Sentencing of Driving Offences that Result in Death or Injury: Consultation Paper

October 2016
About this Consultation Paper

This reference to the Sentencing Advisory Council was made by the Attorney-General and Minister for Justice, the Hon Vanessa Goodwin MLC in October 2015.

This paper provides an overview of the current sentencing framework in Tasmania with a focus on sentencing for driving offences where death or injury was caused. It provides context for a consideration of the appropriateness of sentencing by examining current sentencing patterns in Tasmania for driving offences where death or injury was caused, and by then comparing sentencing in Tasmania with sentencing for equivalent offences in other jurisdictions and comparator offences in Tasmania. It also addresses the purposes of sentencing and examines public opinion in relation to sentencing for driving offences where death or injury has been caused.

The paper then asks for feedback on the appropriateness of sentencing for these offences in Tasmania and possible reform options. The questions are set out at the beginning of the paper and are also contained in the relevant parts of the paper so that the options can be understood in context.

You may choose to address some or all of the questions and your answers may be referred to or quoted in the final report. If you do not wish your response to be published or if you wish to remain anonymous please indicate this in your response. After considering all responses, it is intended that a final report containing recommendations and advice to the Attorney-General will be published.

This Consultation Paper is available on the Sentencing Advisory Council’s website at <www.sentencingcouncil.tas.gov.au> or can be sent to you by email if you contact the Council at sac@justice.tas.gov.au.

Responses should be made in writing by close of business Friday, 18 November 2016. If possible they should be sent by email to sac@justice.tas.gov.au, otherwise they can be mailed to the Sentencing Advisory Council, GPO Box 825 Hobart 7001.

Information on the Sentencing Advisory Council

The Sentencing Advisory Council was established in June 2010 by the then Attorney-General and Minister for Justice, the Hon Lara Giddings MP. The Council was established, in part, as an advisory body to the Attorney-General. Its other functions are to bridge the gap between the community, the courts and the Government by informing, educating and advising on sentencing issues in Tasmania. At the time that this paper was concluded, the Council members were Emeritus Professor Arie Freiberg AM (Chair), Dr Jeremy Prichard, Mr Scott Tilyard, Mr Peter Dixon, Ms Kim Baumeler, Mr Graham Hill, Professor Rob White, Ms Terese Henning, Ms Jo Flanagan, Ms Kate Cuthbertson and Ms Linda Mason.
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Aggravating and mitigating factors (see [2.3.3])

Question 1
Do you agree or disagree with the current approach of Tasmanian courts in relation to the relevant aggravating and mitigating factors in cases where a driving offence has resulted in death or injury? Why or why not?

Sentencing for manslaughter arising out the use of a motor vehicle (see [8.1.1])

Question 2
Do you consider that the types of sentences (imprisonment and licence disqualification) currently used for manslaughter arising out the use of a motor vehicle are appropriate? Why?

Question 3
Do you consider that the sentence length currently imposed by the Supreme Court for manslaughter arising out the use of a motor vehicle is appropriate? Why?

Sentencing for causing death by dangerous driving (see [8.1.2])

Question 4
Do you consider that the types of sentences (imprisonment and licence disqualification) currently used for causing death by dangerous driving are appropriate? Why?

Question 5
Do you consider that the sentence length currently imposed by the Supreme Court for causing death by dangerous driving is appropriate? Why?

Sentencing for causing grievous bodily harm by dangerous driving (see [8.1.3])

Question 6
Do you consider that the types of sentences (imprisonment/suspended sentence and licence disqualification) currently used for causing grievous bodily harm by dangerous driving are appropriate? Why?

Question 7
Do you consider that the sentence length currently imposed by the Supreme Court for causing grievous bodily harm by dangerous driving is appropriate? Why?

Sentencing for causing death and/or grievous bodily harm by negligent driving (see [8.1.4])

Question 8
Do you consider that the types of sentences (predominately suspended sentences) currently used for causing death and/or grievous bodily harm by negligent driving are appropriate? Why?
Question 9
Do you consider that the sentence length currently imposed by the Magistrates Court for causing death and/or grievous bodily harm by negligent driving is appropriate? Why?

Addressing the needs of victims (see [9.1])

Question 10
Do you consider that the interests of victims in cases involving death or injury arising from a motor vehicle crash are adequately recognised? Why?

Question 11
If you answered no, please indicate what else you consider could be done to address the needs of victims.

Question 12
Should restorative justice procedures be available as a supplementary part of the criminal justice system? If not, why not? If so, in what circumstances and which model?

Improved communication with the broader community (see [9.2])

Question 13
Should the Magistrates Court make comments on passing sentence publically available in cases of negligent driving causing death or grievous bodily harm?

Question 14
Should the offences of negligent driving in the Traffic Act 1925 (Tas) be renamed careless driving?

Mechanisms to address any finding that sentencing is inappropriate (see [9.3])

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Question 15
If you think that sentencing is inappropriate, do you consider that the introduction of a guideline judgment scheme in Tasmania should be further considered? Why?

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Question 17
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Question 18
If you consider that the maximum penalties should be increased, please indicate the maximum penalties that you consider appropriate?
Statutory list of aggravating factors (see [9.3.2])

Question 19
If you think that sentencing is inappropriate, do you consider that aggravating features should be set out as matters relevant to sentence in the Sentencing Act 1997 (Tas)? Why?

Alternative verdicts (see [9.3.3]).

Question 20
Should the Criminal Code (Tas) be amended to provide that negligent driving causing death (Traffic Act 1925 s 32(2A)) or grievous bodily harm (Traffic Act 1925 (Tas) s 32(2B)) are alternative verdicts to dangerous driving causing death (Criminal Code (Tas) 167A) or grievous bodily harm (Criminal Code (Tas) s 167B)?
1 Introduction

1.1 Background to this paper

In October 2015, the Attorney-General and Minister for Justice, the Hon Vanessa Goodwin MLC, requested that the Sentencing Advisory Council examine and provide a report in relation to driving offences that result in the death or injury of another. This was a response to community concern in relation to the penalties imposed in cases where driving has caused the death of another person.

Previous community concern about the application of the criminal law in the context of cases where a person is seriously injured or killed as a result of a motor vehicle crash precipitated the review of the law by the Tasmania Law Reform Institute (TLRI). At that time, there had been community comment about the acquittal of two offenders charged in relation to their involvement in fatal motor vehicle crashes and the Institute, following a request from the then Attorney-General, examined the liability of drivers who fall asleep at the wheel. That report provided a concise overview of the law in relation to the various offences relevant to driving offences causing death or injury and provides the foundation for the explanation of the offences provided in this paper.

1.2 Terms of reference

The following terms of reference were given to the Council:

1. the type and length of sentences for causing death or injury by Supreme and Magistrates Court for the period 1980–2015;
2. a comparison with sentencing in other jurisdictions for similar offences and crimes;
3. advice on whether current sentence type and length are appropriate for causing death or injury by driving offences and crimes;
4. if current sentence type and length in respect of the above are not considered appropriate, advice on how best to address this and whether changes to offence provisions and maximum penalties are required.

1.3 Crashes in Tasmania that result in serious injury or death

Figure 1-1 shows the number of crashes each year in Tasmania where serious casualty (death or serious injury) was caused over the period 2005–15. It is noted that not all crashes that result in serious casualty will result in prosecution for a criminal offence. For example, in cases where the driver was the only person in the vehicle or was killed because of the crash, there will be no prosecution (such single vehicle crashes constituted 57.4% of all crashes during the relevant period). Similarly, in cases involving more than one ‘unit’, there will be no prosecution where the driver at fault received fatal injuries in the crash. As discussed at [1.4], even where the driver at fault is not deceased and has caused death or serious injury to another person, they are not necessarily charged with an offence that has death or serious injury as an element of the offence and may, depending on the circumstances, be charged

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with another (less serious) summary offence. It is also noted that only a minority of crashes result in death or serious injury as shown in Table 1-1.

Figure 1-1: Serious casualty (fatal and serious injury) annual crash numbers by number of units involved in the crash

![Figure 1-1: Serious casualty (fatal and serious injury) annual crash numbers by number of units involved in the crash](image)

Source: Unpublished data, Department of State Growth, Crash manager

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Source: Unpublished data, Department of State Growth,

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<td>6184</td>
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Source: Unpublished data, Department of State Growth,

There has been a reduction over time in the number of crashes on Tasmanian roads resulting in death or serious injury. This trend has been identified over several decades and has been

2 It is noted that unit refers to the number of vehicles, pedestrians or cyclists involved in a crash.

3 This is consistent with Australian data that show a decrease in the number of deaths per 100 000 persons, as well as per 10 000 registered vehicles: see A McKenzie, Drinking, Driving and Tragedy: An Options Paper for a New Approach to Drink Driving, University of Tasmania with the Magistrates Court of Tasmania (2013) 10-11. There are currently 99,346 registered cars in Tasmania and 457 629 registered motor vehicles: Australian Bureau of Statistics (ABS), Motor Vehicle Census, Australia, 2016 (2016) Table 1. There has been a decrease in the death of vehicle occupants per 10 000 registered motor vehicles from 1.3 in 2006 to 0.5 in 2015:
attributed to ‘law enforcement measures such as random breath testing, lowering the legal limit of alcohol concentration in the blood, the compulsory wearing of seat belts, and the installation of speed cameras, as well as safer cars and better roads’. There have also been changes to the licencing process, with more stringent requirements introduced for driving assessment tests. As shown in Figure 1-2, other factors identified in the reduction of the number of deaths or serious injuries on Tasmanian roads have been the introduction of 50 km per hour urban speed zones and the introduction of the Road Safety Strategy.

Figure 1-2: Number of Tasmanians killed or seriously injured between 1977 and 2015

Table 1-2 provides a summary of crash factors (that is, causes) attributed to crashes that resulted in serious casualty (death or serious injury) over the 2005–15 period. Crash factors are allocated by a police officer attending the crash and reflect the officer’s best attempt to discern the cause(s) of the crash, and as such should be only taken as an indication of the cause of the crash. It is noted that crashes often have more than one crash factor attributed to them. While inattention has been identified as the most commonly identified cause, caution needs to be exercised. There has been a sharp decline in the identification of inattentiveness as a crash factor from 2009–10 to 2015, which was the product of a directive from Tasmania Police that from 2009 onwards this crash factor was only to be used when this was clearly the cause of the crash and not just as a general catch-all. Table 1-2 shows that alcohol was identified as a factor in 10.2% of crashes, drugs in 5.1% of crashes, speeding (above the speed limit) in 5.5% of crashes and excessive speed in the circumstances in 11.9% of crashes. The Department of Infrastructure, Energy and Resources, *Unlicensed Drivers and Unregistered Vehicles in Tasmania: A Road Safety Perspective* 28.

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5 For example, a crash involving a drunk P-Plater speeding in the wet would likely have a number of crash factors including ‘inexperience’, ‘excessive speed in the conditions’, ‘exceeding speed limit’ and ‘alcohol’: information provided by Simon Buddle, email 28 June 2016.

6 It is also noted that there is overlap in the crash factors which complicated the task of assigning crash factors to crashes (for example, ‘fail to observe road signs/markings’ is in essence a more specific description of ‘inattentiveness’: information provided by Simon Buddle, email 28 June 2016.
Road Safety Advisory Council has identified speeding as the biggest contributing factor in fatal road crashes and serious injury crashes. Research also demonstrates that the speed at which a vehicle is travelling has an impact on an average pedestrian’s probability of severe injury or death: the average risk of death for a pedestrian struck at approximately 30 km/h (17.1 miles per hour) being only about 10%, whereas when struck at approximately 80 km/h (48 miles per hour), it is 75%. However, a survey of driver attitudes in Tasmania found that speeding was not identified as ‘unacceptable driving risk behaviour’.

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<td>Excessive speed for the conditions/circumstances</td>
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<td>Alcohol</td>
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<tr>
<td>Exceeding speed limit</td>
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<td>Drugs</td>
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<td>Fail to give way</td>
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<td>Unwell/Infirm</td>
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<td>Pedestrian on road</td>
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<td>Distraction – external to vehicle</td>
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<td>Road defect</td>
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<tr>
<td>Vehicle defect</td>
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<tr>
<td>Asleep/fatigue</td>
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<tr>
<td>Fail to observe road signs and markings</td>
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<td>Turning without care</td>
</tr>
<tr>
<td>Other</td>
</tr>
<tr>
<td>Improper overtaking</td>
</tr>
<tr>
<td>Distraction – in vehicle</td>
</tr>
<tr>
<td>Other obstruction on road</td>
</tr>
<tr>
<td>Animal on road</td>
</tr>
<tr>
<td>Fail to obey traffic signals</td>
</tr>
<tr>
<td>Reversing without care</td>
</tr>
<tr>
<td>Using a mobile phone</td>
</tr>
<tr>
<td>Undetermined</td>
</tr>
<tr>
<td>Total</td>
</tr>
</tbody>
</table>

Source: Unpublished data, Department of State Growth, Crash Manager

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9 Road Safety Advisory Council, above n 7.
Driving offences resulting in death or injury

Criminal offences are divided into indictable offences or crimes (more serious offences) and summary offences (less serious offences). In Tasmania, indictable offences are generally heard in the Supreme Court. Summary offences are heard in the Magistrates Court (rather than by judge and jury in the Supreme Court).

Under the current law, a person who drives a motor vehicle that is involved in a crash that causes death or serious injury to another person may be charged with indictable offences under the *Criminal Code* (Tas) or summary offences under the *Traffic Act 1925* (Tas). Some of these offences are specifically concerned with driving while others are offences of general application (that is, that may be used for death or serious injury caused by driving or other causes). The offences are as follows:

<table>
<thead>
<tr>
<th>Offence</th>
<th>Summary or indictable</th>
<th>Specific or general offence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murder</td>
<td>Indictable</td>
<td>General</td>
</tr>
<tr>
<td>Manslaughter</td>
<td>Indictable</td>
<td>General</td>
</tr>
<tr>
<td>Cause grievous bodily harm</td>
<td>Indictable</td>
<td>General</td>
</tr>
<tr>
<td>Dangerous driving causing death or grievous bodily harm</td>
<td>Indictable</td>
<td>Specific</td>
</tr>
<tr>
<td>Negligent driving causing death or grievous bodily harm</td>
<td>Summary</td>
<td>Specific</td>
</tr>
</tbody>
</table>

The element of the offence and sentencing practice for the offences of manslaughter, dangerous driving causing death or grievous bodily harm and negligent driving causing death or grievous bodily harm are discussed in detail in Chapter Three.

There are also other summary offences relevant in cases where a person has caused death or serious injury using a motor vehicle. These are contained in other legislation such as the *Road Traffic Rules 2009* (Tas), the *Vehicle and Traffic (Vehicle Operations) Regulations 2014* (Tas) and the *Heavy Vehicle National Law (Tas) Regulations 2014* (Tas) and other associated regulations. These summary offences are typically punishable by a fine alone and the penalties imposed can be the subject of considerable dissatisfaction by family members and friends if death or serious injury has been caused.12

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10 There are limited exceptions where the defendant has the option of a trial by jury or a summary trial for indictable offences, *Justices Act 1959* (Tas) ss 71 and 72. These do not apply to the driving offences under consideration in this paper. In addition, there is power for a judge to remit matters for trial in the Magistrates Court in circumstances where the punishment of a fine not exceeding 20 penalty units or imprisonment not exceeding one year would be adequate for the circumstances of the particular case (*Criminal Code* (Tas) ss 308(1), (4)).

11 It is noted that a charge of murder if not generally relied on in respect of injuries caused by motor vehicle crashes and would typically be laid only where the motor vehicle was used as a weapon, see *R v Mayne*, 12 September 2005 (Crawford J). Although an offender was recently convicted of murder in South Australia, where the offender deliberately crossed to the wrong side of the road and collided with another vehicle in a failed suicide attempt: see Rebecca Opie, ‘Suicidal Driver Jailed for Murder After Head-on Crash at Whyalla has Conviction Appeal Dismissed’, *ABC News* (online), 11 September 2016 <http://www.abc.net.au/news/2016-09-09/suicidal-driver-jailed-murder-has-conviction-appeal-dismissed/7832380>. The issue on appeal was the trial judge’s direction in relation to the relevance of intoxication to the mental element for murder, see *R v Knowles* [2016] SASCFC 100.

12 See for example, Sallese Gibson, ‘Truck Driver Fined After Loose Hay Bale Kills Couple on Motorcycle’, *ABC News* (online), 4 December 2015 <http://www.abc.net.au/news/2015-12-04/truck-driver-fined-loose-hay-bale-kills-couple-on-motorcycle/7002526>. In this case, the truck driver was convicted of 12 traffic offences,
1.5 Prosecution of driving cases resulting in death or injury

A majority of serious and fatal motor vehicle crashes are investigated by the Crash Investigation Squads with the exception being some single vehicle crashes where the driver is killed. Their role is to determine who was driving the vehicles involved in the crash and any factors that affected the driving of those vehicles. Where the investigating officer believes that a crime or a summary offence may have been committed, he or she prepares a file which is forwarded to the Office of the Director of Public Prosecutions (DPP), where the Director or his nominee (senior counsel in the Office) reviews the file and recommends the charge(s) that should to be laid. Tasmania Police should obtain the advice from the Office of the DPP prior to any charges being laid. This process was adopted to provide a unified approach to ensure consistency in the charges used for similar conduct within Tasmania.

This procedure also allows for the early intervention of the Witness Assistance Service (WAS). WAS operates through the Office of the DPP and provides assistance and support to victims and their families. It provides information about Court procedures and legal process, crisis counseling, debriefing from Court and referral to services in the community, attends meetings with families and victims, and assists in the preparation of victim impact statements. Counsel from the Office of the DPP also discuss charging decisions with family members and provide information about the court and sentencing process, as well explaining the sentence received.

Recently, an important change has been made and it is now the Office of the DPP, rather than Tasmania Police, that prosecutes all cases of negligent driving causing death or grievous bodily harm in the Magistrates Court. This recognises the complexity of these cases and also the serious nature of the harm caused by the offence. Significantly, the involvement of the Office of the DPP means that witness assistance is now available for family members to provide support and information about the court process. As noted, WAS can also assist in the preparation of a victim impact statement. This acknowledges that where death is caused, the grief and trauma experienced by the family is likely to be same regardless of whether the offender is charged with causing death by negligent driving or manslaughter.

The Director of Public Prosecutions has developed charging guidelines for serious driving offences that outline factors relevant to the appropriate charge. This document aims to provide for consistency within the state and from case to case and also to provide detailed information to the public about the exercise of prosecutorial discretion. The guidelines provide that:

- **Negligent driving causing death or grievous bodily harm.** These charges capture a wide range of conduct including momentary attention, not keeping a proper lookout and driving too fast for the conditions of the road. At its most serious the conduct can overlap with the crime of causing death by dangerous driving.

- **Causing death or grievous bodily harm by dangerous driving.** Although there can be many different circumstances, generally for the manner of driving to be regarded
as dangerous there must be significant speed, the driver is intoxicated or the vehicle itself is in a dangerous condition. The circumstances are not limited to these but there must be some significant feature that makes the driving dangerous.\footnote{Ibid 43–44.}

- **Manslaughter.** This involves the most serious cases of dangerous driving or reckless driving. Although the distinction between causing death by dangerous driving and manslaughter is often difficult to distinguish an ‘indictment for manslaughter is reserved for those cases involving homicide caused by extreme culpability arising out of situations of patent danger created typically by a combination or speed and intoxication’.\footnote{Ibid 45 citing \textit{R v O’Brien} [1987] TASSC 47, [34] (Wright J).}

Prosecutorial discretion in the charge (including the severity and number of charges) has significance for the sentencing process (if the person is convicted), as the discretion of the sentencing judge is circumscribed by the charges to which a person has been found or pleaded guilty.\footnote{Arie Freiberg, \textit{Fox and Freiberg’s Sentencing: State and Federal Law in Victoria} (Thomson, 3rd ed, 2014) 112.} For example, if the prosecution decides to charge an offender with a less serious offence (such as negligent driving causing death) rather than a more serious charge (such as dangerous driving causing death) and the offender pleads guilty or is found guilty, then the sentencing judge is confined by this charge. The sentence is restricted by any statutory maximum penalty and cannot sentence on the basis of the more serious charge.\footnote{See discussion of \textit{R v De Simoni} (1981) 147 CLR 383 and \textit{Lovegrove v R} (1961) Tas SR 106 in \textit{Charnock v Tasmania Police} [2013] TASSC 64, [21] (Pearce J). See also [2.3.2].}

\section{1.6 The appropriateness of current sentence type and length for driving offences where death or injury caused}

A key focus of this Consultation Paper involves an assessment of current sentence type and length for driving offences where death or injury has been caused. As the Council has previously stated, ‘the assessment of the appropriateness of sentencing is problematic, given that it is difficult to determine the criteria against which this is to be assessed’.\footnote{Sentencing Advisory Council, Tasmania (TSAC), \textit{Sex Offence Sentencing}, Final Report No 4 (2015) 3.} Sentencing should be appropriate but this ‘begs the question, appropriate to what?’\footnote{Ibid 38.} In its analysis of sentencing, the Council has approached the assessment of the appropriateness of sentencing for driving offences where death or injury is caused from multiple perspectives:

- an analysis of sentencing trends for driving offences where death or injury has been caused;
- a statistical comparison between sentences in Tasmania and other jurisdictions for driving offences where death or injury has been caused;
- an examination of the relativities of the sentence imposed for the different offences to understand the position of the various driving offences on the penalty scale, relative to each other as well as other offences;
- an analysis of sentencing for driving offences where death or injury has been caused assessed according to the principles of sentencing; and
an examination of public opinion in relation to sentencing for driving offences where death or injury has been caused.

While the Council has attempted to take a comprehensive approach to the issue of appropriateness, the determination of an appropriate sentence remains problematic due to the social context in which the question is asked and the imprecise nature of ‘appropriateness’. This is discussed further in Chapter Eight.

1.7 Scope of this paper

The focus of this paper is on offences where death or injury is caused as a result of a motor vehicle crash.

Chapter Two provides an overview of the current sentencing framework in Tasmania with a focus on sentencing for driving offences where death or injury was caused.

Chapter Three examines current sentencing patterns for driving offences where death or injury was caused.

Chapter Four compares sentencing for Tasmanian driving offences where death or injury was caused with sentencing for equivalent offences in other jurisdictions.

Chapter Five considers sentencing for comparator offences as a means to analyse the appropriateness of sentencing for these driving offences in Tasmania.

Chapter Six uses the purposes of sentencing as a measure of the appropriateness of sentencing for driving offences where death or injury has been caused.

Chapter Seven considers public perception of sentencing for driving offences where death or injury has been caused.

Chapter Eight draws together the findings of the analysis in the previous chapters and expresses preliminary views on the appropriateness of sentences for driving offences where death or injury has been caused.

Chapter Nine identifies and discusses a number of options for reform.

It is noted that the Council has only examined the sentences imposed for driving offences that cause death or injury in the context of the Sentencing Act 1997 (Tas) and has not considered this issue in context of Youth Justice Act 1997 (Tas). This means that this paper only addresses adult offenders and young offenders dealt with under the Sentencing Act 1997 (Tas). It does not address the issue of sentencing young offenders under the Youth Justice Act 1997 (Tas).

As a general rule, offenders who are under the age of 18 at the time of the commission of the offence will have the matter heard in the Magistrates Court (Youth Justice Division) and, if convicted, the offender will be sentenced under the provisions of the Youth Justice Act 1997 (Tas). However, many driving offences are prescribed offences, and in such cases, the youth is dealt with as an adult. This applies for all youths charged with manslaughter, where the matter will be heard in the Supreme Court. For a youth aged 17, the offences of causing death and grievous bodily harm by negligent driving under the Traffic Act 1925 (Tas) s 32(2A) and s 32(2B) are prescribed offences ‘except where proceedings for that offence are, or are to be determined in conjunction with proceedings for an offence that is not a prescribed

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22 Youth Justice Act 1997 (Tas) ss 3 (definition offence, prescribed offence) and 161(1)(a).
offence’. This means that these offences (unless there are other charges which are not prescribed offences that are being dealt with at the same time) will be heard in the Magistrates Court. If convicted, the court has the option of sentencing the youth under the provisions of the Youth Justice Act 1997 (Tas) or the Sentencing Act 1997 (Tas). In contrast, the offences of causing death by dangerous driving and causing grievous bodily harm by dangerous driving are not prescribed offences. This means that a youth charged with these offences would have the matter dealt in the Magistrates Court (Youth Justice Division) and, if convicted, the offender will be sentenced under the provisions of the Youth Justice Act 1997 (Tas).

It is also noted that this paper considers the appropriateness of sentencing for driving offences where death or injury has been caused generally and does not review the adequacy of sentencing in any particular case.

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23 Youth Justice Act 1997 (Tas) s 3 (definition offence, prescribed offence).
24 Ibid s 107(2).
25 In the case of an indictable offence that is not a prescribed offence, a youth aged 15 or more may indicate that he or she is not willing to be tried in the Magistrates Court (Youth Justice Division) and this means that the matter will be heard by a jury in the Supreme Court, Youth Justice Act 1997 (Tas) s 161.
2 Current sentencing framework in Tasmania

This chapter sets out the current sentencing framework in Tasmania, with a focus on sentencing for driving offences causing death, serious injury/grievous bodily harm or injury. It outlines the current sentencing options in Tasmania, the purposes of sentencing, and the factors relevant to the imposition of sentences.

2.1 Sentencing options

In Tasmania, the sentencing options that are available for the courts in sentencing adult offenders (and young offenders sentenced as adults) are set out in the Sentencing Act 1997 (Tas) s 7:

A court that finds a person guilty of an offence may, in accordance with this Act and subject to any enactment relating specifically to the offence —

(a) record a conviction and order that the offender serve a term of imprisonment; or

(ab) if the court is constituted by a magistrate, record a conviction and make a drug treatment order under Part 3A in respect of the offender; or

(b) record a conviction and order that the offender serve a term of imprisonment that is wholly or partly suspended; or

(c) record a conviction and, if the offender has attained the age of 18 years and the offence is punishable by imprisonment, make a community service order in respect of the offender; or

(d) with or without recording a conviction, make a probation order in respect of the offender if the offender has attained the age of 18 years; or

(e) record a conviction and order the offender to pay a fine; or

(ea) in the case of a family violence offence, with or without recording a conviction, make a rehabilitation program order; or

(f) with or without recording a conviction, adjourn the proceedings for a period not exceeding 60 months and, on the offender giving an undertaking with conditions attached, order the release of the offender; or

(g) record a conviction and order the discharge of the offender; or

(h) without recording a conviction, order the dismissal of the charge for the offence; or

(i) impose any other sentence or make any order, or any combination of orders, that the court is authorised to impose or make by this Act or any other enactment.

Most sentences for indictable driving offences result in custodial sentences, whether immediate imprisonment or fully or partly suspended sentences. This is discussed further in Chapter 3.

