can arise in using comparable cases for offences that cover a broad range of conduct, as some serious road crime offences do. For example, the Supreme Court has cautioned that manslaughter is a “particularly difficult offence to measure by comparative standards”, and that “great care” must be taken when using comparable cases for manslaughter cases involving motor vehicles in particular.<sup>75</sup>
- 4.57 Sometimes the circumstances of a particular case may be so unique that there is “no truly comparable case”.<sup>76</sup> Courts may still find it helpful to use comparable cases, as long as it is done with caution.<sup>77</sup>
- 4.58 Some preliminary submissions raised concerns about the use of comparable cases in sentencing serious road crime offences. For instance, the RTSG stated that sentencing courts use comparable cases for circumstances that cannot be compared.<sup>78</sup>

## **Totality**

- 4.59 The principle of totality is relevant when a court is sentencing one offender for multiple offences, which are committed either separately or at the same time. For instance, it can arise where one crash has multiple victims, and the offender is convicted of a separate offence for each victim.<sup>79</sup>
- 4.60 According to the principle of totality, the court cannot just add up the sentences for each offence.<sup>80</sup> Instead, the court is required to impose an overall sentence that is just and appropriate for the “total criminality” involved in the offending (in other

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72. *Green v R* [2011] HCA 49, 244 CLR 462 [28].

73. *Wong v R* [2001] HCA 64, 207 CLR 584 [58].

74. *R v Pham* [2015] HCA 39, 256 CLR 550 [26]–[27].

75. *R v Smith* [2022] NSWSC 269 [102].

76. *Davidson v R* [2022] NSWCCA 153 [177], [334].

77. *Davidson v R* [2022] NSWCCA 153 [177] (N Adams J), [17] (Brereton JA), [138] (Adamson J).

78. Road Trauma Support Group NSW, *Preliminary Submission PRC72*, 4.

79. *Davidson v R* [2022] NSWCCA 153 [300].

80. *Davidson v R* [2022] NSWCCA 153 [296].

words, how serious the offending was across the offences, taken as a whole).<sup>81</sup> For instance, where one collision involved multiple victims, the court must recognise the consequences of the offence, while also considering that the offences arose from one criminal course of conduct.<sup>82</sup>

- 4.61 Totality recognises that an arithmetical approach very often results in a sentence “that exceeds what is called for” in all the circumstances.<sup>83</sup> An aggregate sentence cannot be inappropriately “crushing” in the circumstances.<sup>84</sup> However, when applying the principle of totality, courts must be careful to maintain public confidence in the criminal justice system and avoid any perception that discounts are given for multiple offences.<sup>85</sup> The sentence cannot be inadequate for the criminality involved.<sup>86</sup>
- 4.62 Appendix A contains recent examples of the application of the totality principle in vehicular manslaughter sentence appeals.
- 4.63 In serious road crimes involving multiple victims, there may be a public perception that the overall sentence does not adequately recognise the harm done to each victim. In a recent CCA case, Justice N Adams explained that totality will result in the offender serving less time in custody for each offence against each victim, compared with a case where there was only one victim and one offence. Her Honour acknowledged that this “may well leave victims of crime feeling that the offender has received little *additional* punishment in relation to the offences committed on them”.<sup>87</sup>

## Sentencing discounts

- 4.64 In some circumstances, a court reduces the sentence by a certain percentage. For example, sentencing discounts for guilty pleas can be between 5% and 25%, depending on the timing and circumstances of the plea.<sup>88</sup> Our summary of recent CCA sentence appeals (appendix A) contains examples of sentencing discounts applied in recent vehicular manslaughter sentence appeals.

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81. *Mill v R* (1988) 166 CLR 59, 63.

82. *Davidson v R* [2022] NSWCCA 153 [333], [36].

83. *R v Holder* [1983] 3 NSWLR 245, 260.

84. See, eg, *Davidson v R* [2022] NSWCCA 153 [41]–[43], [302]–[322].

85. *R v Knight* [2005] NSWCCA 253 [112].

86. *R v KM* [2004] NSWCCA 65 [55].

87. *Davidson v R* [2022] NSWCCA 153 [330] (emphasis in original).

88. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22, s 25D; *R v Thomson* [2000] NSWCCA 309, 49 NSWLR 383.

- 4.66 Lower sentences are imposed for guilty pleas because they:
- avoid the need for a trial, which saves resources and improves the efficiency of the criminal justice system
  - save witnesses and victims from having to give evidence, which may be especially valuable in cases where the victim has suffered trauma, and
  - can be evidence of remorse.<sup>89</sup>
- 4.67 Other sentencing discounts exist to improve the efficiency of the criminal justice system. These include discounts for:
- providing assistance to authorities, such as by assisting with an investigation,<sup>90</sup> and
  - facilitating the administration of justice, such as by making disclosures either before, during or after the trial.<sup>91</sup>
- 4.68 These discounts must not be unreasonably disproportionate to the nature and circumstances of the offence.<sup>92</sup>
- 4.69 Sentencing discounts can result in outcomes that some consider to be unjust, as offenders receive lower sentences than they otherwise would. In the RTSG’s view, discounts for guilty pleas contribute to inadequate sentences for serious road crime offences.<sup>93</sup>
- 4.70 A parliamentary inquiry into dangerous driving recently recommended that the Australian Capital Territory (ACT) Government review discounts to sentences for serious crimes and repeat offenders, and to consider the impact of such discounts on victims.<sup>94</sup> The ACT Government agreed there should be a review.<sup>95</sup>

#### Question 4.1: General sentencing principles and procedures

Are any issues relevant to serious road crime offences not adequately addressed by the general sentencing framework? If so, what specific reforms could address this?

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89. *R v Thomson* [2000] NSWCCA 309, 49 NSWLR 383 [3].

90. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23.

91. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22A(1).

92. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22A(2), s 23(3).

93. Road Trauma Support Group NSW, *Preliminary Submission PRC72*, 4.

94. Australian Capital Territory, Legislative Assembly, Standing Committee on Justice and Community Safety, *Inquiry into Dangerous Driving*, Report 16 (2023) rec 3.

95. Australian Capital Territory Government, *Legislative Assembly Standing Committee on Justice and Community Safety Report No 16: Inquiry into Dangerous Driving*, Government Response (2023) 8–9.

## The guideline judgment for dangerous driving

- 4.71 Guideline judgments can be issued by the CCA, either on the application of the Attorney General or on the CCA’s “own motion” in any proceedings.<sup>96</sup> Guideline judgments operate as a “check”, “sounding board” or “guide” for sentencing courts.<sup>97</sup> While guideline judgments must be taken into account by courts when sentencing, they do not create any rules or presumptions.<sup>98</sup>
- 4.72 There are arguments for and against guideline judgments. Guideline judgments aim to promote consistency in sentencing and maintain public confidence in both the sentences imposed by courts, and in the judiciary.<sup>99</sup> In 2013, the NSW Law Reform Commission remarked that guideline judgments have:
- proved valuable in encouraging greater consistency in sentencing, in correcting inappropriate levels of sentencing and in giving guidance to courts, both in providing numerical ranges and in stating overarching principles.<sup>100</sup>
- 4.73 However, there can be a tension between guideline judgments and the principle of individualised justice.<sup>101</sup> Some have expressed concerns that guideline judgments limit judicial discretion.<sup>102</sup> There may also be challenges with reconciling guideline judgments and updates in the law since they were issued.<sup>103</sup>
- 4.74 In this section, we consider the guideline judgment for sentencing for dangerous driving offences — *R v Whyte (Whyte)*.<sup>104</sup> This replaced the earlier guideline judgment of *R v Jurisic (Jurisic)* but broadly adopted the same reasoning.<sup>105</sup> Another guideline judgment deals with a traffic offence that is beyond the scope of this review.<sup>106</sup>

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96. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 37, s 37A.

97. *R v Whyte* [2002] NSWCCA 343, 55 NSWLR 252 [113].

98. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 36 definition of “guideline judgment”.

99. *R v Whyte* [2002] NSWCCA 343, 55 NSWLR 252 [189]–[190].

100. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [0.53]. See also L A Barnes, P Poletti and I Potas, *Sentencing Dangerous Drivers in New South Wales: Impact of the Jurisic Guidelines on Sentencing Practice*, Research Monograph No 21 (Judicial Commission of NSW, 2002); P Poletti, *Impact of the High Range PCA Guideline Judgment on Sentencing Drink Drivers in NSW*, Sentencing Trends and Issues No 35 (Judicial Commission of NSW, 2005); L A Barnes and P Poletti, *Sentencing Robbery Offenders since the Henry Guideline Judgment*, Research Monograph No 30 (Judicial Commission of NSW, 2007).

101. *R v Whyte* [2002] NSWCCA 343, 55 NSWLR 252 [167].

102. *R v Ngui* [2000] VSCA 78, 1 VR 579 [12].

103. *Stanton v R* [2021] NSWCCA 123 [29]. See further NSW Sentencing Council, *Standard Non-Parole Periods for Dangerous Driving Offences*, Report (2011) 42–45.

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

105. *R v Jurisic* (1998) 45 NSWLR 209.

106. *Application by the Attorney General under s 37 of the Crimes (Sentencing Procedure) Act 1999 (No 3 of 2002)* [2004] NSWCCA 303, 61 NSWLR 305; *Road Transport Act 2013* (NSW) s 110(5).

## Features of the *Whyte* guideline judgment

- 4.75 *Whyte* and *Jurisic* were issued in response to concerns that sentences did not reflect the public’s view about the seriousness of dangerous driving offences.<sup>107</sup> In particular, there were concerns that the sentencing of offenders with strong subjective factors (such as good character) was overly lenient.<sup>108</sup>
- 4.76 In *Whyte*, the CCA identified that the guidelines would apply to a “typical case” with the following features:
- the offence involved a young offender who was of good character and had no, or limited, prior convictions
  - the offence caused death or permanent injury to a single person, who was a stranger to the offender
  - there was no, or limited, injury to the offender or anyone close to the offender
  - the offender was genuinely remorseful, and
  - the offender pleaded guilty, but the plea had limited utilitarian value.<sup>109</sup>
- 4.77 The CCA held that, in a typical case:
- a custodial sentence is usually appropriate unless the offender has a low level of moral culpability, such as with cases of momentary inattention or misjudgement,<sup>110</sup> and
  - where the offender’s moral culpability is high, a full time custodial head sentence of less than 3 years (for an offence causing death) or less than 2 years (for an offence causing GBH) would generally not be appropriate.<sup>111</sup>
- 4.78 The CCA outlined aggravating factors that could influence the court’s assessment of an offender’s level of moral culpability. The presence of these factors, either individually or in combination, could indicate that the offender’s moral culpability was high, and the numerical guideline would be appropriate.<sup>112</sup>
- 4.79 Those factors are:
- the extent and nature of the injuries caused
  - the number of people put at risk, and how long they were exposed to the risk

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107. *R v Jurisic* (1998) 45 NSWLR 209, 223; *R v Whyte* [2002] NSWCCA 343, 55 NSWLR 252 [142]–[145].

108. NSW Office of the Director of Public Prosecutions, Submission TR09 to the NSW Sentencing Council, Repeat Traffic Offenders review (10 May 2019) 3.

109. *R v Whyte* [2002] NSWCCA 343, 55 NSWLR 252 [203]–[204].

110. *R v Whyte* [2002] NSWCCA 343, 55 NSWLR 252 [214].

111. *R v Whyte* [2002] NSWCCA 343, 55 NSWLR 252 [229].

112. *R v Whyte* [2002] NSWCCA 343, 55 NSWLR 252 [228]–[229].

- the degree of speed
- the degree of intoxication from alcohol or drugs
- erratic driving
- competitive driving or showing off
- ignoring warnings
- escaping police pursuit
- the degree of sleep deprivation, and
- failing to stop.<sup>113</sup>

4.80 However, as we explain above, the above aggravating factors cannot be additionally taken into account if they are also an element of the offence.<sup>114</sup> This would apply, for example, where the circumstance of aggravation was escaping police pursuit.<sup>115</sup>

### Impact on sentencing trends

4.81 In 2020, Justice Button commented that “there has been an obvious trend” towards “more severe sentences in more serious fatal driving cases” since *Whyte* was handed down in 2002.<sup>116</sup> An earlier evaluation of *Juriscic* had also concluded that it led to more severe penalties, less prosecution appeals for inadequate sentences and greater consistency in sentencing.<sup>117</sup>

4.82 A full examination of sentencing trends since *Whyte* would require a detailed statistical analysis, which is beyond the scope of this review. However, statistics suggest that average sentences of custody for offences under s 52A of the *Crimes Act 1900* (NSW) (*Crimes Act*) have remained relatively consistent since the guideline judgments were handed down.

4.83 For dangerous driving occasioning death offences, the average head sentence has hovered around 3 years (that is, the numerical guideline in *Whyte*). Figure 4.1 sets out average head sentences (1995–2022) for proven court appearances where dangerous driving occasioning death was the defendant’s most serious (or

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113. *R v Whyte* [2002] NSWCCA 343, 55 NSWLR 252 [216]–[217].

114. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2).

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

116. *Wraydeh v R* [2020] NSWCCA 309 [57].

117. L A Barnes, P Poletti and I Potas, *Sentencing Dangerous Drivers in New South Wales: Impact of the Juriscic Guidelines on Sentencing Practice*, Research Monograph No 21 (Judicial Commission of NSW, 2002); P Poletti, *Impact of the High Range PCA Guideline Judgment on Sentencing Drink Drivers in NSW*, Sentencing Trends and Issues No 35 (Judicial Commission of NSW, 2005); L A Barnes and P Poletti, *Sentencing Robbery Offenders since the Henry Guideline Judgment*, Research Monograph No 30 (Judicial Commission of NSW, 2007).



principal) offence. As the figure shows, there were no such court appearances in 1995. Since *Juriscic* was handed down, the average head sentence ranged from 2 years and 7 months, to 3 years and 9 months.<sup>118</sup>

**Figure 4.1: Average head sentence (months) for dangerous driving occasioning death, 1995–2022**



Source: NSW Bureau of Crime Statistics and Research, reference st23-22811, table 2  
The data table for this graph is at appendix C.

- 4.84 For aggravated dangerous driving offences, the CCA held in *Whyte* that “an appropriate increment to reflect the higher maximum penalty, and what will generally be a higher level of moral culpability, is required”.<sup>119</sup> This is reflected in figure 4.2 below. This shows the average head sentence for aggravated dangerous driving occasioning death, for principal proven offences that resulted in a sentence of custody (1995–2022). For the years after *Juriscic* was handed down, the average head sentences ranged from 4 years and 1 month, to 7 years and 3 months.<sup>120</sup>

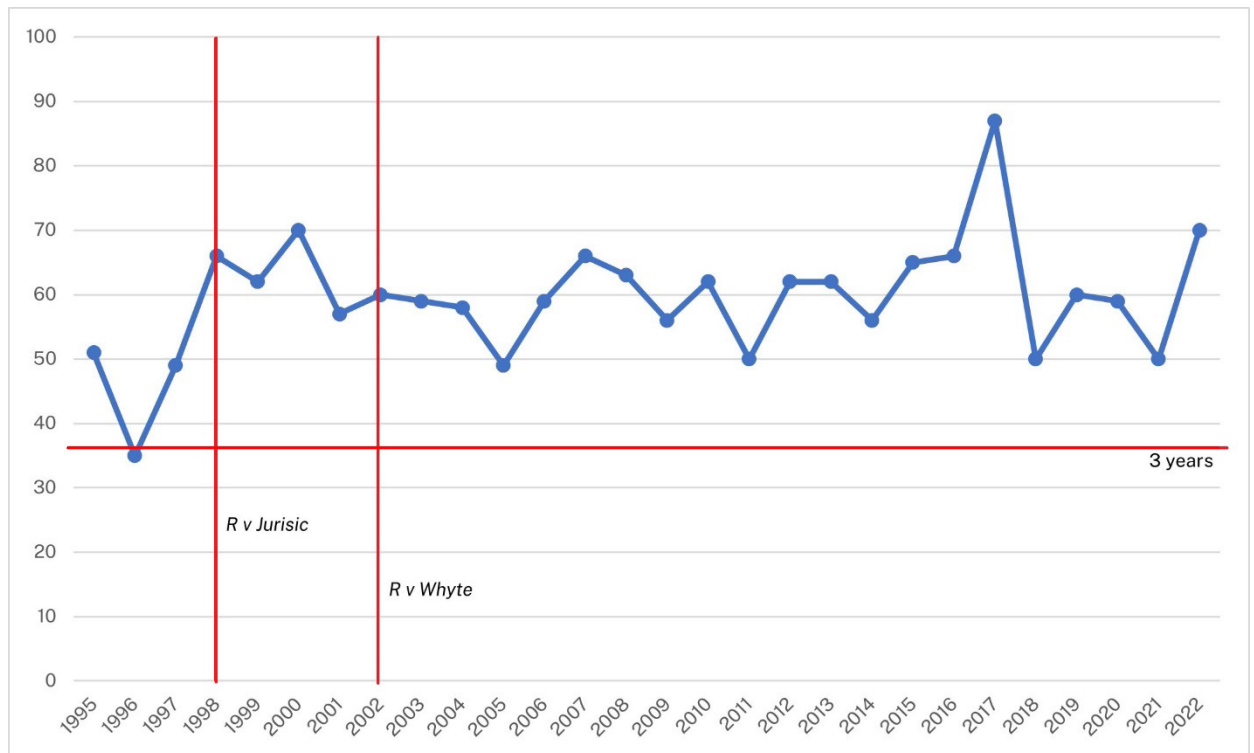
118. NSW Bureau of Crime Statistics and Research, reference st23-22811, table 2.

