



Children's Court of New South Wales

NSW Law Reform Commission
Department of Communities and Justice

16 April 2024

By email: nsw-lrc@dcj.nsw.gov.au

To whom it may concern,

Re: Serious Road Crime Consultation Paper

The Children's Court thanks the NSW Law Reform Commission for the opportunity to comment on the Serious Road Crime Consultation Paper released December 2023.

SRC 2.8: Police Pursuits

The Court acknowledges that the current maximum penalties for police pursuits may not meet community expectations.

It should be noted that an increase in the maximum penalty may not prevent the commission of the offence by young people. The Court recommends a review of the motivation for offending and the circumstances in which young people are committing this offence to inform the development of youth-focused strategies to reduce the incidence of offending.

Section 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) details the aggravating and mitigating factors that are to be taken into account when determining the appropriate sentence for an offence. These factors assist in assessing the objective seriousness of an offence and the moral culpability of an offender. The factors could be amended to address features that are relevant to distinguishing the objective seriousness of road crimes.

Currently, the Court will consider a number of factors when assessing the seriousness of a pursuit, including: speed; manner of driving; length of journey; number of people put at risk (on the road and in the car, including the age of those people where relevant); intoxication; sleep deprivation; whether the car was stolen; damage to the vehicle; damage to other vehicles or property; cost of damage; whether the offence was motivated by a desire to film and distribute the content – or that the pursuit was filmed / distributed (some criteria drawn from the guideline judgment of Whyte [2002] NSWCCA 343 as relevant to dangerous driving cause death cases).

The maximum penalty should provide sufficient sentencing scope to address the principles of sentencing in the most serious instance of offending. The Court should retain discretion for less serious instances of offending.

The disqualification provisions are set out in s 205 of the *Road Transport Act* (NSW) 2013. A person who is convicted of a Police Pursuit is disqualified from driving for an automatic period of three years or a minimum period of twelve months. If they are convicted of the same offence within a five-year period, they are automatically disqualified for five years with a minimum period of two years. Section 206A provides that a person who is sentenced to imprisonment will be disqualified for the relevant period from the date of their release.

The Children's Court requests consideration of a disqualification process that is better aligned with the principles established in the United Nations Convention on the Rights of the Child, the *Children (Criminal Proceedings) Act* 1987 (NSW), the *Young Offenders Act* 1997 (NSW) and case law regarding the primacy of considerations of rehabilitation and community integration when sentencing young offenders.

Supporting young people to receive their licence and become safe drivers supports their positive engagement in communities, including through attending school, work and sport. This has greater significance in Aboriginal communities where there can be significant impediments to driver licensing and in regional and remote communities where there is limited access to public transport. Lengthy disqualification periods prevent young people from accessing pro-social activities which reduces their prospects of rehabilitation, leading to further criminalisation and entrenchment in the criminal justice system.

SRC 2.9: Predatory Driving

The *Road Transport Act* 2013 (NSW) and the *Crimes Act* 1900 (NSW) contain a number of offences that relate to the manner of driving. An investigating police officer is required to assess whether particular conduct falls within a particular offence category, and if the Court does not agree with their categorisation, the Court may dismiss the charges.

If the intention of criminalising particular driving conduct is to prevent adverse driving through apprehension, proof, and consequence then there should be a single offence of unlawful driving with categories that establish different penalties for particular conduct.

The Court suggests that offences of negligent driving, reckless driving, furious driving, menacing driving, road racing, predatory driving and dangerous driving may benefit from being consolidated into a single, layered 'unlawful driving' offence, with different factors impacting the severity of the penalty. Aggravating factors may include but are not necessarily limited to:

- Driving in a manner that poses risks to the driver, passengers, road users, community members or property (Consider whether racing should fall within this category).
- Driving in a manner that would cause a reasonable person to fear personal or property damage.
- If the driver intends to cause harm (including fear of harm).
- If the driver causes harm (including property damage).
- If the driving causes Grievous Bodily Harm.
- If the driving results in death.

Each additional element of the offence charged could be available with reduced elements as a statutory back-up offence. There must be scope to charge different offences according to the number of victims who have been impacted by the conduct rather than the single instance of driving.

There is currently an overlap between the conduct that satisfies elements of offences under the *Road Transport Act 2013* (NSW) and the *Crimes Act 1900* (NSW). Both Acts should be reviewed, and the provisions should be consolidated.

SRC 2.10: A new Serious Road Crimes Act

The Children's Court does not support the creation of an additional Act to address serious road crimes. The *Road Transport Act 2013* (NSW) manages regulatory offences, and the *Crimes Act 1900* (NSW) addresses serious offences. If the suggestion to adopt an offence of 'unlawful driving' is accepted there will need to be further discussion of how to distinguish between regulatory unlawful driving and criminal unlawful driving. The distinction may lie in circumstances where the use of a car is akin to the use of a weapon. Any amendment should clarify which offences are major offences for the purpose of assessing disqualification periods.