In addition, under the Sentencing Act 1997 (Tas) s 55(2) the court may disqualify a person from obtaining or holding a driver’s licence where the person has been convicted of an
indictable offence arising out the use of motor vehicle or convicted of negligent driving causing death or grievous bodily harm under the Traffic Act 1925 (Tas). Restricted licences are available for disqualification ordered under the Sentencing Act 1997 (Tas) s 55(2). However, there are indications that it may be difficult for an offender to satisfy the statutory test for the grant of a restricted licence in cases where death has been caused. In order to obtain a restricted licence, the offender must satisfy three criteria on the balance of probabilities: (1) the licence disqualification will impose severe and unusual hardship on the offender or their dependents; (2) a restricted driver’s licence should be issued to mitigate or alleviate that hardship; and (3) the issue of the restricted licence would not be contrary to the public interest.27 In Barrett v Brown,28 a truck driver was convicted of negligent driving causing death in a case involving inattention rather than the use of alcohol or drugs, or other reckless behaviour. The sentence imposed was a sentence of imprisonment of five months fully suspended, 140 hours community service, licence disqualification for a period of 18 months and 12 months probation. The offender applied for a restricted licence and this was refused by the magistrate on the basis that he could not be satisfied that it would be contrary to public interest to authorise the grant of the licence. The magistrate considered that the punitive or deterrent effect of the order of disqualification would have been unduly ameliorated by the grant of a restricted licence and this was upheld on appeal.

2.2 Penalties for particular offences

The Criminal Code (Tas) does not contain a legislative prescribed hierarchy of offences as indicated by graduated penalties (as exists in other jurisdictions). There is no statutory indication of the relative seriousness of the different offences contained in the Criminal Code (Tas), as the general maximum penalty that is provided for all offences (other than murder and treason) is imprisonment for 21 years, or a fine, or both.29 However, this does not mean that offenders convicted for any indictable offences under the Criminal Code (Tas) will receive the maximum penalty as the court (rather than the legislature) has established a range of sentences for different offences:

The court has for itself placed the various crimes under the Code into different categories of gravity and for itself here and elsewhere has set ranges of sentences appropriate to various crimes according to their gravity.30

This means that ‘sentencing is not arbitrary [and that] it is possible … to identify relatively specific ranges for sentences’.31 The range of sentences imposed for indictable driving offences causing death or grievous bodily harm in Tasmania are discussed in Chapter Three.

The offence of wanton or furious driving causing bodily injury is contained in the Police Offences Act 1935 (Tas) s 36(1). An offender can elect to have this offence heard on
indictment in the Supreme Court rather than as a summary offence tried in the Magistrates Court. The maximum penalty provided in s 36(1) is two years imprisonment.32

For offences relating to negligent driving causing death or grievous bodily harm under the *Traffic Act 1925* (Tas), legislation provides a maximum penalty for these offences. The maximum penalty is an expression of the legislative view of the gravity of an offence and this ‘places a known and legally defined limit on judicial discretion in imposing punishment for that offence’.33 It is reserved for the ‘worst class of the offence … and is justified only for the worst examples of the offence likely to be encountered in practice’.34 Under the *Traffic Act 1925* (Tas) s 32, the maximum penalties are as follows:

<table>
<thead>
<tr>
<th>Offence</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Negligent driving causing death</td>
<td>10 penalty units ($1570) and one year imprisonment for a first offence.</td>
</tr>
<tr>
<td></td>
<td>20 penalty units ($3140) and two years imprisonment for a second offence.</td>
</tr>
<tr>
<td>Negligent driving causing grievous bodily harm</td>
<td>10 penalty units ($1570) and six months imprisonment for a first offence.</td>
</tr>
<tr>
<td></td>
<td>20 penalty units ($3140) and one year imprisonment for a second offence.</td>
</tr>
</tbody>
</table>

### 2.3 The sentencing discretion

The court has a very wide discretion in imposing sentences on an offender, and this is considered essential to ensure ‘justice in the individual case, so there is flexibility for the sentence to respond to the particular facts’.35 In imposing a sentence, a number of matters may be taken into account:

- the facts of the case;
- the general aims of punishment;
- the offence (gravity of crime, the harm done, the prevalence of the offence, the degree of participation of the offender);
- the offender’s personal characteristics (age, sex, character, mental health, family and employment and general social history);
- the offender’s response to the charge (guilty plea, remorse, assistance to authorities);
- effect of the sanction on the offender or others;
- other factors relating to the investigatory or court processes (delay, unfair police practices, availability of correctional or treatment services); and
- whether there is room for mercy.36

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32 The Council has identified one case from the Magistrates Court sentencing database (<http://www.sentencingcouncil.tas.gov.au/statistics>) where an offender was convicted of wanton driving. The offender received a sentence of less than three months imprisonment that was fully suspended. There were no cases identified where the offender was dealt with in the Supreme Court.


34 Freiberg, above n 18, 273.


36 This list is taken from Freiberg, above n 18, 219–20.
The process by which courts determine an appropriate sentence is termed ‘instinctive’ or ‘intuitive’ synthesis, which means that all considerations relevant to the instant case are simultaneously unified, balanced and weighed by the sentencing judge. However, despite this flexibility, there is authority to suggest that the ‘principle of proportionality prevails, providing an overall limit on the severity of the sentence’.

2.3.1 Sentencing purposes
There is no explicit statement in the Sentencing Act 1997 (Tas) setting out the purposes of sentencing; however, this is ‘adverted to in the purposes of the Act’. The Sentencing Act 1997 (Tas) s 3(b) specifies that a purpose of the Act is, ‘the protection of the community as a primary consideration in sentencing offenders’. Section 3(e) states the purpose of the Act is to help prevent crime and promote respect for the law through three primary purposes of sentencing: specific and general deterrence, rehabilitation and denunciation. This is consistent with the approach of the Supreme Court prior to the introduction of the Sentencing Act 1991 (Tas), where the Supreme Court considered ‘deterrence, prevention, rehabilitation and retribution’ as key principles in the sentencing process. Other purposes specified in the Sentencing Act 1997 (Tas) include consistency in sentencing, fairness in sentencing procedures and to recognise the interests of the victims.

2.3.2 Proportionality
A key factor in sentencing in Australia is proportionality. The common law principle of proportionality is an underlying limiting principle that restricts the penalty that the court can impose, requiring that the sentence must fit the crime. Proportionality requires that judges and magistrates do not impose a sentence ‘exceeding that which is commensurate to the gravity of the offence for which the offender has been convicted’. The gravity of the offence is assessed in light of the ‘objective circumstances’ of the case, which includes the statutory penalty, the degree of harm caused, the way in which the offence was committed and the offender’s culpability. Accordingly, an assessment of the sentencing practices requires an understanding of the seriousness of offence, which is generally viewed as comprising two key factors: (1) the harm caused, and (2) the culpability of the offender.

Harm can be defined as ‘the degree of injury done or risked by the act’. Harm focuses on the consequences (actual or potential) of an offender’s conduct. So, in the case of driving offences that relate to motor vehicle crashes where death is caused or motor vehicle crashes where grievous bodily harm is caused, the harm is the same (either death or grievous bodily harm). On the other hand, culpability refers to the fault attributable to the offender. It ‘refers
to the factors of intent, motive, and circumstance that bear on the actor’s blameworthiness.\textsuperscript{48}

In the case of the driving offences under consideration in this paper, there is considerable variability in the culpability of the offender. The culpability and harm hierarchy are set out in Figures 2-1 to 2-4.\textsuperscript{49}

**Figure 2-1: Harm and Culpability**

<table>
<thead>
<tr>
<th>Culpability hierarchy</th>
<th>Harm hierarchy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intentional</td>
<td>Causing death</td>
</tr>
<tr>
<td>Reckless</td>
<td>Causing grievous bodily harm</td>
</tr>
<tr>
<td>Negligent (criminal)</td>
<td>Causing bodily harm</td>
</tr>
<tr>
<td>Dangerous driving</td>
<td>Assault</td>
</tr>
<tr>
<td>Negligent</td>
<td>No harm caused</td>
</tr>
</tbody>
</table>

**Figure 2-2: Culpability\textsuperscript{50}**

<table>
<thead>
<tr>
<th>Fault element</th>
<th>Legal definition</th>
<th>Example of type of conduct that may give rise to a charge</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intention</td>
<td>Involves an intention to bring about a particular consequence or result (for example, an intention to cause grievous bodily harm).</td>
<td>Driving a motor vehicle at another person meaning to seriously hurt them.</td>
</tr>
<tr>
<td>Recklessness</td>
<td>Involves foreseeing the likelihood of a particular consequence or result and proceeding regardless.</td>
<td>Driving a motor vehicle towards another person, not intending to hurt them but to frighten them, but being aware that the person is likely to be hurt.</td>
</tr>
<tr>
<td>Criminal negligence</td>
<td>Negligence goes beyond a mere matter of compensation between subjects and shows such a disregard for the life and safety of other as to amount to a crime against the State and deserving of punishment.\textsuperscript{51}</td>
<td>Driving a motor vehicle on the highway at high speed while heavily intoxicated.</td>
</tr>
<tr>
<td>Dangerousness</td>
<td>Involves driving in a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case.\textsuperscript{52} There must be some feature which is identified not as a want of care but which subjects the public to some risk over and above that ordinarily associated with the driving of a motor vehicle.\textsuperscript{53}</td>
<td>Deliberately driving through red light. Accelerating very quickly on a wet road.</td>
</tr>
<tr>
<td>Negligence</td>
<td>Involves a breach of legal duty to take the same degree of care as an ordinary prudent person would deem necessary in the circumstances presented in order to avoid injury or damage to other’s person or property.\textsuperscript{54}</td>
<td>Being distracted from driving while fiddling with the radio.</td>
</tr>
</tbody>
</table>

\textsuperscript{48} Ibid.

\textsuperscript{49} This is adapted from ibid Figures 1 to 3.

\textsuperscript{50} It is also noted that there are offences of actual and imputed knowledge under the Criminal Code (Tas) such as murder under s 157(b), (c).

\textsuperscript{51} Arnol [1981] Tas R 157. It is also noted that it is a requirement that the act of the accused was voluntary and intentional, Criminal Code (Tas) s 13(1).

\textsuperscript{52} Bennett [1990] Tas R 72.

\textsuperscript{53} Hall, Tas Unreported Serial No 122/1962.

\textsuperscript{54} Criminal Code (Tas) s 167A.

\textsuperscript{55} Jiminez v The Queen (1982) 173 CLR 572, 579.

\textsuperscript{56} Wintulick v Lenthall [1932] SASR 60, 63.
### Figure 2-3: Harm hierarchy

<table>
<thead>
<tr>
<th>Death</th>
<th>Death occurs where there is an irreversible cessation of all function of the brain or irreversible cessation of circulation of blood in the body.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Grievous bodily harm</td>
<td>Any bodily injury of such a nature as to endanger or be likely to endanger life, or to cause or be likely to cause serious injury to health.</td>
</tr>
<tr>
<td>Bodily harm</td>
<td>Any hurt or injury calculated to interfere with health or comfort. It need not be permanent but must be more than transient or trifling.</td>
</tr>
<tr>
<td>Assault</td>
<td>The application of force to the person of another directly or indirectly, or attempting to apply force, or threatening to apply force or depriving another of his liberty.</td>
</tr>
<tr>
<td>No harm caused</td>
<td>There is no harm actually caused by the offender’s conduct.</td>
</tr>
</tbody>
</table>

Figure 2-4 combines the harm and culpability frameworks and sets out the relative seriousness of the offences based on these hierarchies. Generally, where the same result (that is death or grievous bodily harm) is a common element between several offences, ‘the hierarchy of the crimes in terms of seriousness turns on the mental element involved in each’. Accordingly, in descending order of seriousness, a driver causing death may be charged with manslaughter, causing death by dangerous driving or causing death by negligent driving. In relation to a driver causing grievous bodily harm, a driver may be charged with causing grievous bodily harm, dangerous driving causing grievous bodily harm or negligent driving causing grievous bodily harm. This is relevant to the exercise of the sentencing discretion, as the court can only impose a sentence for the offence that the person was convicted and cannot sentence based on elements or circumstances that are ingredients of a more serious offence (the *De Simoni* principle). However, in relation to driving offences causing death or serious injury, it has been recognised that ‘there is “no bright line test to be applied … to guard against a breach of the *De Simoni* Principle”’. The fine distinction that may need to be made between manslaughter and dangerous driving causing death means that ‘an assessment of the level of moral culpability and the degree of abandonment of responsibility [for dangerous driving causing death] may in some cases involve language

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57 *Human Tissue Act 1985* (Tas) s 27A.
58 *Criminal Code* (Tas) s 1.
60 *Criminal Code* (Tas) s 182(1).
62 It is noted that there were two cases in the period 2008–15 where the most serious offence was causing grievous bodily harm contrary to the *Criminal Code* (Tas) s 170 or 172 arising out the use of motor vehicle: see *Eaves*, 18 August 2015 Blow CJ (two years imprisonment with a two year probation order from release from prison); *Carlisle*, 20 April 2009, Tennent J (12 month imprisonment with six months suspended). There were also three cases where an offender was convicted of manslaughter and causing grievous bodily harm contrary to the *Criminal Code* (Tas): see *Redshaw*, 11 December 2008, Blow J; *DPP (Tas) v Watson* [2004] TASSC 54; *Cernigoi*, 12 February 2015, Porter J.
63 See discussion in *Charnock v Tasmania Police* [2013] TASSC 64 [26] (Pearce J).
64 See [1.5]. This principle was applied in *Wahl v Tasmania* [2012] TASCCA 5, where the sentencing judge imposed a global sentence of eight years imprisonment upon conviction for aggravated burglary, causing grievous bodily harm by dangerous driving and perverting justice. In relation to dangerous driving, the sentence was imposed on the basis that she drove at the victim and knowingly drove over her, with reckless indifference to the harm she might cause. On appeal the Court of Criminal Appeal ruled that this was an error as this was the mental element of a more serious crime than dangerous driving causing grievous bodily harm under the *Criminal Code* (Tas) s 167B and reduced the sentence to four years imprisonment.
which is close to aspects of manslaughter’. Views may also differ in relation to the circumstances in which an offender’s conduct has fallen far below the standard expected of a competent and careful driver (dangerous driving) and when the standard of driving is merely below that expected of a competent and careful driver (negligent driving). The overlap between the offences is also reflected in the types of conduct that give rise to the various charges.

Figure 2-4: Harm and culpability hierarchy for driving offences

<table>
<thead>
<tr>
<th>Harm</th>
<th>Culpability</th>
<th>Negligence</th>
<th>Dangerous</th>
<th>Criminal negligence</th>
<th>Reckless</th>
<th>Intention</th>
</tr>
</thead>
<tbody>
<tr>
<td>Injury not a necessary element of the offence</td>
<td>Negligent driving 5 PU(^{68}) <em>(Traffic Act s 32(2))</em></td>
<td>Dangerous driving 20 PU/2 years <em>(1(^{st}) offence)</em> 40 PU/4 years <em>(2(^{nd}) offence)</em> <em>(Traffic Act s 32(1))</em></td>
<td>Assault <em>(Criminal Code s 184)</em> 21 years</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Injury</td>
<td>Negligent drive cause GBH 10 PU/6 months <em>(1(^{st}) offence)</em> 20 PU/1 year <em>(2(^{nd}) offence)</em> <em>(Traffic Act s 32(2B))</em></td>
<td>Dangerous drive cause GBH <em>(Criminal Code s 167B)</em>(^{69}) 21 years</td>
<td>Wanton driving cause bodily injury 2 years <em>(Police Offences Act s 36(1))</em></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Grievous bodily harm</td>
<td>Negligent drive cause death 10 PU/1 year <em>(1(^{st}) offence)</em> 20 PU/2 years <em>(2(^{nd}) offence)</em> <em>(Traffic Act s 32(2A))</em></td>
<td>Dangerous drive cause death <em>(Criminal Code s 167A)</em> 21 years</td>
<td>Cause GBH <em>(Criminal Code s 172)</em> 21 years</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

\(^{66}\) Ibid [129].
\(^{67}\) See Chapter Three.
\(^{68}\) A penalty unit is currently $157, see <http://www.justice.tas.gov.au/>.
\(^{69}\) Note the maximum penalty for all offences under the *Criminal Code* (Tas) is 21 years, except for murder where the maximum penalty is life, *Criminal Code* (Tas) ss 158, 389(3).
\(^{70}\) Manslaughter can also be established by proving that the offender caused the death of the victim by an act intended to cause bodily harm or which was commonly known to cause death or bodily harm or that the offender caused the death of the victim by an unlawful act. If the prosecution is based on an act that was intended to cause bodily harm, or was commonly known to be likely to cause bodily harm, it is likely the prosecution will also need to prove that the event was not a ‘chance event’ (unintended, unforeseen and unforeseeable), *Criminal Code* (Tas), ss 13(1), 156(a), (c). See also *Kaporonovski v The Queen* (1973) 133 CLR 209; *Van Den Bemd* (1994) 179 CLR 137.
\(^{71}\) The fault element for murder can also be established by proving actual or imputed knowledge: either that the offender intended cause bodily harm which the offender knew to be likely to cause death (actual knowledge) or by an unlawful the offender knew (actual knowledge) or ought to have known that the act was likely to cause death (imputed knowledge), *Criminal Code* (Tas) s 157(b), (c).
2.3.3 Aggravating and mitigating factors

In determining the appropriate sentence, a court will consider a number of factors that may aggravate or mitigate a sentence. Aggravating factors are those that ‘increase the harm caused by the offence or the culpability of the offender’ 72 whereas mitigating factors have the opposite effect — decreasing the ‘harm or culpability, and consequently decrease the proportionate punishment that needs to be imposed’. 73

The Tasmanian Court of Criminal Appeal has applied the principles for sentencing for dangerous driving causing death or grievous bodily harm as set out by the New South Wales Court of Criminal Appeal in Jurisic v R74 and R v Whyte,75 to cases of motor manslaughter and dangerous driving causing death or grievous bodily harm.76 In sentencing, the courts have identified the following features as important considerations:

- extent and nature of the injuries inflicted;
- number of people put at risk;
- degree of speed;
- degree of intoxication and/or of substance abuse;
- erratic driving;
- competitive driving or showing off;
- length of the journey during which others were exposed to risk;
- ignoring of warnings;
- escaping police pursuit;
- degree of sleep deprivation;
- failing to stop.

These factors may also be relevant to sentencing for negligent driven causing death or grievous bodily harm.

In sentencing for the summary offences of negligent driving causing death or grievous bodily harm, an assessment of the degree of risk of death or grievous bodily harm posed by the driving is an important factor.77

Another relevant factor is the status of the persons put at risk. If the persons injured or killed knew or ought to have known that they were taking a risk travelling in the vehicle (for example, because they knew that the driver had been drinking) then this is relevant to the sentence imposed. In Tasmania v Dennison,78 Blow J indicated that ‘[a] heavier sentence

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72 Freiberg, above n 18, 223.
73 Ibid.
77 Charlock v Tasmania Police [2013] TASSC 64 cited in DPP, above n 13, 46.
78 Blow J, 20 May 2011 (Sentence).
would have been appropriate if someone who had taken no such risk had been killed or injured’.

In sentencing for serious driving cases, the Court of Criminal Appeal has stressed the need for a deterrent sentence which means that the ‘significance of youth and good antecedents has to yield in substantial measure, to the need to deter the offender and others’. Given that young people typically commit dangerous driving offences, deterrence weighs more heavily than reformatory and rehabilitative factors even for young offenders with the result that in most cases ‘a substantial immediate custodial sentence is appropriate’. The court has emphasised that ‘the protection of the public is a significant factor in determining the length of an appropriate sentence’. However, the age of an offender remains a mitigating factor with the result that a young offender will receive a sentence that is shorter than that which would have been imposed on an older offender for the same conduct. This is consistent with the position in all other Australian jurisdictions that have recognised that special considerations apply to sentencing young offenders, even for serious offences. Different considerations apply to sentencing children on the basis that:

- Juveniles are less mature — less able to form moral judgments, less capable of controlling impulses, less aware of the consequences of acts, in short they are less responsible and therefore less blameworthy, than adults. Their diminished responsibility means that they ‘deserve’ a lesser punishment than an adult who commits the same crime. … Lesser punishment means not only more sparing use of detention but also means significantly shorter terms of detention, bonds and periods of license disqualification, because time has a wholly different dimension for children than it does for adults.

Other mitigating factors include:

- a plea of guilty;
- a good driving record. (Conversely, significant prior driving convictions or disqualification from holding a licence are relevant as a lack of a mitigating factor);
- trauma caused by suffering serious injury or injuring or killing a friend or relative (depending on the circumstances).

Question 1
Do you agree or disagree with the current approach of Tasmanian courts in relation to the relevant aggravating and mitigating factors in cases where a driving offence has resulted in death or injury? Why or why not?
3 Current sentencing practices for driving offences that result in death or injury

3.1 Methodology

The terms of reference request that the Council detail the type and length of sentences for causing death or injury by the Supreme and Magistrates Court for the period 1980–2015.

The analysis conducted by the Council of Supreme Court sentences uses data received from the TLRI sentencing database, which covers the years 2001–14. The Council also identified cases from 2015 using the Andrew Inglis Clark Law Library Supreme Court Sentencing database and these are included in the analysis. Data is entered from the Supreme Court judges’ Comments of Passing Sentence, hard copies of which are held in the Law Library at the University of Tasmania.

In Tasmania, where an offender is convicted of multiple offences, a judge has the power to impose one sentence for all offences (a global sentence). Tasmanian courts also have the power to impose separate sentences for each offence but in practice, where an offender is convicted of multiple offences, a global order is usually made. Consequently, in most cases it is not possible to determine the proportion of the total sentence that relates to each individual count. In the database, the cases are entered based on assessment of the principal offence (most serious offence) as the ‘major crime’.

For the periods of 1978–89 and 1990–2000, the Council has relied on sentencing data presented in the monograph Sentencing in Tasmania.

In relation to the Magistrates Court, data has been obtained from the Department of Justice for the period July 2006 to May 2016. This relates to charges finalised and excludes global sentences.

3.2 Manslaughter

In the period 2001–15, there were 11 convictions for manslaughter arising out the use of motor vehicle. The offender was the driver of the vehicle in nine cases and in two cases, the offender was a passenger in the vehicle. There were seven cases where the offender was convicted of one count of manslaughter and in the remaining four cases, there were several counts arising out the motor vehicle crash. All offenders were male and their ages ranged from 18 to 37 with the median age of 26.

3.2.1 Overview of offence

Culpable homicide that is not murder is manslaughter.86 There is no separate offence in Tasmania for ‘motor manslaughter’. However, in this paper, the phrase motor manslaughter will be used to describe instances of manslaughter arising out the use of a motor vehicle. Indictments for motor vehicle manslaughter usually rely on the Criminal Code (Tas) s 156(2)(b), where a person is killed by an omission amounting to culpable negligence to perform a duty tending to the preservation of human life.87

86 Criminal Code (Tas) s 159.
87 However note Tasmania v Cernigoi, Porter J, 12 February 2015 (Sentence), where the offender was a back-seat passenger who suddenly reached over and pulled the steering wheel causing the vehicle to veer into the
An offender is criminally responsible for manslaughter by criminal negligence where a motor vehicle is involved if:

- the driver of the vehicle owes a duty to the victim to preserve life, which arises under the *Criminal Code* (Tas) s 150 which provides that a person who has ‘anything in his charge or under his control … which, in the absence of precaution or care in its use or management may endanger human life’ has a duty to ‘take reasonable precautions against, and to use reasonable care to avoid, such danger’. This includes motor vehicles.88

- the failure to take proper precautions in the use of the motor vehicle amounts to an omission to perform the duty to preserve human life set out in the *Criminal Code* (Tas) s 150.89

- the omission amounts to culpable negligence, which is a question of fact to be decided on the circumstances of each case.90 Culpable negligence is criminal negligence, which must be such that, ‘the negligence of the accused went beyond a mere matter of compensation between subjects and showed such a disregard for the life and safety of others as to amount to crime against the State and deserving of punishment’.91 This is more than ‘just a simple lack of care due to thoughtlessness, inadvertence or inattention’ and would amount to a clear or gross departure from the expected standards of driving.92

- the omission causes the death of the victim.

Where a person is tried for manslaughter, the alternative verdicts of causing death by dangerous driving under the *Criminal Code* (Tas) s 167A or reckless or dangerous driving under the *Traffic Act 1925* (Tas) s 32(1) are available.93

### 3.2.2 Driving behaviour

As shown in Table 3-1, nearly all convictions for manslaughter arising through the use of a motor vehicle involved the use of alcohol and/or excess speed. There were no cases where the offender was affected by drugs. In three cases, the driver was unlicensed or disqualified from driving at the time of the offence.94

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88 See *McCallum* [1969] Tas SR 73.
90 *Criminal Code* (Tas) s 156(3).
92 TLRI, above n 35, 18 citing *Hall*, Tas Unreported Serial No 122/1962, 2.
93 *Criminal Code* s 334.
94 This is not an aggravating factor but an offender is not entitled to mitigation from a good driving record. These factors may be relevant to the need for personal deterrence and the protection of the public, DPP, above n 13, 47 referring *Shipton v R* [2003] TASSC 23 [11] (Cox CJ); *Moyle v R* (2010) 198 A Crim R 592 [18] (Crawford CJ).
Table 3-1: Driving behaviour, motor manslaughter, 2001–15

<table>
<thead>
<tr>
<th>Driving behaviour</th>
<th>No of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Speed and alcohol affected driving</td>
<td>5</td>
</tr>
<tr>
<td>Alcohol affected driving</td>
<td>1</td>
</tr>
<tr>
<td>Speed</td>
<td>3</td>
</tr>
<tr>
<td>Intentional high risk behaviour</td>
<td>2</td>
</tr>
</tbody>
</table>

3.2.3 Sentencing outcomes

Table 3-2: Motor manslaughter, Supreme Court sentences, single count 1978–2015

<table>
<thead>
<tr>
<th>Years</th>
<th>Median (months)</th>
<th>Max</th>
<th>Min</th>
<th>Total (no)</th>
<th>Custodial %</th>
</tr>
</thead>
<tbody>
<tr>
<td>1978–89</td>
<td>15</td>
<td>36</td>
<td>12</td>
<td>unknown</td>
<td>100</td>
</tr>
<tr>
<td>1990-2000</td>
<td>18</td>
<td>24</td>
<td>12</td>
<td>7</td>
<td>100</td>
</tr>
<tr>
<td>2001–15</td>
<td>68</td>
<td>84</td>
<td>18</td>
<td>7</td>
<td>100</td>
</tr>
</tbody>
</table>

Table 3-3: Motor manslaughter, Supreme Court sentences, all counts, 2001–15

<table>
<thead>
<tr>
<th>Counts</th>
<th>Median (months)</th>
<th>Max</th>
<th>Min</th>
<th>Total (no)</th>
<th>Custodial %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Single</td>
<td>68</td>
<td>84</td>
<td>18</td>
<td>7</td>
<td>100</td>
</tr>
<tr>
<td>Global</td>
<td>48</td>
<td>66</td>
<td>21</td>
<td>4</td>
<td>100</td>
</tr>
<tr>
<td>All counts</td>
<td>60</td>
<td>84</td>
<td>18</td>
<td>11</td>
<td>100</td>
</tr>
</tbody>
</table>

Table 3-4: Motor manslaughter, Supreme Court sentences, single count, 2001–15

<table>
<thead>
<tr>
<th>Years</th>
<th>Median (months)</th>
<th>Max</th>
<th>Min</th>
<th>Total (no)</th>
<th>Imprisonment %</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001-07</td>
<td>50</td>
<td>84</td>
<td>18</td>
<td>4</td>
<td>100</td>
</tr>
<tr>
<td>2008-15</td>
<td>68</td>
<td>84</td>
<td>60</td>
<td>3</td>
<td>100</td>
</tr>
</tbody>
</table>

Table 3-5: Motor manslaughter, Supreme Court sentences, all counts, 2001–15

<table>
<thead>
<tr>
<th>Years</th>
<th>Median (months)</th>
<th>Max</th>
<th>Min</th>
<th>Total (no)</th>
<th>Imprisonment %</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001-07</td>
<td>48</td>
<td>84</td>
<td>18</td>
<td>6</td>
<td>100</td>
</tr>
<tr>
<td>2008-15</td>
<td>66</td>
<td>84</td>
<td>21</td>
<td>5</td>
<td>100</td>
</tr>
</tbody>
</table>

Table 3-6: Motor manslaughter, Supreme Court sentences, all counts, 2001–15, licence disqualification period

<table>
<thead>
<tr>
<th>Median (months)</th>
<th>Max</th>
<th>Min</th>
<th>Total (no)</th>
<th>Disqualification %</th>
</tr>
</thead>
<tbody>
<tr>
<td>36,100</td>
<td>Until further order</td>
<td>12</td>
<td>11</td>
<td>81.8,101</td>
</tr>
</tbody>
</table>

95 The approach adopted in Warner was to include suspended sentences within the count of custodial sentences on the basis that suspended sentences are a sentence of imprisonment that is not immediately activated. However, it does not appear that any suspended sentences were imposed for the offence of manslaughter by criminal negligence arising out the use of a motor vehicle.