119. *R v Whyte* [2002] NSWCCA 343, 55 NSWLR 252 [231].

120. NSW Bureau of Crime Statistics and Research, reference st23-22811, table 2.



**Figure 4.2: Average head sentence (months) for aggravated dangerous driving occasioning death, 1995–2022**



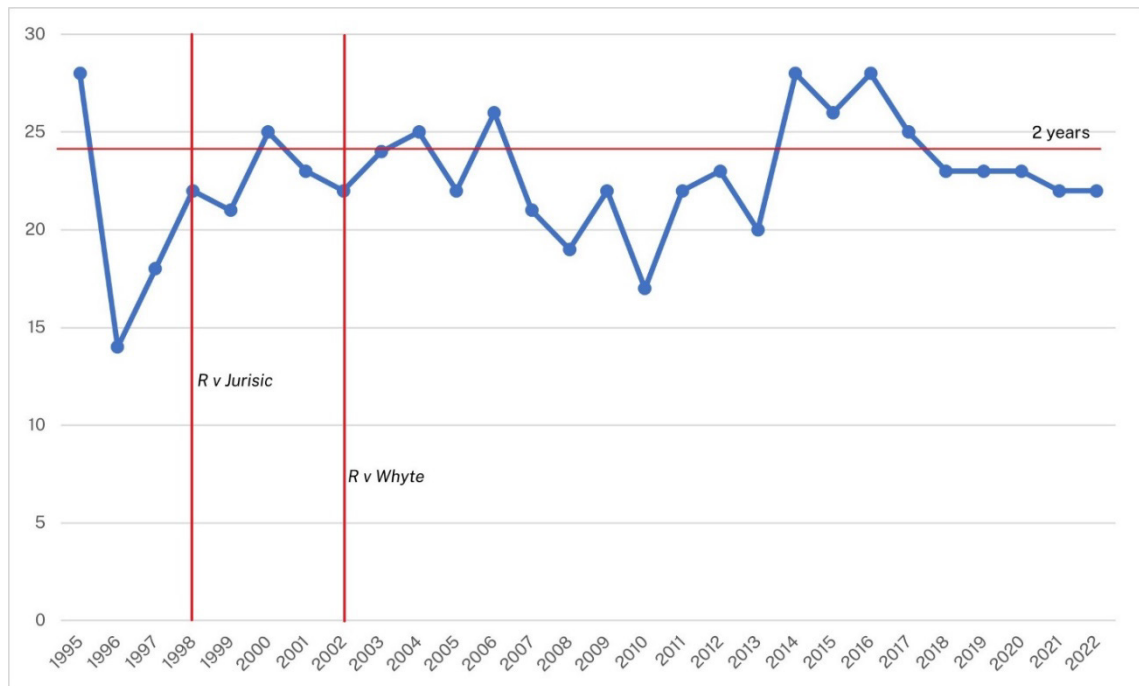
Source: NSW Bureau of Crime Statistics and Research, reference st23-22811, table 2  
The data table for this graph is at appendix C.

- 4.85 Figures 4.3 and 4.4 show statistics for dangerous driving occasioning GBH, and the aggravated version of this offence. Consistent with the approach outlined in *Whyte*, the average head sentences for proven principal offences were higher for the aggravated offence.
- 4.86 For dangerous driving occasioning GBH, the average generally hovered a bit below 2 years (that is, the numerical guideline) after the guideline judgments. In the years after *Jurisic* was handed down, the averages ranged from 1 year and 5 months, to 2 years and 4 months for the basic offence.<sup>121</sup>
- 4.87 For the aggravated offence, the average hovered slightly below 3 years. After *Jurisic*, the average head sentences ranged between 2 years, and 4 years and 1 month.<sup>122</sup>

121. NSW Bureau of Crime Statistics and Research, reference st23-22811, table 2.

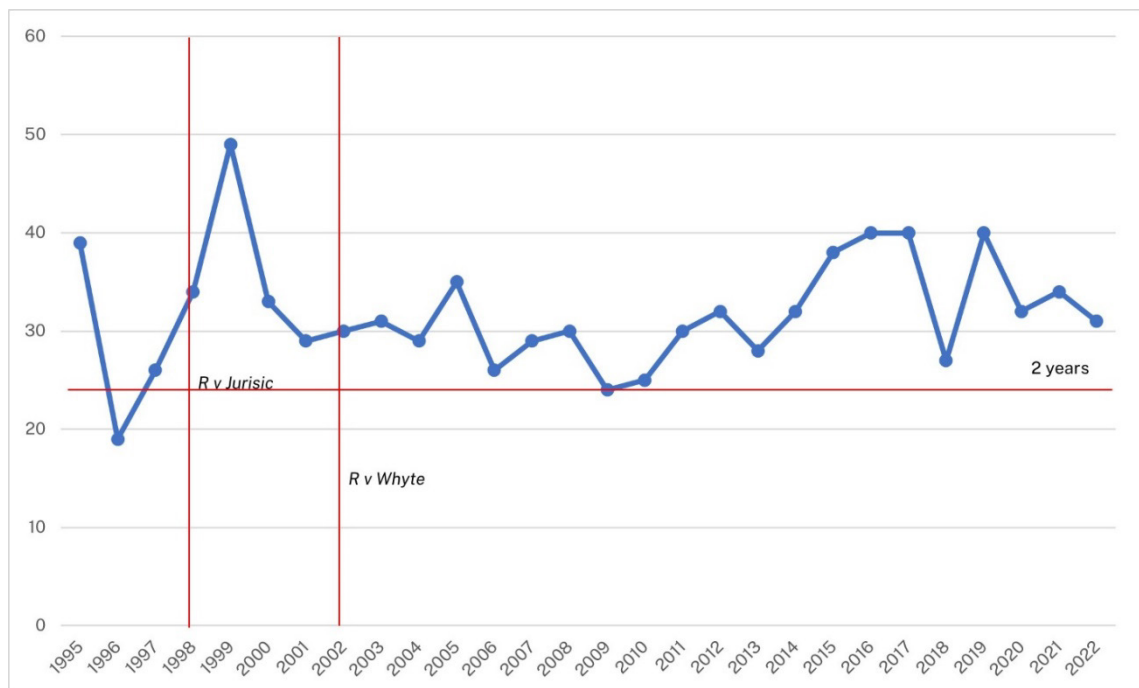
122. NSW Bureau of Crime Statistics and Research, reference st23-22811, table 2.

**Figure 4.3: Average head sentence (months) for dangerous driving occasioning GBH, 1995–2022**



Source: NSW Bureau of Crime Statistics and Research, reference st23-22811, table 2  
The data table for this graph is at appendix C.

**Figure 4.4: Average head sentence (months) for aggravated dangerous driving occasioning GBH, 1995–2022**



Source: NSW Bureau of Crime Statistics and Research, reference st23-22811, table 2  
The data table for this graph is at appendix C.

## Is it time to re-evaluate *Whyte*?

- 4.88 Twenty-one years after this decision, there are questions about whether *Whyte* remains relevant.
- 4.89 Some preliminary submissions, particularly from legal groups, stated that *Whyte* was appropriate and working well.<sup>123</sup> The NSW Bar Association submitted that “guideline judgments are central to sentencing proceedings for serious road crimes and appropriately guide the exercise of judicial discretion”.<sup>124</sup>
- 4.90 On the other hand, some considered *Whyte* to be outdated and out of line with community expectations. We heard concerns, including from some victims’ advocacy groups, that the guideline judgment was inadequate and overly lenient.<sup>125</sup>
- 4.91 In this section, we present some considerations relevant in assessing *Whyte*.

### **There have been significant legal developments since *Whyte***

- 4.92 Courts need to apply current laws alongside *Whyte* when sentencing dangerous driving offenders.<sup>126</sup> This may lead to unnecessary complexity.
- 4.93 There have been significant developments in sentencing law since *Whyte* was handed down. These include, for example:
- more recent caselaw that has explained the difference between moral culpability and objective seriousness, which is inconsistent with the way *Whyte* refers to moral culpability,<sup>127</sup> and
  - changes to the *Sentencing Procedure Act*, including legislated discounts for guilty pleas, the 2018 reforms to sentencing options and amendments to the s 21A list of aggravating and mitigating factors.<sup>128</sup>
- 4.94 However, caselaw has clarified how to reconcile *Whyte* with updated sentencing laws.<sup>129</sup> *Whyte* also allows for judicial discretion to determine the appropriate sentence.

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123. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PRC77*, 7; Local Court of NSW, *Preliminary Submission PRC82*, 4; NSW Bar Association, *Preliminary Submission PRC83*, 2; Aboriginal Legal Service (NSW/ACT) Ltd, *Preliminary Submission PRC88*, 1.

124. NSW Bar Association, *Preliminary Submission PRC83*, 2.

125. Road Trauma Support Group NSW, *Preliminary Submission PRC72*, 3–4; Victims of Crime Assistance League (Hunter), *Preliminary Submission PRC84*, 4.

126. *Stanton v R* [2021] NSWCCA 123 [29]; *Foaiaulima v R* [2020] NSWCCA 270 [27].

127. See *R v Eaton* [2023] NSWCCA 125 [56].

128. *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.

129. See, eg, *R v Eaton* [2023] NSWCCA 125 [56].

## Does the “typical case” in *Whyte* reflect current conditions?

- 4.95 The features of the “typical case” outlined in *Whyte* were based on offences committed over 20 years ago. This raises questions about whether the guidelines in *Whyte*, which were based on such a case, remain appropriate for dangerous driving cases today. These may have different “typical” features.
- 4.96 Evaluating this would involve a detailed assessment that is beyond the scope of this review. However, some factors suggest there may be merit in reconsidering the features that make up the typical case and whether the guidelines of at least a 2 or 3 year custodial sentence is appropriate.
- 4.97 One consideration is whether most dangerous driving offenders are young. For all proven principal dangerous driving offences finalised between 24 September 2018 and 3 December 2022 in the higher courts, only 32% of offenders were under 25 when their matter was finalised.<sup>130</sup>
- 4.98 Another issue is whether dangerous driving offenders typically have no, or limited, prior convictions. For proven principal offences finalised between 24 September 2018 and 31 December 2022, 45% did not involve the offender having a prior record. The others had a prior record of some kind (48% involving offences of a different type, and 7% involving offences of the same type).<sup>131</sup>
- 4.99 Additionally, the typical case in *Whyte* involved a guilty plea of “limited utilitarian value”. In *Whyte*, the offender pleaded guilty partway through the trial, and the court allowed a discount of 10%.<sup>132</sup>
- 4.100 The utilitarian value of a guilty plea reflects the benefit the plea provides to the criminal justice system. If someone enters a plea at the earliest possible opportunity, this will provide a greater benefit than someone who enters a guilty plea partway through a criminal trial.
- 4.101 Guilty pleas appear to still be “typical”. They were involved in 84.6% of the proven principal dangerous driving offences finalised between 2016 and 2022 (which would have resulted in sentencing discounts, as we discuss above). Only 15.4% of these offences involved a finding of guilt at trial.<sup>133</sup>
- 4.102 However, the utilitarian value of such pleas is now assessed differently. The *Sentencing Procedure Act* now provides for the discount to be applied for guilty

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130. Judicial Commission of NSW, *Sentencing Statistics*, Judicial Information Research System (retrieved 9 October 2023).

131. Judicial Commission of NSW, *Sentencing Statistics*, Judicial Information Research System (retrieved 16 October 2023).

132. *R v Whyte* [2002] NSWCCA 343, 55 NSWLR 252 [242].

133. NSW Bureau of Crime Statistics and Research, reference st23-22821, table 7.

pleas for offences dealt with on indictment.<sup>134</sup> The 2018 early appropriate guilty plea reforms were intended to “ensure cases are better managed” to provide additional incentives and opportunities for defendants to plead guilty at an earlier stage of criminal proceedings.<sup>135</sup>

#### Question 4.2: Guideline judgment for dangerous driving offences

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

## Standard non-parole periods

- 4.103 If sentencing outcomes for dangerous driving offences are considered inadequate, an alternative to updating *Whyte* might be to introduce standard non-parole periods (SNPPs) for those offences.
- 4.104 The *Sentencing Procedure Act* lists the offences that have SNPPs.<sup>136</sup> The SNPP scheme was introduced to promote public understanding of the sentencing process, improve transparency, and promote consistency in sentencing.<sup>137</sup> The scheme provides a guidepost in sentencing to be considered by all courts when sentencing for a particular offence dealt with on indictment in the District or Supreme Courts. There are some limited exceptions, including for defendants who were under 18 at the time the offence was committed.<sup>138</sup>
- 4.105 Adding certain serious road crime offences to the SNPP scheme may be one way to address concerns that sentences are too lenient, and to promote consistency in sentencing outcomes. However, this may be a controversial option.

### What is an SNPP?

- 4.106 In sentences of imprisonment, the non-parole period (NPP) is the minimum period an offender must spend in prison.<sup>139</sup> In most cases, the court will also outline an additional period that the offender can serve in the community under supervision, if they are granted parole (this is the “parole period”). The NPP is usually 75% of the

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134. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 3 div 1A.

135. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 11 October 2017, 277–278.

136. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4 div 1A table standard non-parole periods.

137. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 23 October 2002, 5813.

138. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D.

139. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(1).

total sentence of imprisonment.<sup>140</sup> However, a court can impose a lower NPP if it finds there are special circumstances that justify this.<sup>141</sup>

- 4.107 An SNPP is the NPP that is in the middle of the range of seriousness for the relevant offence, viewed objectively. This means that if all possible instances of the offence were ranked based on their seriousness, objectively speaking, the SNPP will be appropriate for the cases that fall around the middle.<sup>142</sup>
- 4.108 Courts must take SNPPs into account when sentencing an offender.<sup>143</sup> They are intended to provide “a reference point or benchmark” for sentencing courts.<sup>144</sup> While they do not have to be followed in all cases, sentencing courts must provide reasons if they do not impose the SNPP.<sup>145</sup>

### **What are the potential benefits and disadvantages of SNPPs?**

- 4.109 The main potential benefits of SNPPs are consistency and addressing concerns regarding inadequate sentencing outcomes. A 2010 review by the Judicial Commission of NSW found that, for some offences, SNPPs dramatically increased the severity of sentences and resulted in more uniform sentencing outcomes. However, the study raised concerns that this could have been caused by different cases being treated similarly to comply with the SNPP scheme.<sup>146</sup>
- 4.110 Some are critical of SNPPs. Harsher sentences have implications for the prison population.<sup>147</sup> These risks are particularly pronounced for high-volume offences.<sup>148</sup> Increases to the prison population can cause resourcing issues for the criminal justice system. Harsher sentences can also worsen socioeconomic outcomes and may impede efforts to reduce the disproportionate incarceration rates of Aboriginal people.

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140. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(2).

141. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44(2). See, eg, *R v Simpson* [2001] NSWCCA 534, 53 NSWLR 704 [62]; *Quayle v R* [2010] NSWCCA 16 [40].

142. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54A(2).

143. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B(2).

144. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 23 October 2002, 5816.

145. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54B(3), s 54C(1).

146. P Poletti and H Donnelly, *The Impact of the Standard Non-Parole Period Sentencing Scheme on Sentencing Patterns in New South Wales* (Judicial Commission of NSW, 2010) 22, 60, 61.