The *Road Transport Act 2013* (NSW) should maintain different disqualification periods for second or subsequent offences. The *Crimes Act 1900* (NSW) could increase penalties for second or subsequent offences, or s 21A could be amended to include repeat offending of a similar nature as an aggravating factor on sentence.

Currently, young people aged 16 and 17 of a licensable age and who are charged with an offence under the *Road Transport Act 2013* (NSW) are required to attend the Local Court. A young person who commits a crime and a Road Transport offence attends the Children's Court and is represented by the Children's Legal Service, without cost to the child. Therefore, Specialist Children's Magistrates only determine traffic proceedings for young people if they commit a crime, whereas young people with less serious behaviour are treated as adults with proceedings in the Local Court. (Note, s 210 of the *Criminal Procedure Act 1986* (NSW) enables young people to be

sentenced in accordance with the *Children's (Criminal Proceedings) Act 1987* (NSW). The section is rarely used which may be because it is unfamiliar to general practitioners and Magistrates.)

The Children's Court requests an extension of jurisdiction to enable Specialist Magistrates to address relevant *Road Transport* offending by adolescents. Any consideration of extending the jurisdiction should also review the application of the *Young Offenders Act 1997* (NSW) to traffic offences committed by young persons of licensable age. Currently, young traffic offenders are prevented from diversion, access to a free legal representative, proceedings in a specialist jurisdiction and youth appropriate penalties, offence-focused programs and supervision, despite evidence indicating that diversions are effective in reducing recidivism.

SRC 2.11: Accessorial liability for serious road crime offences

The Court does not consider that there are any reforms needed to the law on accessorial liability as it applies to serious road crimes.

The Court supports an amendment to address the severity of non-driver conduct. The Children's Court frequently determines proceedings for young people charged with take and drive, knowingly drive, and carried in conveyance, all of which carry a maximum of five years imprisonment. There is no caselaw addressing the objective seriousness of these different types of conduct, but submissions are usually directed towards: the length of the journey; the behaviour of the driver; the conduct of the passengers; the conduct of the driver; any damage to the vehicle; any evidence that the passenger encouraged the driver; whether the passenger had an opportunity to alight the vehicle; any steps taken to discourage the driver; and whether the offending was filmed. Despite the equivalent penalties, it is generally accepted that a person who stole the car is more culpable than a person who rides in the car.

It would be very difficult to prove accessorial liability for a serious road crime offence. It may be more appropriate to increase the objective seriousness of an offence where a passenger has been proven to aid / abet / encourage the driver in the commission of a serious road crime.

SRC 3.3: Maximum penalties for other serious road crimes offences

The suggestion to consolidate unlawful driving conduct into a single offence would enable staged penalties depending on the objective seriousness of the offending, including the intent of the driver. Currently, serious road crimes can be charged as:

- s 24 manslaughter (maximum 25 years imprisonment),
- s 33B use offensive weapon (maximum 12 years imprisonment or 15 years imprisonment if committed in company),

- s 52A dangerous driving occasioning death (maximum 10 years imprisonment), dangerous driving occasioning grievous bodily harm (maximum 7 years imprisonment)
- s 51A predatory driving (maximum 5 years imprisonment),
- s 51B Police pursuit (maximum 3 years imprisonment for the first offence or 5 years imprisonment for the second offence),
- s 117 *Road Transport Act 2013* (NSW) negligent driving occasioning death (maximum 18 months imprisonment for the first offence or 2 years imprisonment for the second offence),
- s 118 menacing driving (maximum 12 months imprisonment).

The legislated maximum penalties are intended to address the objective seriousness of the offending which broadly relates to intention, conduct and consequence. Each of those factors would be better addressed in a single offence with staged maximum penalties.

SRC 3.5: Mandatory minimum sentences

Mandatory minimum sentences should not apply. The Courts properly exercise their discretion in relation to the balance between all matters relevant to sentence. These submissions provide sufficient detail about the numerous variables that present in different types of offending related to road crimes. Additional discrepancies arise when considering the mitigating factors as outlined in s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

SRC 5.2 Serious children's indictable offences

The dangerous driving offences in s 52A should not be added to the definition of serious children's indictable offences. Sections 31(3) and 31(5) of the *Children (Criminal Proceedings) Act 1987* (NSW) provide a mechanism for committing serious instances to the District Court for trial or sentence. Children's Magistrates have the specialisation to address the offending behaviour of young people and the consequences of their offending when assessing whether a matter should be committed. It is noted that many of the victims of these offences are friends or relatives of the young driver.

Additionally, reform may have unintended consequences for regional and Aboriginal children.

If you have any questions regarding the Children's Court's response, please contact

Yours sincerely,

Judge Nell Skinner
President of the Children's Court