96 Data from Warner, above n 33, 280.

97 Ibid.

98 This table does not include sentence lengths for suspended sentences.

99 This does not take into account whether disqualification length was from time of sentence or time of release from prison.

100 This does not include the indefinite disqualification.

101 It is noted that the two passengers convicted of manslaughter in relation to a motor vehicle crash did not receive licence disqualifications.
Use of imprisonment and sentence length

As shown in Table 3-2, there has been a dramatic increase in the sentences imposed for manslaughter arising out of the use of a motor vehicle in the period 2001–15 when compared to earlier periods. In the period 2001–15, all offenders were sentenced to immediate imprisonment, with the minimum term being 18 months (one and a half years) and the maximum being 84 months (seven years). The median sentence imposed increased from 18 months (one and a half years) to 68 months (five years and eight months) between 1999–2000 and 2001–15.

Appeal decisions and comments on passing sentence

In 2003, the Court of Criminal Appeal in Shipton v R\textsuperscript{102} made it clear that sentencing for ‘bad cases of misconduct in the management of motor vehicles’ required ‘considerably higher penalties than in the past’.\textsuperscript{103} In this case, the offender appealed a sentence of seven years imprisonment with a non-parole period of five following his conviction for manslaughter. The offender drove for a period of one and a half hours while severely affected by alcohol, imperilling numerous members of the public before overtaking at speed and fatally injuring the driver of an oncoming vehicle. The court rejected the appeal. It highlighted legislative reforms that had been introduced with a view to improving road safety and accepted that these changes indicated a parliamentary desire to increase penalties for serious motor vehicle offences. In his judgment, Blow J stated that ‘this crime was almost as evil as murder within the scope of the Criminal Code, s 157(1)(c)’\textsuperscript{104} where the offender ought to have known that his act was likely to cause death in the circumstances.

The need to increase the prevailing standard of penalties for manslaughter involving culpably negligent driving of a motor vehicle was accepted in the subsequent case of Director of Public Prosecutions v Watson,\textsuperscript{105} where the court upheld an appeal by the DPP that a sentence of 18 months imprisonment with a non-parole period of nine months was manifestly inadequate. In this case, the offender was an 18-year-old P-plater who was involved in a race with another vehicle over seven blocks in the centre of Hobart. The offender drove through a red light at 100 km per hour and hit another vehicle, killing the driver of that vehicle and seriously injuring the passenger. The Court of Criminal Appeal increased the sentence to a sentence of three years imprisonment with a non-parole period of 18 months. The court applied the principles set out in Shipton and rejected any suggestion that there was a separate category of motor manslaughter. In his judgment, Underwood J expressed the view that:

The respondent’s criminal conduct was just as dangerous, if not more so, as firing a gun down Liverpool Street and across its intersection with Harrington Street. Indeed, a motor car being driver at very high speeds by an inexperienced driver through city streets could well be regarded as far more dangerous than a single shot fired from a rifle.\textsuperscript{106}

\textsuperscript{102} [2003] TASSC 23.
\textsuperscript{103} Ibid [10] (Cox CJ).
\textsuperscript{104} Ibid [45]. The median sentence for murder in the period 2001–15 was 21 years (this excludes two cases where a life penalty was imposed). However, it is noted that there are differences in culpability for murder based on the offender’s state of mind — from an intention to kill (the most serious) to imputed knowledge (that the offender ought to have known that his act was likely to cause death (the least serious).
\textsuperscript{105} (2004) 146 A Crim R 223.
\textsuperscript{106} Ibid [20].
His Honour stated that society’s view with respect to the seriousness of offences can change and that:

Death and injury from negligent driving is now widely recognised by the community as a serious social and financial problem. Courts are expected to impose penalties that will be sufficiently severe to deter both the offender and others who might be minded to act like him or her.107

Similarly, Slicer J acknowledged that social expectations and the standard required by the community had altered and that regardless of any historical distinction ‘culpability for manslaughter as found by a jury, ought be equivalent to other forms of “involuntary manslaughter”’.108 Further, Slicer J stated that:

A single act of dangerous conduct involving the use of a motor vehicle and which results in death, might still attract a lesser penalty than an equivalent act which involves what has traditionally been described as containing an act of hostility to another. However where there is an extended course of conduct, as here, then there ought to be greater equivalence. The absence of personalised or focused hostility is offset by the prolonged conduct, each minute of which is fraught with the danger.109

In sentencing, the court accepted that the age of the offender, his previous record and his guilty plea were mitigating factors.

The stance adopted in these cases represented an explicit change from the previous approach where manslaughter committed by culpable negligence in driving a motor vehicle had been treated less seriously than other categories of manslaughter110 and this has led to an increase in penalty. Since 2003, the minimum term of imprisonment imposed for a single count of manslaughter arising from the use of a motor vehicle was 28 months imprisonment and the median was 64 months imprisonment (five years and four months). The minimum term of imprisonment imposed for all counts of motor manslaughter was 21 months and the median was 60 months (five years). The highest penalty of seven years was imposed in Shipton (as discussed above) and also in Tasmania v Harris, where the offender drove while intoxicated and under the influence of illicit drugs and at speed over a long period before colliding with an oncoming vehicle and killing the driver of that vehicle.111 At the time of the crash, the offender was disqualified from driving and had a significant driving record. The vehicle was not road worthy. In sentencing, Tennent J adopted the approach in Shipton and also referred to the statement in Jurusic v R,112 that:

the nature of the criminal conduct, its consequences and the need for general deterrence and retribution require less weight to be given to subjective matter … in cases of manslaughter involving motor vehicles, the need for general deterrence is of greater importance than matters purely personal to the offender.

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107 Ibid [18], [21].
108 Ibid [41], [43].
109 Ibid [44].
110 Warner, above n 33, 278.
111 Tennent J, 19 November 2008 (Sentence).
In imposing sentence, it was stated that the case was ‘a very bad example of a crime of this nature and a significant sentence was required’.

Subsequent to *Shipton*, the lowest sentence of 21 months imprisonment was imposed in a case where the offender had been drinking and drove at very high speed and collided with a pole killing one of his passenger and seriously injuring another. In imposing a lower penalty, Blow J noted that:

- the period of dangerous driving was only for a very short period of time;
- the offender was a generally good character;
- the offender did not have a bad driving record;
- the offender had pleaded guilty; and
- the driving disqualification would have considerable impact on his employment.

Sentences in the vicinity of five years imprisonment were imposed in *Tasmania v Doddridge*, where the offender drove at high speed over a distance of 13-14 kilometres and approached a bend above the critical speed required by the nature of the corner. He lost control of his vehicle and collided with a motorcycle, killing the rider. The offender stopped briefly but then drove off and did not summon aid for six kilometres. The offender had a bad driving record. In *Tasmania v Hansson*, the offender was affected by alcohol, lack of sleep and drove at excessive speed given those circumstances. He was unlicensed and in an unregistered and uninsured vehicle. The offender had taken his one hand off the wheel to adjust the radio and the vehicle veered into the gravel on the side of the road. The offender then attempted to correct and lost control of his vehicle and collided with an oncoming vehicle. The offender killed the driver of that vehicle and seriously injured the passenger. In sentencing, Tennent J accepted that while the offender’s ‘driving did not contain elements of hooning, drag racing or overtaking and was over a relatively short distance and time period, it did contain elements which lead to a conclusion that a significant sentence is required’.

In 2016, there have been two cases where an offender was convicted of manslaughter arising from the use of a motor vehicle. A sentence of six years imprisonment was imposed in *Tasmania v Holmyard*, where the offender drove at speeds of 170 km per hour while impaired by drugs and alcohol when attempting to evade police. He collided with another vehicle and killed the driver. The offender entered a plea of guilty to manslaughter. A sentence of five years imprisonment was imposed in *Tasmania v JMDB*, where a 15 year old drove an excessive speed for a prolonged period before driving through a red light and colliding with another vehicle and killing the driver. The offender also entered a plea of guilty to manslaughter. In sentencing, Wood J expressed the view that the offender’s driving was a ‘chillingly dangerous’ act of driving and that his criminal culpability was particularly high given that it was not an isolated act of impulsive driving but a prolonged period of driving at very high speeds. His inexperience at driving and his ineligibility to hold a driver’s licence heightened the risk of his driving. He increased the danger by showing off to his passengers

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113 Redshaw, Blow J, 11 December 2008 (Sentence).
114 Slicer J, 5 August 2009 (Sentence).
115 Tennent J, 26 March 2007 (Sentence).
116 Pearce J, 5 February 2016 (Sentence).
117 Wood J, 9 August 2016 (Sentence).
and also turning off his headlights. Some of his driving at high speed was due to seeing a police vehicle and trying to avoid apprehension. He deliberately drove into an intersection against a red light at high speed. Her Honour took into account his youth and, while acknowledging that the significance of youth carried less weight than in other types of cases, imposed a sentence that was not as heavy as would be imposed upon an adult offender.

### 3.3 Dangerous driving causing death

In the period 2001–15, there were 20 convictions for dangerous driving causing death. In all cases the offender was the driver of the vehicle. There were 13 cases where the offender was convicted of one count of dangerous driving causing death and in the remaining seven cases, there were several counts arising out the motor vehicle crash. All but one of offenders was male. The offenders’ ages ranged from 18 to 51 with the median age of 22.\textsuperscript{118}

#### 3.3.1 Overview of the offence

The offence of dangerous driving causing death is contained in the Criminal Code (Tas) s 167A, which provides that:

> Any person who causes the death of another person by the driving of a motor vehicle at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including in the case of the driving of a motor vehicle on a public street, the nature, condition and use of the street, and the amount of traffic which is actually at the time or which might reasonably be expected to be, on the street, is guilty of a crime.

An offender is criminally responsible for dangerous driving causing death if:

- the act of driving is voluntary;
- the offender was driving at ‘a speed or in a manner which is dangerous to the public’. This has been interpreted to mean that there is ‘a quality in the speed or manner of driving which either intrinsically in all the circumstances, or because of the particular circumstances surrounding the driving is in a real sense potentially dangerous to a human being or human beings who as a member or members of the public may be upon or in the vicinity of the roadway on which the driving is taking place’.\textsuperscript{119} Dangerous driving means that ‘there must be some feature which is identified not as a want of care but which subjects the public to some risk over and above that ordinarily associated with the driving of a motor vehicle, including driving by person who may, on occasions, drive with less than due care and attention’.\textsuperscript{120} The standard of fault for dangerous driving is a lesser standard that criminal negligence, as required for manslaughter, but something more than the standard of negligence required for negligent driving causing death. It is an objective standard and does not contain any requirement for proof of a mental element (such as recklessness);\textsuperscript{121} and
- the offender causes the death of another person by driving a motor vehicle dangerously.

\textsuperscript{118} In three cases, the age of the offender was not stated.

\textsuperscript{119} McBride v The Queen (1966) 115 CLR 44, 49 (Barwick CJ).

\textsuperscript{120} Jiminez v The Queen (1992) 173 CLR 572, 579 (Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

\textsuperscript{121} Charnock v Tasmania Police [2013] TASSC 64, [27], [31].
The defence of honest and reasonable mistake applies to dangerous driving causing death.\textsuperscript{122} The offence of dangerous driving causing death was created in Tasmania in 1975 as a response to a perceived reluctance of jurors to convict an offender for the crime of manslaughter in circumstances where death was caused as a result of a motor vehicle crash.\textsuperscript{123} This offence exists in all other Australian jurisdictions, except the Australian Capital Territory.\textsuperscript{124}

Where a person is tried for dangerous driving causing death, the alternative verdicts of reckless or dangerous driving under the \textit{Traffic Act 1925 (Tas)} s 32(1) are available.\textsuperscript{125} Negligent driving causing death (under the \textit{Traffic Act 1925 (Tas)} s 32(2A)) is not an alternative verdict.

\subsection*{3.3.2 Driving behaviour}

All convictions for dangerous driving causing death involved the use of alcohol, drugs and/or excess speed. There were 10 cases where the offender was speeding and affected by alcohol, one case where the offender was speeding and affected by drugs, and in the remaining case, the offender was affected by drugs and alcohol and travelling at speed that was excessive in the circumstances. There were eight cases where the offender was affected by drugs and six cases where the offender was speeding.\textsuperscript{126} In six cases, the driver was unlicensed or disqualified from driving at the time of the offence.

\begin{table}[h]
\centering
\begin{tabular}{|l|c|}
\hline
\textbf{Driving behaviour} & \textbf{No of cases} \\
\hline
Speed and alcohol/drug affected driving & 12 \\
Alcohol/drug affected driving & 4 \\
Speed & 4 \\
\hline
\end{tabular}
\caption{Driving behaviour, dangerous driving causing death, 2001–15}
\end{table}

\subsection*{3.3.3 Sentencing outcomes}

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|c|c|c|}
\hline
\textbf{Years} & \textbf{Median (months)} & \textbf{Max} & \textbf{Min} & \textbf{Total (no)} & \textbf{Custodial \%} \\
\hline
1978–89\textsuperscript{127} & 9 & 18 & 3 & 30 & 94\textsuperscript{128} \\
1990–2000\textsuperscript{129} & 9 & 24 & 6 & 14 & 93\textsuperscript{130} \\
2001–15 & 12 & 48 & 6 & 13 & 100\textsuperscript{131} \\
\hline
\end{tabular}
\caption{Dangerous driving causing death, Supreme Court sentences, single count 1978–2015}
\end{table}

\textsuperscript{122} Jiminez v The Queen (1992) 173 CLR 572. This means that ‘if the defendant can raise the possibility that he or she had an honest and reasonable belief that the driving was not dangerous, the burden falls on the prosecution to prove beyond reasonable doubt that the defendant did not have this belief’: TLRI, above n 35, 24.


\textsuperscript{124} See Appendix A.

\textsuperscript{125} \textit{Criminal Code} s 334C.

\textsuperscript{126} It is noted that an offender may fall into more than one category, for example speeding and drug affected or speeding, alcohol affected and drug affected.

\textsuperscript{127} Data from Warner, above n 33, 282.

\textsuperscript{128} This includes four fully suspended sentences.

\textsuperscript{129} Data from Warner, above n 33, 282.

\textsuperscript{130} This includes one fully suspended sentence.

\textsuperscript{131} This does not include any suspended sentences.
Table 3-9: Dangerous driving causing death, Supreme Court sentences, 2001–15

<table>
<thead>
<tr>
<th>Counts</th>
<th>Median (months)</th>
<th>Max</th>
<th>Min</th>
<th>Total (no)</th>
<th>Imprisonment %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Single</td>
<td>12</td>
<td>48</td>
<td>6</td>
<td>13</td>
<td>100</td>
</tr>
<tr>
<td>Global</td>
<td>27</td>
<td>39</td>
<td>12</td>
<td>7</td>
<td>100</td>
</tr>
<tr>
<td>All counts</td>
<td>12</td>
<td>48</td>
<td>6</td>
<td>20</td>
<td>100</td>
</tr>
</tbody>
</table>

Table 3-10: Dangerous driving causing death, Supreme Court sentences, single count, 2001–15

<table>
<thead>
<tr>
<th>Years</th>
<th>Median (months)</th>
<th>Max</th>
<th>Min</th>
<th>Total (no)</th>
<th>Imprisonment %</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001–07</td>
<td>9</td>
<td>12</td>
<td>9</td>
<td>7</td>
<td>100</td>
</tr>
<tr>
<td>2008–15</td>
<td>28.5</td>
<td>48</td>
<td>6</td>
<td>6</td>
<td>100</td>
</tr>
</tbody>
</table>

Table 3-11: Dangerous driving causing death, Supreme Court sentences, all counts, 2001–15

<table>
<thead>
<tr>
<th>Years</th>
<th>Median (months)</th>
<th>Max</th>
<th>Min</th>
<th>Total (no)</th>
<th>Imprisonment %</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001–07</td>
<td>10.5</td>
<td>12</td>
<td>8</td>
<td>10</td>
<td>100</td>
</tr>
<tr>
<td>2008–15</td>
<td>29</td>
<td>48</td>
<td>6</td>
<td>10</td>
<td>100</td>
</tr>
</tbody>
</table>

Table 3-12: Dangerous driving causing death, Supreme Court sentences, 1978–2015, licence disqualification period

<table>
<thead>
<tr>
<th>Years</th>
<th>Median (months)</th>
<th>Max</th>
<th>Min</th>
<th>Disqualification %</th>
</tr>
</thead>
<tbody>
<tr>
<td>1978–1989</td>
<td>24</td>
<td>36</td>
<td>12</td>
<td>80</td>
</tr>
<tr>
<td>1990–2000</td>
<td>36</td>
<td>60</td>
<td>15</td>
<td>100</td>
</tr>
<tr>
<td>2001–2015</td>
<td>36</td>
<td>60</td>
<td>14</td>
<td>100</td>
</tr>
</tbody>
</table>

Use of imprisonment and sentence length

As shown in Table 3-8, there has been an increase in the use of imprisonment in the period 2001–15 when compared to earlier periods. In the period 2001–15, all offenders were sentenced to immediate imprisonment with no suspended sentence imposed. There was also an increase in the median term (from 9 to 12 months) and the longest sentence imposed (24 to 48 months). The increase in penalty is also evident in Table 3-10, which shows that for single counts of dangerous driving causing death from the periods 2001–07 and 2008–15. The longest sentence imposed had increased from 12 to 48 months and the median sentence imposed increased from nine months to 28.5 months (two years and 4.5 months).

Appeal decisions and comments on passing sentence

As with sentencing for manslaughter arising out of the use of a motor vehicle, the Tasmanian Court of Criminal Appeal has recognised the need for sentencing for serious driving offences (including dangerous driving causing death or grievous bodily harm) to increase. In Director

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132 This table does not include sentence lengths for suspended sentences.
133 This does not take into account whether disqualification length was from time of sentence or time of release from prison.
134 Warner, above n 33, 282.
135 Ibid.
of Public Prosecutions v Smithurst,\textsuperscript{136} the offender was convicted on his plea of guilty to causing death by dangerous driving causing death, and the offences of driving while not the holder of a driver licence, driving a motor vehicle while exceeding the prescribed alcohol limit and driving a motor vehicle whilst a prescribed illicit drug was present in his blood. He was sentenced to a term of imprisonment of two years and three months with a non-parole period of one half of that term. On appeal, the DPP successfully argued that the sentence was manifestly inadequate and the sentence was increased to three years and three month with a non-parole period of two years. The DPP’s submission of inadequacy was not on the basis that the sentence was manifestly inadequate when compared with earlier sentences but on the basis that ‘sentences for this type of offending had been low, and, as a matter of policy, it was appropriate for the Court to set a higher standard’.\textsuperscript{137} In increasing the penalty, the court accepted that the approach to serious cases of bad driving was that the ‘range of penalties [were] generally increased’.\textsuperscript{138} This was also the approach of the Court of Criminal Appeal in Acting Director of Public Prosecutions v Rushton,\textsuperscript{139} where Tennent J expressed the view that:

There is little doubt having regard to a number of cases in recent years involving death by dangerous driving that the Court has recognised the need to impose sentences that more obviously reflect society’s condemnation of driving behaviour which results in the death or a person or persons. As a consequence, sentences imposed for this crime have trended upwards.\textsuperscript{140}

Her Honour also recognised that this ‘does not mean that, in every case where a sentence which, on its face appears light, is handed down, that sentence should be overturned and increased’.\textsuperscript{141} However, in the circumstances of the case, it was held that a sentence of 10 and a half months imprisonment was inadequate and the sentence was increased to two years and nine months imprisonment. The offender had a blood alcohol level of 0.147 and was travelling around a corner at approximately 75 km/h (where the advisory speed was 45 km/h). He lost control of car and crashed, killing his passenger. The offender, at the time of the crash, was a disqualified driver — his disqualification having been imposed just 13 days prior for drink driving. The decision to drive was viewed as deliberate and in blatant disregard of a very recent court order. It was accepted that ‘the potential risk to those other cars [on the road] was high given the demonstrated inability of the respondent to control the car on the bend where the accident occurred’.\textsuperscript{142} The offender had driven for 15 kilometres before the crash and so it did not involve an action of short duration.

Since 2008, the minimum term of imprisonment imposed for a single count of dangerous driving causing death was six months imprisonment and the median was 28.5 months imprisonment (two years and nearly five months). The longest sentence imposed was 48 months (four years). The minimum term of imprisonment imposed for all counts of dangerous driving causing death was six months and the median was 29 months (two years and five months).

\textsuperscript{136} [2011] TASCCA 19.
\textsuperscript{137} Ibid [12] (Tennent J).
\textsuperscript{138} Ibid [25] (Tennent J).
\textsuperscript{139} [2015] TASCCA 20.
\textsuperscript{140} Ibid [6].
\textsuperscript{141} Ibid [16].
\textsuperscript{142} Ibid [19].
In the period 2008–15, the highest penalty of four years imprisonment was imposed in two cases. In *Tasmania v Gallagher*, the offender was convicted of causing death by dangerous driving following a jury trial. He had been engaged in a mutual course of racing and dangerous driving with his co-offender (who was convicted of manslaughter). He had been drinking and was travelling at a speed of approximately 140 km/h. The journey during which others were exposed to risk was 50 kilometres. The co-offender lost control of his vehicle collided with a motorcycle whose rider was killed instantly. The offender had prior convictions for drink driving, including an apprehension for a drink driving offence shortly before the crash. In *Tasmania v Storehouse*, the offender pleaded guilty to dangerous driving causing death. He had been drinking heavily and had consumed cannabis and antidepressant medication. He was driving with his partner when he lost control of the vehicle and his partner was killed. At the time of the crash, he had a blood alcohol level of 0.214. He had a prior conviction for drink driving and had never held a driver’s licence.

In 2016, a sentence of four years imprisonment was also imposed in *Tasmania v Henrick*, where an offender pleaded guilty to one count of causing death by dangerous driving and two counts of causing grievous bodily harm by dangerous driving. After the offender had been drinking and consuming cannabis and after being warned not to drive, he drove his vehicle with three passengers at high speed causing the vehicle to skid off the road. He then returned to the party when he was again warned not to drive. Instead of stopping, he drove off at even higher speed and again lost control of the vehicle causing the death of one of the passengers and serious injury to the other two passengers. The offender was a L-plater and aged 20 years old at the time of offence. He was assessed as having an intellectual disability, which contributed to his decision to drive and also to his ability to fully understand the potential consequences of his actions but the sentencing judge still considered that his moral culpability was significant. It was accepted that there were worse cases given that the driving was of short duration.

Sentences in the vicinity of 30 months were imposed in *Tasmania v Thorne* (30 months) and *Tasmania v Rushton* (33 months). In *Thorne*, the offender was found guilty of one count of causing death by dangerous driving and one count of causing grievous bodily harm by dangerous driving. The offender was travelling at a speed of approximately 120-130 km per hour when he travelled around a corner, lost control of his vehicle, and collided with an oncoming vehicle. The driver in the other vehicle was killed and its passenger suffered serious injury. The speed limit was 80 km per hour and the advisory sign for the corner was 65 km per hour. After the crash, the offender’s blood contained a relatively high reading of THC. He had previous offences for speeding. The offender also suffered serious injury as a result of the crash and has ongoing health issues. In sentencing, Wood J accepted that there were aggravating factors that were not present in the case, including that it was not a very prolonged period of dangerous driving and there had been no warning ignored by the driver.

The lowest penalty of six months imprisonment was imposed in *Tasmania v Phillips*, where the offender lost control of her vehicle and killed a pedestrian. The offender and her partner

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143 Slicer J, 18 June 2009 (Sentence).
144 Tennent J, 1 August 2008 (Sentence).
145 Wood J, 1 July 2016 (Sentence).
146 Wood J, 22 May 2015 (Sentence).
147 This case is discussed above.
148 Evans J, 3 November 2011 (Sentence).
had a series of disagreements, which culminated in her partner saying that he was leaving her and asking the offender to drive him into town. The offender agreed but was extremely annoyed and drove in an aggressive manner, including accelerating a ‘full throttle’ up her street. It had been raining and she lost control of her vehicle shortly after the journey commenced. In imposing sentence, Evans J noted that while there had been a marked change in the length of sentences and the approach taken to suspending them for dangerous driving causing death, this was not a case that involved many of the factors that had resulted in the imposition of lengthy sentences and that the duration of her ‘impetuous period of dangerous driving was very brief’.

3.4 Dangerous driving causing grievous bodily harm

In the period 2001–15, there were 11 convictions for dangerous driving causing grievous bodily harm. In all cases the offender was the driver of the vehicle. There were four cases where the offender was convicted of one count of dangerous driving causing grievous bodily harm and in the other seven cases, there were several counts arising out the motor vehicle crash. Nine of the eleven offenders were male. The offenders’ ages ranged from 21 to 34 with the median age of 27.