147. NSW Sentencing Council, *Standard Non-Parole Periods for Dangerous Driving Offences*, Report (2011) 35.

148. NSW Sentencing Council, *Standard Minimum Non-Parole Periods*, Questions for Discussion (2013) [1.19].

4.111 Another argument against SNPPs is that the existing sentencing framework does not need an additional guidepost, as it provides enough guidance to sentencing courts while still allowing judicial discretion.<sup>149</sup>

### **Should any serious road crime offences have SNPPs?**

4.112 One preliminary submission suggested that serious road crime offences, such as aggravated dangerous driving occasioning death, should have SNPPs. The submission argued this reform would reflect the seriousness of these offences and deter and punish offenders more effectively.<sup>150</sup> In another preliminary submission, the RTSG argued that each category of serious road crime offences should have a minimum NPP. In its view, this would result in sentences that better align with community expectations.<sup>151</sup>

4.113 If SNPPs were to be introduced for dangerous driving offences, it may be preferable for any SNPPs to override the operation of the guideline judgment. This is because the interaction of any SNPPs with the guideline judgment would lead to complexities in sentencing.<sup>152</sup>

4.114 The NSW Sentencing Council has developed guidelines to help determine if an offence should be included in the SNPP scheme. In the Council's view, it may be appropriate to introduce an SNPP for an offence if it:

- has a significant maximum penalty
- is a serious indictable offence
- involves elements of aggravation
- involves a vulnerable victim
- involves special risk of serious consequences to the victim and the community
- is prevalent
- is subject to a pattern of inadequate sentencing, and
- is subject to a pattern of inconsistent sentences.<sup>153</sup>

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149. NSW Sentencing Council, *Standard Non-Parole Periods for Dangerous Driving Offences*, Report (2011) 35.

150. Confidential, *Preliminary Submission PRC91*, 4.

151. Road Trauma Support Group NSW, *Preliminary Submission PRC72*, 3.

152. These were comprehensively considered and outlined by NSW Sentencing Council, *Standard Non-Parole Periods for Dangerous Driving Offences*, Report (2011) 38.

153. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) rec 2.1.



- 4.115 The Council stated these factors should be applied “flexibly and with careful judgement”, and that not all need to be present for an offence to be considered appropriate for an SNPP.<sup>154</sup>
- 4.116 In the Council’s view, an SNPP should generally be 37.5% of the maximum penalty for the offence. But this could be reduced, or increased up to 50%, taking certain factors into account.<sup>155</sup>
- 4.117 Only three serious road crime offences satisfy the strictly indictable guideline: manslaughter, aggravated dangerous driving occasioning death and dangerous driving occasioning death.
- 4.118 However, the Council considered that offences covering a wide range of offending conduct are ordinarily not suitable for an SNPP.<sup>156</sup> It has been generally accepted that manslaughter should not have an SNPP, given the wide range of conduct and culpability the offence covers.<sup>157</sup> The Council also recommended in 2011 that none of the dangerous driving offences should have an SNPP, as the wide range of circumstances covered by these offences makes it difficult to identify a mid-range of objective seriousness.<sup>158</sup>
- 4.119 Other arguments against applying SNPPs to dangerous driving offences were raised with the Council, including:
- the existing sentencing framework for dangerous driving offences is comprehensive, and sentencing outcomes and practices are appropriate
  - as dangerous driving offences involve an element of judgement, a wide discretion in sentencing is needed
  - SNPPs would complicate sentencing for dangerous driving offences, increase the number of sentence appeals and have resourcing implications, and
  - applying SNPPs to dangerous driving offences could lead to sentencing anomalies, including because:
    - SNPPs are not applicable to offences heard in the Local Court
    - dangerous driving offences are available as alternative verdicts to offences that do not have SNPPs,<sup>159</sup> and

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154. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) [2.3].

155. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) rec 4.1.

156. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) rec 2.1.

157. *Chandler v R* [2023] NSWCCA 59 [97]; NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) rec 2.1(2), [2.48] citing M D Finlay, *Review of the Law of Manslaughter in New South Wales*, Report (NSW Attorney General’s Department, 2003) [6.1].

158. NSW Sentencing Council, *Standard Non-Parole Periods for Dangerous Driving Offences*, Report (2011) 46–47.

159. *Crimes Act 1900* (NSW) s 52AA(4).



- it would lead to inconsistency in sentencing the similar offence of dangerous navigation (which does not have an SNPP),<sup>160</sup> and in sentencing adult and child offenders (as SNPPs do not apply to children).<sup>161</sup>

4.120 However, there may be a strong view in the community that the imposition of SNPPs is justified as one potential way to increase sentences for dangerous driving offences.

#### **Question 4.3: Standard non-parole periods**

Should any of the dangerous driving offences (*Crimes Act 1900* (NSW) s 52A) have standard non-parole periods? If so, what should the standard non-parole periods be?

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160. *Crimes Act 1900* (NSW) s 52B.

161. NSW Sentencing Council, *Standard Non-Parole Periods for Dangerous Driving Offences*, Report (2011) 36–37; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D(3).



## 5. Jurisdictional issues

### In brief

In this chapter, we seek your views on whether the NSW Local Court and NSW Children’s Court should have jurisdiction to hear proceedings for serious road crime offences.

<b>Should the Local Court hear serious road crime offences?</b>	<b>95</b>
What are “table offences”?	96
Should any table offences become strictly indictable?	97
Should negligent driving occasioning death become indictable?	98
<b>Should the Children’s Court hear serious road crime offences?</b>	<b>99</b>
The jurisdiction of the Children’s Court	100
Sentencing outcomes	102
Should the list of serious children’s indictable offences be expanded?	103

- 5.1 In this chapter, we consider whether the NSW Local Court and the NSW Children’s Court should continue to hear and determine proceedings for certain serious road crime offences. Some preliminary submissions suggested that these offences should instead be tried and sentenced in higher courts.<sup>1</sup>
- 5.2 The terms of reference for our review do not refer specifically to either of these jurisdictional issues. However, we regard these issues as relevant to the terms of reference, particularly those relating to sentencing and maximum penalties, and merit further consideration.

### Should the Local Court hear serious road crime offences?

- 5.3 Where a case is heard in the Local Court, it is subject to the “jurisdictional limit” that applies to the custodial sentences that the Court can impose. The highest sentence of imprisonment the Local Court can impose is:
- 2 years, where the offender is being sentenced for a single offence, or

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1. See, eg, Road Trauma Support Group, *Preliminary Submission PRC72*, 4; Victims of Crime Assistance League (Hunter), *Preliminary Submission PRC84*, 5.

- 5 years, where the offender is being sentenced for multiple offences (this is called an “aggregate sentence”).<sup>2</sup>
- 5.4 The Local Court cannot impose a higher sentence, even if the offence itself has a higher maximum penalty. While the maximum penalty will be considered by the Local Court as part of the sentencing exercise, the Court is constrained by its jurisdictional limit.<sup>3</sup> We discuss sentencing principles and procedures in chapter 4.
- 5.5 It could be argued that certain road crime offences should not be heard in the Local Court, but in the higher courts, which would avoid the Local Court’s jurisdictional limit. One option to achieve this could be to make other serious road crime offences “strictly indictable offences”, so that they must be tried on indictment in the higher courts. This could be done by removing certain serious road crime offences from the Tables in the *Criminal Procedure Act 1986 (NSW) (Criminal Procedure Act)*.<sup>4</sup>

### What are “table offences”?

- 5.6 “Table offences” are the offences listed in Table 1 and Table 2 of schedule 1 of the *Criminal Procedure Act*. A table offence must be heard summarily (generally in the Local Court), unless an election is made for it to be tried on indictment in a higher court (for example, the District Court).<sup>5</sup>
- 5.7 Either the prosecutor or the person charged can elect for offences listed in Table 1 to be tried on indictment, while only the prosecutor can elect for offences listed in Table 2 to be tried on indictment.<sup>6</sup>
- 5.8 In the *Prosecution Guidelines*, the Director of Public Prosecutions outlines the factors to be considered when electing to deal with a table offence on indictment. These include, for example:
- whether the offence can be appropriately dealt with by the Local Court’s sentencing limits
  - how prevalent the offence is, and the need for deterrence, and
  - any connection between the table offence and any offence that is being dealt with on indictment.<sup>7</sup>

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2. *Criminal Procedure Act 1986 (NSW)* s 267(2), s 268 (1A). This limit is applied after any discount for a guilty plea: *Park v R* [2021] HCA 37, 273 CLR 303 [2], [19]–[23]; *Park v R* [2020] NSWCCA 90 [29]–[30].

3. Local Court of NSW, *Preliminary Submission PRC82*, 3–4, citing *R v Doan* [2000] NSWCCA 317, 50 NSWLR 115; *Park v R* [2021] HCA 37, 273 CLR 303.

4. *Criminal Procedure Act 1986 (NSW)* sch 1 table 1 pt 1 cl 2.

5. *Criminal Procedure Act 1986 (NSW)* s 5, s 6.

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

7. NSW Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2021) [6.2].

- 5.9 However, elections are only made in a minority of cases. The Local Court noted that that 94.7% of Table 1 offences and 99.7% of Table 2 offences are finalised in the Local Court.<sup>8</sup>
- 5.10 The table offences model has significant benefits for the criminal justice system. It was introduced because the Local Court is more cost effective than the District Court. It allows quicker resolution of less serious criminal matters, without the stress of a jury trial, including for victims and witnesses.<sup>9</sup> However, as noted above, cases heard in the Local Court are subject to its jurisdictional limit.

### **Should any table offences become strictly indictable?**

- 5.11 The following serious road crimes are table offences:
- failing to stop and driving recklessly or dangerously in response to a police pursuit (Table 2)
  - aggravated dangerous driving occasioning GBH (Table 1)
  - dangerous driving occasioning GBH (Table 1)
  - failing to stop and assist after a vehicle impact causing death or GBH (Table 1)
  - predatory driving (Table 1), and
  - injuries by furious driving etc (Table 1).<sup>10</sup>
- 5.12 Some preliminary submissions considered that the current table offence classifications do not reflect the gravity of the offences involving serious bodily harm. The Victims of Crime Assistance League (Hunter) (VOCAL) argued that making more serious road crime offences strictly indictable would improve deterrence, as offenders would not be “granted the security of lower sentencing penalties in the Local Court”. In its view, “serious driving matters that cause extensive physical and psychological injuries to victims, should be afforded a stronger criminal justice response”.<sup>11</sup>
- 5.13 Most serious road crime table offences are heard in the Local Court.<sup>12</sup> In 2022, the proportions of finalised charges for serious road crime table offences in the Local Court were:
- predatory driving: 100% (44 of 44 charges)

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8. Local Court of NSW, *Preliminary Submission PRC82*, 3.

9. NSW, *Parliamentary Debates*, Legislative Council, Second Reading Speech, 24 May 1995, 119.

10. *Crimes Act 1900* (NSW) s 51A, s 51B, s 52A(3), s 52A(4), s 52AB, s 53.

11. Victims of Crime Assistance League (Hunter), *Preliminary Submission PRC84*, 5.

12. We have included the Children’s Court in these statistics. The Children’s Court exercises summary jurisdiction and is defined as a Local Court for the purpose of appeals: *Children (Criminal Proceedings) Act 1987* (NSW) s 27, s 31; *Crimes (Appeal and Review) Act 2001* (NSW) s 3(1) definition of “Local Court”.

- failing to stop and driving recklessly or dangerously in response to a police pursuit: 95% (1257 of 1328 charges)
  - injuries by furious driving etc: 85% (152 of 179 charges)
  - dangerous driving occasioning GBH: 77% (147 of 191 charges)
  - failing to stop and assist after a vehicle impact causing GBH: 71% (15 of 21 charges)
  - aggravated dangerous driving occasioning GBH: 61% (17 of 28 charges), and
  - failing to stop and assist after a vehicle impact causing death: 13% (1 of 8 charges).<sup>13</sup>
- 5.14 Serious road crime table offences sentenced in the higher courts generally receive more severe sentences. For instance, sentences of imprisonment were imposed in 2022 for all proven court appearances in the higher courts in which a police pursuit offence was the defendant’s principal proven offence. In the Local Court, the proportion was 47%.<sup>14</sup> This is unsurprising, as it is expected that the prosecutor would elect for the more serious cases to be tried on indictment.
- 5.15 However, it is unclear if the current arrangements are limiting sentencing discretion unduly. Few cases finalised between January 2019 and December 2022 resulted in sentences at the top of the Local Court’s jurisdictional limit, where a serious road crime offence was the defendant’s principal proven offence. For example, no sentence for dangerous driving occasioning GBH or aggravated dangerous driving occasioning GBH reached the jurisdictional limit.<sup>15</sup>
- 5.16 This suggests there were few instances where magistrates may have wanted to impose a heavier sentence for a serious road crime table offence, but were limited by the Local Court’s sentencing limits.

### **Should negligent driving occasioning death become indictable?**

- 5.17 In its preliminary submission, VOCAL questioned how any driving offence that results in death can be heard in the Local Court.<sup>16</sup> Currently, the only such offence is negligent driving occasioning death.<sup>17</sup>

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13. NSW Bureau of Crime Statistics and Research, reference k23-22320, table 1b.

14. NSW Bureau of Crime Statistics and Research, reference k23-22320, table 3b.

15. Judicial Commission of NSW, *Sentencing Statistics*, Judicial Information Research System (retrieved 14 August 2023).

16. Victims of Crime Assistance League (Hunter), *Preliminary Submission PRC84*, 5.

17. *Road Transport Act 2013* (NSW) s 117(1)(a).

- 5.18 All offences in the *Road Transport Act 2013* (NSW) (*RTA*) are summary offences.<sup>18</sup> This means they are heard summarily, generally in the Local Court.
- 5.19 Between 2016 and 2022, negligent driving occasioning death was the defendant's principal offence in 223 proven appearances that were finalised in the Local Court.<sup>19</sup>
- 5.20 To address VOCAL's concern, options might include making this offence:
- indictable and a table offence, so it could be heard on indictment in some circumstances, or
  - strictly indictable, so it would always be heard on indictment.
- 5.21 However, careful consideration should be given to whether the distinction should be maintained between negligent driving occasioning death and the serious road crime offences in the *Crimes Act*.

#### Question 5.1: Table offences

- (1) Should any serious road crime offences in the *Crimes Act 1900* (NSW) that are currently listed in Table 1 and Table 2 of schedule 1 of the *Criminal Procedure Act 1986* (NSW) be made strictly indictable?
- (2) Should the offence of negligent driving occasioning death (*Road Transport Act 2013* (NSW) s 117(1)(a)) be made indictable or strictly indictable?

## Should the Children's Court hear serious road crime offences?

- 5.22 The Children's Court is a specialist jurisdiction, with a criminal framework specifically developed for children. Except for manslaughter, all serious road crime offences in the *Crimes Act* can be dealt with in the Children's Court. This Court has specialised penalties for child offenders.<sup>20</sup> It also has lower jurisdictional limits for custodial penalties. The Children's Court cannot sentence a child to a control order (that generally involves full time custody) for more than 2 years for one offence, or 3 years for multiple offences.<sup>21</sup>
- 5.23 One preliminary submission raised concerns around inadequate sentencing outcomes for serious road crimes in the Children's Court.<sup>22</sup> One question is whether

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18. *Road Transport Act 2013* (NSW) s 200(1).

19. NSW Bureau of Crime Statistics and Research, reference k23-22320, table 2a.

20. *Children (Criminal Proceedings) Act 1987* (NSW) s 33.

21. *Children (Criminal Proceedings) Act 1987* (NSW) s 33(1)(g), s 33A.

22. Road Trauma Support Group NSW, *Preliminary Submission PRC72*, 4–5.

serious road crime offences, particularly the aggravated dangerous driving and dangerous driving offences, should remain within the Children’s Court’s jurisdiction.

## The jurisdiction of the Children’s Court

- 5.24 The *Children (Criminal Proceedings) Act 1987* (NSW) (*CCP Act*) outlines principles that guide the exercise of any functions under the Act. It applies to all courts, including the Children’s Court. These principles focus on reintegration and rehabilitation for young offenders and recognise that children need guidance and assistance because of their immaturity and dependency.<sup>23</sup>
- 5.25 Not every case will be appropriate for the Children’s Court to determine. For indictable offences only, the Children’s Court has a discretion to commit cases that “cannot be properly disposed of summarily” to a higher court (often the District Court).<sup>24</sup> When deciding whether to commit a matter, the “most significant consideration” is whether the penalties available to the Children’s Court are appropriate for the case, including its sentencing limits.<sup>25</sup>
- 5.26 The Children’s Court’s decision to commit a case to a higher court will be informed by the guiding principles mentioned above. The decision is also informed by the seriousness and nature of the offence, the age and maturity of the child, and any prior offences.<sup>26</sup> Where there is a plea of guilty, the Children’s Court can also consider the impact of any sentencing discounts, and the contents of a background report prepared for sentence, when deciding whether to commit the proceedings.<sup>27</sup>
- 5.27 Specialised principles still apply if the Children’s Court commits a case to a higher court. The higher court must decide whether to apply the general sentencing framework (which we discuss in chapter 4), or the children’s penalties outlined in the *CCP Act*.<sup>28</sup> This decision may be informed by the seriousness of the offence, the age and maturity of the child, and the appropriateness of the available penalties.<sup>29</sup>

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23. *Children (Criminal Proceedings) Act 1987* (NSW) s 6.

