THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CLC:BMcd020424

2 April 2024

Hon Tom Bathurst AC KC
Chairperson
NSW Law Reform Commission
GPO Box 31
Sydney NSW 2001

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

Dear Mr Bathurst,

Review of serious road crime offences

The Law Society appreciates the extensive work undertaken by the Law Reform Commission in preparing Consultation Paper 23: Serious road crime (**Consultation Paper**) and welcomes the opportunity to provide a substantive submission to the Review of serious road crime offences (**Review**).

Noting the profound trauma endured by individuals and communities in NSW arising from road crime, the Law Society supports the Review and investigation into potential measures to improve the criminal justice response to serious road crime. To best support an effective justice response to road crime, we consider that law reform should be accompanied by improving the resourcing of justice agencies engaged with road crime, and resourcing to ensure that victims of serious road crimes and their families have access to effective, trauma-informed support services as needed.

Please find enclosed for consideration a table setting out our response to each question raised in the Consultation Paper.

If you have any questions in relation to this letter and attachments, please contact Claudia Daly, Policy Lawyer on (02) 9926 0233 or by email: claudia.daly@lawsociety.com.au.

Yours sincerely,

Brett McGrath
President

Encl.

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Law Council
OF AUSTRALIA
CONSTITUENT BODY

Question	Comments
2.1 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?	We are of the view that a new offence of vehicular manslaughter/homicide is not necessary. The current offence of manslaughter already involves a gross level of negligence, captures a sufficiently broad range of conduct, and carries an appropriate maximum penalty. Likewise, the offence of murder exists where sufficient intent can be proven. There does not appear to be evidence to suggest that the existing manslaughter offence is not operating effectively, or otherwise being inappropriately used, that may warrant consideration of legislative change.
Question 2.2: Dangerous driving occasioning death or grievous bodily harm	
Are the circumstances of dangerous driving (*Crimes Act 1900* (NSW) s 52A(1), s 52A(3)) appropriate? What, if any, circumstances should be added?	We consider the current circumstances of dangerous driving appropriate, particularly noting that the circumstance under section 52A(1)(c), to drive 'in a manner dangerous to another person or persons', already captures a broad range of behaviour. We would be particularly concerned if the law were to be amended to include licence suspension, disqualification, or driving unlicenced as additional circumstances of dangerous driving. We note that licences can be suspended, disqualified or not held for a range of reasons other than problematic driving, including, for example, failure to pay a fine for a graffiti offence. In our view, it would be inappropriate for such circumstances, which are unconnected to driving, to constitute dangerous driving under section 52A.
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?	We consider that there is a need to ensure that the law reflects the fundamental principle that persons can only be criminally responsible for voluntary acts. To this end, we consider the current law to strike the correct balance, particularly considering that *Jiminez*[1] provides sufficient scope for a range of factual scenarios to be considered.
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?	We do not consider there to be a need to amend any other elements of the dangerous driving offences.
Question 2.3: Circumstances of aggravation for dangerous driving	

[1] (1992) 173 CLR 572.