3.4.1 Overview of the offence

The offence of dangerous driving causing death is contained in the Criminal Code (Tas) s 167A. This offence was introduced in April 2000 as part of a raft of reforms that included the introduction of the offences of negligent driving causing death and negligent driving causing grievous bodily harm. The purpose of the introducing the offence was to create a more serious offence than the offence of dangerous driving under the Traffic Act 1925 (Tas) s 32 that applied in circumstances where grievous bodily harm was caused.149

The elements of this offence are identical to those of dangerous driving causing death, except that grievous bodily harm (rather than death) is caused. Grievous bodily harm is defined as ‘any bodily injury of such a nature as to endanger or be likely to endanger life, or cause or be likely to cause serious injury to health’.150

Where a person is tried for causing grievous bodily harm by dangerous driving under the Criminal Code (Tas) s 167B, the alternative verdicts of reckless or dangerous driving under the Traffic Act 1925 (Tas) s 32(1) are available.151 Negligent driving causing grievous bodily harm (under the Traffic Act 1925 (Tas) s 32(2B)) is not an alternative verdict.

3.4.2 Driving behaviour

As shown in Table 3-13, most of the convictions for dangerous driving causing grievous bodily harm involved the use of alcohol, drugs and/or excess speed (72.8%). In two cases, the driver was unlicensed or disqualified from driving at the time of the offence.

150 Criminal Code (Tas) s 1.
151 Ibid s 334B.
Table 3-13: Driving behaviour, Dangerous driving causing grievous bodily harm, 2001–15

<table>
<thead>
<tr>
<th>Driving behaviour</th>
<th>No of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Speeding and alcohol/drug affected driving</td>
<td>5</td>
</tr>
<tr>
<td>Alcohol/drug affected driving</td>
<td>2</td>
</tr>
<tr>
<td>Speed</td>
<td>1</td>
</tr>
<tr>
<td>Other high risk behaviour(^{152})</td>
<td>3</td>
</tr>
</tbody>
</table>

3.4.3 Sentencing outcomes

Table 3-14: Dangerous driving causing grievous bodily harm, Supreme Court sentences, 2001–15\(^{153}\)

<table>
<thead>
<tr>
<th>Counts</th>
<th>Median (months)</th>
<th>Max</th>
<th>Min</th>
<th>Total (no)</th>
<th>Imprisonment%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Single</td>
<td>7.5</td>
<td>9</td>
<td>6</td>
<td>4</td>
<td>50(^{154})</td>
</tr>
<tr>
<td>Global</td>
<td>28.5</td>
<td>48</td>
<td>18</td>
<td>7</td>
<td>85.7</td>
</tr>
<tr>
<td>All counts</td>
<td>27</td>
<td>48</td>
<td>6</td>
<td>11</td>
<td>72.7(^{155})</td>
</tr>
</tbody>
</table>

Table 3-15: Dangerous driving causing grievous bodily harm, Supreme Court sentences, single count, 2001–15\(^{156}\)

<table>
<thead>
<tr>
<th>Years</th>
<th>Median (months)</th>
<th>Max</th>
<th>Min</th>
<th>Total (no)</th>
<th>Imprisonment</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001–07</td>
<td>—</td>
<td>9</td>
<td>9</td>
<td>2</td>
<td>1 out of 2 offenders(^{157})</td>
</tr>
<tr>
<td>2008–15</td>
<td>—</td>
<td>6</td>
<td>6</td>
<td>2</td>
<td>1 out of 2 offenders(^{158})</td>
</tr>
</tbody>
</table>

Table 3-16: Dangerous driving causing grievous bodily harm, Supreme Court sentences, all counts, 2001–15\(^{159}\)

<table>
<thead>
<tr>
<th>Years</th>
<th>Median (months)</th>
<th>Max</th>
<th>Min</th>
<th>Total (no)</th>
<th>Imprisonment%</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001–07(^{160})</td>
<td>—</td>
<td>9</td>
<td>9</td>
<td>3</td>
<td>33.3(^{161})</td>
</tr>
<tr>
<td>2008–15</td>
<td>27</td>
<td>48</td>
<td>6</td>
<td>8</td>
<td>87.5(^{162})</td>
</tr>
</tbody>
</table>

---

\(^{152}\) This includes a case of dangerously overtaking a vehicle, a case of driving off quickly to escape from a confrontation and a case where the offender was driving on the wrong side of the road while talking to a friend in the other vehicle.

\(^{153}\) This table does not include sentence lengths for suspended sentences.

\(^{154}\) It is noted that there were two partly suspended sentences imposed.

\(^{155}\) It is noted that there were also two partly suspended and one fully suspended sentence imposed.

\(^{156}\) This table does not include sentence lengths for suspended sentences. Note for each period, only one sentence of full-time imprisonment was imposed.

\(^{157}\) It is noted that there was also one partly suspended sentence imposed.

\(^{158}\) It is noted that there were also one partly suspended sentence imposed.

\(^{159}\) This table does not include sentence lengths for suspended sentences.

\(^{160}\) There was only one case where a sentence of immediate imprisonment was imposed.

\(^{161}\) It is noted that there was one partly suspended and one fully suspended sentence imposed.

\(^{162}\) It is noted that there was one case where a partly suspended sentence was imposed.
Table 3-17: Dangerous driving causing grievous bodily harm, Supreme Court sentences, all counts, 2001–15, licence disqualification period

<table>
<thead>
<tr>
<th>Median (months)</th>
<th>Max</th>
<th>Min</th>
<th>Total (no)</th>
<th>Disqualification %</th>
</tr>
</thead>
<tbody>
<tr>
<td>36</td>
<td>72</td>
<td>12</td>
<td>11</td>
<td>100</td>
</tr>
</tbody>
</table>

**Use of imprisonment and sentence length**

This offence was created in 2000 and, accordingly, sentencing data is not available for earlier periods. In the period 2001–15, for all counts, 72.7% of offenders were sentenced to immediate imprisonment and there were two partly suspended and one fully suspended sentence imposed. In relation to single counts of dangerous driving causing grievous bodily harm, immediate imprisonment was imposed in 50% of cases. However, it is noted that this only involved four cases. As shown in Table 3-16, there is an increase in penalty between the period 2001–07 and 2008–15 for all counts of dangerous driving causing grievous bodily harm in terms of the use of immediate imprisonment and also the length of the sentences imposed. The longest sentence imposed had increased from nine to 48 months and the median sentence imposed increased from nine months to 27 months. There were four cases of dangerous driving causing grievous bodily harm in the period 2001–15 involving single counts and only two sentences of immediate imprisonment were imposed. This makes it impractical to compare the sentences between the two periods with a view to identifying any change in the sentencing practice of the court.

**Appeal decisions and comments on passing sentence**

As with other serious driving offences, the Court of Criminal Appeal in *Moyle v Tasmania* \(^{164}\) signalled that, while there were too few cases to indicate a well-settled tariff, sentencing levels needed to increase for the offence of dangerous driving causing grievous bodily harm. In this case, the offender seriously injured his girlfriend when he failed to navigate a turn in the road, while intoxicated, and crashing his vehicle. At the time of the crash, he had been disqualified from driving because of a recent prior conviction for drink driving. He was sentenced to imprisonment for two years and six months and appealed on the ground that the sentence was manifestly excessive. The court (by majority) held that, although the sentence was at the high end, it sentence was not excessive. Wood J expressed the view that ‘the sentence reflects a stern approach taken by sentencing judges in Tasmania in recent years in relation to the crime of causing death by dangerous driving’. \(^{165}\) The court noted that in the circumstances of this case, the injuries suffered by the victim were very serious and the appellant drove with a high blood alcohol reading after showing signs of tiredness and being affected by alcohol.

Between 2008 and 2015, there have been two cases where an offender was charged with a single count of dangerous driving causing grievous bodily harm. In *Tasmania v Moate*, \(^{166}\) the offender was convicted of one count of causing grievous bodily harm as a result of a crash between a motorcycle driven by him and a motorcycle being driven in the opposite direction. The offender was on the wrong side of the road in far too close a proximity to a corner. In

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163 This does not take into account whether disqualification length was from time of sentence or time of release from prison.
165 Ibid [72].
166 Porter J, 2 July 2010 (Sentence).
sentencing, Porter J accepted that the conduct of the offender did not fall within the more serious category of this type of crime but stated that he had created ‘a grave danger which in fact eventuated and caused significant bodily injury to another road user’. It was not a momentary lapse of attention but there were few of the factors which are said to aggravate this type of offence: the offender was not affected by drugs or alcohol, was not speeding and did not drive in a dangerous manner for a sustained period. The offender had a significant driving history and was disqualified from driving at the time of the offence, which was a factor relevant to personal deterrence. The offender also suffered significant permanent injury as a result of the crash and that was taken into account in sentencing. The offender was sentenced to six months imprisonment.

In *Tasmania v Minehan*, the offender was found guilty of causing grievous bodily harm by dangerous driving. The offender’s vehicle collided with a motorcycle driven by the complainant and caused fractures to the complainant’s clavicle and ribs. The offender was sentenced on the basis that he drove dangerously by attempting to overtake the complaint on the right hand or, and in very close proximity to the bike and when travelling at a speed of approximately 100 km per hour. The offender was ‘angrily determined to get past the complainant, irrespective of risk, and showed extreme carelessness’. In sentencing, Porter J noted the stern approach of the Court of Criminal Appeal to cases of dangerous driving causing death or grievous bodily harm. However, His Honour noted that in this case, there was an absence of any of the usual aggravating factors such as a prolonged period of driving at high speed or a sustained period of dangerous driving and there was no suggestion of drug or alcohol use. There were, however, aggravating features in terms of the amount of traffic on the road and the highly erratic nature of the driving. The offender was sentenced to 12 months imprisonment with six months of the sentence being suspended.

An examination of sentences imposed for all counts of dangerous driving causing grievous bodily harm between 2008 and 2015 (n=8) shows that 87.5% of offenders received a sentence of immediate imprisonment with the minimum term of imprisonment imposed being six months imprisonment and the median being 27 months imprisonment. There was one case in which a partly suspended sentence was imposed (*Minehan*). The longest sentence imposed was 48 months imposed in *Wahl v Tasmania*, where the offender was found guilty of aggravated burglary, dangerous driving causing grievous bodily harm and perverting justice. The offender drove her son to another person’s house so that her son could assault the victim’s son who was a resident of that house. The offender waited in the car while her son and another person entered the house and were chased out by the victim and members of her family. There was a hostile situation where the victim and her son were threatening the occupants of the vehicle and the offender drove the vehicle and ran over the victim causing significant long-term injuries. In sentencing, it was accepted that the offender drove dangerously in circumstances of stress but that the commission of the aggravated burglary had provoked that hostility. The period of dangerous driving was brief but the offender bore a high degree of personal moral blame for what occurred. In addition, the terrible injuries suffered by the victim significantly diminished any mitigatory effect of the period of driving.

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167 Porter J, 22 April 2015 (Sentence).
Sentences in the vicinity of 27 months were imposed in *Tasmania v Wessing* (27 months),169 *Tasmania v Moyle* (30 months)170 and *Tasmania v Bush*.171 In *Wessing*, the offender pleaded guilty to two changes of causing grievous bodily harm by dangerous driving. He was also convicted of a number of summary driving offences. Against the advice of his girlfriend, he drove his vehicle with a blood alcohol level of 0.152 and after smoking cannabis. He was travelling at a speed of 138 km per hour on a road where the speed limit was 80 km per hour and lost control of his vehicle while attempting to negotiate a bend. He collided with another vehicle. In *Bush*, the offender pleaded guilty to two counts of causing grievous bodily harm by dangerous driving. He collided with the vehicle driven by the victim, while driving on the wrong side of the road when grossly intoxicated.

### 3.5 Negligent driving causing death

#### 3.5.1 Overview of the offence

This offence is contained in the *Traffic Act 1925* (Tas) s 32(2A), which provides that ‘[a] person must not cause the death of another person by driving a motor vehicle on a public street negligently’. The *Traffic Act 1925* (Tas) s 32(2C) provides that for the purposes of determining whether a person is driving a motor vehicle negligently the following matters are to be taken into account:

- the circumstances of the case;
- the nature and condition of the public street;
- the amount of traffic that is actually, or might reasonably be expected to be, on the public street.

The test for negligent driving is whether the defendant exercised the degree of care that a reasonable and prudent driver would exercise in the circumstances.172 Negligent driving is:

a breach of a legal duty to take care, and the duty imposed by the law on persons who drive vehicles on a public road is that they shall manage them with the same degree of care as an ordinary prudent man would deem necessary in the circumstances presented to him, in order to avoid injury, or causing damage to the person or property of others who may be using the road. The standard, it will be noted is not of the exceptional man, nor it is that which the actual driver may consider sufficient, but the standard of the average man who has regard for the safety and rights of others.173

It is an objective standard and does not contain any requirement for proof of a mental element (such as recklessness).174

This offence was introduced in 2000 following a recommendation by Coroner Ian Matterson that the government should consider introducing an offence between dangerous driving

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169 Crawford CJ, 2 March 2010 (Sentence).
170 Wood J, 18 February 2010 (Sentence).
172 *Robertson v Watts*, unreported 51/1964 (Crawford J) applied to negligent driving causing death in *Filz v Knox* [2002] TASSC 82.
173 *Wintulich v Lenthall* (1932) SASR 60, 63 (Murray K) cited in *Robertson v Watts*, unreported 51/1964 (Crawford J).
174 *Charnock v Tasmania Police* [2013] TASSC 64, [27], [31].
causing death and negligent driving. This was on the basis that ‘[a]t the present time, if a
person drives negligently and kills someone or causes someone grievous bodily harm that
person can only be charged with the very minor offence of negligent driving’. It was also
intended to prevent overcharging by the prosecution in circumstances where death was
caused, so that the prosecution did not charge with dangerous driving in circumstances where
the driving may have been merely negligent. It was noted that in these cases, the DPP had
been required to drop the charges, which had caused distress to the families of the victims. 176

3.5.2 Driving behaviour

Table 3-18: Driving behaviour, Negligent driving causing death, 2008–15 177

<table>
<thead>
<tr>
<th>Driving behaviour</th>
<th>No of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alcohol/drug affected driving</td>
<td>2</td>
</tr>
<tr>
<td>Fatigue</td>
<td>3</td>
</tr>
<tr>
<td>Speed</td>
<td>4</td>
</tr>
<tr>
<td>Inattention</td>
<td>12</td>
</tr>
<tr>
<td>Failure to secure load/trailer</td>
<td>2</td>
</tr>
</tbody>
</table>

3.5.3 Sentencing outcomes

Table 3-19: Negligent driving causing death, Magistrates Court sentences by most
serious penalty, single count, July 2006 – May 2016

<table>
<thead>
<tr>
<th></th>
<th>Full-time imprisonment</th>
<th>Partly suspended sentence</th>
<th>Fully suspended sentence</th>
<th>Community service order</th>
<th>Fine</th>
</tr>
</thead>
<tbody>
<tr>
<td>06–07 to 10–11</td>
<td>1</td>
<td>2</td>
<td>6</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>11–12 to 15–16</td>
<td>0</td>
<td>1</td>
<td>8</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Total period</td>
<td>1</td>
<td>3</td>
<td>14</td>
<td>1</td>
<td>2</td>
</tr>
</tbody>
</table>

Use of imprisonment and sentence length

In the period July 2006 to May 2016, there were 21 charges where a single sentence was
imposed for negligent driving causing death and the majority of offenders received a fully
suspended sentence (66.7%). In the period, there was one sentence of full-time imprisonment
imposed for a term of six months. There were also three partly suspended sentences imposed.
These were as follows: six months imprisonment with five months suspended, six months
imprisonment with three months suspended and eight months imprisonment with four months
suspended.

Magistrates Court comments on passing sentence and appeal decisions

As demonstrated above, typically an offender sentenced for the offence of negligent driving
causing death will receive a term of imprisonment that is fully suspended. However, a settled
sentencing range has been difficult for the courts and the community to ascertain given that
sentences imposed by the Magistrates Court are not generally published and, accordingly,

176 Ibid.
177 The details of these cases were identified using the Newsbank database, which allows online searching of the
Tasmanian newspapers (The Advocate, The Mercury and The Examiner). This may not be an exhaustive search
but is indicative of the circumstances in which convictions are obtained for the offence.
details of the offence have not been readily available. This was recognised in *Charnock v Tasmania Police* where the Supreme Court of Tasmania considered the principles that should be applied in sentencing an offender for negligent driving causing death and grievous bodily harm. In this case, Pearce J noted that he had been referred to no other sentences previously imposed in Tasmania for these offences. However, his Honour gave consideration to where the sentence imposed sat relative to the ranges imposed for more serious offending such as manslaughter and dangerous driving causing death and grievous bodily harm.

In *Charnock v Tasmania Police*, the offender failed to ensure that the safety chain was attached between the truck and the trailer and while the offender was driving on a highway, the trailer detached from the truck. The trailer hit an oncoming vehicle resulting in the death of three people and serious injury for four others. The offender pleaded guilty to one count of causing death by negligent driving, one count of causing grievous bodily harm by negligent driving and one count of driving a vehicle that did not comply with vehicle standards. The offender was sentenced to a term of imprisonment of nine months, three months of which were suspended for two years. In addition, he was disqualified from driving for two years from release from prison. The offender appealed on the ground that the sentence was manifestly excessive, in particular that the magistrate should have imposed a fully suspended sentence.

In considering the approach to sentencing for negligent driving causing death and grievous bodily harm, Pearce J accepted the views expressed by Tasmanian courts in sentencing for the more serious driving offences of dangerous driving causing death or grievous bodily harm, namely that the general level of sentencing for serious driving offences should increase and that general deterrence was a significant sentencing consideration. His Honour stated that the sentence imposed on an offender required an examination of the level of culpability and the harm caused.

In relation to culpability for negligence, it was appropriate to consider the extent to which the applicant’s driving departed from the standard of care of a reasonable and prudent driver and the extent of the risk of death or injury posed by the negligence. In this case, factors such as speed, drugs, alcohol or the manner of the driving did not contribute to the crash. However, it was accepted that the level of negligence in this case was high and that it was a serious example of the offence given that the offender was a senior employee and had considerable experience in transport vehicles and he did nothing to secure the trailer. The truck and trailer were to be driven on a main highway which carried a high volume of traffic at high speed and that ‘it would have been obvious to a reasonably prudent driver that the consequences of the trailer becoming detached from the truck could be catastrophic’.

In relation to the consequences of the offender’s driving (the harm), it was stated that the fact that death and grievous bodily harm were caused are not aggravating factors as they are

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178 Although sentencing data are now available from the Sentencing Advisory Council’s Magistrates Court sentencing database (SACStats), see <http://www.sentencingcouncil.tas.gov.au/statistics>.
179 [2013] TASSC 64.
180 Ibid [52].
181 Ibid [54].
182 [2013] TASSC 64.
183 Ibid [49], [50].
184 Ibid [47].
elements of the offence. However, the number of people killed and injured justified an increase in the severity of the sentence.\(^{185}\) Accordingly, Pearce J was not persuaded that the decision to suspend only part of the sentence was excessive in the circumstances of the case:

This was a case in which his Honour was entitled to conclude that, even for a person of otherwise good character, the gravity of the offence and the need to condemn and deter others from such negligence required imposition of a sentence of actual imprisonment. A strong punitive measure was appropriate, notwithstanding the personal circumstances which could be properly taken into account.\(^{186}\)

The approach in *Chanlock* was subsequently used by Magistrate Webster in *Cordwell v Ellis*,\(^{187}\) where the Magistrate also relied on sentencing guidance from the Supreme Court in the exercise of the sentencing discretion for negligent driving causing death. In this case, the offender drove on the incorrect side of the road for approximately 700 metres when his vehicle collided with the vehicle driven by the deceased. The offender was sentenced to four months imprisonment, which was fully suspended for a period of two years. In sentencing, his Honour noted that youth and/or good character of offender must be regarded as subordinate to the need for a deterrent sentence. A key factor identified in sentencing was the individual facts of the case and the degree of negligence in each case, rather than treating all cases the same because the end result (death) was the same in each case.

In this case, the Magistrate considered that the defendant’s negligence was significant but not at the higher end of the scale of seriousness for offences of causing death by negligent driving. The Magistrate identified features that would have made the offence more serious, such as if the offender had driven with alcohol or illicit drugs in his system, if the offender was speeding or deliberately undertaking a dangerous manoeuvre such as overtaking on double white lines or if the offender was driving while tired or while not in a fit condition to do so. These features were absent. However, the Magistrate considered that the offender’s inadvertence and lack of attention was prolonged and not momentary.

It is noted that there has been previous comment in the Magistrates Court that has highlighted the importance of the sentencing the offender for the charge for which he or she has been convicted and not on the basis of a more serious offence. In the case of *Garth*,\(^{188}\) the offender was convicted of negligent driving causing death and was sentenced to imprisonment for nine months.\(^{189}\) This case involved conscious risk-taking as the offender drove with a blood alcohol reading of .098 and with illicit drugs in his system. He swerved to avoid a kangaroo but the effect of the alcohol and drugs he had consumed contributed to his failure to see and avoid an on-coming vehicle. He had previous drink driving convictions. In sentencing, the magistrate expressed the view that the offender’s driving ‘might have fallen into a more serious category, that is cause death by dangerous driving’. However, the magistrate observed

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185 Ibid [48].
186 Ibid [55]. The personal circumstances included the remorse of the offender and family circumstances regarding his wife’s health and good prospects of rehabilitation.
187 Webster, 25 June 2014 (Sentence). As has been noted, as a general rule, sentencing decisions from the Magistrates Court are not available. However, the court made available the decision in this case and this is the only sentencing decision available on the court’s website.
188 Magistrates Court, 13 August 2015 (Sentence).
189 The offender was also convicted of exceeding the blood alcohol concentration limit and driving with an illicit drug in his system.
that he could only sentence the offender on the basis of the less serious charge of negligent driving causing death.

### 3.6 Negligent driving causing grievous bodily harm

#### 3.6.1 Overview of the offence

This offence is contained in the *Traffic Act 1925* (Tas) s 32(2B), which provides that ‘[a] person must not cause grievous bodily harm to another person by driving a motor vehicle on a public street negligently’.

The elements of the offence are identical to those of negligent driving causing death, except that grievous bodily harm (rather than death) is caused. As indicated at [3.4], grievous bodily harm is defined as ‘any bodily injury of such a nature as to endanger or be likely to endanger life, or cause or be likely to cause serious injury to health’.  

This offence was also introduced in 2000.

#### 3.6.2 Driving behaviour

*Table 3-20: Driving behaviour, Negligent driving causing grievous bodily harm, 2008–15.*

<table>
<thead>
<tr>
<th>Driving behaviour</th>
<th>No of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alcohol/drug affected driving</td>
<td>1</td>
</tr>
<tr>
<td>Inattention</td>
<td>4</td>
</tr>
<tr>
<td>Speed</td>
<td>0</td>
</tr>
<tr>
<td>Unknown</td>
<td>2</td>
</tr>
</tbody>
</table>

#### 3.6.3 Sentencing outcomes

*Table 3-21: Negligent driving causing grievous bodily harm, Magistrates Court sentences by most serious penalty, single count, July 2006 – May 2016*

<table>
<thead>
<tr>
<th></th>
<th>Full-time imprisonment</th>
<th>Partly suspended sentence</th>
<th>Fully suspended sentence</th>
<th>Community service order</th>
<th>Fine</th>
</tr>
</thead>
<tbody>
<tr>
<td>06–07 to 10–11</td>
<td>n/a</td>
<td>n/a</td>
<td>n/a</td>
<td>n/a</td>
<td>n/a</td>
</tr>
<tr>
<td>11–12 to 15–16</td>
<td>0</td>
<td>0</td>
<td>4</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Total period</td>
<td>0</td>
<td>0</td>
<td>4</td>
<td>0</td>
<td>3</td>
</tr>
</tbody>
</table>

*Use of imprisonment and sentence length*

In the period July 2011 to May 2016, there were seven charges where a single sentence was imposed for negligent driving causing grievous bodily harm and, as with negligent driving causing death, the majority of offenders received a fully suspended sentence (57.1%).

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190 *Criminal Code* (Tas) s 1.

191 These cases were identified using the Newsbank database, which allows online searching of the Tasmanian newspapers (*The Advocate*, *The Mercury* and *The Examiner*). This may not be an exhaustive search but is indicative of the circumstances in which convictions are obtained for the offence.

192 There were no cases retrieved from the Department of Justice database for the period 2006–07 to 2010–11.
Magistrates Court comments on passing sentence and appeal decisions

As discussed above, the decision in *Charnock v Tasmania Police*\(^{193}\) outlines relevant sentencing considerations for the offence of negligent driving causing grievous bodily harm.

### 3.7 Trends across offences

#### 3.7.1 Driving behaviour

An examination of driving behaviour associated with convictions for driving offences shows that excessive speed and the consumption of alcohol and/or drugs are typically associated with convictions for manslaughter and dangerous driving causing death or grievous bodily harm. This reflects the practical overlap between the two offences in terms of the culpability of the offender (criminal negligence and driving falling fall below the standard of the ordinary prudent driver). It also reflects the finding of the TLRI’s consideration of the criminal liability of drivers who fall asleep at the wheel. The TLRI’s review of cases between 1997 and June 2010 found that:

> convictions for manslaughter arising out the use of motor vehicle and convictions for causing death by dangerous driving were both predominately associated with excessive speed and/or high blood alcohol readings/drug use. It appears that the difference between manslaughter arising out the use of a motor vehicle and causing death by dangerous driving is one of degree.\(^{194}\)

In relation to negligent driving causing death or grievous bodily harm, there were fewer offenders who engaged in deliberate bad driving (such as speeding and/or the consumption of drugs and alcohol before driving) and more convictions arising from cases of inattention. However, the analysis shows (as recognised in the DPP guidelines) that ‘[a]t its most serious the conduct can overlap with the crime of causing death by dangerous driving’.\(^{195}\)

#### 3.7.2 Sentencing outcomes

Figure 3-1 sets out the use of imprisonment for offenders convicted of driving offences causing death or serious injury in the Supreme Court between 2008 and 2015. For manslaughter and dangerous driving causing death, all offenders received an immediate custodial sentence. For those convicted of dangerous driving causing grievous bodily harm (all counts), 87.5% received an immediate custodial sentence.

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\(^{193}\) [2013] TASSC 64.

\(^{194}\) TLRI, above n 1, 22-3.

\(^{195}\) DPP, above n 13, 43.
In relation to negligent driving causing death or grievous bodily harm, full-time imprisonment is rarely used with a majority of offenders receiving a fully suspended sentence of imprisonment (see [3.6.3]).

Figure 3-2 shows the range of terms of imprisonment imposed in respect of the minimum term, the 25th percentile, median, 75th percentile and maximum term of the driving offences under consideration in this paper (manslaughter, dangerous driving causing death, dangerous driving causing grievous bodily harm, negligent driving causing death and negligent driving causing grievous bodily harm).