24. *Children (Criminal Proceedings) Act 1987* (NSW) s 31. The higher court has the discretion to sentence the child using the penalty framework outlined in the *Children (Criminal Proceedings) Act 1987* (NSW) s 18.

25. *R v CL* [2022] NSWChC 5 [54].

26. *R v CL* [2022] NSWChC 5 [77]–[78].

27. *R v CL* [2022] NSWChC 5 [53].

28. *Children (Criminal Proceedings) Act 1987* (NSW) s 18(1).

29. *Children (Criminal Proceedings) Act 1987* (NSW) s 18(1A). See, eg, *R v WKR* (1993) 32 NSWLR 447, 451.



- 5.28 If the higher court decides to sentence the young person based on the general sentencing framework, the guiding principles in s 6 of the *CCP Act* still apply.<sup>30</sup> One of the s 6 principles is that the penalty imposed on a child for an offence should be no greater than the penalty imposed on an adult who commits an offence of the same kind.<sup>31</sup>
- 5.29 Other principles also apply to the sentencing of children and young people in all courts. In particular, the sentencing purpose of rehabilitation may be more significant when sentencing young offenders. Courts have also recognised that maturity and the ability to control impulses, which can contribute to a young person's offending, develop over adolescence and into early adulthood.<sup>32</sup>
- 5.30 Depending on the young person's age, the higher court may also direct that they serve all or part of any term of imprisonment as a juvenile offender.<sup>33</sup> However, intensive correction orders are not available for offenders under 18, in any court.<sup>34</sup>
- 5.31 If the higher court chooses to sentence the young person under the *CCP Act*, the court will exercise the functions of the Children's Court.<sup>35</sup> This means the higher court will follow the *CCP Act*, and have the same rules and powers as the Children's Court. Where the young person is under 21, the higher court can also send the matter back to the Children's Court to be sentenced there.<sup>36</sup>
- 5.32 Vehicular manslaughter cases are always tried in higher courts and not the Children's Court. This is because specific "serious children's indictable offence[s]" cannot be heard and determined in the Children's Court in any circumstances.<sup>37</sup> These are serious offences, with maximum penalties ranging from 20 years to life imprisonment, such as homicide offences, some sexual offences and some firearms offences.<sup>38</sup>

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30. *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].

31. *Children (Criminal Proceedings) Act 1987* (NSW) s 6(e).

32. *BP v R* [2010] NSWCCA 159 [4]–[6].

33. *Children (Criminal Proceedings) Act 1987* (NSW) s 19.

34. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7(3).

35. *Children (Criminal Proceedings) Act 1987* (NSW) s 18(2).

36. *Children (Criminal Proceedings) Act 1987* (NSW) s 20(1).

37. Except for committal proceedings: *Children (Criminal Proceedings) Act 1987* (NSW) s 28(1)(a).

38. *Children (Criminal Proceedings) Act 1987* (NSW) s 3(1) definition of "serious children's indictable offence".

5.33 These offences are always tried and sentenced “according to law” (that is, according to the general sentencing framework, including the ordinary sentencing options).<sup>39</sup> However, the guiding principles in s 6 of the *CCP Act* still apply.<sup>40</sup>

## Sentencing outcomes

5.34 The below table shows the number of finalised court appearances, where the defendant was aged 10 – 17 when they were charged with a dangerous driving offence, in the Children’s Court compared with other courts. The statistics cover all finalised principal offences (both proven and unproven) between 2016 and 2022. As the table shows, only one such offence was finalised in the District Court.

**Table 5.1: Finalised court appearances for young people (aged 10–17 when charged) by jurisdiction, 2016–2022<sup>41</sup>**

Offence	Children’s Court	Local Court	District Court	Total
Dangerous driving occasioning death	7 (87.5%)	0 (0%)	1 (12.5%)	8
Aggravated dangerous driving occasioning death	0 (0%)	0 (0%)	0 (0%)	0
Dangerous driving occasioning GBH	25 (89%)	3 (11%)	0 (0%)	28
Aggravated dangerous driving occasioning GBH	1 (100%)	0 (0%)	0 (0%)	1

Source: NSW Bureau of Crime Statistics and Research, reference dg23-22821, table 1

5.35 The table below looks at sentencing outcomes in the Children’s Court between 2016 and 2022, where the offences of dangerous driving occasioning death and GBH were the defendant’s principal proven offences.

**Table 5.2: Sentencing outcomes for dangerous driving occasioning death and GBH for young people (aged 10–17 when charged) in the Children’s Court, 2016–2022<sup>42</sup>**

Offence	Custody	Supervised community sentence	Unsupervised community sentence	Total
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39. *Children (Criminal Proceedings) Act 1987* (NSW) s 17.

40. *Children (Criminal Proceedings) Act 1987* (NSW) s 4, s 6; *R v WKR* (1993) 32 NSWLR 447, 449.

41. *Crimes Act 1900* (NSW) s 52A(1), s 52A(2), s 52A(3), s 52A(4).

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

Dangerous driving occasioning death	1 (20%)	3 (60%)	1 (20%)	5
Dangerous driving occasioning GBH	4 (17%)	7 (30%)	12 (52%)	23

NSW Bureau of Crime Statistics and Research, reference dg23-22821, table 2

- 5.36 No defendants in the Children’s Court, aged 10–17 when charged, were sentenced for a principal offence of aggravated dangerous driving occasioning death between 2016 and 2022.<sup>43</sup> Only one such defendant was sentenced for a principal offence of aggravated dangerous driving occasioning GBH in the Children’s Court during this period.<sup>44</sup> This resulted in a supervised community sentence.<sup>45</sup>
- 5.37 Over the same period, only one defendant who was 10–17 when charged was sentenced for a principal dangerous driving offence in the District Court. The offence was dangerous driving occasioning death.<sup>46</sup> That defendant received a sentence of imprisonment, with a non-parole period of 15 months.<sup>47</sup>

### **Should the list of serious children’s indictable offences be expanded?**

- 5.38 In general, young offenders receive more lenient sentencing outcomes than adult offenders, even when sentenced in the higher courts. As noted above, certain specialised principles apply to the sentencing of children in all courts.
- 5.39 However, if there are concerns about sentencing outcomes in the Children’s Court, one option could be to expand the definition of serious children’s indictable offence to include aggravated dangerous driving occasioning death and GBH, and dangerous driving occasioning death and GBH. This would mean these offences would be dealt with in higher courts in all circumstances.<sup>48</sup>
- 5.40 There are arguments for and against this proposal. As the above statistics show, very few cases of dangerous driving occasioning death and aggravated dangerous driving occasioning death are finalised in the Children’s Court. On one view, these low numbers could suggest that the change is unnecessary. On the other hand, this

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

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

45. NSW Bureau of Crime Statistics and Research, reference dg23-22821, table 2.

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

47. NSW Bureau of Crime Statistics and Research, reference dg23-22821, table 2.

48. *Children (Criminal Proceedings) Act 1987* (NSW) s 28.

means the reform would not have any significant resourcing implications for the higher courts.

- 5.41 It could be considered that these offences are so serious, and have such devastating consequences, that the Children’s Court is never an appropriate jurisdiction. Including these offences as serious children’s indictable offences could send a message about the community’s perception of their seriousness. It could also promote deterrence, which has been recognised as particularly significant for young drivers.<sup>49</sup>
- 5.42 However, the Children’s Court may be best placed to deal with children charged with serious road crime offences due to its specialist knowledge, experience and framework. Subjecting these children to the general law could be unnecessarily punitive and may not adequately take their developmental stage and maturity into account.
- 5.43 For these reasons, some consider that the Children’s Court should have jurisdiction over all offences, regardless of seriousness. Legal Aid NSW has previously argued that the Children’s Court should be allowed to hear all serious children’s indictable offences, provided it has the discretion to commit particularly serious matters to higher courts.<sup>50</sup> In its view, this would be consistent with international child justice principles.<sup>51</sup>
- 5.44 The reform could also have unintended consequences for disadvantaged young people. Young people, particularly young Aboriginal people, are disproportionately impacted by road crime offences, both as victims and offenders.<sup>52</sup> The impact of any reforms on these groups, particularly if they were to result in harsher and longer sentences, must be considered.

#### Question 5.2: Serious children’s indictable offences

Should the dangerous driving offences in s 52A of the *Crimes Act 1900* (NSW) be added to the definition of “serious children’s indictable offence” in section 3 of the *Children (Criminal Proceedings) Act 1987* (NSW)? If so, what offences should be added?

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49. *SBF v R* [2009] NSWCCA 231 [151].

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

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

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

# 6. The experiences and rights of victims

## In brief

This chapter focuses on the experiences of victims of serious road crimes and their families in the criminal justice system. It considers the support available to victims, their rights, and opportunities for participation through victim impact statements and restorative justice processes. We ask if changes could be made to any of these areas.

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- 6.1 We have been asked to review the experiences and rights of victims of serious road crime victims and their families in the criminal justice system. In reviewing this issue, we begin by recognising the trauma, profound grief and ongoing suffering that serious road crime victims and their families experience. We also acknowledge that their experiences in the criminal justice system often compounds this.
- 6.2 This chapter asks if changes could be made to the criminal justice system, and related areas, to better support victims and their families. We outline the procedures and support that are currently available, including the Charter of Victims Rights, the legislative procedure for making victim impact statements (VIS), and financial and trauma support. We also consider if more opportunities to participate in restorative justice processes should be made available.

## Experiences in the criminal justice system

- 6.3 Serious road crimes can have a devastating, life-changing impact.<sup>1</sup> Deaths caused by motor vehicle collisions can be highly traumatic for the families of victims, who may suffer from “particularly severe grief responses”.<sup>2</sup> This trauma may be compounded by the perception that these deaths are unnecessary or preventable.<sup>3</sup>
- 6.4 According to research commissioned by the Road Trauma Support Group (RTSG), losing a loved one due to fatal road crimes puts victims’ families at a high risk of mental distress and severe long-term mental health impacts. Families of serious road crime victims are at risk of suffering prolonged grief disorder, which is associated with chronic symptoms including anger, numbness, detachment and loss of meaning in life.<sup>4</sup>
- 6.5 People who are seriously injured by a road crime can also experience life-changing harm. In addition to their physical injuries, they may face the loss of “independence, autonomy, income, future prospects, relationships and more”.<sup>5</sup> Their family and friends may face ongoing caregiving responsibilities, as well as the emotional toll of seeing their loved one suffer.<sup>6</sup>
- 6.6 As well as coming to terms with potentially life-changing injuries or the loss of a loved one, victims of serious road crimes and their families often must also deal with the criminal justice process.

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1. See, eg, M Duke, *Preliminary Submission PRC56*, 1; A Worthington, *Preliminary Submission PRC86*, 4; M Hough and others, *Attitudes to the Sentencing of Offences Involving Death by Driving*, Research Report 5 (Sentencing Advisory Panel, 2008) 52.
  2. Victoria, 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* (2019) 24, 70. See also Road Trauma Support Group NSW and fiftyfive5, *The Unheard Trauma of Fatal Road Crimes in NSW* (2023) 25; RMIT University, Centre for Innovative Justice, *Preliminary Submission PRC80*, 3.
  3. RMIT University, Centre for Innovative Justice, *Preliminary Submission PRC80*, 3; Road Trauma Support Group NSW and fiftyfive5, *The Unheard Trauma of Fatal Road Crimes in NSW* (2023) 25; J H Lord, “Real MADD: How to Help Road Trauma Survivors” (Autumn 2010) 13 *Grief Matters* 4, 5.
  4. Road Trauma Support Group NSW and fiftyfive5, *The Unheard Trauma of Fatal Road Crimes in NSW* (2023) 48, 49.
  5. RMIT University, Centre for Innovative Justice, *Preliminary Submission PRC80*, 2.
  6. RMIT University, Centre for Innovative Justice, *Preliminary Submission PRC80*, 2.

## Aspects of the criminal justice process can exacerbate trauma

- 6.7 Victims and families often find court processes impersonal and alienating, and sometimes retraumatising.<sup>7</sup> For example, we heard that victims of serious road crimes and their families are often distressed by the use of the word “accident” in the criminal justice process.<sup>8</sup> The Office of the Director of Public Prosecutions (ODPP) and Victims of Crime Assistance League (Hunter) (VOCAL) submitted that this word should be avoided as it may be perceived as indicating a lack of criminal responsibility.<sup>9</sup>
- 6.8 Other aspects of the criminal justice process can also be confronting. Victims and their families can be distressed by the amount of time a trial takes. For example, a report commissioned by the RTSG highlighted the experience of parents who had lost a child. They found the court process to be drawn out, and time dragged on while they waited for justice. Postponed hearings and other delays added to the trauma they experienced.<sup>10</sup>
- 6.9 Some victims’ families expressed concern that the process focuses on the offender, including the offender’s personal circumstances, rather than on the impact of the crime.<sup>11</sup> This can leave victims feeling “ignored and unimportant”, and make it harder for them to process the trauma caused by the road crime.<sup>12</sup>
- 6.10 Some preliminary submissions stated that families need to be treated with more respect in the court process.<sup>13</sup> For instance, VOCAL argued that changes are required to ensure courts adequately recognise the harm suffered by victim-survivors and their families.<sup>14</sup>

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7. M Hough and others, *Attitudes to the Sentencing of Offences Involving Death by Driving*, Research Report 5 (Sentencing Advisory Panel, 2008) ix; Road Trauma Support Group NSW, *Preliminary Submission PRC72*, 2; Road Trauma Support Group NSW and fiftyfive5, *The Unheard Trauma of Fatal Road Crimes in NSW* (2023) 68.

8. NSW Office of the Director of Public Prosecutions, *Preliminary Submission PRC77*, 9; Victims of Crime Assistance League (Hunter), *Preliminary Submission PRC84*, 2; Road Trauma Support Group NSW, *Preliminary Submission PRC72*, 2; A Worthington, *Preliminary Submission PRC86*, 3–4.

9. Victims of Crime Assistance League (Hunter), *Preliminary Submission PRC84*, 2; NSW Office of the Director of Public Prosecutions, *Preliminary Submission PRC77*, 9.

10. Road Trauma Support Group NSW and fiftyfive5, *The Unheard Trauma of Fatal Road Crimes in NSW* (2023) 69.

11. Anonymous, *Preliminary Submission PRC69*, 2; NSW Office of the Director of Public Prosecutions, *Preliminary Submission PRC77*, 6; Victims of Crime Assistance League (Hunter), *Preliminary Submission PRC84*, 4. See also M Hough and others, *Attitudes to the Sentencing of Offences Involving Death by Driving*, Research Report 5 (Sentencing Advisory Panel, 2008) 61; RMIT University, Centre for Innovative Justice, *Preliminary Submission PRC80*, 3.

12. RMIT University, Centre for Innovative Justice, *Preliminary Submission PRC80*, 3–4.

13. See, eg, Road Trauma Support Group NSW, *Preliminary Submission PRC72*, 2.

14. Victims of Crime Assistance League (Hunter), *Preliminary Submission PRC84*, 7.



## Some victims and families feel let down by sentencing outcomes

- 6.11 Victims can have different responses to sentences imposed for serious road crimes. As the RMIT University Centre for Innovative Justice (RMIT CIJ) recognised:
- Each road collision is unique and the people involved will have different views on whether the criminal justice system has provided an adequate response. For some people, the person responsible's acknowledgement of guilt and their sentence may provide a sense of resolution or satisfaction. For others, regardless of its severity, a sentence will ultimately be insufficient as it can never make up for the loss of their loved one, having acquired a life-changing injury, or the trauma experienced.<sup>15</sup>
- 6.12 For some victims, the outcomes of the criminal justice response can seem inadequate in the context of road trauma. As the RMIT CIJ observed, legally-defined degrees of culpability can “result in a sentence that the person harmed finds difficult to reconcile with what they have experienced”.<sup>16</sup>
- 6.13 Some families consider that the sentences for serious road crimes do not adequately recognise the harm they or their loved ones have suffered.<sup>17</sup> The RTSG's research recognised that this can leave them feeling further tormented.<sup>18</sup> Concerns about sentencing were also expressed in preliminary submissions (which we discuss in further detail in chapter 4).<sup>19</sup>
- 6.14 In particular, some families consider it unjust that offenders will only have their lives disrupted for a short time in prison, whereas their lives have been changed forever.<sup>20</sup>

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

16. RMIT University, Centre for Innovative Justice, *Preliminary Submission PRC80*, 3. See also S Cunningham, “Vehicular Homicide: Need for a Special Offence?” in C M V Clarkson and S Cunningham (ed), *Criminal Liability for Non-Aggressive Death* (Taylor and Francis, 2008) 117.