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?	While we support efforts to simplify and standardise language in legislation, we are concerned that removing the word 'very' in this context may change the offence provision in a substantive way, namely by lowering the relevant threshold. To ensure that the threshold is not lowered, we are of the view that it would be preferable for the word 'very' to remain in the provision.
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?	We consider the current threshold to be suitable. In our view, given that a significantly higher maximum penalty is engaged for aggravated offences, lowering the speeding threshold would not be appropriate.
Are any other changes needed to the circumstances of aggravation? If additional circumstances are needed, how should they be expressed?	We are concerned that by including additional circumstances of aggravation, the key criminality of the offence (the manner of driving) may be diluted. We also note that, under the current legislation, the additional circumstances of aggravation suggested on pages 23 and 24 of the Consultation Paper can already be taken into account on sentence as part of the broader sentencing process. Further, failing to stop and assist after impact causing injury is already an offence under section 146 of the *Road Transport Act 2013.* If amendments are to be considered, however, amendments should be limited to aggravating factors that relate to the manner of driving, and/or particularly egregious conduct, such as: ▪ The accused person was taking part in an unlawful race or speed trial (as in Queensland). ▪ The offence was committed as part of a prolonged, persistent and deliberate course of "very bad driving" (as in South Australia). ▪ That the accused knew the other person was killed or injured, and left the scene (as in Queensland).
Question 2.4 and 2.5: Dangerous driving causing actual bodily harm and wanton or furious driving	
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?	Currently, matters involving actual bodily harm are captured under section 53, which we agree is framed in fairly 'obsolete terms.' We agree that there may be scope to improve clarity and logicality in the offence structure that captures driving that causes actual bodily harm. Any new offence should be developed together with consideration of amendment to section 53, noting that section 53 captures both driving causing actual bodily harm, as well as other, broader offences, including offences occurring on private land.
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?	If a new offence were to be developed in respect of dangerous driving causing actual bodily harm, we would consider it appropriate for the current maximum penalty attached to section 53 (two years imprisonment) to apply to the new offence. If a new offence were to be developed in respect of negligent driving causing actual bodily harm under the *Road Transport Act 2013,* we consider that an appropriate maximum penalty would be 6 months imprisonment, sitting below the maximum penalty for negligent, furious or reckless driving causing death (18 months imprisonment) and causing grievous bodily harm (9 months) under section 117 of the *Road Transport Act 2013.*
Question 2.6: Potential new offences for driving causing death or grievous bodily harm	
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?	We do not consider it necessary to develop a new mid-tier offence of this type, as there does not appear to be a gap in the current offence structure. The existing dangerous driving and negligent driving offences cover a continuum of conduct.
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?	We do not consider it necessary to introduce amendments to criminalise negligent driving that occurs on private land, particularly considering that sections 53 and 54 of the *Crimes Act 1900* are available in appropriately serious circumstances. We agree with the 2015 Inquiry's reasons for recommending against a new offence, set out on page 29 of the Consultation Paper.
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?	We do not consider reform to section 52AB to be necessary. We consider the current 10-year maximum penalty sufficient, particularly considering that this offence is not a standalone offence, but is generally charged in addition to a primary offence. In respect of extending penalties to passengers, we agree with the ACT Government that such a change would 'fundamentally change the default nature and role of a passenger's responsibility under the existing road transport legislation', and should not be pursued.
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?	We do not have any issues to raise.
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?	We consider the current regime to be appropriate, and to cover a sufficiently broad range of conduct.
Question 2.10: A new serious road crimes Act	
Should there be a separate Act for serious road crime offences? Why or why not?	We do not consider there to be a need to create a separate Act for serious road crime offences. In our view, creating a new Act would be a complex and largely unnecessary endeavour, particularly considering that the current legislative structure does not appear to be causing any significant difficulty. We also note that retaining all driving provisions under the *Crimes Act 1900* ensures that the general principles contained under the *Crimes Act 1900* (such as provisions about criminal responsibility) automatically apply to relevant road crime offences.
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?	
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?	While we are not opposed to restructuring serious road crime offences in a new division of the *Crimes Act 1900,* we do not consider there to be a particularly pressing need to do so.
Question 2.11: Accessorial liability for serious road crime offences	
Are any reforms needed to the law on accessorial liability as it applies to serious road crimes? If so, what needs to change?	We do not consider there a need to expand accessorial liability in the context of serious road crime offences. General principles of accessorial liability and joint criminal enterprise are available for the prosecution to rely on in appropriate cases and, in our view, are sufficient in the context of serious road crimes.
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?	We would be concerned if serious road crime offences were expanded to capture non-driver conduct. In particular, we would consider penalising individuals for failing to attempt to prevent a person from driving dangerously to be an unjustified extension of criminal liability.
Question 3.1 – 3.3 Maximum penalties	
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?	We share concerns raised in the Consultation Paper that 'increasing maximum penalties could have unintended consequences for disadvantaged groups', including affecting progress toward Closing the Gap.[2] In light of these concerns, and noting that the current maximum penalties are broadly consistent with other Australian jurisdictions, and that, more generally, increased maximum penalties do not serve as an effective deterrent, we oppose any increase to maximum penalties.

[2] Consultation Paper, p. 44.