**Figure 3-2: Length of imprisonment for driving offences causing death or grievous bodily harm (all counts), 2008–15**
Figure 3-2 shows that sentencing for manslaughter is more severe than sentencing for dangerous driving causing death or grievous bodily harm. There is little overlap between the sentencing practices for manslaughter and dangerous driving causing death or grievous bodily harm. This reflects the increased seriousness of manslaughter given the increased culpability of the offender. This is illustrated in the cases of *Tasmania v Gallagher*196 and *Tasmania v Anderson*,197 where both offenders were convicted in relation to the death of a motorcyclist. Anderson and Gallagher had been drinking and were engaged in a mutual course of racing and dangerous driving. Anderson lost control of his vehicle and collided with the motorcyclist. He was convicted of manslaughter and sentenced to five years and eight months imprisonment. Gallagher was driving his vehicle behind Anderson’s vehicle before the crash. He was convicted of causing death by dangerous driving and sentenced to four years imprisonment. In sentencing, Slicer J acknowledged that the disparity in sentence reflected the different offences for which the offenders were convicted and also the difference in the driving records of the two men.

In contrast, there is considerable overlap in the sentencing range for dangerous driving causing death or grievous bodily harm and this reflects the fact that both involve the same fault element (dangerous driving). Although causing death is viewed more seriously that causing grievous bodily harm, in the individual circumstances of the case, the gravity of the offence in a case of dangerous driving causing grievous bodily harm may warrant a sentence more severe than some imposed for dangerous driving causing death. An illustrative case would be where grievous bodily harm is caused and the culpability of the offender is significant and the harm caused is catastrophic and long-term.198

In order to provide a full picture of the offence hierarchy for dangerous driving and negligent driving offences, Table 3-22 set out the maximum penalty, the use of an immediate term of imprisonment and the sentencing range (where applicable) for the offences that contain dangerous driving and negligent driving as an element of the offence. In addition, the offence of wanton or reckless driving causing injury is included. Although this offence is infrequently used (one case has been identified in the Magistrates Court in the period 1 July 2009 to 29 June 2015 and no cases in the Supreme Court database for the period 2001–15), it can be used where the driving takes place other than on a ‘public street’ (as applies for dangerous driving and negligent driving offences under the *Traffic Act 1925* (Tas)).199

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196 Slicer J, 18 June 2008 (Sentence).
197 Slicer J, 18 June 2008 (Sentence).
198 For example in *Moyle v Tasmania* (2010) 198 A Crim R 592, Wood J identified the significant and permanent consequences for the victim and her family as a factor warranting a significant deterrent sentence. Her Honour stated that ‘[w]hile she did not die, it is arguable that the consequences for her and her family are as bad as if she had because she has lost her life as it was, and her family have the lost the person they knew’: at [53].
199 See [2.2].
Table 3-22: Comparative table of selected driving offences, single count, Tasmania, 2008–15

<table>
<thead>
<tr>
<th>Offence</th>
<th>Maximum penalty</th>
<th>Imprisonment</th>
<th>Median (months)</th>
<th>No of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Death by dangerous driving</td>
<td>21 years</td>
<td>All cases</td>
<td>28.5</td>
<td>6</td>
</tr>
<tr>
<td>GBH by dangerous driving</td>
<td>21 years</td>
<td>50% (one of two offenders)</td>
<td>Not applicable</td>
<td>2</td>
</tr>
<tr>
<td>Dangerous driving</td>
<td>20 penalty unit fine and/or 2 years imprisonment (first offence).</td>
<td>11.5%</td>
<td>3</td>
<td>131</td>
</tr>
<tr>
<td>Wanton or furious driving causing injury</td>
<td>2 years imprisonment (summary conviction)</td>
<td>100% (only involved one case)</td>
<td>Not applicable</td>
<td>1</td>
</tr>
<tr>
<td>Death by negligent driving</td>
<td>10 penalty units and/or imprisonment for a term not exceeding 1 year (first offence).</td>
<td>0%</td>
<td>Not applicable</td>
<td>21</td>
</tr>
<tr>
<td>GBH by negligent driving</td>
<td>10 penalty unit fine and/or 6 months imprisonment (first offence)</td>
<td>0%</td>
<td>Not applicable</td>
<td>7</td>
</tr>
<tr>
<td>Negligent driving</td>
<td>A 5 penalty unit fine.</td>
<td>0%</td>
<td>Not applicable</td>
<td>299</td>
</tr>
</tbody>
</table>

Note that the data for dangerous driving, negligent driving, negligent driving causing death and negligent driving causing grievous bodily harm relate to the period July 2006 to May 2016.

This offence is contained in the Police Offences Act 1935 (Tas) s 36(1).
Figure 3-3: Sentencing outcomes by most serious penalty, summary driving offences, single count, Tasmania, July 2006 – May 2016

Current sentencing practices for driving offences that result in death or injury
A comparison of driving offences causing death or serious injury between Tasmania and other Australian states

As requested by term of reference two, in this chapter, a comparison is made between sentencing for driving offences causing death or serious injury in Tasmania and sentences for like offences in other jurisdictions.

4.1 Difficulties of inter-jurisdictional comparisons

While this is one way of attempting to assess the appropriateness of current sentencing practices for driving offences causing death or serious injury, inter-jurisdictional comparisons are problematic for a number of reasons: Australian criminal law is not uniform and offence definitions vary between jurisdictions; sentencing laws are not uniform and there are differences in the sentencing options that are available, non-parole periods and parole eligibility provisions differ (difficulties that are compounded by the use of global sentencing in Tasmania); and there are differences with respect to which offences are dealt with summarily and in higher courts.

There are also difficulties in obtaining comparable local data as these may not be publicly available, and even if available, may relate to different data periods (and so making comparisons problematic) given that judicial approaches to sentencing for particular offences have changed over time.

In making an assessment of the sentence imposed in different jurisdictions, it is important to be aware that the sentences imposed reflect the gravity of the cases that give rise to a particular charge. For example, in New South Wales, ‘practice suggests that manslaughter is rarely charged in driving cases’ but that the precise numbers are not known. This does not appear to reflect the approach in Tasmania, as in the period 2001–15, there were 11 offenders convicted of manslaughter arising from the use of a motor vehicle and 20 convicted of dangerous driving causing death. In Tasmania, manslaughter will be charged in an appropriate case where the offender’s culpability is high and it is not a principle in Tasmania that manslaughter should rarely be charged.

Differences in charging practices are also suggested by the VSAC’s examination of sentencing for major driving offences, which identified fatigue and inattention as the relevant

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202 For example, in Tasmania, the crimes of dangerous driving causing death and serious injury are indictable offences heard in the Supreme Court. In Victoria, dangerous driving causing death, negligently causing serious injury and dangerous driving causing serious injury are indictable offences but are triable summarily (Criminal Procedure Act 2009 (Vic) s 28(b)(i)). However, it is the policy of the DPP that all offences of dangerous driving causing death should be prosecuted as indictable offences and that offences of dangerous driving causing serious injury may be prosecuted summarily but that all such cases should be reviewed by the Office of Public Prosecutions (OPP): see VSAC, Major Driving Offences: Current Sentencing Practices (2015) 20. In New South Wales, local courts and higher courts have jurisdiction to hear cases of dangerous driving causing grievous bodily harm, aggravated dangerous driving causing grievous bodily harm, negligent driving causing death and negligent driving causing grievous bodily harm, information provided by Judicial Commission of New South Wales.

203 See TSAC, above n 20, 288.


205 It is noted that this figure relates to the number of convictions rather than the number of persons charged with an offence. However, it does suggest that manslaughter is a charge that is used relatively more frequently in Tasmania for driving causing death (compared to the situation in New South Wales).
driver behaviour for culpable driving causing death and dangerous driving causing death (as shown in Table 4-1).

Table 4-1: Percentage of Victorian cases containing a particular sentencing factor, 2006–07 to 2012–13

<table>
<thead>
<tr>
<th></th>
<th>Culpable driving causing death</th>
<th>Dangerous driving causing death</th>
</tr>
</thead>
<tbody>
<tr>
<td>Inattention</td>
<td>8%</td>
<td>37%</td>
</tr>
<tr>
<td>Fatigue</td>
<td>5%</td>
<td>8%</td>
</tr>
<tr>
<td>Mobile phone use</td>
<td>2%</td>
<td>0%</td>
</tr>
</tbody>
</table>

In England and Wales, prosecution guidelines set out factors relevant to charging an offender for dangerous driving compared to careless driving causing death. In relation to dangerous driving causing death, they provide as follows:

Dangerous driving includes situations where the driver has of his or her own free will adopted a particular way of driving, and also where there is a substantial error of judgement, that, even if only for a short time, amounts to driving falling far below the required standard. If the driving that caused the danger was taken as a deliberate decision, this would be an aggravating feature of the offence.

It is important to remember that the manner of the driving must be seen in the context of the surrounding circumstances in which the driving took place (for example amount of traffic, visibility, weather conditions, excess speed etc) and these unique factors will be relevant in reaching an appropriate charging decision in each case.

The test for “dangerousness” is an objective one: persistent disregard of, say, traffic directions (be they “stop”, “give way” or traffic lights) may be evidence that the manner of the driving has fallen far below the standard required, thus making a charge of dangerous driving appropriate.

The following examples of circumstances that are likely to be characterised as dangerous driving are derived from decided cases and the SGC Definitive Guideline:

- racing or competitive driving;
- failing to have a proper and safe regard for vulnerable road users such as cyclists, motorcyclists, horse riders, the elderly and pedestrians or when in the vicinity of a pedestrian crossing, hospital, school or residential home;
- speed, which is particularly inappropriate for the prevailing road or traffic conditions;
- aggressive driving, such as sudden lane changes, cutting into a line of vehicles or driving much too close to the vehicle in front;
- disregard of traffic lights and other road signs, which, on an objective analysis, would appear to be deliberate;
- disregard of warnings from fellow passengers;
- overtaking which could not have been carried out safely;

206 VSAC, above n 202, 27, 38.
• driving when knowingly suffering from a medical or physical condition that significantly and dangerously impairs the offender's driving skills such as having an arm or leg in plaster, or impaired eyesight. It can include the failure to take prescribed medication;

• driving when knowingly deprived of adequate sleep or rest;

• driving a vehicle knowing it has a dangerous defect or is poorly maintained or is dangerously loaded;

• using a hand-held mobile phone or other hand-held electronic equipment whether as a phone or to compose or read text messages when the driver was avoidably and dangerously distracted by that use; R v Browning (2001) EWCA Crim 1831, R v Payne (2007) EWCA Crim 157;

• driving whilst avoidably and dangerously distracted such as whilst reading a newspaper/map, talking to and looking at a passenger, selecting and lighting a cigarette or by adjusting the controls of electronic equipment such as a radio, hands-free mobile phone or satellite navigation equipment;

• a brief but obvious danger arising from a seriously dangerous manoeuvre. This covers situations where a driver has made a mistake or an error of judgement that was so substantial that it caused the driving to be dangerous even for only a short time. Cases that illustrate this principle include:

  o Att Gen’s Reference No 32 of 2001 (2002) 1 Cr App R (S) 121 (offender failed to stop at a junction where there was a give way sign, failing to see a taxi that was being driven across the junction perfectly properly and colliding with it);

  o Att Gen’s Reference No 4 of 2000 [2001] EWCA Crim 780 (offender unintentionally pressed the accelerator instead of the brake);

  o Att Gen’s Reference No 76 of 2002 (Hodges) (2003) 1 Cr App R (S) 100 (offender drove across a junction marked by a give way sign and collided with a car that was being driven along the major road and had no explanation for his failure to see the other car) “this was a single misjudgement. It was a bad misjudgement but nevertheless a single one” (p 423).

It is not necessary to consider what the driver thought about the possible consequences of his actions: simply whether or not a competent and careful driver would have observed, appreciated and guarded against obvious and material dangers.

In the case of a vehicle in such a state of disrepair as to be dangerous, consideration should be given to whether the vehicle should have been driven at all, as well as to how it was driven in the particular circumstances.207

In relation to careless driving, the guidelines provides as follows:

There are decided cases that provide some guidance as to the driving that courts will regard as careless or inconsiderate and the following examples are typical of what we are likely to regard as careless driving:

• overtaking on the inside;
• driving inappropriately close to another vehicle;
• inadvertently driving through a red light;
• emerging from a side road into the path of another vehicle;
• tuning a car radio; when the driver was avoidably distracted by this action;
• using a hand-held mobile phone or other hand-held electronic equipment when the driver was avoidably distracted by that use (note that this is an offence itself under Regulation 110 of the Road Vehicles (Construction and Use) (Amendment) (No. 4) Regulations 2003). If this is the only relevant aspect of the case it is more appropriate to use the specific offence;
• selecting and lighting a cigarette or similar when the driver was avoidably distracted by that use.

These examples are merely indicative of what can amount to careless driving. In addition, prosecutors should note that some of these examples also fall within the examples of dangerous driving. …

Prosecutors must note that the same factors must be taken into consideration as those outlined for the charging practice in respect of dangerous driving offences under section 2 of the RTA 1988. The manner of the driving must be seen in the context of the surrounding circumstances in which they took place (for example; amount of traffic, visibility, weather conditions, excess speed etc). The circumstances in every case will be unique and must be considered in each case before reaching a decision as to the appropriate charge.

It is necessary to put the facts into context, decide the degree to which the standard of driving fell below that required, and consider whether the particular facts of the case warrant a charge under section 3 of the RTA 1988 (careless driving) or under section 2 of the RTA 1988 (dangerous driving).208

In Tasmania, there were no cases where a conviction was obtained for dangerous driving causing death or grievous bodily harm or manslaughter in circumstances where the offender was tired or otherwise not paying proper attention. As discussed in Chapter 3, when examining cases where convictions were obtained, these offences were limited to cases of deliberate bad driving such as speeding and/or driving while affected by drugs and/or alcohol. However, it is noted that there are relatively few cases of driving causing death or serious injury in Tasmania and the charge relied upon by the prosecution reflects all the circumstances in the individual case and so it cannot be said that an offender would never be charged with dangerous driving in cases of fatigue or failure to pay attention.

Statistical sentencing data are also limited in the ability to make comparisons between sentencing practices for each jurisdiction because it is not possible to consider the specific details of the cases and so make an assessment of sentencing for comparable circumstances. It is not possible to determine from the sentencing statistics whether like cases are sentenced alike in different jurisdictions. While statistical information allows sentencing ranges to be determined, there are only a small number of offenders sentenced in Tasmania compared with larger jurisdictions such as Victoria and New South Wales. This makes identification of a settled sentencing pattern difficult in Tasmania and means that caution needs to be applied when reviewing statistics.

208 Ibid.
Bearing these limitations in mind, sentencing for driving offences causing death or serious injury in Tasmania can be assessed against sentencing in other jurisdictions in a number of ways:

1) examining maximum penalties;
2) examining the use of imprisonment; and
3) examining the length of the sentence of imprisonment imposed.

4.2 The maximum penalty

The maximum penalty for a particular offence can be used as a measure of the appropriateness of sentence. It is an expression of Parliament’s view of the relative seriousness of particular offences.

4.2.1 Indictable offences

In Tasmania, as discussed, given that the Criminal Code (Tas) does not contain graduated penalties and the general maximum penalty that is provided for all offences is imprisonment for 21 years, there is no statutory indication of the relative seriousness of offences. However, the general maximum can be compared with the maximum penalties for driving offences causing death or serious injury in other jurisdictions.

The maximum penalties provide an indication of offence hierarchy and, as Tables 4-2 to 4-4 show, penalties in other jurisdictions are generally graduated in terms of culpability (the fault element) and harm caused (the consequence). The maximum penalties are typically higher for driving that causes death relative to driving that causes grievous bodily harm and the level of penalty also reflects the levels of culpability of the offender. This structure generally reflects the offence hierarchy indicated in the decisions of the Tasmanian Supreme Court.209

Manslaughter/culpable driving causing death

In Tasmania, as discussed, motor manslaughter is not a separate offence but the factual circumstance of manslaughter and liability for manslaughter arising out of the use of a motor vehicle is usually based on culpable negligence. This fault element is the same as for the offence of culpable driving causing death that exists in South Australia, Victoria and the Australian Capital Territory.210 In these jurisdictions, manslaughter and culpable driving causing death co-exist and reflect a historical perception that juries were reluctant to convict an offender for manslaughter when it arose out the use of the motor vehicle.211 In Victoria, the maximum penalty for manslaughter and culpable driving causing death are the same but in South Australia and the Australian Capital Territory, the maximum penalty for the offences differ (with manslaughter having a longer maximum penalty).212

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209 See Chapter Three.
210 See Appendix A.
211 See discussion in Stanley Yeo, ‘Manslaughter v Special Homicide Offences: An Australian Perspective’ in Chris Clarkson and Sally Cunningham (eds), Criminal Liability for Non-Aggressive Death (Routledge, 2008) 217. It is noted that in Victoria the maximum penalty for culpable driving causing death was considerably less than that provided for manslaughter (seven years compared to 20 years). However, both offences now have the same maximum penalty: see Yeo, at 217.
212 See Appendix A.
Table 4.2: Range of statutory maximum penalties for manslaughter/culpable driving causing death

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Maximum penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tasmania</td>
<td>21 years</td>
</tr>
<tr>
<td>New South Wales</td>
<td>25 years</td>
</tr>
<tr>
<td>Victoria</td>
<td>20 years</td>
</tr>
<tr>
<td>Queensland</td>
<td>Life</td>
</tr>
<tr>
<td>South Australia</td>
<td>15 years – life and must disqualify from driving for at least 10 years</td>
</tr>
<tr>
<td>Western Australia</td>
<td>Life</td>
</tr>
<tr>
<td>Australian Capital Territory</td>
<td>14–20 years</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>Life</td>
</tr>
<tr>
<td>New Zealand</td>
<td>Life</td>
</tr>
<tr>
<td>England</td>
<td>Life</td>
</tr>
</tbody>
</table>

Dangerous driving causing death

All jurisdictions (other than the Australian Capital Territory) have an offence of dangerous driving causing death.213

In New South Wales, South Australia, Queensland and Western Australia, there are increased penalties for aggravated offences. There are jurisdictional differences in the circumstances that are considered to be aggravating. In New South Wales, circumstances of aggravation are that the offender:

- drove with a blood alcohol concentration of 0.15 or more;
- exceeded the speed limit by more than 45 km/h;
- was escaping pursuit by police;
- had an ability to drive that was very substantially impaired by the fact that under the influence of a drug (other than alcohol) or a combination of drugs.214

In Western Australia, circumstances of aggravation are that the offender:

- exceeded the speed limit by more than 45 km/h;
- was escaping pursuit by police (it does not matter whether the pursuit had been suspended or terminated at the time of the offence);
- was unlawfully driving without the consent of the owner.215

In Queensland, circumstances of aggravation are that the offender was:

- adversely affected by an intoxicating substance;
- was taking part in an unlawful race or speed trial;
- was excessively speeding.216

213 In the ACT, there are offences of causing death by culpable driving, causing death by aggravated culpable driving and negligent driving causing death, see Appendix A.
214 Crimes Act 1900 (NSW) s 52A(7).
215 Road Traffic Act 1974 (WA) s 49AB.
In South Australia, aggravating circumstances are that the offender:

- exceeded the speed limit by more than 45 km/h;
- was escaping pursuit by police;
- was in a street race;
- was disqualified or suspended from holding driver’s licence;
- committed the offence as part of prolonged, persistent and deliberate course of very bad driving;
- drove with a blood alcohol concentration of 0.08 or more;
- drove under the influence of an intoxicating liquor or drugs;
- drove with a prescribed drug in his/her blood.

In South Australia, legislation also provides for increased penalties for second and subsequent offences. It is also noted that in South Australia, the maximum penalty for culpable driving causing death is the same as for dangerous driving causing death.\(^{217}\)

**Table 4-3: Range of statutory maximum penalties for dangerous driving causing death**

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Maximum penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tasmania</td>
<td>21 years</td>
</tr>
<tr>
<td>New South Wales</td>
<td>10–14 years</td>
</tr>
<tr>
<td>Victoria</td>
<td>10 years</td>
</tr>
<tr>
<td>Queensland</td>
<td>10–14 years</td>
</tr>
<tr>
<td>South Australia</td>
<td>15 years – life and must disqualify from driving for at least 10 years</td>
</tr>
</tbody>
</table>
| Western Australia        | 10–20 years. Also a mandatory term of imprisonment of 12 months (if aggravated circumstance)  
                          | Mandatory licence disqualification of at least 12 months  |
| Australian Capital Territory | No equivalent offence                                    |
| Northern Territory       | 10 years                                                  |
| New Zealand              | 10 years or a $20 000 fine                                |
| England                  | 14 years                                                  |

**Dangerous driving causing grievous bodily harm**

All jurisdictions (other than the Australian Capital Territory)\(^{218}\) have an offence of dangerous driving causing grievous bodily harm or serious injury.

As with dangerous driving causing death, in New South Wales, South Australia, Queensland and Western Australia, there are increased penalties for aggravated offences and in South Australia there is an increased maximum penalty for repeat offenders. In Queensland and South Australia, the same maximum penalty applies regardless of whether death or grievous

\(^{216}\) *Criminal Code* (Qld) s 328A(4).

\(^{217}\) See Appendix A.

\(^{218}\) In the ACT, there are offences of causing grievous bodily harm by culpable driving, causing grievous bodily harm by aggravated culpable driving and negligent driving causing grievous bodily harm, see Appendix A.
bodily harm is caused. In addition, in South Australia, the maximum penalty for culpable
driving death is the same as for dangerous driving causing grievous bodily harm. 219

Table 4-4: Range of statutory maximum penalties for dangerous driving causing
grievous bodily harm

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Maximum penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tasmania</td>
<td>21 years</td>
</tr>
<tr>
<td>New South Wales</td>
<td>7–11 years</td>
</tr>
<tr>
<td>Victoria</td>
<td>5 years</td>
</tr>
<tr>
<td>Queensland</td>
<td>10–14 years</td>
</tr>
<tr>
<td>South Australia</td>
<td>15 years – life and must disqualify from driving for at least 10 years</td>
</tr>
<tr>
<td>Western Australia</td>
<td>7–14 years</td>
</tr>
<tr>
<td></td>
<td>There is mandatory licence disqualification of at least 12 months.</td>
</tr>
<tr>
<td>Australian Capital Territory</td>
<td>No equivalent offence</td>
</tr>
<tr>
<td>Northern Territory</td>
<td>7 years</td>
</tr>
<tr>
<td>New Zealand</td>
<td>5 years or a $20 000 fine</td>
</tr>
<tr>
<td>England</td>
<td>Crown court – 5 years and/or a fine</td>
</tr>
<tr>
<td></td>
<td>Magistrates Court Level 5 fine and/or 6 months imprisonment</td>
</tr>
</tbody>
</table>

4.2.2 Summary offences

In Tasmania, individual maximum penalties are provided for the summary offences of
negligent driving causing death or grievous bodily harm, which allows a direct comparison to
be made with the statutory maximum penalty that exists in other jurisdictions. Equivalent
offences exist in New South Wales, South Australia, the Australian Capital Territory, New
Zealand and England (cause death only). In Australia, not all jurisdictions have an offence
that is equivalent to negligent driving causing death or grievous bodily harm. This means that
in Victoria, Queensland, Western Australia and the Northern Territory, if serious injury or
death is caused but the offender’s driving does not meet the objective standard for dangerous
driving, the offender can only be convicted of a summary offence such as careless driving. 220
There is no intermediate offence between dangerous driving causing death or grievous bodily
harm and negligent or careless driving.

In New Zealand, aggravated offences exist (with enhanced penalties) and apply in cases
where the driver was exceeding the speed limit or driving in such a manner so as to commit
an offence against the rules about overtaking or driving in the correct portion of the road. 221

219 See Appendix A.

220 In Victoria, the penalty for careless driving is a fine of 12 penalty units (1st offence) and 25 penalty units
(subsequent offence), Road Safety Act 1986 (Vic) s 65(1). A penalty unit is $151.67
(<http://www.justice.vic.gov.au/home/justice+system/fines+and+penalties/penalties+and+values/>). In
Queensland, the penalty for careless driving is a fine of 40 penalty units or six months imprisonment,
Transport Operations (Road Use Management) Act 1995 (Qld) s 83. A penalty unit is $121.90
In Western Australia, the penalty for careless driving is a fine of 12 penalty units
(<https://rsc.wa.gov.au/Road-Rules-Penalties>), In the Northern Territory, there are various penalties prescribed for summary driving offences (for example, failure to give way – 100 penalty units, overtake incorrectly – 70 penalty units), see Traffic Regulations 1988 (NT) Appendix 1. A penalty unit is $50.00.
(<http://www.treasury.nt.gov.au/TaxesRoyaltiesAndGrants/AboutTerritoryRevenueOffice/Pages/Penalty-Units.aspx>).

221 Land Transport Act 1998 (NZ) s 39.
There is also a specific offence of careless driving causing injury or death while under the influence of alcohol and/or drugs or while a controlled drug is present in the system. This has the same penalty as aggravated careless driving causing injury or death (three years or a fine not exceeding $10 000). Similarly, in England, there are specific careless driving offences that apply where the offender caused death while under the influence of drink or alcohol. However, this has a significant maximum penalty (14 years) compared with causing death by careless driving heard in the magistrates court (six months). There is also an offence of causing death by driving while unlicensed, disqualified or uninsured, which has a penalty of two years imprisonment. There is no requirement for the offender’s driving to be careless. There is no equivalent English offence of careless or negligent driving causing grievous bodily harm.

**Negligent driving causing death**

Table 4-5: Range of statutory maximum penalties for negligent driving causing death

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Maximum penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tasmania</td>
<td>10–20 penalty units fine and 1–2 years.</td>
</tr>
<tr>
<td>New South Wales</td>
<td>30–50 penalty units fine and/or imprisonment for 18 months – 2 years.</td>
</tr>
<tr>
<td>South Australia</td>
<td>1 year and mandatory licence disqualification of not less than 6 months.</td>
</tr>
<tr>
<td>Australian Capital Territory</td>
<td>200 penalty units and/or imprisonment for 2 years.</td>
</tr>
<tr>
<td>New Zealand</td>
<td>3 months – 3 years or fine $4500 - $10 000.</td>
</tr>
<tr>
<td>England</td>
<td>On indictment – 5 years. Magistrates Court – 6 months and/or level 5 fine.</td>
</tr>
</tbody>
</table>

**Negligent driving causing grievous bodily harm**

Table 4-6: Range of statutory maximum penalties for negligent driving causing grievous bodily harm

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Maximum penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tasmania</td>
<td>Fine 10–20 penalty units fine and imprisonment not exceeding 6 months – 1 year.</td>
</tr>
<tr>
<td>New South Wales</td>
<td>20–30 penalty units fine and/or imprisonment for 9–12 months.</td>
</tr>
<tr>
<td>South Australia</td>
<td>12 months imprisonment and mandatory licence disqualification of not less than 6 months.</td>
</tr>
<tr>
<td>Australian Capital Territory</td>
<td>100 penalty units and/or imprisonment for 1 year.</td>
</tr>
<tr>
<td>New Zealand</td>
<td>3 months – 3 years or fine $4500 – $10 000.</td>
</tr>
</tbody>
</table>

**Discussion**

As shown in Figure 4-1, there is considerable jurisdictional variation in the maximum penalty for negligent or careless driving causing death or grievous bodily harm.