17. See, eg, Road Trauma Support Group NSW and fiftyfive5, *The Unheard Trauma of Fatal Road Crimes in NSW*, Report (2023) 25; Victoria, 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* (2019) 24; Tasmania, Sentencing Advisory Council, *Sentencing of Driving Offences that Result in Death or Injury*, Final Report No 8 (2017) 113–114.

18. Road Trauma Support Group NSW and fiftyfive5, *The Unheard Trauma of Fatal Road Crimes in NSW*, Report (2023) 25.

19. See, eg, M Duke, *Preliminary Submission PRC56*, 1; Anonymous, *Preliminary Submission PRC69*, 2; Victims of Crime Assistance League (Hunter), *Preliminary Submission PRC84*, 6.

20. M Hough and others, *Attitudes to the Sentencing of Offences Involving Death by Drunk Driving*, Research Report 5 (Sentencing Advisory Panel, 2008) 54.



## Existing rights, victim impact statements and support schemes

- 6.15 While nothing can take away the trauma caused by serious road crime, or the pain of losing a loved one, the legal system has taken steps to support victims and their families, and to give them a voice in the criminal justice process. However, it could be argued that more could be done to improve these responses.

### Victims' rights are enshrined in the Charter of Victims Rights

- 6.16 NSW introduced a Charter of Victims Rights in 1996 (the Charter).<sup>21</sup> It contains a list of non-enforceable principles about how any government agency or person exercising official functions should treat victims of crime.<sup>22</sup>
- 6.17 For the purposes of the Charter, a victim of crime includes a person who suffers physical or psychiatric harm as a direct result of an act committed in the course of a criminal offence. If a person dies as a result of a criminal act, a member of the person's immediate family is also considered to be a victim of crime.<sup>23</sup> This means the Charter applies to anyone who has been injured, and to an immediate family member of someone who was killed, as a result of a road crime.
- 6.18 The Charter sets out a wide range of rights in relation to the criminal justice process. For example, it states that victims are to be:
- treated with "courtesy, compassion, cultural sensitivity and respect"
  - informed about the services and remedies available to them
  - informed about the investigation of the crime, if they request this, unless that would jeopardise the investigation
  - informed about key prosecution decisions, and
  - able to access assistance to prepare a victim impact statement.<sup>24</sup>
- 6.19 If a victim of crime believes there has been a breach of the Charter, they can complain to the Commissioner of Victims Rights. The Commissioner can recommend that an agency apologise or make changes to improve its compliance with the Charter. The Commissioner can also report to parliament about any breaches by an agency.<sup>25</sup>

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21. NSW Sentencing Council, *Victims' Involvement in Sentencing*, Report (2018) [1.45].

22. *Victims Rights and Support Act 2013* (NSW) pt 2 div 2.

23. *Victims Rights and Support Act 2013* (NSW) s 5(1)–(3) definition of "victim of crime", definition of "harm".

24. *Victims Rights and Support Act 2013* (NSW) s 6.

25. *Victims Rights and Support Act 2013* (NSW) s 10(1)(d)–(f), s 13(2).

## Victims can participate by making victim impact statements

- 6.20 A VIS is a written statement made by a victim to the court, in which they express the harm they suffered due to the crime.
- 6.21 NSW has a statutory VIS scheme.<sup>26</sup> This has increased the ability of victims to participate in the criminal justice process, and for their experiences to be considered by the court.<sup>27</sup>
- 6.22 Both “primary victims” and “family victims” can make a VIS for a relevant offence. A “primary victim” is a person who suffers personal harm as a direct result of the offence, including by witnessing the offence. If a person has died as a direct result of the offence, a member of their immediate family is considered a “family victim”.<sup>28</sup>
- 6.23 A primary victim can make a statement about harm they or an immediate family member have suffered as a direct result of the offence. This can include personal harm, emotional suffering, harm to relationships or economic harm. If a primary victim has died, a family victim may make a statement about how the death has affected the family.<sup>29</sup>
- 6.24 The statement is tendered after the offender has been convicted. The victim (or a representative) may read the statement out to the court at any time the court determines. The sentencing court must consider the statement and may make any comment on the statement that it considers appropriate.<sup>30</sup>
- 6.25 A VIS made by a family victim can also be taken into account in sentencing (we consider sentencing principles in more detail in chapter 4). The impact of a victim’s death on family victims is considered to be an aspect of the harm done to the community.<sup>31</sup> In a vehicular manslaughter case in which the offender killed four children, for example, the court accepted the VIS made by the surviving family members as evidence of the “extensive and substantial emotional harm to the family victims and correspondingly to the community in general”.<sup>32</sup>

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26. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 3 div 2.

27. NSW Bar Association, *Preliminary Submission PRC83* [12]; NSW Office of the Director of Public Prosecutions, *Preliminary Submission PRC77*, 8–9.

28. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28, s 26 definition of “primary victim”, definition of “family victim”.

29. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28.

30. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30D, s 30E(1).

31. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30E(3).

32. *Davidson v R* [2022] NSWCCA 153 [220].

- 6.26 A VIS may also be used to establish that the offence caused substantial harm, which is an aggravating factor in sentencing.<sup>33</sup>
- 6.27 A VIS can be made in relation to almost all the serious road crime offences that we consider in this review, in the Local Court and the higher courts.<sup>34</sup> The exception is the offence of failing to stop and driving recklessly or dangerously in response to a police pursuit.<sup>35</sup> However, a VIS may not be relevant to this offence as it does not involve a direct victim.

## Victims can access financial support and counselling services

- 6.28 Victims of serious road crimes in NSW can receive support through the compulsory third party (CTP) compensation scheme for motor vehicle collisions. It is funded by CTP motor vehicle insurance. The scheme provides compensation to individuals who have been injured in motor vehicle collisions and covers the reasonable cost of treatment and care, as well as weekly statutory benefits to compensate for loss of earning.<sup>36</sup> Other states and territories have similar motor vehicle compensation schemes.
- 6.29 To avoid duplication, victims of serious road crime generally cannot access support through the NSW Victims Support Scheme (VSS) under the *Victims Rights and Support Act 2013* (NSW) (*Victims Rights Act*).<sup>37</sup> This scheme allows victims of violent crime to access support including financial assistance, recognition payments and counselling services. Most states and territories in Australia take a similar approach.<sup>38</sup>
- 6.30 Some states and territories have a different model. For example, the Australian Capital Territory (ACT) recently expanded its victims services scheme to include individuals who suffer harm as a result of the death of a family member caused in a

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33. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(g). See, eg, *Bajouri v R* [2016] NSWCCA 20 [32]–[33].

34. See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27. A sentencing court has discretion at common law to admit a VIS and consider the impact of the crime on the victim in determining the seriousness of the offence and the relevant sentence: *Porter v R* [2008] NSWCCA 145 [54]; *Siganto v R* [1998] HCA 74, 194 CLR 656, 665–6. See also *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27(5).

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

36. *Motor Accidents (Lifetime Care and Support) Act 2006* (NSW) s 5, s 11A; *Motor Accidents Compensation Act 1999* (NSW) s 3; *Motor Accident Injuries Act 2017* (NSW) s 3.24, s 3.9.

37. *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: s 25(2A)–(2B).

38. Queensland, Department of Justice and Attorney-General, *Final Report on the Review of the Victims of Crime Assistance Act 2009* (2015) 20.

road collision.<sup>39</sup> In Queensland, victims of violence who are eligible to make a claim under CTP insurance can also make a claim for victims of crime assistance, but they must finalise their motor collision claim before their application can be decided. An exception allows immediate consideration of any application for counselling expenses.<sup>40</sup>

- 6.31 The NSW Department of Communities and Justice is currently reviewing the *Victims Rights Act*. In a submission to that review, the RTSG recommended that the scope of the VSS should be broadened to include victims of serious road crime so that they are able to receive mental health support and financial support immediately after the collision.<sup>41</sup>

### Question 6.1: Existing rights, victim impact statement and support schemes

Is there a need to improve the existing rights, victim impact statement and support schemes for victims of serious road crimes and their families? If so, what could be done?

## Restorative justice may address unmet needs

- 6.32 Some victims and families may find that a restorative justice process can support them to respond to the harm caused by road trauma.<sup>42</sup> NSW offers a post-sentence restorative justice service through Corrective Services NSW (CSNSW), but it has limited capacity.<sup>43</sup> In this section, we ask if restorative justice should be expanded in NSW to support people affected by serious road crimes.

### What is restorative justice?

- 6.33 Restorative justice is a broad term, which refers to processes that try to address some of the needs not met by the traditional court system.<sup>44</sup>
- 6.34 Although the criminal justice system has changed in recent decades to better include and support victims, it remains an adversarial process. It is focused on

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39. *Victims of Crime Regulation 2000 (ACT)* cl 24. See also Australian Capital Territory Government, *Legislative Assembly Standing Committee on Justice and Community Safety Report No 16 Inquiry into Dangerous Driving: Government Response (2023)* 27–28.

40. *Victims of Crime Assistance Act 2009 (Qld)* pt 3A.

41. Road Trauma Support Group, *Response to Statutory Review of the Victims Rights and Support Act 2013 (2022)* 7, 26.

42. RMIT University, Centre for Innovative Justice, *Preliminary Submission PRC80*, 4–5.

43. 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, 337, 340.

44. J Bolitho, “Putting Justice Needs First: A Case Study of Best Practice” (2015) 3 *Restorative Justice: An International Journal* 256, 259.

assessing the evidence to determine if the offender is legally guilty and, if so, to decide the appropriate sentence. This is important to many victims of crime. But at times victims have other emotional needs, including the need to have closure and to feel heard, that may not be satisfied by the adversarial process.<sup>45</sup>

- 6.35 While the criminal justice process treats crime as a violation against the state, restorative justice focuses on the need to understand and repair the harm that has been done to individual victims and communities.<sup>46</sup> It has been described as a way of achieving a “deeper form of justice”.<sup>47</sup>
- 6.36 Restorative justice can take a range of forms.<sup>48</sup> For example, the restorative justice service offered by CSNSW gives victims and offenders an opportunity to communicate about the crime and its impact. The form of communication depends on the expressed needs and circumstances of the participants. It can involve direct communication (eg, face-to-face meetings), indirect communication (eg, with facilitators acting as “go-betweens” if participants do not want to meet), or a mix of different forms of communication.<sup>49</sup>

### **What are the potential benefits of restorative justice?**

- 6.37 Studies of restorative justice programs in the ACT and the UK found that victims who chose to take part in a restorative justice process were significantly more satisfied than victims who only went court.<sup>50</sup> An evaluation in the ACT reported very high levels of satisfaction with both the conference process and outcomes.<sup>51</sup> Over the course of the study, 93% of participants were satisfied with the outcome of

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45. J Bolitho, “Putting Justice Needs First: A Case Study of Best Practice” (2015) 3 *Restorative Justice: An International Journal* 256, 259. See also RMIT University, Centre for Innovative Justice, *Preliminary Submission PRC80*, 5.

46. S M Pfander (2020) “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.

47. J Bolitho, “Putting Justice Needs First: A Case Study of Best Practice” (2015) 3 *Restorative Justice: An International Journal* 256, 259.

48. J Bolitho, “Putting Justice Needs First: A Case Study of Best Practice” (2015) 3 *Restorative Justice: An International Journal* 256, 257.

49. NSW Government, *Restorative Justice Service: Policy* (28 November 2023) 7–8 <<https://correctiveservices.dcj.nsw.gov.au/content/dam/dcj/corrective-services-nsw/restorative-justice/restorative-justice-service-policy-DCJ-NSW.pdf>> (retrieved 8 December 2023).

50. Victoria, 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* (2019) 17–18.

51. R Broadhurst and others, *Australian Capital Territory Restorative Justice Evaluation: An Observational Outcome Evaluation Report of Findings* (Australian National University, 2018) 6, 9.

their conference, and 97% said they would recommend the process to others and would attend again.<sup>52</sup>

- 6.38 A 2011 evaluation of the use of restorative justice in New Zealand (NZ) had similar results. Eighty percent of victims were likely to recommend restorative justice to others in a similar situation.<sup>53</sup> More recently, a 2023 evaluation found that 77% of victims surveyed were at least fairly satisfied with the conference they attended.<sup>54</sup>
- 6.39 Restorative justice can have a positive effect on victims' emotional state and may reduce the traumatic effect of the crime.<sup>55</sup> The 2011 NZ evaluation found that almost three quarters of attendees felt better after participating in a restorative justice conference.<sup>56</sup>
- 6.40 Similarly, a 2017 evaluation of the CSNSW service found that most victims described a positive shift in their emotions both immediately and five years after the conference. Victims described feelings including relief and dissipation of anger.<sup>57</sup>
- 6.41 Restorative justice can give victims a chance to tell the offender how they feel and ask questions. Participants in NZ said the best feature of the conference was the opportunity to meet the offender face-to-face, talk, and ask questions. Some victims chose to participate because they wanted the offender to know about the personal impact of the offence. Victims were also motivated by the desire to receive an explanation from the offender.<sup>58</sup>
- 6.42 However, there are many valid reasons why some victims may choose not to participate in restorative justice processes. For example, some may wish to avoid

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52. R Broadhurst and others, *Australian Capital Territory Restorative Justice Evaluation: An Observational Outcome Evaluation Report of Findings* (Australian National University, 2018) 3, 9, 10.

53. New Zealand, Ministry of Justice, *Victim Satisfaction with Restorative Justice: A Summary of Findings* (2011) 1, 2, 6.

54. New Zealand, Ministry of Justice, *Restorative Justice Review: Findings Report* (2023) 11.

55. Victoria, 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* (2019) 18; Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) [7.254].

56. New Zealand, Ministry of Justice, *Victim Satisfaction with Restorative Justice: A Summary of Findings* (2011) 5. See also D Curruthers, "Restorative Justice: Lessons from the Past, Pointers for the Future" (2012) 20 *Waikato Law Review* 1.

57. J Bruce and J Bolitho, "On Being 'Good Sad' and Other Conundrums: Mapping Emotion in Post Sentencing Restorative Justice" (2019) 2 *International Journal of Restorative Justice* 389, 399, 403.

58. New Zealand, Ministry of Justice, *Victim Satisfaction with Restorative Justice: A Summary of Findings* (2011) 3, 5. See also I Marit, *Report on Restorative Practices in Road Traffic Offences in Europe* (2018) 11.

any interaction with the offender or may feel that they have already “moved on” emotionally.<sup>59</sup> Victims need to be able to decide for themselves whether they want to participate in restorative justice, based on their own needs.

## Restorative justice and serious road crimes

- 6.43 As discussed above, many victims of serious road crimes and their families feel there is a significant gap in what the criminal justice system can offer them. Some might find restorative justice beneficial.<sup>60</sup>
- 6.44 A process that is designed to repair social and communal ties may be particularly important when victims and offenders know each other. This is often the case in serious road crimes.<sup>61</sup>
- 6.45 The RMIT CIJ ran a pilot restorative justice program for people affected by serious road crimes that caused death or serious injury in Victoria. The program achieved positive results, with all participants reporting benefits.<sup>62</sup> Participants reported that restorative justice had met many of their justice needs, including the need to:
- be heard and properly listened to in a way that could not be achieved by giving a VIS in the court process
  - have their experience of harm validated, understood and recognised
  - find out information about the collision that was not provided during the court process
  - seek to prevent the offender from committing similar crimes in the future by directly explaining the harm caused by their behaviour, and
  - hold the offender accountable for their actions, and receive a genuine apology in a way that cannot be facilitated by the court process.<sup>63</sup>
- 6.46 Following the success of the pilot program, the Victorian Government engaged the RMIT CIJ to expand restorative justice services for serious road crime victims who would like to participate.<sup>64</sup>

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59. New Zealand, Ministry of Justice, *Restorative Justice Review: Findings Report* (2023) 22.

60. Victoria, 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* (2019) 24; Tasmania, Sentencing Advisory Council, *Sentencing of Driving Offences that Result in Death or Injury*, Final Report No 8 (2017) 114.