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?	
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) (c) injuries by furious driving etc (*Crimes Act 1900* (NSW) s 53)? If not, what should the maximum penalties be?	
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?	We consider the current licence disqualification scheme to be appropriate. We would be concerned if there were to be any increase in licence disqualification periods, particularly noting that the Sentencing Council in 2020 noted 'research suggesting that lengthy disqualification periods are a weak deterrent',[3] and that, currently, licence disqualification provisions already have a disproportionate impact on Indigenous people and regional and remote communities.
Should any serious road crime offences in the *Crimes Act 1900* (NSW) have mandatory minimum sentences? If so, what should these be?	The Law Society opposes the introduction of mandatory minimum sentences. In our view, mandatory and minimum sentences inappropriately exclude judicial discretion, disproportionately impact disadvantaged groups, and can negatively impact guilty pleas and strain criminal justice resources, while having negligible deterrent impact. We are also of the view that mandatory and minimum imprisonment sentences breach Australia's international human rights obligations under the *International Covenant on Civil and Political Rights*, including articles 9(1) and 14(5).
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?	We consider the general sentencing framework to be operating effectively in respect of serious road crime offences.
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?	We consider the *Whyte*[4] guideline judgment to remain relevant and continues to appropriately guide the exercise of judicial discretion in sentencing for serious road crime 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?	We are of the view that standard non-parole periods should not be introduced for dangerous driving offences. In our view, the current sentencing framework, including the guideline judgment, is operating effectively to guide the exercise of judicial discretion, and sentencing patterns do not warrant introducing standard non-parole periods.
Jurisdictional issues	
Question 5.1: Table offences	
Should any serious road crime offences in the *Crimes Act 1900* (NSW) that are currently listed in	We consider the serious road crime offences that are currently listed in Table 1 and Table 2 of the *Criminal Procedure Act 1986*

[3] Consultation Paper, p. 63.
[4] (2002) 55 NSWLR 252.

Table 1 and Table 2 of schedule 1 of the *Criminal Procedure Act 1986* (NSW) be made strictly indictable?	are appropriately placed and should not be made strictly indictable.
Should the offence of negligent driving occasioning death (*Road Transport Act 2013* (NSW) s 117(1)(a)) be made indictable or strictly indictable?	We are of the view that the offence of negligent driving should not be made indictable or strictly indictable. While we recognise the severe consequence arising from such offences, the fault element of this offence remains negligence, and we are of the view that the law currently responds appropriately to this level of criminal liability.
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?	We would not consider it appropriate to include dangerous driving offences in the definition of 'serious children's indictable offence' in section 3 of the *Children (Criminal Proceedings) Act 1987.* We are of the view that the Children's Court has appropriate powers, and is the most appropriate venue, to consider matters of this type. We also note that, currently, in appropriate cases, it is open to the prosecution to proceed with a manslaughter charge, which is already a serious children's indictable offence under the *Children (Criminal Proceedings) Act 1987* (NSW).
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?	We consider the current victim impact statement provisions to be appropriate in enabling and supporting the voice of victims of serious road crimes in criminal matters. We would support consideration of other appropriate measures to further support victims of serious road crimes and their families. As noted in our Preliminary Submission, to this end, the Law Reform Commission may wish to consider, for example, whether compensation available through the NSW Victims Support Scheme is sufficient to support victims and their families, and whether the services that support victims and their families while a prosecution for a serious road crime is on foot are appropriately resourced and accessible.
Question 6.2: Restorative justice	
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?	We support the principles of restorative justice and would encourage consideration of ways that restorative justice could be incorporated into the process of dealing with serious road crime offences, where appropriate. As noted in the Consultation Paper, we agree that restorative justice can operate to 'repair social and communal ties', which can be 'particularly important when victims and offenders know each other'[5], as is often the case in serious road crime matters. We note that restorative
If restorative justice was to be made available pre-sentence,	

[5] Consultation Paper, p. 115.

should an offender's participation be taken into account in sentencing?	justice is only likely to be effective where both the offender and the victim desire to participate in the process.
Should restorative justice processes for serious road crimes be supported by legislation? If so, what legislative safeguards and processes would be appropriate?	If restorative justice processes are to be introduced, we would appreciate the opportunity to provide feedback and assistance in developing appropriate legislative amendments.