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222 Ibid s 62.
223 See Appendix A.
224 See Appendix A.
It is also noted that, in other jurisdictions, the maximum penalty applicable for negligent or careless driving causing death or serious injury is considerably less than the maximum penalty that exists for the offences of death or serious injury caused by dangerous driving. This is set out in Figures 4-2 and 4-3.
It is noted that in New Zealand, the offence categories refer to careless or dangerous driving causing injury (rather than grievous bodily harm).

4.3 Custodial sentence

An assessment of sentencing practice can be made by comparing the use of the various sentencing options (immediate imprisonment, partly suspended sentences, fully suspended sentences and non-custodial orders) in Tasmania with the approach in other jurisdictions.

Inter-jurisdictional data on the use of custody for various offences are available from the Australian Bureau of Statistics (ABS) data contained in the Criminal Courts, Australia series. However, the broad offence categories used in these data do not allow any analysis to be made of sentencing practices in different jurisdictions for the offences under consideration in this paper. Instead, comparisons are made between the sentences imposed for specific driving offences causing death or grievous bodily harm in Tasmania with those imposed for equivalent offences in other jurisdictions. In this paper, Victoria, New South Wales and Queensland have been chosen based on the accessibility of data. However, in relation to the offence of manslaughter or culpable negligence causing death, data is only available from Victoria as it is not possible to isolate the manslaughter cases in Queensland and New South Wales that relate to the use of a motor vehicle.

4.3.1 Indictable offences

Manslaughter/culpable driving causing death

A comparison of full-time imprisonment rates for manslaughter/culpable driving causing death in Tasmania and Victoria is set out in Figure 4-4. This shows that Tasmania had the higher rate of imprisonment with all offenders receiving a sentence of imprisonment. However, it is noted that the number of offenders in Tasmania is very small (five offenders in relation to all counts).

Figure 4-4: Sentencing outcomes for manslaughter/culpable driving causing death, Victoria,\(^\text{227}\) Tasmania\(^\text{228}\)

\(^{227}\) VSAC, above n 202, 32. This relates to the period 2006–07 to 2012–13 for charges. The Victorian data includes nine charges where an offender was sentenced to a youth justice detention order. There were no offenders sentenced under the Youth Justice Act 1997 (Tas) in the Tasmanian sample.

\(^{228}\) 2008–15 (all counts).
Dangerous driving causing death

Figure 4-5 provides a comparison of full-time imprisonment rates for dangerous driving causing death in Tasmania, Victoria, Queensland and New South Wales. It is noted that the Queensland offence includes both dangerous driving causing death or grievous bodily harm and so the data include both consequences. This means that the sentence imposed for dangerous driving causing death is likely to be understated.\(^{229}\) It is also noted that in New South Wales and Queensland, the sentencing data was separated between aggravated dangerous driving causing death and other cases, and so to allow a comparison with the Tasmanian data, these categories have been combined.

Figure 4-5 shows that Tasmania had the higher rate of imprisonment with all offenders receiving a sentence of imprisonment. However, it is noted that the number of offenders in Tasmania was again very small (six offenders).

**Figure 4-5:** Sentencing outcomes for dangerous driving causing death, Victoria,\(^ {230}\) Queensland,\(^ {231}\) New South Wales,\(^ {232}\) Tasmania\(^ {233}\)

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\(^{229}\) It is noted that Brignell and Donnelly, above n 204, 25 examined the sentencing data for offences under the *Criminal Code* (Qld) s 328A over the period 1 July 2007 to 30 June 2013 and isolated cases where death was caused. They reported that 35.7% of offenders received a full-time sentence of imprisonment and 40.7% of offenders received a partly suspended sentence.

\(^{230}\) VSAC, above n 202, 43. This relates to the period 2006–07 to 2012–13 for individual charges.

\(^{231}\) Data obtained from Queensland Sentencing Information Service, November 2008 to October 2015.

\(^{232}\) Data obtained from Judicial Commission of New South Wales 1 July 2011 to 30 June 2015.

\(^{233}\) 2008–15 (single counts).
figures for Victoria do not sum to total due to rounding

In New South Wales, additional information about the approach to sentencing for serious cases of driving causing death or serious injury can be found in the guideline judgment of *R v Whyte*,\(^{234}\) which reformulated the principles set out in *R v Jurisic*.\(^{235}\) The Court of Criminal Appeal stated that for the offence of dangerous driving causing death, ‘a custodial sentence will usually be appropriate unless the offender has a low level of moral culpability, as in the case of momentary inattention or misjudgment’.\(^{236}\) In determining the moral culpability of the offender, the courts have referred to the concept of ‘abandonment of responsibility’, and this concept is:

\[
\text{directed to the objective gravity of the offence. It is concerned, where relevant, with the extent to which the driver was affected by alcohol or a drug and, generally, with the course of driving and the danger posed by it in its attendant circumstances.}\(^{237}\)
\]

A person who drives with a high level of blood alcohol concentration (0.15 or above) is, ‘without more, morally culpable in high degree. That degree of moral culpability is increased very sharply indeed when the result of such irresponsible behaviour is … death … and serious injury’.\(^{238}\) The risk created by the driving and the driver’s awareness of the risk are also relevant to the assessment of moral culpability.\(^{239}\) The Judicial Commission of New South Wales has observed that where it is determined that an offender has abandoned his or her responsibility a full time custodial sentence may be inevitable.\(^{240}\) However, this does not mean that in other cases a full time custodial sentence can always be avoided.\(^{241}\)

*Dangerous driving causing grievous bodily harm*

Figure 4-6 provides a comparison of full-time imprisonment rates for dangerous driving causing grievous bodily harm in Tasmania, Victoria, Queensland and New South Wales. It is

\(^{236}\) Ibid [214].
\(^{237}\) Rosenthal v R [2008] NSWCCA 149 [16].
\(^{238}\) R v Veatufunga [2007] NSWCCA 54 [19].
\(^{241}\) Ibid citing *R v Dutton* [2005] NSWCCA 248 [29].
noted that the Queensland offence includes both dangerous driving causing death or grievous bodily harm and so the data include both consequences. This means that the sentence imposed for dangerous driving causing grievous bodily harm is likely to be overstated. It is also noted that in New South Wales and Queensland, the sentencing data was separated between aggravated dangerous driving causing death and other cases, and so to allow a comparison with the Tasmanian data, these categories have been combined.

Figure 4-6 shows that Tasmania had the highest rate of imprisonment of all the jurisdictions but it is noted that the sample size for Tasmania was again very small (two offenders). However, the sentencing data does show that the offence of dangerous driving causing grievous bodily harm does not inevitably receive a sentence of immediate imprisonment in other comparable jurisdictions.

**Figure 4-6: Sentencing outcomes for dangerous driving causing grievous bodily harm, Victoria, Queensland, New South Wales, Tasmania**

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Imprisonment</th>
<th>Partly suspended sentence</th>
<th>Fully suspended sentence</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>NSW (n=225)</td>
<td>36.9%</td>
<td>20.4%</td>
<td>40.9%</td>
<td>1.5%</td>
</tr>
<tr>
<td>Qld (n=457)</td>
<td>42.7%</td>
<td>30.9%</td>
<td>27.6%</td>
<td>1.5%</td>
</tr>
<tr>
<td>Vic (n=145)</td>
<td>47%</td>
<td>8%</td>
<td>33%</td>
<td>12%</td>
</tr>
<tr>
<td>Tas (n=2)</td>
<td>50%</td>
<td>0%</td>
<td>50%</td>
<td>0%</td>
</tr>
</tbody>
</table>

**4.3.2 Summary offences**

**Negligent driving causing death**

Figure 4-7 provides a comparison of the sentencing outcomes for negligent driving causing death in New South Wales and Tasmania. An equivalent offence also exists in South Australia and the Australian Capital Territory but sentencing data is not available from those jurisdictions. However, it appears that sentences other than full-time imprisonment are used in

---

242 It is noted that Brignell and Donnelly, above n 204, 25 examined the sentencing data for offences under the *Criminal Code* (Qld) s 328A over the period 1 July 2007 to 30 June 2013 and isolated cases where death was caused. They reported that 35.7% of offenders received a full-time sentence of imprisonment and 40.7% of offenders received a partly suspended sentence.

243 VSAC, above n 202, 65. This relates to the period 2006–07 to 2012–13 for individual charges.

244 Data obtained from Queensland Sentencing Information Service, November 2008 to October 2015. This is the same as for dangerous driving causing death as the sentencing data for death and causing grievous bodily harm are combined.

245 Data obtained from Judicial Commission of New South Wales 1 July 2011 to 30 June 2015. It is noted that the offences of aggravated dangerous driving causing grievous bodily harm and dangerous driving causing grievous bodily harm can be heard in the lower court and the higher courts (County Court and Supreme Court). Of the 225 cases, 84 were heard in the higher court and 63% of offender (n=53) received a sentence of immediate imprisonment. Partly suspended sentences are not a sentencing option in New South Wales.

those jurisdictions. In the Australian Capital Territory, imprisonment is considered to be inappropriate for offences of negligent driving causing death at the lower end of offending. In England, causing death by careless driving can be heard in the Crown Court or the Magistrates Court. Community based sentences have also been recognised as being appropriate for this offence in that jurisdiction.

### Figure 4-7: Sentencing outcomes for negligent driving causing death, New South Wales, Tasmania

As shown in Figure 4-7, in New South Wales, very few offenders were sentenced to immediate imprisonment for negligent driving causing death with the most commonly used sanction being a good behaviour bond. This is a less serious sanction than a fully suspended sentence and more akin to a conditional unsupervised release order in Tasmania. In contrast, in Tasmania 90% of offenders received a custodial sentence (10% partly suspended sentence and 80% fully suspended sentence).

#### Negligent driving causing grievous bodily harm

Figure 4-8 provides a comparison of the sentencing outcomes for negligent driving causing grievous bodily harm in New South Wales and Tasmania. An equivalent offence also exists in South Australia and the Australian Capital Territory but sentencing data is not available from

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250 Data obtained from Judicial Commission of New South Wales 1 July 2011 to 30 June 2015. It is noted that negligent driving causing grievous bodily harm can be heard in the lower and higher courts. In this period, 1042 cases were heard in the local court and 2 in the higher court.

251 July 2011 to May 2016 (charges).

252 See Sentencing Act 1997 (Tas) s 101.
those jurisdictions. However, it appears that sentences other than full-time imprisonment are used in those jurisdictions.\footnote{253}

**Figure 4-8: Sentencing outcomes for negligent driving causing grievous bodily harm, New South Wales,\footnote{254} Tasmania\footnote{255}**

<table>
<thead>
<tr>
<th></th>
<th>NSW (n = 1044)</th>
<th>Tas (n = 7)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Imprisonment</td>
<td>0.7</td>
<td>57.1</td>
</tr>
<tr>
<td>Partly suspended sentence</td>
<td>7.1</td>
<td>28.4</td>
</tr>
<tr>
<td>Fully suspended sentence</td>
<td>2.4</td>
<td>42.9</td>
</tr>
<tr>
<td>Good behaviour bond</td>
<td>56.8</td>
<td></td>
</tr>
<tr>
<td>Community service order</td>
<td>4.7</td>
<td></td>
</tr>
<tr>
<td>Other</td>
<td>5.8</td>
<td>0.6</td>
</tr>
<tr>
<td>Fine</td>
<td>56.8</td>
<td>0.0</td>
</tr>
</tbody>
</table>

* figures do not sum to total due to rounding

Again, in New South Wales, imprisonment is very rarely used for negligent driving causing grievous bodily harm and considerable use is made of the good behaviour bond. In Tasmania, a fully suspended sentence of imprisonment was used most frequently.

### 4.4 Sentence length

This paper uses the median sentence length imposed for an offence as the basis of inter-jurisdictional comparison.\footnote{256} The median is the ‘sentence that lies in the middle of the distribution of sentences (the 50th percentile). Half of the cases lie above and half of the cases lie below’.\footnote{257} It is less likely to be skewed by outlier sentences than the mean (average) sentence.\footnote{258} Accordingly, the median is useful as a measure of central tendency. However, as has been recognised, ‘the determination or calculation of the median sentence imposed for any particular offence says little (if anything) about the appropriateness of any specific sentence in any individual case’.\footnote{259}

Information is also provided (where available) about the range of sentences imposed — the lowest and highest sentence imposed — as another measure of sentencing practice in the different jurisdictions.

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\footnote{253}{See for example, Alexandra Back, ‘Elderly Driver Fined for Scooter Collision’, *The Canberra Times* (Canberra), 2 April 2016 ($2200 fine).}

\footnote{254}{Data obtained from Judicial Commission of New South Wales 1 July 2011 to 30 June 2015. It is noted that negligent driving causing death can be heard in the lower and higher courts. In this period, 122 cases were heard in the local court and 10 in the higher court.}

\footnote{255}{July 2011 to May 2016 (charges).}

\footnote{256}{It is noted that while the head sentences provide one measure, jurisdictions vary in relation to the relationship between the head sentence and actual time served, that is, how parole operates.}

\footnote{257}{Brignell and Donnelly, above n 204, 7.}

\footnote{258}{Ibid.}

\footnote{259}{*Stephens v The Queen* [2016] VSCA 121 [37] (Redlich, Santamaria and Beach JJA).}
4.4.1 Indictable offences

**Manslaughter/culpable driving causing death**

Figure 4-9 shows that Tasmania’s median sentence for a single count of manslaughter is five years (n=3) and eight months compared to five years and six months in Victoria for culpable driving causing death. In Tasmania, the minimum sentence was 60 months (five years) and the maximum sentence was 84 months (seven years).

In the period 2009-10 to 2013-14, in Victoria, sentences for culpable driving causing death ranged from three years to 10 years and 6 months.\(^{260}\)

**Figure 4-9: Median head for manslaughter/culpable driving causing death (in months), Victoria, Tasmania**\(^{261}\)

In relation to total effective sentence, the median sentence in Tasmania for all counts of manslaughter (n=5) was five years and six months. In Victoria, the median total effective term of imprisonment (n=105) was six years and one month.\(^{263}\)

**Dangerous driving causing death**

Figure 4-10 provides a comparison of the median head sentence for dangerous driving causing death in Victoria, Queensland, New South Wales and Tasmania. It shows that the highest median sentence is imposed in Queensland, followed by New South Wales, Victoria and then Tasmania.

Data provided by the Judicial Commission of New South Wales, indicates that the sentencing range for dangerous driving causing death was 18 months (one year and six months) to 63 months (five years and three months) and for aggravated dangerous driving 33 months (two years and nine months) to 120 months (12 years). In Queensland, the shortest sentence imposed for dangerous driving causing death or grievous bodily harm was between 13 months and 18 months and the longest sentence was between nine years and one day and ten years. For aggravated dangerous driving causing death or grievous bodily harm, the shortest


\(^{261}\) VSAC, above n 202, 32. This relates to the period 2006–07 to 2012–13. The Victorian data includes nine cases where an offender was sentenced to a youth justice detention order. There were no offenders sentenced under the *Youth Justice Act 1997* (Tas) in the Tasmanian sample.

\(^{262}\) 2008–15 (single counts).

\(^{263}\) VSAC, above n 202, 33.
sentence was between 13 months and 18 months and the longest sentence was between eight years and one day and nine years.\textsuperscript{264}

In Tasmania, the range for a single count of dangerous driving causing death was six months to 48 months (four years).

**Table 4-7: Minimum and maximum penalty for dangerous driving causing death, New South Wales, Queensland and Tasmania**

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Minimum (months)</th>
<th>Maximum (months)</th>
</tr>
</thead>
<tbody>
<tr>
<td>NSW – Dangerous driving causing death</td>
<td>18</td>
<td>63</td>
</tr>
<tr>
<td>NSW – Aggravated dangerous driving</td>
<td>33</td>
<td>120</td>
</tr>
<tr>
<td>Qld – Dangerous driving causing death or GBH</td>
<td>Between 13 and 18</td>
<td>Between 109 and 120</td>
</tr>
<tr>
<td>Qld – Aggravated dangerous driving causing death or GBH</td>
<td>Between 13 and 18</td>
<td>Between 97 and 108</td>
</tr>
<tr>
<td>Tasmania</td>
<td>6</td>
<td>48</td>
</tr>
</tbody>
</table>

**Figure 4.10:** Median head sentence for dangerous driving causing death, Victoria,\textsuperscript{265} Queensland,\textsuperscript{266} New South Wales,\textsuperscript{267} Tasmania\textsuperscript{268}

In their consideration of sentencing for dangerous/culpable driving causing death offences in New South Wales, Queensland and Victoria, Brignell and Donnelly suggested that higher ranking median sentences observed for Queensland may be due in part to the number of offenders who receive partially suspended sentences.\textsuperscript{269} This observation acknowledges that

\textsuperscript{264} Queensland Sentencing Information Service.

\textsuperscript{265} VSAC, above n 202, 43. This relates to the period 2006–07 to 2012–13 for individual charges.

\textsuperscript{266} Brignell and Donnelly, above n 204, 26. This relates to the period 1 July 2007 to 30 June 2013. This analysis analysed and coded judgments to isolate cases where the offence under the *Criminal Code* (Qld) s 328A resulted in death (rather than grievous bodily harm). It was noted that in 28 cases (of the 448 cases) sentencing comments were not available and of the remaining 420, 182 resulted in death while 227 resulted in grievous bodily harm. In the remaining case, the judgment did not specify the harm caused and this was excluded.

\textsuperscript{267} Data obtained from Judicial Commission of New South Wales 1 July 2011 to 30 June 2015.

\textsuperscript{268} 2008–15 (single counts).

\textsuperscript{269} Brignell and Donnelly, above n 204, 26. It is also noted that the offence in Queensland covers death and grievous bodily harm.
an assessment of sentencing needs to take account of the sentence length and the use of different sentencing types. Similarly, previous research has acknowledged the limitations in measuring sentencing severity solely through the length of imprisonment terms imposed and ways of marrying this with the proportion of offenders that receive imprisonment have been suggested.270 One method used to overcome this limitation has been referred to as the ‘Fisher Formula’. This method multiplies the median term of imprisonment imposed (in years) with the imprisonment rate to obtain a ‘seriousness score’.271

Using this measure, as shown in Table 4.8, sentencing for dangerous driving causing death in Tasmania is more severe than all other jurisdictions, except for the aggravated form of the offence in New South Wales. However, as has been acknowledged, the very small number of offenders in Tasmania means that caution is required.

Table 4-8: Seriousness score, Dangerous driving causing death, Victoria, Queensland, New South Wales and Tasmania

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Median</th>
<th>Imprisonment rate</th>
<th>Seriousness Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>New South Wales (aggravated)</td>
<td>4.5</td>
<td>100%</td>
<td>4.5</td>
</tr>
<tr>
<td>New South Wales (other cases)</td>
<td>3</td>
<td>69.5%</td>
<td>2.1</td>
</tr>
<tr>
<td>Queensland</td>
<td>5.5</td>
<td>35.7%272</td>
<td>2</td>
</tr>
<tr>
<td>Victoria</td>
<td>3</td>
<td>38%</td>
<td>1.1</td>
</tr>
<tr>
<td>Tasmania</td>
<td>2.4</td>
<td>100%</td>
<td>2.4</td>
</tr>
</tbody>
</table>

In Stephens v The Queen,273 the Victorian Court of Appeal expressed the view that current sentencing standards for offences in the mid-category of seriousness were inadequate and that there needed to be a gradual increase in the sentences to be imposed for cases of dangerous driving causing death which fell within or above the mid-category of seriousness.274 The court’s conclusion on the inadequacy of current sentencing practice was based on the reasoning set out in Harrison v The Queen275 (a case considering current sentencing practice for negligently causing serious injury involving driving) that: (1) sentences imposed in the upper range of seriousness disclosed an inadequate response to the increase in maximum penalty and that an inappropriately narrow range of sentences had been imposed; and (2) current practice failed to reflect the objective seriousness of the offences.276 The flow on effect from this judgment in Victoria remains to be seen.

In New South Wales, as discussed, the approach to sentencing for dangerous driving causing death and grievous bodily harm has been outlined in a guideline judgment. This provides that for a typical case under the Crimes Act 1900 (NSW) s 52A(1) or 52A(3), ‘where the offender’s moral culpability is high, a full-time custodial head sentence of less than three years (in the case of death) and two years (in the case of grievous bodily harm would not

271 Ibid 8. This calculation excludes partly and fully suspended sentences from the calculation of the median sentence.
272 This relates only to dangerous driving causing death, see Brignell and Donnelly, above n 204, 25.
273 [2016] VSCA 121.
274 Ibid [33].
276 Ibid [40]-[41].
generally be appropriate’. For the aggravated form of the offence under the *Crimes Act 1900* (NSW) s 52A(2) and (4), the court indicated that ‘an appropriate increment to reflect the higher maximum penalty, and what will generally be a higher level of moral culpability, is required’. The court also indicated that other factors, such as the number of victims, would also require appropriate increments.

In England, the sentencing guidelines for causing death by dangerous driving provide as follows:

<table>
<thead>
<tr>
<th>Nature of offence</th>
<th>Starting point</th>
<th>Sentencing range</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Level 1</strong></td>
<td>The most serious offence encompassing driving that involved a deliberate decision to ignore (or a flagrant disregard for) the great danger being caused to others.</td>
<td>8 years custody</td>
</tr>
<tr>
<td><strong>Level 2</strong></td>
<td>Driving that created a substantial risk of danger.</td>
<td>5 years custody</td>
</tr>
<tr>
<td><strong>Level 3</strong></td>
<td>Driving that created a significant risk of danger.</td>
<td>3 years custody</td>
</tr>
</tbody>
</table>

*Dangerous driving causing grievous bodily harm*

Figure 4-11 provides a comparison of the median head sentence for dangerous driving causing grievous bodily harm in Victoria, New South Wales and Tasmania. It shows that the median sentences in New South Wales for aggravated offences were the highest (two years and seven months) and Tasmania the lowest (six months). In Tasmania, there was only one offender (out of two offenders) who was sentenced to a term of six months full-time imprisonment for a single count of dangerous driving causing grievous bodily harm in the period 2008–15.

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278 *Ibid* [231].
279 *Ibid*.
281 Such offences are likely to be characterised by: (a) a prolonged, persistent and deliberate course of very bad driving; and/or (b) consumption of substantial amounts of alcohol or drugs leading to gross impairment; and/or (c) a group of determinants of seriousness which in isolation or smaller number would place the offence in level 2: *ibid* 10.
282 This is likely to be characterised by: (a) greatly excessive speed, racing or competitive driving against another driver; or (b) gross avoidable distraction such as reading or composing text messages over a period of time; or (c) driving whilst ability to drive impaired as a result of alcohol or drugs, failing to take prescribed medication or as a result of a known medical condition; or (d) a group of determinants of seriousness which in isolation or smaller numbers would place the offence in level 3: *ibid* 10.
283 This is likely to be characterised by: (a) driving above the speed limit/at a speed that is inappropriate for the prevailing conditions; or (b) driving when knowingly deprived of adequate sleep or rest or knowing that the vehicle has a dangerous defect or is poorly maintained or is dangerously loaded; or (c) a brief but obvious danger arising from a seriously dangerous manoeuvre; or (d) driving while avoidably distracted; or (e) failing to have proper regard to vulnerable road users.
284 In the remaining case, the offender received a partly suspended sentence.
The sentencing range in New South Wales for aggravated dangerous driving causing grievous bodily harm was from one year and three months to six years. The range for dangerous driving causing death was eight months to five years.

**Figure 4-11: Median head sentence for dangerous driving causing grievous bodily harm, Victoria, 285 New South Wales (in months) 286**

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### 4.4.2 Summary offences

**Negligent driving causing death**

In New South Wales, very few offenders were imprisoned for the offence of negligent driving causing death (six out of 132 offenders). In cases where full-time imprisonment was imposed, the median sentence was 12 months, the minimum sentence was nine months and the maximum sentence was 14 months. In Tasmania, only one offender in the period July 2006 to May 2016 was sentenced to imprisonment for negligent driving causing death and the sentence imposed was six months.

As discussed, in England, causing death by careless driving can be heard in the Crown Court or the Magistrates’ Court. The guidelines for the Magistrates’ Court are as follows: 287

<table>
<thead>
<tr>
<th>Example of nature of activity</th>
<th>Starting Point</th>
<th>Range</th>
</tr>
</thead>
<tbody>
<tr>
<td>Careless or inconsiderate driving arising from momentary inattention with no aggravating factors.</td>
<td>Medium level community order</td>
<td>Low level community order to high level community order</td>
</tr>
<tr>
<td>Other cases of careless or inconsiderate driving.</td>
<td>Crown Court</td>
<td>High level community order to Crown Court</td>
</tr>
<tr>
<td>Careless or inconsiderate driving falling not far short of dangerous driving.</td>
<td>Crown Court</td>
<td>Crown Court</td>
</tr>
</tbody>
</table>

The guidelines for the Crown Court as follows: 288

<table>
<thead>
<tr>
<th>Example of nature of activity</th>
<th>Starting Point</th>
<th>Range</th>
</tr>
</thead>
<tbody>
<tr>
<td>Careless or inconsiderate driving falling not far short of dangerous driving</td>
<td>15 months custody</td>
<td>36 weeks – 3 years custody</td>
</tr>
<tr>
<td>Other cases of careless or inconsiderate</td>
<td>36 weeks custody</td>
<td>High level community order – 2</td>
</tr>
</tbody>
</table>

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285 VSAC, above n 202, 65. This relates to the period 2006–07 to 2012–13 for individual charges.
286 Data obtained from Judicial Commission of New South Wales 1 July 2011 to 30 June 2015.
<table>
<thead>
<tr>
<th>驾驶行为</th>
<th>年份</th>
<th>年份</th>
<th>年份</th>
</tr>
</thead>
<tbody>
<tr>
<td>粗心或不考虑的驾驶，由于短暂的注意力不集中，无加重因素</td>
<td>社区命令（中等）</td>
<td>低级社区命令到高级社区命令</td>
<td></td>
</tr>
</tbody>
</table>

**疏忽驾驶导致严重伤害**

在新南威尔士州，很少有罪犯因疏忽驾驶导致严重伤害罪而被监禁（七人中的七百四十四人）。在全职监禁被判处的案件中，中位数刑期为六个月，最低刑期为三个月，最高刑期为八个月。在塔斯马尼亚，没有因疏忽驾驶导致严重伤害罪而被判处全职监禁的案例。

*Comparison of driving offences between Tasmania and other Australian states* 65
5 Comparison of sentences for driving offences causing death with comparator offences in Tasmania

A measure of the appropriateness of sentencing in Tasmania for driving offences where death or injury is caused is to compare sentencing with other comparator offences in Tasmania.