61. Victoria, 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* (2019) 24.

62. Victoria, 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* (2019) 4–5.

63. RMIT University, Centre for Innovative Justice, *Preliminary Submission PRC80*, 5–7.

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



## NSW provides a limited restorative justice service

- 6.47 CSNSW has offered a post-sentence restorative justice service since 1999.<sup>65</sup> This service gives victims and offenders an opportunity to take part in a safe and voluntary restorative justice process, which “seeks primarily to address the harm caused by a criminal offence”.<sup>66</sup> With the help of trained facilitators, participants have the chance to discuss:
- what happened
  - how people were harmed, and
  - how the harm can be addressed.<sup>67</sup>
- 6.48 The service does not have a legislative basis. However, its processes and eligibility rules are set out in a policy document.<sup>68</sup> The service will accept a referral only if:
- the relevant offence has directly or indirectly harmed at least one person
  - at least one person has been sentenced in NSW for the offence, and/or is serving a sentence (in custody or the community) or is now residing in NSW
  - the participating person(s) harmed and the person(s) responsible are adults, or will be accompanied by an adult or guardian
  - the offence did not involve domestic violence, and
  - the offender is capable of taking responsibility for their offence.<sup>69</sup>
- 6.49 The policy provides that a restorative justice process should only be arranged after any ongoing or planned legal matters have been finalised. This includes appeals, any civil action or upcoming parole hearings. This is designed to ensure that the person responsible for the harm is “not motivated, even in part, by any potential legal benefits or advantage they might receive” from participating in a restorative justice process.<sup>70</sup>
- 6.50 Participants must also be assessed as suitable for restorative justice. This is based on factors including their motivations, the risks of participating (including any risks of re-traumatisation) and their expectations of the process.<sup>71</sup>
- 6.51 For eligible and suitable participants, the process involves four phases:

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65. NSW Government, *Restorative Justice Service: Policy* (28 November 2023) 3.

66. NSW Government, *Restorative Justice Service: Policy* (28 November 2023) 4.

67. NSW Government, *Restorative Justice Service: Policy* (28 November 2023) 7.

68. NSW Government, *Restorative Justice Service: Policy* (28 November 2023).

69. NSW Government, *Restorative Justice Service: Policy* (28 November 2023) 10.

70. NSW Government, *Restorative Justice Service: Policy* (28 November 2023) 19–20.

71. NSW Government, *Restorative Justice Service: Policy* (2023) 6–7.



- the facilitator(s) meet separately with the person harmed and the person responsible to explain the process and give them time to ensure restorative justice is likely to meet their needs before agreeing to take part
- the facilitator(s) helps the participants to prepare, giving them the opportunity to think about what they may want to say, how they want to say it, and what expectations they might have
- the participants communicate in a way that suits their needs and wishes, and
- if the participants agree to a plan, the facilitator(s) can help them to implement it and arrange follow-up meetings, or additional care and support.<sup>72</sup>

6.52 The restorative justice team is small and only has capacity to deal with a fraction of all relevant matters. A 2017 study found that it facilitates about ten conferences each year.<sup>73</sup> There may be potential for greater uptake if opportunities to participate in restorative justice were made more widely available.

### **Other NSW programs**

6.53 Other programs in NSW can bring offenders and victims together in alternative sentencing or diversionary programs. These include:

- youth justice conferencing, a diversionary option available for some children
- the circle sentencing program that is available for Aboriginal offenders in some Local Courts, and
- the Walama List, a sentencing list available in the District Court for some Aboriginal offenders.<sup>74</sup>

6.54 These programs can provide an opportunity for victims and other community members to participate in a discussion about the crime. However, victim involvement is optional and the programs are primarily focused on the offender.<sup>75</sup>

### **Some reform considerations**

6.55 If NSW were to expand the availability of restorative justice services, issues for consideration include:

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72. NSW Government, *Restorative Justice Service: Policy* (2023) 5–6.

73. J Bolitho, “Putting Justice Needs First: A Case Study of Best Practice in Restorative Justice” (2015) 3 *Restorative Justice: An International Journal* 256, 262; J Bolitho and J Bruce, “Science, Art and Alchemy: Best Practice in Facilitating Restorative Justice” (2017) 20 *Contemporary Justice Review* 336, 340.

74. *Young Offenders Act 1997* (NSW) pt 5; *Criminal Procedure Regulation 2017* (NSW) pt 7; District Court of NSW, *Criminal Practice Note 26: Walama List Sentencing Procedure*, 22 November 2021.

75. *Young Offenders Act 1997* (NSW) s 34(2); *Criminal Procedure Regulation 2017* (NSW) cl 43; District Court of NSW, *Criminal Practice Note 26: Walama List Sentencing Procedure*, 22 November 2021 [30].

- when in the criminal justice process victims should be offered the option to participate
- whether offender participation should be considered in sentencing, and
- whether the process should have a legislative basis.

### **When should restorative justice be offered?**

- 6.56 As we discuss above, CSNSW offers a restorative justice service after sentencing and appeals have been completed. If this service was to be expanded, it is important to consider whether it should also be available pre-sentencing.
- 6.57 A restorative justice process called forum sentencing used to be available as a pre-sentencing intervention program for eligible adult offenders in the NSW Local Court.<sup>76</sup> This was generally available for summary offences and indictable offences that could be dealt with summarily, subject to certain exceptions.<sup>77</sup> It involved a voluntary conference between the offender and the victim, among other participants (such as the victim's support person).<sup>78</sup> Forum sentencing stopped in 2018 after evaluations found that the program, although well-liked by participants, did not reduce the risk of reoffending.<sup>79</sup>
- 6.58 Currently, restorative justice conferences in the ACT are available for almost all offences at various stages of the criminal justice process.<sup>80</sup> Restorative justice is also widely available in NZ, where courts can adjourn proceedings before sentencing to enable a restorative justice process to occur.<sup>81</sup> There, 97% of restorative justice referrals are made by the court after a guilty plea but before sentencing.<sup>82</sup>
- 6.59 Recent reviews have recommended flexibility. The 2023 evaluation of the NZ scheme recommended that consideration be given to offering restorative justice with more flexible timing, including earlier in the proceedings or as a post-

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76. NSW Sentencing Council, *Victims' Involvement in Sentencing*, Consultation Paper (2017) [6.13]–[6.15]; M Rossner, J Bruce and M Meher, *The Process and Dynamics of Restorative Justice: Research on Forum Sentencing* (University of Western Sydney, 2013) 7; *Criminal Procedure Regulation 2017* (NSW) pt 8, repealed by *Criminal Procedure Amendment (Intervention Programs) Regulation 2018* (NSW) cl 3(1).

77. *Criminal Procedure Act 1986* (NSW) s 348; *Criminal Procedure Regulation 2017* (NSW) cl 59, repealed by *Criminal Procedure Amendment (Intervention Programs) Regulation 2018* (NSW) cl 3(1).

78. NSW Sentencing Council, *Victims' Involvement in Sentencing*, Consultation Paper (2017) [6.13]; *Criminal Procedure Regulation 2017* (NSW) pt 8 div 3, repealed by *Criminal Procedure Amendment (Intervention Programs) Regulation 2018* (NSW) cl 3(1).

79. S Poynton, *Rates of Recidivism among Offenders Referred to Forum Sentencing*, Crime and Justice Bulletin No 172 (NSW Bureau of Crime Statistics and Research, 2013).

80. *Crimes (Restorative Justice) Act 2004* (ACT) s 8, s 9, s 15.

81. *Sentencing Act 2002* (NZ) s 25(1).

82. New Zealand, Ministry of Justice, *Restorative Justice Review: Findings Report* (2023) 10.

sentencing option. According to the evaluation report, this would ensure that restorative justice was available whenever participants were ready. This could improve uptake.<sup>83</sup>

- 6.60 The Victorian Law Reform Commission (VLRC) also recommended that restorative justice be made available at multiple stages in the criminal justice process, including after a plea of guilty but before sentencing, and after a plea of guilty in connection with an application for compensation.<sup>84</sup>
- 6.61 There are mixed views on the benefits of pre-sentence restorative justice to victims. On one hand, it can provide an immediate short-term intervention that may contribute to the victim's healing process.<sup>85</sup> On the other hand, some research suggests there may be less resolution for the victim if there is insufficient time between the crime event and the restorative justice process.<sup>86</sup>

### **Should offender participation be considered in sentencing?**

- 6.62 If restorative justice is offered pre-sentence, another issue is whether an offender's participation should be considered in sentencing. This could affect the willingness of victims and/or offenders to participate.
- 6.63 In NZ, the sentencing court is required to consider any outcomes of a restorative justice process.<sup>87</sup> In some cases this results in a sentence reduction.<sup>88</sup> In the ACT, the court may consider whether an offender has taken part in restorative justice, but it is not required to reduce any sentence as a result.<sup>89</sup>
- 6.64 If restorative justice was offered pre-sentencing in NSW, it is possible that it could be seen as evidence of the offender's remorse. As we discuss in chapter 4, an offender's remorse is taken into account as a mitigating factor in some circumstances.<sup>90</sup> The court is not required to decrease the sentence when there is evidence of remorse, but it may do so.<sup>91</sup>

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83. New Zealand, Ministry of Justice, *Restorative Justice Review: Findings Report (2023)* 25.

84. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) [7.306].

85. New Zealand, Ministry of Justice, *Restorative Justice Review: Findings Report (2023)* 18.

86. J Bruce and J Bolitho, "On Being 'Good Sad' and other Conundrums: Mapping Emotion in Post Sentencing Restorative Justice" (2019) 2 *International Journal of Restorative Justice* 389, 400.

87. *Sentencing Act 2002* (NZ) s 8(j).

88. See, eg, *New Zealand Police v Kearns* [2017] NZDC 9319 [20]; *R v Henare* [2019] NZDC 589 [34]; *Robinson v New Zealand Police* [2022] NZHC 442 [8].

89. *Crimes (Restorative Justice) Act 2004* (ACT) s 19(1)(b), s 53(e); *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(y).

90. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(i).

91. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(i), s 21A(5).

- 6.65 Some victims may not wish to participate in restorative justice if they think it could lead to a reduction in sentence. The 2023 NZ evaluation noted that some victims chose not to participate because of this. There were concerns that offenders might be motivated by the sentencing discount, and not genuine remorse.<sup>92</sup>
- 6.66 One option to address these concerns could be to legislate to prevent courts from considering participation in restorative justice as a mitigating factor in sentencing.
- 6.67 However, this approach could have disadvantages. According to the VLRC, an offender may have little motivation to participate in restorative justice if their participation cannot be considered in sentencing. The VLRC recommended that judges should have the discretion to decide how to take an offender's pre-sentence participation into account.<sup>93</sup>

### **Should restorative justice have a legislative basis?**

- 6.68 As we mention above, the restorative justice services provided by CSNSW does not have a legislative basis. Among other things, this means there is no legislative requirement to inform victims or offenders of the possibility of engaging in restorative justice.
- 6.69 NZ has a different model. If the offender pleads guilty, the District Court must adjourn proceedings to investigate if restorative justice would be appropriate.<sup>94</sup> A restorative justice facilitator then contacts the victim and the offender to explain what restorative justice involves and asks if they would like to participate.<sup>95</sup> This provides a structure for informing all relevant parties about their options.
- 6.70 The VLRC recommended that restorative justice should be supported by legislation, and that victims should be informed of their right to request it.<sup>96</sup> This would provide statutory safeguards, including requiring both the victim and offender to provide their free and informed consent to participate.<sup>97</sup>

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92. New Zealand, Ministry of Justice, *Restorative Justice Review: Findings Report (2023)* 19, 21.

93. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) [7.298], [7.302].

94. *Sentencing Act 2002* (NZ) s 24A.

95. New Zealand, Ministry of Justice, *Restorative Justice: Practice Framework* (2019) 14.

96. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) rec 35.

97. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) [7.311].

- 6.71 The VLRC also considered that the legislation should include a rigorous and tailored assessment process for suitability, and require that victims and offenders be informed about their entitlement to seek legal advice.<sup>98</sup>

#### Question 6.2: Restorative justice

- (1) Should restorative justice be made widely available for serious road crime offences? If so, at what stage in the criminal justice process should restorative justice be available?
- (2) If restorative justice was to be made available for serious road crime offences pre-sentence, should an offender's participation be taken into account in sentencing?
- (3) Should restorative justice processes for serious road crimes be supported by legislation? If so, what legislative safeguards and processes would be appropriate?

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98. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) [7.312], [7.329].



## Appendix A: NSW Court of Criminal Appeal vehicular manslaughter sentencing decisions, 2016–2023

Case	Charge(s)	Facts	Reasoning	Sentence at first instance	Outcome of appeal
<i>Lees v R</i> [2019] NSWCCA 65	<ul style="list-style-type: none"> <li>▪ 1 count of manslaughter (unlawful and dangerous act)</li> <li>▪ 1 offence on a s 166 certificate</li> <li>▪ 2 call ups for breach of bonds</li> </ul>	<ul style="list-style-type: none"> <li>▪ The offender experienced domestic violence committed by the deceased</li> <li>▪ The offender, under the influence of methamphetamine, intentionally hit the deceased with a motor vehicle after the deceased hit the car with a bottle</li> <li>▪ The deceased became trapped under the car and was dragged along the road for 35 metres</li> </ul>	<ul style="list-style-type: none"> <li>▪ <b>Objective seriousness:</b> “in the high range”</li> <li>▪ <b>Moral culpability:</b> reduced by her psychiatric and intellectual disabilities</li> <li>▪ <b>Prominent sentencing purposes:</b> general deterrence, although the need for this was reduced by the impact of the offender’s psychiatric issues on her moral culpability</li> <li>▪ <b>Aggravating/mitigating factors:</b> no serious criminal history; low risk of reoffending in a similar way; experience of incarceration made more onerous due to psychiatric condition</li> <li>▪ <b>Sentencing discount/s:</b> 10% discount for guilty plea</li> </ul>	<ul style="list-style-type: none"> <li>▪ 16 years’ imprisonment (12 years NPP)</li> </ul>	<ul style="list-style-type: none"> <li>▪ Appeal allowed (sentence manifestly excessive; failure to take into account impact of psychiatric disabilities on moral culpability)</li> <li>▪ Resentenced to 12 years’ imprisonment (9 years NPP)</li> </ul>

Case	Charge(s)	Facts	Reasoning	Sentence at first instance	Outcome of appeal
<i>Smith v R</i> [2020] NSWCCA 181	<ul style="list-style-type: none"> <li>1 count of manslaughter (criminal negligence)</li> <li>3 offences on a s 166 certificate</li> </ul>	<ul style="list-style-type: none"> <li>The offender drove erratically and at high speeds while heavily intoxicated over an extended period, with near misses and warnings</li> <li>Crashed into another car, killing the driver</li> <li>BAC most likely 0.261 (over five times the legal limit) and under the influence of THC</li> </ul>	<ul style="list-style-type: none"> <li><b>Objective seriousness:</b> “extreme”</li> <li><b>Moral culpability:</b> high, even taking into account background of childhood deprivation</li> <li><b>Aggravating/mitigating factors:</b> previous convictions for DUI offences; dysfunctional upbringing; history of domestic violence and substance abuse; mental illness including PTSD; good prospects of rehabilitation; incarceration made more onerous by COVID-19 and family being evacuated due to bushfires</li> <li><b>Prominent sentencing purposes:</b> general deterrence</li> <li><b>Sentencing discount/s:</b> 25% discount for a guilty plea</li> </ul>	<ul style="list-style-type: none"> <li>9 years’ imprisonment (6 years 3 months NPP)</li> </ul>	<ul style="list-style-type: none"> <li>Appeal allowed (sentence manifestly excessive)</li> <li>Resentenced to 7 years 6 months’ imprisonment (5 years NPP)</li> </ul>



Case	Charge(s)	Facts	Reasoning	Sentence at first instance	Outcome of appeal
<i>Lord v R</i> [2020] NSWCCA 208	<ul style="list-style-type: none"> <li>1 count of manslaughter (unlawful and dangerous act)</li> </ul>	<ul style="list-style-type: none"> <li>The offender and the deceased were married for 25 years, but their relationship had deteriorated over time</li> <li>The offender was having an extra-marital affair</li> <li>While on a holiday, the pair had a heated argument</li> <li>The offender intentionally drove a car with the deceased in it into a river, resulting in her death</li> <li>The offender initially lied to police about the state of his marriage, his extra-marital affair and what had occurred</li> </ul>	<ul style="list-style-type: none"> <li><b>Objective seriousness and moral culpability:</b> a serious example of a death caused by an unlawful and dangerous act</li> <li><b>Aggravating/mitigating factors:</b> no criminal history, but a record of various traffic infringements; good character; good prospects of rehabilitation; mental illness (adjustment disorder); failure to demonstrate remorse</li> <li><b>Prominent sentencing purposes:</b> general deterrence, denunciation, punishment, rehabilitation</li> <li><b>Sentencing discount/s:</b> 15% discount for a guilty plea</li> </ul>	<ul style="list-style-type: none"> <li>10 years 8 months' imprisonment (8 years NPP)</li> </ul>	<ul style="list-style-type: none"> <li>Appeal dismissed (sentence not manifestly excessive; judge did not discount the actions taken by the offender after the offence)</li> </ul>