In this paper, in relation to matters heard in the Supreme Court, the Council has considered sentencing for other homicide offences (murder, manslaughter where it does not arise from the use of a motor vehicle), causing grievous bodily harm, rape and armed robbery (including aggravated armed robbery) as comparator offences to determine the judicial view of the relative seriousness of the offences.

5.1 Indictable offences

5.1.1 Use of imprisonment

Table 5-1 sets out the use of imprisonment as a sanction for the selected offences between 2008–14 and shows that imprisonment was used as the sanction in all cases of murder, manslaughter and dangerous driving causing death or grievous bodily harm. It was used in 96.5% of rape cases, and a smaller proportion of cases of causing grievous bodily harm (60.5%) and armed robbery (60.4%).

Table 5-1: Comparator crimes, Supreme Court sentences, all counts, 2008–14

<table>
<thead>
<tr>
<th>Offence</th>
<th>Median (months)</th>
<th>Max (months)</th>
<th>Min (months)</th>
<th>Imprisonment%</th>
<th>Total (no)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murder</td>
<td>252 (21 years)</td>
<td>576 (48 years)</td>
<td>216 (18 years)</td>
<td>100</td>
<td>19</td>
</tr>
<tr>
<td>Manslaughter (exclude driving cases)</td>
<td>84 (7 years)</td>
<td>120 (10 years)</td>
<td>36 (3 years)</td>
<td>100</td>
<td>7</td>
</tr>
<tr>
<td>Manslaughter (driving cases)</td>
<td>64 (5 years and 4 months)</td>
<td>84 (7 years)</td>
<td>21 (1 year and 9 months)</td>
<td>100</td>
<td>4</td>
</tr>
<tr>
<td>Dangerous driving causing death</td>
<td>27.5 (2 years and 3.5 months)</td>
<td>48 (4 years)</td>
<td>6</td>
<td>100</td>
<td>8</td>
</tr>
<tr>
<td>Cause GBH</td>
<td>36 (3 years)</td>
<td>60 (5 years)</td>
<td>9</td>
<td>60.5</td>
<td>38</td>
</tr>
<tr>
<td>Dangerous driving causing GBH</td>
<td>27 (2 years and 3 months)</td>
<td>48 (4 years)</td>
<td>6</td>
<td>100</td>
<td>7</td>
</tr>
<tr>
<td>Rape</td>
<td>46.5 (3 years and 10.5 months)</td>
<td>144 (12 years)</td>
<td>9</td>
<td>96.5</td>
<td>27</td>
</tr>
<tr>
<td>Armed robbery (including aggravated armed robbery)</td>
<td>24 (2 years)</td>
<td>90 (7 years and 6 months)</td>
<td>6</td>
<td>60.4</td>
<td>159</td>
</tr>
</tbody>
</table>

289 Excluding two life sentences
290 Excluding two life sentences.
5.1.2 Length of imprisonment

Figure 5-1 shows the median terms for charges that received imprisonment. It shows that the longest median sentence was for murder, followed by manslaughter (excluding driving cases), motor manslaughter cases, rape, causing grievous bodily harm, dangerous driving causing death, dangerous driving causing grievous bodily harm and then armed robbery.

Figures 5-2 and 5-3 show the range of terms of imprisonment imposed in respect of the minimum term, the 25th percentile, median, 75th percentile and maximum terms. As Figure 5-2 shows, sentencing for murder is considerably more severe than for other crimes in the Criminal Code (Tas). The longest term imposed for murder was 48 years, and the next longest term was 12 years for rape.

Figure 5-1: Median imprisonment term for comparator offences (all counts): Supreme Court, 2008–14

<table>
<thead>
<tr>
<th>Crime</th>
<th>Median Term</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murder</td>
<td>252.0</td>
</tr>
<tr>
<td>Manslaughter (exclude driving)</td>
<td>84.0</td>
</tr>
<tr>
<td>Manslaughter (driving)</td>
<td>64</td>
</tr>
<tr>
<td>Dangerous driving cause death</td>
<td>27.5</td>
</tr>
<tr>
<td>Cause GBH</td>
<td>36</td>
</tr>
<tr>
<td>Dangerous driving cause GBH</td>
<td>27</td>
</tr>
<tr>
<td>Rape</td>
<td>46.5</td>
</tr>
<tr>
<td>Armed robbery (include aggravated armed robbery)</td>
<td>24</td>
</tr>
</tbody>
</table>

Figure 5-2: Range of imprisonment terms, comparator crimes, Supreme Court sentences, all counts, 2008–14
5.1.3 Relative seriousness of the offences

As discussed at [4.4.1], an understanding of the relative seriousness of offences requires a consideration of the use of imprisonment and the length of the sentences imposed. For this reason, this paper considers the relative seriousness of offences by using a measure that multiples the median term of imprisonment (in years) with the imprisonment sentence rate to obtain a seriousness score. Using this measure, murder was again the most serious offence followed by manslaughter (excluding driving offences), manslaughter (driving offences) then
rape, dangerous driving causing death, dangerous driving causing grievous bodily harm, then causing grievous bodily harm and armed robbery.

Table 5.1: Seriousness score and rank for selected offences, 2008–14

<table>
<thead>
<tr>
<th>Offence</th>
<th>Seriousness score</th>
<th>Rank</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murder</td>
<td>21</td>
<td>1</td>
</tr>
<tr>
<td>Manslaughter (exclude driving offences)</td>
<td>7</td>
<td>2</td>
</tr>
<tr>
<td>Manslaughter (driving offences)</td>
<td>5.3</td>
<td>3</td>
</tr>
<tr>
<td>Rape</td>
<td>3.7</td>
<td>4</td>
</tr>
<tr>
<td>Dangerous driving causing death</td>
<td>2.3</td>
<td>5</td>
</tr>
<tr>
<td>Dangerous driving causing GBH</td>
<td>2.25</td>
<td>6</td>
</tr>
<tr>
<td>Cause GBH</td>
<td>1.8</td>
<td>7</td>
</tr>
<tr>
<td>Armed robbery</td>
<td>1.2</td>
<td>8</td>
</tr>
</tbody>
</table>

5.1.4 Discussion

**Manslaughter**

As indicated at [3.2.3], the Court of Criminal Appeal has expressed the view that contrary to any historic approach, there is not a separate (and less serious) category of manslaughter that applies for motor manslaughter. The court indicated that manslaughter arising from the use of a motor vehicle should be equivalent to other forms of ‘involuntary manslaughter’ and further, that where there is an extended course of conduct, there should be greater equivalence with cases where there is manslaughter arising from an act of hostility to another. Contrary to the statements of the court, the sentencing data indicate that there still appears to be a difference in sentencing where manslaughter arises out of the use of a motor vehicle compared with other types of manslaughter. In the period 2008-14, the median sentence for other categories of manslaughter was seven years compared to five years and four months for motor manslaughter, the longest sentence imposed was 10 years compared to seven years and the shortest sentence imposed was three years compared to 21 months. However, as has been widely recognised, ‘manslaughter embraces a wide range of situations varying considerably in culpability’.291 There were also relatively few sentences imposed for manslaughter as there were only seven cases (other than driving cases) between 2008–14 and there were only four cases of motor manslaughter.

Other manslaughter cases typically involved a hostile act by the offender and the conviction for manslaughter was obtained on the basis that the offender lacked the requisite intention for murder but ‘committed an act intended to cause bodily harm or commonly known to be likely to cause bodily harm’.292 In the period 2008–14, there was one case where the act of the offender was a single punch that caused the death of the victim and a sentence of three years was imposed on the 17-year-old offender.293 Other cases tended to involve a course of violence during which death was caused or other circumstances where there was prior hostility. The longest sentence (12 years) was imposed in two cases where the offender was

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291 Warner, above n 33, 273.
292 *Criminal Code* (Tas) s 156(a).
293 *Tasmania v K*, Crawford CJ, 28 July 2010 (Sentence).
involved (with others) in inflicting violence on the deceased over an extended period and where the jury had found the offender not guilty of murder.294

In 2015, there were two cases where an offender was convicted of involuntary manslaughter (other than arising from the use of a motor vehicle). One case involved an unprovoked assault on a stranger, where the defendant pushed an elderly woman who fell and hit her head. He was 50 years old and had a longstanding problem with alcohol and violence. He was sentenced to eight years imprisonment.295 Another sentence of eight years imprisonment was imposed in a case where a 20-year-old offender shot the deceased in the chest.296

Since 2008, outside the context of death caused by driving, there has only been one case where the basis for the manslaughter conviction was an omission to perform a duty tending to the preservation of human life which amounted to criminal negligence. In this case, the defendants were sentenced to two years imprisonment following the death of one of the defendant’s mother. The deceased was frail with poor mobility and she was placed in a bed in an unheated shipping container to sleep for a night where she died from hypothermia.297 There were no cases where a manslaughter conviction arose based on culpable negligence relating to the use of another form of dangerous object (such as a firearm).

### Dangerous driving causing death or grievous bodily harm

The crimes of dangerous driving causing death or grievous bodily harm contained in the *Criminal Code* (Tas) are unusual as criminal liability attaches based on an objectively assessed standard of dangerousness. These are strict liability offences and there is therefore no need for an offender to intend to drive dangerously and cause harm or to foresee the likelihood that harm would be caused. There are no offences that are completely analogous.298

In the Council’s examination of sentencing for sexual offences, the offence of causing death by dangerous driving was compared with armed robbery (including aggravated armed robbery), causing grievous bodily harm/wounding, rape, maintaining a sexual relationship with a young person, aggravated sexual assault, sexual intercourse with a young person and indecent assault.299 It found that dangerous driving causing death ranked second (behind rape) when the relative seriousness of offences was assessed by analysing the length of imprisonment terms and the proportion of offenders that received a sentence of imprisonment. As noted at [2.3.2] and [3.7.2], causing death by dangerous driving is a less serious offence than manslaughter and sentencing practice in Tasmania reflects this: the median sentence for motor manslaughter is over double that of dangerous driving causing death (in the period 2008–15 it was 66 months compared to 29 months for all counts), the longest sentence is nearly double (seven years compared to four years) and the minimum sentence is over three times as long (one year and nine months compared to six months).

294 See *Tasmania v Keene*, Crawford CJ, 18 March 2011 (Sentence); *Tasmania v Williams*, Porter J, 30 June 2010 (Sentence).

295 *Tasmania v Bowden*, Tennent J, 29 April 2015 (Sentence).

296 *Tasmania v Price*, Estcourt J, 21 September 2015 (Sentence).

297 *Tasmania v Anglin*, Tennent J, 13 April 2015 (Sentence).

298 An offence exists in relation to death or grievous bodily harm caused by a dangerous dog. However, under the *Criminal Code* (Tas) s 167C, a person is criminally responsible if death or grievous bodily harm is caused only where there was actual or imputed knowledge. An offender is criminally responsible if they: knew or ought to have known that the dog was a dangerous dog or a restricted breed; they failed to take reasonable steps to keep the dog under proper control; and knew or ought to have known that a failure to keep the dog under proper control could expose a person to the risk of death or grievous bodily harm.

299 TSAC, above n 20, 53.
Where an offender’s dangerous driving causes grievous bodily harm, sentencing practice can be compared with other offences where an offender’s criminal responsibility relates to causing grievous bodily harm. Under the Criminal Code (Tas) s 172, an offender may be convicted of causing grievous bodily harm where he or she intended to cause grievous bodily harm or was reckless in relation to causing grievous bodily harm (that is, the offender foresaw the likelihood of causing grievous bodily harm). These fault elements are subjective as they relate to the offender’s particular state of mind and, consequently, an offender’s culpability is generally greater where an offender intended to cause grievous bodily harm or foresaw the likelihood of causing harm than where an offender is convicted of causing grievous bodily harm based on an objectively assessed standard dangerousness. An offender can also be convicted under the Criminal Code (Tas) s 172, where an offender is culpably negligent in relation to whether grievous bodily harm is caused. Although this is also an objective standard (as with dangerousness), culpable negligence is a higher degree of blameworthiness than dangerousness. It is noted that while all offenders convicted of dangerous driving causing grievous bodily harm received a sentence of full-time imprisonment (in contrast to s 172 where only 60.5% of offenders received full-time imprisonment), the maximum term and the median sentence imposed were longer for s 172 than dangerous driving causing grievous bodily harm (five years compared to four years (longest sentence) and three years compared to two years and three months (median)). Nevertheless, a comparison of sentencing for offences under s 172 and sentencing for dangerous driving causing grievous bodily harm shows that sentencing practices appear to be generally more severe for driving offences based on an assessment of the relative seriousness of the offences (see [5.1.3]).

Sentencing for the offences of dangerous driving causing death or grievous bodily harm can also be compared with the sentences imposed for dangerous driving under the Traffic Act 1925 (Tas) s 32(1). An offender convicted of dangerous driving has the same level of fault as an offender convicted of dangerous driving causing death or grievous bodily harm; however, the harm caused is different. In the case of dangerous driving it is the risk of harm that is punished, whereas it is the realisation of that harm that is punished where death or serious injury results from an offender’s dangerous driving. As discussed at [3.7.2], dangerous driving has a maximum penalty of two years imprisonment (first offence) and only 11.5% of offenders received a sentence of full-time imprisonment.

It is also possible to compare the judicial approach to causing grievous bodily harm by dangerous driving with the approach of the legislature to other cases where grievous bodily harm is caused. Under the Sentencing Act 1997 (Tas), there a mandatory minimum sentence of six months imprisonment provided in cases where serious bodily harm is caused to a police officer if a person knows, or ought reasonably be expected to know, that bodily harm to a police officer may be caused or may arise from the offence, unless exceptional circumstances exist. There is no inconsistency with the legislative approach to serious injuries caused to police officers and the approach of the courts in cases where grievous bodily harm has been caused by dangerous driving. Sentencing data show that all offenders received a sentence of imprisonment with the minimum term imposed being six months imprisonment.

5.2 Summary offences

Sentences for the summary offences of negligent driving causing death or grievous bodily harm are difficult to compare with other offences, given that there are few like offences where the fault element for a criminal offence relating to causing death or grievous bodily harm is
civil negligence. There is no equivalent offence creating criminal responsibility for civil negligence, for example, that would apply to the negligent use of other forms of motorised transport (such as a powerboat or jet ski), the negligent use of a firearm or fireworks. However, criminal liability for negligent conduct does exist in relation to death or serious injury that occurs in a workplace situation.

Under the *Work Health Act 2012* (Tas), a person conducting a business or undertaking owes a duty to provide a safe workplace and if a person fails to comply with a health and safety duty and that failure exposes an individual to a risk of death or serious injury or illness, a person has committed an offence. There are key differences between the workplace situation and liability that arises in the context of driving. First, in relation to work health and safety, imprisonment is only a sentencing option if a person is reckless as to the risk to an individual of death or serious injury or illness. The maximum penalty for the risk of death or serious injury or illness arising from negligence is a significant fine. Second, it is noted that the workplace offence refers to the risk of death or serious injury (and so this offence applies whether or not death or serious injury actually results). In contrast, there is a separate offence hierarchy for driving offences with different maximum penalties for the offences of negligent driving, negligent driving cause grievous bodily harm and negligent driving causing death.

Another area in which there has been an extension of criminal responsibility relates to dangerous dogs. Under the *Dog Control Act 2000* (Tas) s 19A, it is an offence if a dangerous dog that has previously attacked a person or another animal subsequently attacks a person or another animal. This is a strict liability offence and is punishable by a maximum fine of 50 penalty units and/or imprisonment not exceeding 12 months. The Council has identified one case where an offender was convicted of this offence and a term of imprisonment of between three and six months was imposed.

Sentencing for negligent driving causing death or grievous bodily harm can also be contrasted with sentencing for negligent driving under the *Traffic Act 1925* s 32(2). The maximum penalty for this offence is five penalty units ($785) and in the period July 2006 to May 2016, 76.9% of offenders received a fine. In the same period, offenders convicted of negligent driving causing death or grievous bodily harm were likely to receive a custodial sentence.

### Table 5-2: Negligent driving causing death or grievous bodily, Magistrates Court sentences, single count, July 2006 – May 2016

<table>
<thead>
<tr>
<th></th>
<th>Full-time imprisonment</th>
<th>Partly suspended sentence</th>
<th>Fully suspended sentence</th>
<th>Community Service Order</th>
<th>Fine</th>
</tr>
</thead>
<tbody>
<tr>
<td>Negligent driving cause death (n=21)</td>
<td>4.8%</td>
<td>14.3%</td>
<td>66.7%</td>
<td>4.8%</td>
<td>9.5%</td>
</tr>
<tr>
<td>Negligent driving cause grievous</td>
<td>0</td>
<td>0</td>
<td>57.1%</td>
<td>0</td>
<td>42.9%</td>
</tr>
</tbody>
</table>

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300 *Work Health Act 2012* (Tas) ss 31, 32.
301 Ibid s 31.
302 This is a fine not exceeding $150 000 if the offence is committed by an individual (other than as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking), a fine not exceeding $300 000 if committed by a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking; or a fine not exceeding $1 500 000 if committed by a body corporate, *Work Health Act 2012* (Tas) s 32.
303 See Figure 3-3.
| bodily harm (n=7) |   |   |   |   |

* figures do not sum to total due to rounding.
6 The purposes of sentencing

This chapter uses the purposes of sentencing as a measure of the appropriateness of sentencing for driving offences where death or injury is caused through an examination of the decisions of the Supreme Court and Court of Criminal Appeal.

Analysis of sentencing comments in Tasmania is facilitated by the publication policy of the Supreme Court. Unlike the practice in many other jurisdictions, sentencing comments are publicly available in Tasmania to allow the community to better understand the reasons for a particular sentence and to enhance the general deterrent effect of sentencing. The latest sentences are available on the Supreme Court website, usually from the day that the sentence is imposed, and sentences from 2008 onwards are available online from the Tasmanian Sentence database.304

6.1 Proportionality and retribution

Retribution is a common law purpose of sentencing,305 but is not stated explicitly as a purpose in the Sentencing Act 1997 (Tas).306 In Australia, the concept of proportionality operates to set the limits of permissible retribution.307 Retribution is fundamentally about matching the punishment to the particular offence through a sentence that is proportionate to the offence — it is not about vengeance. Proportionality helps to inform legislative and judicial approaches to the relationship between offences and the level of sentences, although the single maximum penalty for most indictable offences in Tasmania limits the utility of the principle of proportionality as expressed by the legislature.308 When courts, or the public, state that a sentence is too lenient or too severe, they are generally making a statement that the punishment does not match the seriousness of the crime and the offender’s culpability — that it is disproportionately low or high. Ultimately, this is a value judgment that must be made in respect of each offence and in the circumstances of each case.

In the context of serious driving offences, as has been noted in Chapter Three, the Supreme Court has previously made it clear that the general level of sentence needed to increase to reflect a change in society’s view about the seriousness of such offences and subsequent sentencing practice has reflected this call for more severe sentences to ensure that the sentence imposed was proportionate to the offence.309 In Tasmania v Horsten,310 in imposing sentencing for dangerous driving causing grievous bodily harm, the court stated that, ‘[i]t is accepted of course that he had no desire to hurt anyone. Nevertheless it has been made clear by the Court of Criminal Appeal that for cases of this kind involving dangerous and irresponsible driving and causing death or serious injury, the only appropriate punishment for most cases is not insignificant imprisonment’. However, the court has also made it clear that

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304 This is accessible from the Inglis Clarke Library website <http://catalogues.lawlibrary.tas.gov.au/textbase/SentSearch.htm>.
305 The other limiting principle at common law is parsimony: see Warner, above n 33, 75.
306 This contrasts with the position in other jurisdictions, for example, see Sentencing Act 1991 (Vic) s 5(1)(a); Crimes Act 1914 (Cth) ss 7(1)(a), 16A(1); Criminal Law (Sentencing) Act 1988 (SA) s 10(1)(k); Penalties and Sentences Act 1992 (Qld) s 9(1)(a); Sentencing Act 1995 (NT) s 5(1)(a); Sentencing Act 1995 (WA) s 6(1).
308 See [2.2].
310 6 December 2011 (Sentence).
retribution must be measured and that the criminal justice system, by the sentence imposed, cannot undo the harm.\textsuperscript{311}

\section*{6.2 Denunciation}

The \textit{Sentencing Act 1997} (Tas) s 3(e)(iii) provides that denunciation is a purpose of sentencing to help prevent crime and promote respect for the law. Denunciation expresses a community’s disapprobation, both in general and toward the specific offender.\textsuperscript{312} The court’s awareness of community concern about serious driving offences has been reflected in the general increase in the level of sentences.\textsuperscript{313} As recognised by Pearce J in \textit{Tasmania v Triffett}:

\begin{quote}
this court has made clear that heavy sentences are to be imposed for serious driving offences of this nature. Death and injury for dangerous driving is now widely recognised by the community as a serious social and financial problem.\textsuperscript{314}
\end{quote}

Similarly, in the \textit{Director of Public Prosecutions (Acting) v Rushton}, Tennent J stated that:

\begin{quote}
There is little doubt having regard to a number of cases in recent years involving death by dangerous driving that the Court has recognised the need to impose sentences that more obviously reflect society’s condemnation of driving behaviour which results in the death of a person or persons. As a consequence, sentences imposed for this crime have trended upwards.\textsuperscript{315}
\end{quote}

In \textit{Tasmania v Bush}, Wood J observed that ‘[s]entences are now more severe than they were previously reflecting the community’s justifiable concern about such driving’.

\section*{6.3 Deterrence}

The \textit{Sentencing Act 1997} (Tas) stipulates general and specific deterrence as purposes of sentencing. General deterrence aims to discourage potential offenders: it relies on the idea of rational choice theory — that offenders balance the costs and benefits of a particular choice before acting. Specific deterrence is the application of a criminal sanction in order to dissuade the particular offender in the specific case from repeating his or her offence.

Deterrence is a primary consideration when sentencing for serious driving offences and has been given increasing significance by the Court of Criminal Appeal. As recognised by Evan J in \textit{Wahl v Tasmania}:

\begin{quote}
Recent authorities of this Court have emphasised that in cases involving death or injury caused by culpable negligent driving, courts should impose penalties that will be sufficiently severe to deter both the offender and others who might be similarly minded.\textsuperscript{317}
\end{quote}

Similarly, in \textit{Tasmania v Thorne}, Wood J stated that ‘an important objective in cases such as this is general deterrence and denunciation, but also important is the rehabilitation of the

\textsuperscript{311} \textit{Tasmania v M}, Slicer J, 20 December 2007 (Sentence). See discussion at [6.6].
\textsuperscript{312} \textit{Ryan} (2001) 206 CLR 267, [118]–[120] (Kirby J).
\textsuperscript{313} \textit{Tasmania v Moate}, Porter J, 2 July 2010 (Sentence); \textit{Moyle v Tasmania} (2010) 198 A Crim R 592, [51] (Tennent J), [65] (Wood J).
\textsuperscript{314} 27 February 2014 (Sentence).
\textsuperscript{315} [2015] TASSCA 20, [16] (Tennent J).
\textsuperscript{316} Wood J, 18 February 2010 (Sentence).
\textsuperscript{317} \textit{Wahl v Tasmania} [2012] TASSCA 5, [38].
offender. '318 The need for general deterrence has been said to ‘overwhelm considerations such as good character and remorse’. 319 However, despite the focus of the courts on the deterrent effect of sentencing and its intuitive appeal, the utility of increasing sentence lengths as a general deterrent has been called into question. While it is certainly agreed that having a punishment structure (police, courts, and sentences) does have a deterrent effect and does reduce offending, 320 research suggests that increasing sentence severity does not better deter would be offenders (marginal deterrence) or reduce crime rates. 321 This was recognised by the Full Bench of the Supreme Court of South Australia in R v Payne,322 where it was stated that:

When one considers the range of factors that contribute to fatal accidents, one becomes all the more conscious of the fact that the punishment of offenders through the courts is only one of a range of appropriate responses to the problem of road fatalities. The courts must play their part, but it is a mistake to assume that increasing the severity of sentences is the answer to the problem. In the light of the information before us we are not satisfied that increasing the level of sentences would further reduce the incidence of this offence. Driver performance and driver behaviour are obviously significant factors, but whether an increased level of sentences would have any significant effect is doubtful.

Further, in cases of inadvertence or inattention (such as failing to stop at a give way sign or a red light or failing to see another vehicle when entering a roadway as a result of loss of concentration), it is ‘unclear how general deterrence can operate in relation to unintentional conduct’. 323 Evidence also suggests that increasing penalties does not work to deter the particular offender from re-offending (that is, specific deterrence). 324 This is supported by other research that has generally shown that increasing the severity of traditional sentencing options has little or no impact on drink-driving rates or recidivism rates for drink driving. 325

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318 22 May 2015 (Sentence).
319 Tasmania v Bush, Wood J, 18 February 2010 (Sentence).
322 (2004) 89 SASR 49 [49].
323 Mirko Bagaric and Richard Edney, Australian Sentencing (Westlaw AU, n.d.) [860.2100].
324 Bagaric and Alexander, above n 321, 45.
325 Jillian Mullen, Stacy Ryan, Charles Mathias and Donald Dougherty, ‘Treatment Needs of Driving While Intoxicated Offenders: The Need for a Multimodal Approach to Treatment’ (2015) 16 Traffic Injury Prevention 637, 637 citing Jerome Friedman, Charles Harrington and David Higgins, Reconvicted Drinking Driver Study (New York State Department of Motor Vehicles, 1995); Kiptoo Terer and Rick Brown, ‘Effective Drink Driving Prevention and Enforcements Strategies: Approaches to Improving Practice’ (Trends and Issues In Crime and Criminal Justice No 472, Australian Institute of Criminology, 2014) 5; Ross Homel ‘Penalties and the Drink-Drive: A Study of One Thousand Offenders’ (1981) 14 Australian and New Zealand Journal of Criminology 225, 237. However, note Briscoe, above n 4, which found ‘some evidence of beneficial effect’ after penalties in NSW were increased but only for offenders who lived outside of the Sydney metropolitan area. For non-Sydney locations, ‘the overall effect of the increased penalties on recidivism rates was relatively small, with the probability of a drink-driver reoffending being reduced by just three percentage points’: at 8.
While the reality is that many of the offenders, as summed up by Tennent J in *Tasmania v Harris*, 326 ‘were an accident waiting to happen’, increasing the penalty for driving offences where death or injury is caused is unlikely to be successful given that many drivers would not associate their bad driving with driving that is likely to cause death or injury.327 A majority of the offenders convicted of serious driving offences had previous convictions for driving offences, such as speeding, driving whilst disqualified, driving under the influence of drugs and/or exceeding the blood alcohol concentration. For cases sentenced between 2008 and 2015, all offenders convicted of dangerous driving causing death had previous convictions for traffic offences and five out of eight offenders convicted for dangerous driving causing grievous bodily harm had previous convictions for traffic offences. In relation to manslaughter, excluding the case where the offender was a passenger in the vehicle, all offenders had previous convictions for traffic offences. This suggests that nearly all offenders convicted of an indictable driving offence relating to death or serious injury had previously engaged in risky driving behaviour (although actual harm to another person had not been caused) and that the offenders had not been deterred from bad driving by previous penalties imposed, including, in some cases, sentences of imprisonment.328 As King CJ stated in *R v Johnson*, ‘[t]he truth is that in the great majority of cases [where death is caused by dangerous driving], [the offender] simply does not expect to be involved in a serious accident’.329 This highlights the need to focus on more targeted criminal justice system responses (such as the development of a drink driving court),330 as well as other road safety strategies (outside of the criminal justice system) to reduce death and serious injuries.331

### 6.4 Incapacitation/protection of the community

In sentencing offenders for serious driving offences, courts have recognised the danger presented by dangerous and risky driving and the need for community protection.332 Community protection is specifically identified as one of the purposes of sentencing in Tasmania.333 This umbrella term covers retribution, deterrence and rehabilitation as well as incapacitation.334 Incapacitation of the offender protects the community by imprisonment given that for the duration of an offender’s incarceration that person cannot commit offences against the general community. Imprisonment is one of the only incapacitating sentencing orders available in Tasmania. Although, conditions attached to non-custodial options that reduce an offender’s opportunity to reoffend may be aimed at incapacitation.335

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326 19 November 2008 (Sentence).
328 Another factor to note is that many people with bad driving records are not involved in crashes where death or serious injury are caused and this is perhaps a matter of luck. This is discussed further at [8.1.1], [8.1.4].
329 (1985) 38 SASR 582, 586.
330 The introduction of a drink driving list was suggested by the Sentencing Advisory Council (see TSAC, *Phasing Out of Suspended Sentences*, Final Report No 6 (2016)) and is currently being considered by the Tasmania Law Reform Institute.
333 *Sentencing Act 1997* (Tas) s 3(b).
334 Warner, above n 33, 73.
335 Ibid.
Licence disqualification was ordered in all cases heard in the Supreme Court between 2001 and 2015 where an offender was the driver of a motor vehicle and was convicted of a driving offence where death or injury resulted. Licence disqualification is a sentencing order that potentially reduces an offender’s capacity to reoffend and thereby maintains public safety provided an offender abides by the restriction. An examination of sentencing comments from cases where an offender was convicted of motor manslaughter and dangerous driving causing death or grievous bodily harm revealed that at the time of the crash which resulted in death or injury, the driver was disqualified or unlicensed in 26.2% of cases. Research conducted by the Road Safety Advisory Council reported that crash data from 2011 showed approximately 10% of drivers involved in fatal crashes were unlicensed and that it was evident from ‘a random sample of Tasmanian crash reports involving an unlicensed driver … that they were engaging in high risk behaviours at the time of the incident’.