Case	Charge(s)	Facts	Reasoning	Sentence at first instance	Outcome of appeal
<i>Crowley v R</i> [2021] NSWCCA 45	<ul style="list-style-type: none"> <li>1 count of manslaughter (criminal negligence) (2 Form 1 offences)</li> <li>3 counts of aggravated dangerous driving occasioning grievous bodily harm</li> </ul>	<ul style="list-style-type: none"> <li>The offender was driving at high speeds and on the wrong side of the road at times</li> <li>Evaded police who started following the car after they observed the speeding</li> <li>The offender eventually crashed head-on into another car while travelling at 144km/hr in an 80km/hr zone, killing 1 victim and injuring 5 others, including one person in a separate car shortly before the head-on collision</li> <li>BAC 0.12 (over twice the legal limit)</li> </ul>	<ul style="list-style-type: none"> <li><b>Objective seriousness:</b> high</li> <li><b>Moral culpability:</b> high, not substantially reduced by the offender's anxiety, depression and OCD</li> <li><b>Prominent sentencing purposes:</b> general deterrence, denunciation</li> <li><b>Aggravating/mitigating factors:</b> previous convictions disentitled offender to leniency (including mid-range PCA offence); otherwise of good character; youth; remorse; good prospects of rehabilitation</li> <li><b>Sentencing discount/s:</b> 25% discount for a guilty plea</li> </ul>	<ul style="list-style-type: none"> <li>Aggregate sentence: 14 years 3 months' imprisonment (10 years NPP)</li> <li>Indicative sentence for manslaughter: 11 years' imprisonment</li> </ul>	<ul style="list-style-type: none"> <li>Appeal dismissed (sentence not manifestly excessive, among other grounds)</li> </ul>

Case	Charge(s)	Facts	Reasoning	Sentence at first instance	Outcome of appeal
<i>DPP v Abdulrahman</i> [2021] NSWCCA 114	<ul style="list-style-type: none"> <li>1 count of manslaughter (criminal negligence) (2 Form 1 offences)</li> <li>1 offence on a s 166 certificate</li> </ul>	<ul style="list-style-type: none"> <li>The offender was driving at 65km/hr in a 40km/hr school zone while under the influence of various drugs including methylamphetamine</li> <li>Drove through a red light and crashed into and killed a 12 year-old child on a pedestrian crossing</li> <li>The offender was disqualified from driving at the time and was subject to an ICO for prior driving offences</li> <li>The offender did not assist the victim after the crash</li> </ul>	<ul style="list-style-type: none"> <li><b>Objective seriousness:</b> very serious example of vehicular manslaughter</li> <li><b>Moral culpability:</b> very high</li> <li><b>Prominent sentencing purposes:</b> general and specific deterrence, community protection</li> <li><b>Aggravating/mitigating factors:</b> substantial criminal history; mental illness including PTSD and substance use disorder; remorse; poor prospects of rehabilitation</li> <li><b>Sentencing discount/s:</b> 25% discount for a guilty plea</li> </ul>	<ul style="list-style-type: none"> <li>Aggregate sentence: 6 years 10 months' imprisonment (4 years 6 months NPP)</li> <li>Indicative sentence for manslaughter: 6 years 9 months' imprisonment</li> </ul>	<ul style="list-style-type: none"> <li>Appeal allowed (sentencing judge failed to address specific deterrence and community protection)</li> <li>Aggregate sentence: 10 years 2 months' imprisonment (6 years 8 months NPP)</li> <li>Indicative sentence for manslaughter: 10 years 1 month imprisonment</li> </ul>

Case	Charge(s)	Facts	Reasoning	Sentence at first instance	Outcome of appeal
<p><i>Byrne v R; Cahill v R</i> [2021] NSWCCA 185</p>	<ul style="list-style-type: none"> <li>1 count of manslaughter (criminal negligence)</li> </ul>	<ul style="list-style-type: none"> <li>The two offenders, who were on provisional licences, took part in a street race at speeds in excess of 100km/hr in a 50km/hr zone, at times driving on the wrong side of the road, both with passengers</li> <li>The offending took place in a built-up area, involving significant risk to the community</li> <li>One of the vehicles crashed into another car, killing the driver</li> </ul>	<ul style="list-style-type: none"> <li><b>Objective seriousness:</b> mid-range</li> <li><b>Moral culpability:</b> higher than most motor vehicle accidents; increased by the length of time of the street race and the fact that it took place in a built-up area, which increased the risks involved</li> <li><b>Prominent sentencing purposes:</b> general deterrence, which was particularly important as both offenders were on provisional licences; specific deterrence</li> <li><b>Aggravating/mitigating factors:</b> remorse; no or limited criminal history; one offender had a likely diagnosis of ADHD and history of drug use; incarceration more onerous due to COVID-19; while youth was not a mitigating factor, principles relating to youth still applied (eg, retribution may assume less significance and rehabilitation may assume more significance)</li> <li><b>Sentencing discount/s:</b> both offenders received a 25% discount for a guilty plea</li> </ul>	<ul style="list-style-type: none"> <li>Each offender received a sentence of 10 years 6 months' imprisonment (7 years NPP)</li> </ul>	<ul style="list-style-type: none"> <li>Appeal dismissed (sentences not manifestly excessive)</li> </ul>

Case	Charge(s)	Facts	Reasoning	Sentence at first instance	Outcome of appeal
<p><i>Moananu v R</i> [2022] NSWCCA 85</p>	<ul style="list-style-type: none"> <li>▪ 2 counts of manslaughter (criminal negligence) (one count had 3 offences on a Form 1)</li> <li>▪ 1 count of aggravated dangerous driving occasioning grievous bodily harm</li> </ul>	<ul style="list-style-type: none"> <li>▪ The offender drove in an erratic and dangerous manner for more than 6km</li> <li>▪ Car was travelling at least 112km/hr leading up to the crash, BAC over 0.2 (four times the legal limit)</li> <li>▪ The offender crashed into another car, seriously injuring one person and killing two people, including a woman who was pregnant with twins</li> <li>▪ Offender was unlicensed at the time of the offending</li> </ul>	<ul style="list-style-type: none"> <li>▪ <b>Objective seriousness:</b> high end, but not in the worst category</li> <li>▪ <b>Moral culpability:</b> high, although reduced by background of social deprivation</li> <li>▪ <b>Prominent sentencing purposes:</b> general deterrence, denunciation</li> <li>▪ <b>Aggravating/mitigating factors:</b> significant remorse; limited criminal history but substantial traffic history; childhood history of neglect, dysfunction, violence and exposure to alcohol; reasonable prospects of rehabilitation; significant injuries sustained in the crash</li> <li>▪ <b>Sentencing discount/s:</b> 25% discount for a guilty plea</li> </ul>	<ul style="list-style-type: none"> <li>▪ Aggregate sentence: 15 years' imprisonment (10 years NPP)</li> <li>▪ Indicative sentence for count 1 of manslaughter: 8 years 6 months' imprisonment</li> <li>▪ Indicative sentence for count 2 of manslaughter: 9 years' imprisonment</li> </ul>	<ul style="list-style-type: none"> <li>▪ Appeal allowed (sentence manifestly excessive)</li> <li>▪ Aggregate sentence: 12 years 6 months' imprisonment (8 years 4 months NPP)</li> <li>▪ Indicative sentence for count 1 of manslaughter: 7 years 6 months' imprisonment</li> <li>▪ Indicative sentence for count 2 of manslaughter: 8 years 3 months' imprisonment</li> </ul>

Case	Charge(s)	Facts	Reasoning	Sentence at first instance	Outcome of appeal
<i>Davidson v R</i> [2022] NSWCCA 153	<ul style="list-style-type: none"> <li>▪ 4 counts of manslaughter (criminal negligence)</li> <li>▪ 1 count of aggravated dangerous driving occasioning grievous bodily harm</li> <li>▪ 2 counts of cause bodily harm by misconduct in charge of a motor vehicle</li> </ul>	<ul style="list-style-type: none"> <li>▪ The offender had spent the day drinking and taking drugs with friends</li> <li>▪ Drove erratically over an extended period</li> <li>▪ The offender crashed into seven children, killing four and injuring three others</li> <li>▪ Car was travelling at 111km/hr, BAC 0.182 (over three times the legal limit), MDMA and cocaine in the offender's system</li> </ul>	<ul style="list-style-type: none"> <li>▪ <b>Objective seriousness:</b> high</li> <li>▪ <b>Moral culpability:</b> high</li> <li>▪ <b>Prominent sentencing purposes:</b> recognition of harm, general deterrence</li> <li>▪ <b>Aggravating/mitigating factors:</b> remorse; no criminal record; good prospects of rehabilitation; low risk of reoffending; good character; ADHD; imprisonment more onerous due to segregation, COVID-19 and ADHD</li> <li>▪ <b>Sentencing discount/s:</b> 25% discount for a guilty plea</li> </ul>	<ul style="list-style-type: none"> <li>▪ Aggregate sentence: 28 years' imprisonment (21 years NPP)</li> <li>▪ Indicative sentence for each count of manslaughter: 14 years 3 months' imprisonment</li> </ul>	<ul style="list-style-type: none"> <li>▪ Appeal allowed (sentence manifestly excessive; totality principle – significant harm arising from one criminal course of conduct)</li> <li>▪ Aggregate sentence: 20 years' imprisonment (15 years NPP)</li> <li>▪ Indicative sentence for each manslaughter count: 10 years 6 months' imprisonment</li> </ul>

Case	Charge(s)	Facts	Reasoning	Sentence at first instance	Outcome of appeal
<i>R v Cook</i> [2023] NSWCCA 9	<ul style="list-style-type: none"> <li>▪ 2 counts of manslaughter (unlawful and dangerous act)</li> <li>▪ 1 count of recklessly cause GBH</li> <li>▪ 1 count of break enter and commit serious indictable offence in circumstances of aggravation</li> <li>▪ 1 count of supply indictable quantity of prohibited drug</li> <li>▪ 1 count of possess shortened firearm</li> <li>▪ 1 count of possess loaded firearm in public place</li> <li>▪ 6 offences on a Form 1 attached to 5 of the 7 charges</li> </ul>	<ul style="list-style-type: none"> <li>▪ In a drug deal, the offender paid \$7000 for “ice” but did not receive anything</li> <li>▪ One of the deceased had planned to defraud the offender out of revenge, as the offender provided a statement to police in a criminal matter where the deceased was convicted</li> <li>▪ The victims took off in a car with the offender’s money</li> <li>▪ The offender chased the victims’ car, driving at speeds of up to 144km/hr for around 2–3 minutes</li> <li>▪ The offender misjudged how far the other car was away from him and crashed into it, causing the other driver to lose control</li> <li>▪ The other car crashed, killing two people and severely injuring another</li> <li>▪ After the crash, the offender did not help the victims but retrieved his money from the car and left the scene</li> <li>▪ The offender was on an ICO at the time of the drug offences, and on several suspended sentences and a s 9 bond at the time of the vehicular manslaughter and reckless GBH offences</li> </ul>	<ul style="list-style-type: none"> <li>▪ <b>Objective seriousness:</b> mid-range</li> <li>▪ <b>Moral culpability:</b> somewhat reduced by background of social deprivation</li> <li>▪ <b>Prominent sentencing purposes:</b> protection of the community, general deterrence, denunciation, recognition of harm, rehabilitation</li> <li>▪ <b>Aggravating/ mitigating factors:</b> late demonstration of remorse; high likelihood of reoffending; substantial criminal history; poor prospects of rehabilitation; history of social disadvantage, child sexual abuse, and substance abuse; poor cognitive ability and literacy; mental health issues including depressive disorder, PTSD and severe stimulant disorder; custody particularly onerous due to segregation, back injury and previous trauma from jail</li> <li>▪ <b>Sentencing discount/s:</b> 25% discount for a guilty plea</li> </ul>	<ul style="list-style-type: none"> <li>▪ Aggregate sentence: 14 years’ imprisonment (9 years NPP)</li> <li>▪ Indicative sentence for each count of manslaughter: 6 years’ imprisonment</li> </ul>	<ul style="list-style-type: none"> <li>▪ Appeal dismissed (sentence not manifestly excessive; correct application of totality principle, based on four separate episodes of criminality)</li> </ul>

Case	Charge(s)	Facts	Reasoning	Sentence at first instance	Outcome of appeal
<i>Chandler v R</i> [2023] NSWCCA 59	<ul style="list-style-type: none"> <li>1 count of manslaughter (unlawful and dangerous act) (3 Form 1 offences)</li> </ul>	<ul style="list-style-type: none"> <li>The offender deliberately drove a car through the fence of a suburban backyard to avoid police</li> <li>The offender hit and killed an 18 month-old child who was playing in the backyard, before driving away from the scene, resulting in a police pursuit</li> <li>The offender drove at speeds of up to 130-140km/hr in an 80km/hr zone, through several red lights, and on the wrong side of the road</li> <li>The police ended the pursuit because of the risk to the public (this was the basis of a separate offence included on the Form 1)</li> <li>At the time of the offending, the offender was unlicensed, under the influence of “ice” and driving a stolen car</li> </ul>	<ul style="list-style-type: none"> <li><b>Objective seriousness:</b> at the “gravest end of the spectrum”</li> <li><b>Moral culpability:</b> reduced by background of social deprivation</li> <li><b>Prominent sentencing purposes:</b> recognition of harm; protection of the community; specific and general deterrence</li> <li><b>Aggravating/mitigating factors:</b> remorse; dysfunctional upbringing; history of substance abuse and mental illness, including ADHD, schizophrenia, bipolar disorder, schizoaffective disorder and drug induced psychosis; substantial criminal history; significant risk of reoffending, although on appeal it was found that prospects of rehabilitation had been slightly improved by actions taken in custody; offence committed in the home of the victim and in the presence of children; offender was on bail; not part of planned or organised criminal activity; incarceration more onerous due to being a target of violence and retaliation, and COVID-19</li> <li><b>Sentencing discount/s:</b> 5% discount for a guilty plea</li> </ul>	<ul style="list-style-type: none"> <li>19 years’ imprisonment (13 years NPP)</li> </ul>	<ul style="list-style-type: none"> <li>Appeal allowed (sentence manifestly excessive)</li> <li>15 years 8 months’ imprisonment (10 years 6 months NPP)</li> </ul>



# Appendix B: Glossary of sentencing options and statistical concepts

## Custodial sentencing options

**Imprisonment:** An order for a term of imprisonment that includes a minimum period served in a correctional centre or equivalent.<sup>1</sup>

**Intensive correction order (ICO):** An order for term of imprisonment, served by way of intensive correction in the community. Although ICOs are served in the community, the *Crimes (Sentencing Procedure) Act 1999* (NSW) still classifies ICOs as custodial sentences.<sup>2</sup>

ICOs can be up to 2 years for one offence or up to 3 years for multiple offences.<sup>3</sup>

ICOs include standard conditions: the offender must not commit any offence and must submit to supervision by a community corrections officer.<sup>4</sup>

The court must also impose at least one additional condition (such as home detention, electronic monitoring or a community service work condition of up to 750 hours) unless there are exceptional circumstances.<sup>5</sup> It can also impose any further conditions at its discretion.<sup>6</sup>

## Non-custodial sentencing options

**Community correction order (CCO):** A sentence served in the community. CCOs can be up to 3 years.<sup>7</sup>

CCOs include standard conditions: The offender must not commit any offence and must appear before the court if called on.<sup>8</sup>

The court can also impose certain additional conditions (such as a curfew, community service of up to 500 hours or a treatment condition), as well as any further conditions at its discretion.<sup>9</sup>

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1. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5.
  2. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7.
  3. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7, s 68.
  4. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 73.
  5. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 73A.
  6. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 73B.
  7. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 8, s 85.
  8. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 88.
  9. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 89, s 90.

**Conditional release order (CRO):** An order discharging the offender, either with or without a conviction.<sup>10</sup> A CRO can be imposed for up to 2 years.<sup>11</sup>

CROs include standard conditions: The offender must not commit any offence and must appear before the court if called on.<sup>12</sup>

The court can also impose certain additional conditions (such as a treatment condition, abstention condition or non-association condition), as well as any further conditions at its discretion.<sup>13</sup> However, the court cannot impose conditions involving home detention, electronic monitoring, a curfew or community service work.<sup>14</sup>

**Dismissal of charge:** An order that dismisses the charge against the offender, without a conviction.<sup>15</sup>

**Conditional discharge:** An order that dismisses the charge against the offender without a conviction on the condition that they agree to participate in, and comply with, an intervention program.<sup>16</sup>

**Fine:** A monetary penalty. One penalty unit is \$110.<sup>17</sup>

## NSW Bureau of Crime Statistics and Research classifications

The NSW Bureau of Crime Statistics and Research (BOCSAR) classifies sentencing outcomes as:

- **Custody:** A custodial sentence, where a minimum term is served in a custodial centre or equivalent. Cumulative terms of imprisonment are excluded.
- **Supervised community sentence:** A community-based sentence where the offender must regularly report to and obey reasonable directions from their Community Corrections Officer. This category of penalties includes supervised bonds, supervised CCOs, supervised Community Service Orders, suspended sentences with supervision, supervised CROs, ICOs and Home Detention.
- **Unsupervised community sentence:** A community-based sentence where the offender is not formally supervised. This category of penalties includes unsupervised bonds, unsupervised CROs (with or without conviction), unsupervised CCOs and suspended sentences without supervision.
- **Fine:** Same definition as above.
- **Other penalty:** Any other penalty, including no action taken on a breach of bond, dismissed after Youth Justice Conference, juvenile offence proved, dismissed,

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10. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 9.

11. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95.

12. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 98.

13. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 99(1)–(2).

14. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 99(3).

15. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(1)(a).

16. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(1)(c).

17. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17.

and unknown penalties. Where there were low numbers, the statistics in this consultation paper include fines in the category of “other penalty”.<sup>18</sup>

These categories provide a way of comparing sentencing outcomes before and after the significant sentencing reforms in 2018.<sup>19</sup> The reforms changed the sentencing options available to the court.<sup>20</sup>

The consultation paper includes BOCSAR statistics from 2016–2022 to reflect sentencing outcomes before and after the 2018 reforms.

This range also allows consideration of sentencing outcomes before the COVID-19 pandemic commenced in March 2020. As the pandemic impacted crime and sentencing trends, this time period provides a more complete picture compared with only examining sentencing outcomes from 2020 or just before.

## Other BOCSAR statistical terms and concepts

Other BOCSAR statistical terms and concepts used in this consultation paper include:

- **Finalised charge:** A charge that has been fully determined by the court and for which no further court proceedings are required.
- **Defendant with a finalised charge:** A defendant against whom one or more criminal charges have been laid and which are heard together as one court appearance. Court data in JusticeLink are case-based, with each case containing one or more charges against a single individual. When different charges within the same case are finalised on either the same or different dates in the same jurisdiction these are counted by BOCSAR as one finalised court appearance and therefore reported as one person.
- **Proven charge/proven offence:** An outcome of criminal proceedings in which the court accepts that a charge is proven through a guilty plea entered by a defendant, found guilty by the court, and higher court outcomes where the court finds the act proven but the defendant not criminally responsible due to mental health or cognitive impairment. Proven charges also include proven outcomes where no conviction is recorded.
- **Principal proven offence:** The offence charged and proven that received the most serious penalty (based on BOCSAR’s classification of penalties).
- **Finalised court appearance:** Where all charges against a defendant that are being dealt with at the same time have been processed to completion within a court level.

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18. NSW Bureau of Crime Statistics and Research, “Definitions and Explanations: NSW Criminal Court Statistics” <[www.bocsar.nsw.gov.au/Pages/bocsar\\_court\\_stats/court\\_glossary.aspx](http://www.bocsar.nsw.gov.au/Pages/bocsar_court_stats/court_glossary.aspx)> (retrieved 3 November 2023).

19. NSW Bureau of Crime Statistics and Research, “Definitions and Explanations: NSW Criminal Court Statistics” <[www.bocsar.nsw.gov.au/Pages/bocsar\\_court\\_stats/court\\_glossary.aspx](http://www.bocsar.nsw.gov.au/Pages/bocsar_court_stats/court_glossary.aspx)> (retrieved 3 November 2023).

20. *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW) sch 1.

- **Proven court appearance:** A finalised court appearance where the defendant was proven guilty of at least one charge, that involved the imposition of a penalty.
- **Proven court appearances where the principal offence was a serious road crime:** Where all charges against a defendant that were being dealt with at the same time have been processed to completion within a court level, and where the relevant serious road crime was the defendant’s most serious proven offence (in other words, the offence for which they received the most serious penalty, based on BOCSAR’s classifications).<sup>21</sup>

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21. NSW Bureau of Crime Statistics and Research, “Definitions and Explanations: NSW Criminal Court Statistics” <[www.bocsar.nsw.gov.au/Pages/bocsar\\_court\\_stats/court\\_glossary.aspx](http://www.bocsar.nsw.gov.au/Pages/bocsar_court_stats/court_glossary.aspx)> (retrieved 3 November 2023).

# Appendix C:

## Dangerous driving statistics

**Average head sentence for sentences of imprisonment, proven principal offences of dangerous driving, 1995–2000<sup>1</sup>**

Year	Aggravated dangerous driving occasioning death	Dangerous driving occasioning death	Aggravated dangerous driving occasioning GBH	Dangerous driving occasioning GBH
1995	4 years 3 months (2 proven court appearances)	N/A (0 proven court appearances)	3 years 3 months (4 proven court appearances)	2 years 4 months (1 proven court appearances)
1996	2 years 11 months (5 proven court appearances)	2 years 11 months (9 proven court appearances)	1 year 7 months (5 proven court appearances)	1 year 2 months (9 proven court appearances)
1997	4 years 1 month (4 proven court appearances)	3 years 3 months (11 proven court appearances)	2 years 2 months (6 proven court appearances)	1 year 6 months (14 proven court appearances)
1998	5 years 6 months (12 proven court appearances)	4 years 4 months (16 proven court appearances)	2 years 10 months (12 proven court appearances)	1 year 10 months (19 proven court appearances)
1999	5 years 2 months (5 proven court appearances)	3 years 9 months (27 proven court appearances)	4 years 1 month (5 proven court appearances)	1 year 9 months (21 proven court appearances)
2000	5 years 10 months (7 proven court appearances)	3 years 5 months (22 proven court appearances)	2 years 9 months (10 proven court appearances)	2 years 1 month (29 proven court appearances)
2001	4 years 9 months (10 proven court appearances)	3 years 1 month (22 proven court appearances)	2 years 5 months (9 proven court appearances)	1 year 11 months (29 proven court appearances)

1. *Crimes Act 1900* (NSW) s 52A(2), s 52A(1), s 52A(4), s 52A(3).

Year	Aggravated dangerous driving occasioning death	Dangerous driving occasioning death	Aggravated dangerous driving occasioning GBH	Dangerous driving occasioning GBH
2002	5 years (9 proven court appearances)	3 years 3 months (31 proven court appearances)	2 years 6 months (14 proven court appearances)	1 year 10 months (27 proven court appearances)
2003	4 years 11 months (13 proven court appearances)	3 years 9 months (19 proven court appearances)	2 year 7 months (13 proven court appearances)	2 years (26 proven court appearances)
2004	4 years 10 months (9 proven court appearances)	3 years 4 months (16 proven court appearances)	2 years 5 months (12 proven court appearances)	2 years 1 month (16 proven court appearances)
2005	4 years 1 month (8 proven court appearances)	3 years 5 months (20 proven court appearances)	2 years 11 months (11 proven court appearances)	1 year 10 months (19 proven court appearances)
2006	4 years 11 months (7 proven court appearances)	3 years 5 months (16 proven court appearances)	2 years 2 months (11 proven court appearances)	2 years 2 months (23 proven court appearances)
2007	5 years 6 months (2 proven court appearances)	3 years 5 months (19 proven court appearances)	2 years 5 months (7 proven court appearances)	1 year 9 months (26 proven court appearances)
2008	5 years 3 months (7 proven court appearances)	3 years 3 months (13 proven court appearances)	2 years 6 months (8 proven court appearances)	1 year 7 months (15 proven court appearances)
2009	4 years 8 months (7 proven court appearances)	3 years 4 months (14 proven court appearances)	2 years (12 proven court appearances)	1 year 10 months (21 proven court appearances)
2010	5 years 2 months (6 proven court appearances)	2 years 11 months (21 proven court appearances)	2 years 1 month (9 proven court appearances)	1 year 5 months (13 proven court appearances)
2011	4 years 2 months (7 proven court appearances)	3 years (20 proven court appearances)	2 years 6 months (8 proven court appearances)	1 year 10 months (20 proven court appearances)

Year	Aggravated dangerous driving occasioning death	Dangerous driving occasioning death	Aggravated dangerous driving occasioning GBH	Dangerous driving occasioning GBH
2012	5 years 2 months (5 proven court appearances)	2 years 7 months (13 proven court appearances)	2 years 8 months (8 proven court appearances)	1 year 11 months (18 proven court appearances)
2013	5 years 2 months (4 proven court appearances)	3 years 5 months (15 proven court appearances)	2 years 4 months (6 proven court appearances)	1 year 8 months (8 proven court appearances)
2014	4 years 8 months (7 proven court appearances)	3 years (16 proven court appearances)	2 year 8 months (9 proven court appearances)	2 years 4 months (10 proven court appearances)
2015	5 years 5 months (8 proven court appearances)	3 years 2 months (19 proven court appearances)	3 years 2 months (14 proven court appearances)	2 years 2 months (16 proven court appearances)
2016	5 years 6 months (2 proven court appearances)	3 years 4 months (10 proven court appearances)	3 years 4 months (3 proven court appearances)	2 years 4 months (13 proven court appearances)
2017	7 years 3 months (3 proven court appearances)	2 years 11 months (21 proven court appearances)	3 years 4 months (13 proven court appearances)	2 years 1 month (23 proven court appearances)
2018	4 years 2 months (5 proven court appearances)	3 years 1 month (19 proven court appearances)	2 years 3 months (8 proven court appearances)	1 year 11 months (22 proven court appearances)
2019	5 years (7 proven court appearances)	3 years 3 months (30 proven court appearances)	3 years 4 months (8 proven court appearances)	1 year 11 months (18 proven court appearances)
2020	4 years 11 months (10 proven court appearances)	2 years 8 months (17 proven court appearances)	2 years 8 months (9 proven court appearances)	1 year 11 months (19 proven court appearances)
2021	4 years 2 months (6 proven court appearances)	3 years 2 months (19 proven court appearances)	2 years 10 months (11 proven court appearances)	1 year 10 months (14 proven court appearances)

Year	Aggravated dangerous driving occasioning death	Dangerous driving occasioning death	Aggravated dangerous driving occasioning GBH	Dangerous driving occasioning GBH
2022	5 years 10 months (3 proven court appearances)	3 years 1 month (18 proven court appearances)	2 years 7 months (5 proven court appearances)	1 year 10 months (17 proven court appearances)

Source: NSW Bureau of Crime Statistics and Research, reference st23-22811, table 2



## Appendix D: Preliminary submissions

<b>PRC01</b>	Anonymous, 19 December
<b>PRC02</b>	M I, 20 December 2022
<b>PRC03</b>	B Snape, 20 December 2022
<b>PRC04</b>	T S, 20 December 2022
<b>PRC05</b>	J Enright, 21 December 2022
<b>PRC06</b>	A McCabe, 21 December 2022
<b>PRC07</b>	S Jeffrey, 22 December 2022
<b>PRC08</b>	D Baker, 22 December 2022
<b>PRC09</b>	T George, 23 December 2022
<b>PRC10</b>	Confidential, 24 December 2022
<b>PRC11</b>	Confidential, 5 January 2023
<b>PRC12</b>	D Heilpern, 1 February 2023
<b>PRC13</b>	G H, 5 February 2023
<b>PRC14</b>	L Wong, 5 February 2023
<b>PRC15</b>	M Bishop, 5 February 2023
<b>PRC16</b>	L Carroll, 5 February 2023
<b>PRC17</b>	D Edds, 5 February 2023
<b>PRC18</b>	C Claridge, 5 February 2023
<b>PRC19</b>	B Reynolds, 5 February 2023
<b>PRC20</b>	G H, 5 February 2023
<b>PRC21</b>	L and M Carroll, 5 February 2023
<b>PRC22</b>	R Bussey, 5 February 2023
<b>PRC23</b>	C Beetham, 5 February 2023
<b>PRC24</b>	J Duffield, 6 February 2023
<b>PRC25</b>	K Dunshea, 6 February 2023
<b>PRC26</b>	N Micos, 6 February 2023
<b>PRC27</b>	E Carroll, 6 February 2023
<b>PRC28</b>	A Goulding, 7 February 2023
<b>PRC29</b>	A Walton, 7 February 2023
<b>PRC30</b>	D McNulty, 7 February 2023

- PRC31** K Miller, 7 February 2023
- PRC32** Anonymous, 6 February 2023
- PRC33** J Williams, 7 February 2023
- PRC34** P Warburton, 7 February 2023
- PRC35** D and B Reynolds, 7 February 2023
- PRC36** R Zarb, 7 February 2023
- PRC37** K Bruce, 7 February 2023
- PRC38** R Bruce, 7 February 2023
- PRC39** V Little, 7 February 2023
- PRC40** K Moses, 8 February 2023
- PRC41** S Edds, 8 February 2023
- PRC42** A Weeks, 8 February 2023
- PRC43** R Bishop, 9 February 2023
- PRC44** I Smith, 9 February 2023
- PRC45** A Thompson, 9 February 2023
- PRC46** R Lamont, 9 February 2023
- PRC47** Anonymous, 10 February 2023
- PRC48** Transport for NSW, 10 February 2023
- PRC49** Anonymous, 11 February 2023
- PRC50** J Smith, 11 February 2023
- PRC51** K Sivagurunathan, 12 February 2023
- PRC52** J Bruce, 12 February 2023
- PRC53** S Collins, 13 February 2023
- PRC54** S McFarlane, 14 February 2023
- PRC55** D Bharathi, 15 February 2023
- PRC56** M Duke, 15 February 2023
- PRC57** B Deery, 15 February 2023
- PRC58** B Moore, 15 February 2023
- PRC59** Law Society of NSW, 15 February 2023
- PRC60** L Reynolds, 15 February 2023
- PRC61** L 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** A Wilson, 16 February 2023
- PRC66** J McCroary, 16 February 2023
- PRC67** J Buckenham, 16 February 2023
- PRC68** A Reynolds, 16 February 2023
- PRC69** Anonymous, 16 February 2023
- PRC70** Australasian College of Road Safety, 17 February 2023
- PRC71** S 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** NSW Office of the Director of Public Prosecutions, 17 February 2023
- PRC78** Legal Aid NSW, 17 February 2023
- PRC79** R Jones, 17 February 2023
- PRC80** RMIT University, Centre for Innovative Justice, 17 February 2023
- PRC81** G 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** A 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** L Clark, 11 March 2023
- PRC90** D Bruton, 27 July 2023
- PRC91** Confidential, 7 September 2023



# Appendix E: Preliminary consultations

## **Restorative Justice Unit, Corrective Services NSW (PRCC01)**

**13 June 2023**

Ms Stephanie Wallace, Senior Manager

Dr Derek Brookes, Senior Policy and Program Officer

## **Restorative justice practitioners (PRCC02)**

**29 June 2023**

Ms Kelsey Field, Principal Advisor, Resolution and Services, New Zealand Ministry of Justice

Mr Nathan Smith, Senior Advisor, Resolution and Services, New Zealand Ministry of Justice

Ms Stephanie Wallace, Senior Manager, Victims Register and Restorative Justice Unit, Corrective Services NSW

Dr Derek Brookes, Senior Policy and Program Officer, Victims Register and Restorative Justice Unit, Corrective Services NSW

## **Restorative justice researchers and practitioners (PRCC03)**

**3 July 2023**

Mr Stan Winford, Associate Director, Research, Innovation and Reform, RMIT University Centre for Innovative Justice

Ms 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

## **NSW Director of Public Prosecutions (PRCC05)**

**10 July 2023**

Mr Frank Veltro SC, Deputy Director

Mr James Dorney, Principal Legal Advisor

## **NSW Police Force (PRCC06)**

**14 July 2023**

Sergeant Jason Tozer, Police Prosecution and Licensing Enforcement Directorate

Assistant Commissioner Scott Whyte, Police Prosecution and Licensing Enforcement Directorate

Assistant Commissioner Brett McFadden, Traffic and Highway Patrol Command

Detective Inspector Jason Hogan, Traffic and Highway Patrol Command

Inspector Paul Bousfield, Traffic and Highway Patrol Command

Ms Lisa Fitzroy, Senior Policy Officer, Legislation and Policy Branch, Office of the Commissioner

Ms Marilyn Kourbelis, Acting Policy Manager, Legislation and Policy Branch, Office of the Commissioner

## **Road Trauma Support Group (PRCC07)**

**21 July 2023**

Mr Tom Daher

Mr Duncan Wakes-Miller

Ms Roxanne Arnold

Mr David Vidal

Mr Craig Mackenzie

## **District Court (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 (PRCC09)**

**28 August 2023**

Judge E Skinner, President

Olivia Taylor, Associate to Judge Skinner

## **Legal Aid NSW and Aboriginal Legal Service (NSW/ACT) Ltd (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) Ltd

Sascha Kelly, Policy Officer, Aboriginal Legal Service (NSW/ACT) Ltd