6.5 Rehabilitation

Rehabilitation is recognised as an aim of sentencing in Tasmania under the Sentencing Act 1997 (Tas) s 3(e)(ii). Rehabilitation aims ‘to reduce crime by offering forms of sentence (especially in non-custodial settings), which provide educative, counselling, drug rehabilitation, psychological, social work, retraining or other services designed to help address the factors that are thought to contribute to the offending’.

In sentencing drivers for offences arising out of crashes where death or injury has occurred, courts have indicated that deterrence is the primary sentencing consideration and that this ‘weighs heavily against the reformative and rehabilitative factors’. Rehabilitation is infrequently mentioned in the sentencing comments. However, there has been recognition that a just sentence should allow an opportunity for reform, particularly where the offender is young.

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336 This information is not available in relation to sentences imposed in the Magistrates Court.

337 In the context of drink driving, research has shown that many recidivist drink drivers continue to drive without a licence and that they often continue to do so after they are eligible to regain their licence, see Randy Elder, Robert Voas, Doug Beirness, Ruth Shults, David Sleet, James Nichols and Richard Compton, ‘Effectiveness of Ignition Interlocks for Preventing Alcohol-Impaired Driving and Alcohol-Related Crashes: A Community Guide Systematic Review’ (2011) 40 American Journal of Preventative Medicine 362, 362–3; Thomas Brown, Maurice Dongier, Marie Ouimet, James Tremblay, Florence Chanut, Lucie Legault and Ng Mien Kwong Ng King Kin, ‘Brief Motivational Intervening for DWI Recidivists Who Abuse Alcohol and are not Participating in DWI Intervention’ (2010) 34 Alcoholism: Clinical and Experimental Research 292; Robert Voas, A Scott Tippets and A Scott McKnight, ‘DUI Offenders Delay License Reinstatement: A Problem?’ (2010) 34 Alcoholism: Clinical and Experimental Research 1282; J Mullen et al, above n 325, 637. In-depth interviews with offenders has found that ‘once suspended from driving for long periods … the low risk of apprehension for driving without a licence combined with family and employment demands, inconvenience, and the sense that they won’t get their licence back in the foreseeable future, … lead a significant number of suspended drivers to drive without a licence’: Simon Lenton, James Featherston and Rita Cerarelli, ‘Recidivist Drink Drivers’ Self-Reported Reasons for Driving Whilst Unlicensed – A Qualitative Analysis’ (2010) 42 Accident Analysis and Prevention 637, 642. See also, Mary Sheehan, Barry Watson, Cynthia Schonfield, Angela Wallace and Bradley Partridge, ‘Drink Driver Rehabilitation and Education in Victoria (RACV Research Report 05/01, 2005) 4.

338 Department of Infrastructure, Energy and Resources, Unlicensed Drivers and Unregistered Vehicles in Tasmania: A Road Safety Perspective 15.

339 Freiberg, above n 18, 257.


341 Tasmania v JMDB, Wood J, 9 August 2016 (Sentence); Tasmania v Thorne, Wood J, 22 May 2015 (Sentence).
6.6 Interests of the victim

Tasmania is only one of two jurisdictions that expressly provide that one of the purposes of its sentencing Act is to recognise the interests of victims of offences. The interests of victims may include:

- punishment, deterrence, rehabilitation and protection of the community; and
- recognition of the harm resulting from driving offence to them or their family and of driving offences that cause injury or death in general.

In Tasmania, the courts can address these interests of victims through sentencing. First, courts can recognise the harm by giving victims a voice in court through the use of victim impact statements in the sentencing process, and secondly by recognising harm through the imposition of penalty to an offender according to the purposes of sentencing.

More recently, the comments on passing sentence in the Supreme Court have frequently referred to the contents of the victim impact statements. As recognised by Wood J in Tasmania v Thorne, victim impact statements are important. They provide an insight into the magnitude of the consequences for the family and loved ones, and the harm to the community. Until recently, the Sentencing Act 1997 (Tas) s 81A only provided statutory recognition for victim impact statement in relation to indictable offences and not in relation to summary offence (such as negligent driving causing death or grievous bodily harm). However, in summary cases, the prosecution could still make submissions to the court about the impact of the offence on the victim. Section 81A has now been amended to formally allow victims or their family members to provide victim impact statements for summary offences where the offence has resulted in serious injury or death.

The inadequacy of the sentence imposed as a measure of the value of a life has been a focus of media and social media commentary in relation to sentencing for driving offences. This is particularly apparent in cases where an offender is convicted of causing death or serious injury by negligent driving, which involves a high level of harm and a low degree of culpability. For example, the view has been expressed that the sentence of an offender who received a partly suspended sentence of nine months with three months suspended was inadequate on the basis that ‘three people died — 61 days a life – that’s not a penalty’. Similarly, the notion that an offender has killed someone and receives a suspended sentence of imprisonment has also been viewed as ‘slap on the wrist’ and an inadequate reflection of the loss of life. In her examination of special offences for motor vehicle homicide, Cunningham explains the response of family members in the following way:

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343 22 May 2015 (Sentence).
344 See Crimes (Miscellaneous Amendments) Act 2016 (Tas) s 16.
It is often the case that relatives of homicide victims, when interviewed by the press following a criminal conviction and sentence, will express a view that justice has not been done. Whatever the state of mind of the causer of death at the time of death and the level of blameworthiness established by legal advocates, relatives will unavoidably feel that the result of a criminal trial in the form of a prison sentence should relate to, or even equate to, the harm of death caused. They have suffered the worst loss known to humans, and will be grieving long after the trial has ended and the public announcement as to culpability made. Often the sentence passed is seen to be woefully inadequate in reflecting that loss, and relatives may feel that insult has been added to injury by the sentencing judge. This may be so whatever the level of blameworthiness demonstrated by D. The relative of a victim of a careless driver may feel the same loss as a murder victim, and view any penalty as derisory. But we cannot expect relatives to remain rational and objective on the issue of exacting justice; that is the role of the State. The law should at least recognise their needs but should not alter D’s fate in doing so.348

While it is necessary and appropriate that the law has different levels of culpability for homicide offences and that the sentence imposed reflects the fault of the offender, it may be difficult for family members and the broader community to accept the sentence imposed in circumstances where the offender has not been convicted of murder but an offence that has a lower standard of culpability. In its research on attitudes for sentencing of offences involving death by driving, the Sentencing Advisory Panel observed that ‘spontaneous comments from the focus groups … revealed that many people considered an offence involving death to constitute murder, and favour the imposition of a sentence commensurate with murder’.349

In sentencing offenders for driving offences where death or injury has been caused, the comments of the court demonstrates an understanding of these concerns of family members and the broader community and also an awareness of the inability of the criminal justice system to compensate for the loss of life. In Tasmania v Thorne,350 Wood J acknowledged that ‘no sentence will [be] able to restore the life that has been lost. The sentence should not be taken as an indication of the value on the life that has been taken. Rather, the sentence needs to reflect the sanctity of life generally’. Similarly, in Tasmania v Dennison,351 Blow J stated that:

No sentence of imprisonment will be able to return the life that has been lost or restore [the victim’s] physical faculties. … Sentences in a case like this often seem overwhelming from the point of view of the offender and those close to the offender, and, from another point of view, nowhere near as severe as the harm the offender has caused.

In Tasmania v Dallas,352 Crawford CJ also referred to the inability of the sentence imposed to provide recompense for the life lost: ‘[n]o sentence of the Court will return [the deceased’s] life or otherwise put the effects of the crime to nought’.

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348 Sally Cunningham, ‘Vehicular Homicide: Need for a Special Offence’ in Christopher Clarkson and Sally Cunningham (eds), Criminal Liability for Non-aggressive Deaths (Ashgate, 2008) 97, 117.
350 Wood J, 22 May 2015 (Sentence).
351 Blow J, 20 May 2011 (Sentence).
352 Crawford CJ, 8 February 2006 (Sentence).
7 Public opinion and sentencing for driving offences that result in death or injury

Sentencing remarks in Tasmania contain references to the standards and concerns of the community about driving offences that cause death or injury and, as discussed, the courts have responded to changing public attitudes by increasing sentencing levels. However, despite these increasing levels, this reference was provided to the Sentencing Advisory Council as a response to perceived community concern in relation to the penalties imposed in cases where driving has caused the death of another person. As discussed, media reports and social media would suggest that concern exists about sentencing levels in some cases where death or serious injury results from a motor vehicle crash. However, as the Council has previously recognised, it is clear that, in the abstract, a majority of people believe that sentences are too lenient. The Council has also noted that caution must be used in relying on ‘top-of-the-head’ responses, as studies that have examined people’s response to sentencing in more detail have found punitive attitudes are generally linked with myths and misconceptions about crime and justice and that the desire for harsher sentencing that is evident in opinion polls needs to be heavily qualified. In the context of offences involving death by driving, the Sentencing Advisory Panel for England and Wales (the SAP) made observations about the intense media coverage that is involved and the fact that ‘[t]he loss of life resulting from these offences is likely to eclipse, in the public mind, considerations of the offender’s level of culpability’. Accordingly, the Council is mindful of the need to develop a more nuanced understanding of public opinion.

7.1 Public opinion and sentencing for driving offences that result in death or injury

In contrast to the considerable research that has examined public attitudes towards sentencing in general, there have only been a small number of studies that have examined perceptions of driving offences. See also Sarah Armstrong, Gill McIvor, Fergus McNell and Paul McGuinness, ‘International Evidence Review of Conditional (Suspended) Sentences’ (Final Report, The Scottish Centre for Crime and Justice Research, 2013) Ch 6 for a summary of Scottish, Netherlands, England and Wales, Canadian and Australian literature; Jean-Louis van Gelder, Pauline Aarten, Willemijn Lamet and Peter van der Laan, ‘Unknown, Unloved? Public Opinion on and Knowledge of Suspended Sentences in the Netherlands’ (2015) 61(5) Crime and Delinquency 669 (first published online 2011); Willem de Koster, Peter Achterberg and Natalia Ivanova, ‘Reconsidering the Impact of Informational Provision on Opinions of Suspended Sentences in the Netherlands: The Importance of Cultural Frames’ (2016) 62 Crime and Delinquency 1528 (first published online 2014).
of sentencing for specific offences. One such groundbreaking study was conducted in Tasmania, and was subsequently used as a model for a Victorian study conducted between 2013–14. Limited other research has been conducted in Australia and internationally.

### 7.1.1 Tasmania

The Tasmanian Jury Study sought to gauge public opinion by ascertaining the perceptions of jurors in relation to sentencing. The study adopted a three stage mixed method design. The study ran for two years and involved 162 trials, of which three were culpable driving trials. There were 138 trials for which at least one response was received, of which two were culpable driving trials. Of the jurors in the culpable driving trials, eleven jurors responded to the survey. As there were few trials for culpable driving involved in the study, and only eleven (out of 36 jurors) participated, caution must be exercised in drawing any firm conclusions based on the responses.

In Stage One, after returning a verdict of guilty, jurors were asked to specify the sentence that should be imposed on the offender. This was compared with the sentence imposed by the judge and a large majority of jurors imposed a sentence that was more lenient than the judge (82%), no jurors suggested a sentence that was the same and only 18% of jurors suggested a sentence that was more severe. Jurors were most likely to be less severe than the judge for culpable driving (82%) than for the other offence categories of sex offences (48%), violence offences (49%), drug offences (48%) and property offences (68%).

In Stage Two, after the judge had imposed sentence, participating jurors were sent details of the sentence and asked whether it was appropriate. In response, all jurors considered that the sentence was appropriate (66.7% very appropriate and 33.3% fairly appropriate). This was the only offence category where this occurred with other offence categories having a proportion of jurors who considered that the sentence was inappropriate (sex offences (12.2%); violence offences (8%); drug offences (17%); property offences (7.2%)).

### 7.1.2 Other jurisdictions

A study of attitudes to sentencing of offences involving death by driving was conducted in 2008 for the Sentencing Advisory Panel for England and Wales, in which the attitudes of the general public as well people who had lost a relative as a result of a driving offence were examined. The study involved a representative survey of 1031 people, 12 focus groups of the general public and 11 in-depth interviews with close relatives of someone killed in a road traffic accident.

The study examined a number of issues:

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358 Warner et al, above n 356, 35.

359 Ibid. The sentences imposed were five years and eight months imprisonment (manslaughter) and four years (death by dangerous driving) in a joint trial and two years and six months (causing grievous bodily harm by dangerous driving).

360 Ibid 50.

361 Hough, et al, above n 349, vi.
public perceptions of the relative seriousness of the offences of causing death by careless or inconsiderate diving, causing death by careless driving when under the influence of drink or drugs, causing death by dangerous driving and causing death by driving unlicensed, disqualified or uninsured. It found that careless driving was regarded as the least serious of the four offences with the other three offences being viewed as broadly on par. Focus group participants focused on the deliberate choices made by offenders in cases other than the ‘careless’ offence, which was described as ‘something that “could happen to anyone”’. The careless offence was viewed as an offence that could be committed by people like the participants who made a mistake with terrible consequences compared to the offences that were assumed to be committed by ‘real offenders’.

(2) the importance of mitigating and aggravating factors. The research found that prior conviction had a highly significant influence on sentencing severity in the survey results and greatly influenced the responses of participants in the focus group. Similarly, the absence of prior convictions was an important mitigating factor. However, the youth of an offender was given little weight as a mitigating factor. Another finding of the research was that the public tended to place less importance on mitigating factors than aggravating factors.

(3) to determine public sentencing preferences to assist the Panel with setting sentencing guidelines. The study found that there was a significant under-estimation of the severity of current sentencing practices for driving offences resulting in death. It also found that while the majority of people could tolerate current or recommended practices for the offences, there was a ‘significant minority calling for very long sentences indeed’. The study found that ‘many individuals suggested sentences that are similar to, or more lenient that the Panel’s proposal’. The findings from the interviews with relatives of victims found that they preferred sentences were much tougher than those expressed by survey participants. There was universal dissatisfaction with the leniency of the sentence, with many families describing ‘their abiding sense … that the offenders would continue with their lives more-or-less as normal after the disruption of a relatively short period in prison; whereas their own lives were irreversibly changed’. Family members also expressed concern about the court process in general, including its impersonal nature of the proceedings and the attitudes of the judges and lawyers.

The findings of earlier studies examining public opinion and driving offences were summarised in the Sentencing Advisory Panel’s paper. These studies were as follows:

362 Ibid vii.
363 Ibid 15.
365 Ibid 39.
366 Ibid 45.
367 Ibid 43.
368 Ibid 47.
370 Ibid 34.
371 Ibid ii.
372 Ibid viii.
373 Ibid 54.
374 Ibid 60.
(1) A Canadian study in 1982 conducted by Doob and Roberts, which tested the hypothesis that ‘top-of-the-head’ public reactions would be punitive but if the public had more information, the responses would be different. It found that ‘[p]eople were significantly more likely to rate the sentence as being lenient if they read the brief, ‘newspaper length’ account, than if they read a more comprehensive version of the case’.

(2) The study also tested the attitudes of the public to sentencing an offender convicted of driving with a blood alcohol level in excess of the legal limit. In this experiment, participants were given two scenarios — one where the offender came into contact with the police through a random stop and one where the offender came into contact with police as a result of having been involved in an accident where another individual had died (although the offender bore no responsibility for causing the accident). The participants were significantly more punitive in the case where the offender was involved in the fatal accident, demonstrating the public’s focus on consequences rather than culpability.

(3) A 1984 study in the United States conducted by Dejoy and Klippel where participants were asked to rate the seriousness of a driving crime as well as the offender’s degree of culpability. A number of scenarios were presented that changed the level of unsafe behaviour and the harm caused by the crash with the results indicating that ‘the seriousness of the offence were significantly affected by the severity of consequences. Drinking and driving was only perceived to be serious to the extent that it resulted in actual harm’.

(4) A study of public attitudes to drink driving offences conducted in 1996 by Applegate, Cullen, Link, Richards and Lanza-Kaduce that tested the variables that were related to participant’s punitiveness. This study found that the level of harm and the extent of the offender’s criminal record were the only two variables that were related to punitiveness.

7.2 Public opinion and offence seriousness

Related to studies that have examined public opinion about sentencing of offenders is the research conducted by VSAC that examined public perception of offence seriousness. The study involved 244 participants who took part in 14 community panels in regional and metropolitan Victoria. Two quantitative methods were used to measure community judgments about offence seriousness: (1) ‘paired comparisons’ which involved asking participants to compare pairs of offences and indicate the offence that they think is more serious in each pair; and (2) ‘category’ or ‘coded’ rating or ranking, which asked participants to indicate how serious they think offences are by rating or ranking them using a scale of seriousness. The
coded ranking provided participants with vignettes, which contained case scenarios. Qualitative data was also obtained though facilitated discussion sessions.

The paired comparison used 10 offences: rape, aggravated burglary, armed robbery, arson, blackmail, intentionally causing serious injury, drug trafficking (large commercial quantity), kidnapping, murder and theft. This comparison did not include offences relating to death or injury caused by driving.

The coded rating used 40 offences and included fatal offences, serious injury offences against the person, sexual offences, property offences, drug offences, fraud, blackmail and incitement and attempted charges. This included culpable driving causing death and dangerous driving causing death. The vignette for culpable driving causing death was that the offender had been drinking a lot of alcohol at a party and then does burnout in his car on the wet street outside. He loses control of the car and hits and kills a pedestrian. The vignette for dangerous driving causing death was that the offender was driving a car when his phone rings. He tries to answer it and he accidentally drops it to the floor and bends down to pick it up. He loses control of the car and crashes, killing his passenger. The vignette for manslaughter was that the offender threw a knife at the victim, only wanting to scare him. The knife hit and killed the victim.

Examining the category of offences that were classified as offences causing or risking death (fatal offences), the research showed that participants ‘tended to make differentials in seriousness based on distinct levels of harm and culpability that produced a sliding scale based on these different levels’. The ranking of offences where a death was caused were as follows:

- intentional (intentional murder);
- recklessness combined with knowledge (reckless murder);
- reckless and culpable behaviour (manslaughter, culpable driving causing death);
- negligence (arson causing death); and
- dangerousness (dangerous driving causing death).

It also showed a high level of agreement that murder was the most serious offence. While there was disagreement on the seriousness of offences with the reducing levels of culpability, particularly in relation to dangerous driving causing death, three broad distinctions were made by participants in assessing the level of culpability of the offender:

- if there was an intention to cause very serious harm. A general distinction was made in relation to offence seriousness based on whether there was an intention to kill or commit very serious harm or whether this intention was lacking.

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381 Ibid 20.
382 Ibid 21.
383 Ibid 33.
384 It is noted that this refers to criminal negligence.
385 VSAC, above n 379, 33.
386 Ibid 33, 42.
387 Ibid 63.
• if there was no intention to cause very serious harm but a high level of culpability due to the high level of risk or recklessness involved in the behaviour. In the case of culpable driving causing death, participants distinguished this offence from the very high level of intention for murder but still considered it to occupy a high position on the culpability hierarchy.\(^{388}\)

• if there was no intention to cause very serious harm and a lower level of culpability due to dangerous behaviour with an unforeseen outcome with participants tending to see these offences as more akin to ‘accidental’ causation of harm.\(^{389}\)

The VSAC study found that there were differences in approaches used by participants to assess offence seriousness including those who were predominately influenced by either harm or culpability or those who balanced a number of factors, including harm, culpability and the level of risk involved in the behaviour.\(^{390}\)

In terms of the mean ranking of all participants’ scores, intentional murder was the most serious offence followed by sexual penetration of a child under 12 (2), rape (3), intentionally causing serious injury (4), reckless murder (5), manslaughter (8), indecent act with a child under 16 (11), culpable driving causing death (13), drug trafficking (large commercial quality (14); armed robbery (17), recklessly causing serious injury (18), sexual penetration of a child aged 12–16 under care, supervision and authority (20), making a threat to kill (23), dangerous driving causing death (24), stalking (26), indecent assault (34), sexual penetration of a child aged 12–16 (38).\(^{391}\)

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\(^{388}\) Ibid.

\(^{389}\) Ibid 65.

\(^{390}\) Ibid 65–7.

\(^{391}\) Ibid Appendix 5.
8 Assessing the appropriateness of sentencing for driving offences causing death or injury

As part of its assessment of the appropriateness of current sentence types and the length of sentences imposed for driving offences causing death or injury, the Council has used several measures including:

- an analysis of sentencing trends in Tasmania (Chapter Three);
- a statistical comparison between sentences imposed for driving offences causing death or injury in Tasmania and in other jurisdictions (Chapter Four);
- an examination of the relativities of the sentences imposed for different offences to understand the position of driving offences causing death or injury on the penalty scale relative to other offences (Chapter Five);
- an analysis of sentencing decisions for driving offences causing death or injury in Tasmania assessed according to the principles of sentencing (Chapter Six); and
- an examination of public opinion in relation to the sentences imposed for driving offences causing death or injury (Chapter Seven).

This chapter draws together the findings from the various measures used and seeks feedback on the appropriateness of the sentences imposed for driving offences causing death or injury in Tasmania.392

As the Council has previously observed, in making an assessment of the appropriateness of sentencing, there is no ‘correct’ sentence and, as Freiberg, Donnelly and Gelb point out, ‘the appropriate level of punishment for any offence … is essentially a value judgment, one that tends to be culturally determined.’393 As the data in Chapter Four show, there are differences in the sentencing practices between all jurisdictions and it is difficult to say that one jurisdiction has ‘appropriate sentencing’ compared to any other jurisdiction. This may reflect a number of factors, as acknowledged by Freiberg, Donnelly and Gelb, who have pointed out that jurisdictional differences may:

be due to generally lower crime rates, reduced need for deterrence, or that the penal culture or climate in that jurisdiction is different to others. Penal values or cultures also change over time, reflecting population changes, crime rates, media interest in crime and punishment, and the political complexion of the government in power.394

The Council’s view is that the differences in sentencing levels between all jurisdictions suggests that the need for reform in Tasmania should be viewed in the Tasmanian context rather than necessarily following the approach of other jurisdictions, which themselves vary over time and between offences.

392 This is the approach that the Council adopted in its consideration of the appropriateness of sentencing for sex offences, see TSAC, above n 20.
393 Freiberg, Donnelly and Gelb, above n 342, 37.
394 Ibid 106.
The Council notes that there has been a decline in the last decade in crashes resulting in serious casualty (fatal and serious injury) from 355 in 2005 to 289 in 2015. There has also been a decline in the number of crashes reported in this period from 6966 to 6584. In Tasmania, the rate of death as a result of road trauma has fallen from 11.2 per 100 000 people in 2006 to 6.6 per 100 000 people in 2015. This was the largest decrease in the rate across Australia. Accordingly, it is difficult to justify increases in sentences on the basis of deterrence given that the number of serious driving offences in Tasmania has declined.

The Council has also previously cautioned against increasing sentencing levels in response to perceived public dissatisfaction with sentencing given that there is no evidence to show that the public is more satisfied with sentencing in jurisdictions that are more punitive. It is certainly the case that driving offences are a matter of community concern and that there can be community outrage where driving causes the death or injury of another person. However, as the Supreme Court of South Australia has recognised, the response of the criminal justice system needs to appropriately reflect the culpability of the offender:

> Few people deliberately cause a serious accident. The typical dangerous driver does not contemplate the possibility of a serious accident or the possibility of causing death or harm to others. It is important therefore that in concentrating our attention on the dreadful consequences of the driving, we do not obscure the chasm which exists between the moral quality of heedless or even reckless conduct which causes death or bodily harm and the moral quality of conduct which deliberately inflicts death or bodily harm. Consequences of conduct are important in the criminal law but they are not the determinants of the moral turpitude involved in the conduct. Comparisons which are sometimes made between the terrible consequences to the victim and the punishment inflicted on the wrongdoer seem to reflect a desire for a reversion to a form of lex talionis [the law of retaliation] rather than an attempt to relate the punishment imposed to the moral quality of the conduct which is punished or to any rational purpose of punishment.

In making this observation, the Council is acutely aware of the enormous sensitivity of these issues and the grief and trauma to relatives, friends and the broader community that accompany the death or serious injury of a person in a motor vehicle crash.

### 8.1 Specific offences

In providing advice on the appropriateness of sentencing for specific driving offences that result in death or injury, the Council recognises the diversity of circumstances that arise and believes that a court should have discretion to allow this diversity to be taken into account. The Council also acknowledges that advice as to the appropriateness of sentencing for

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395 See Figure 1-1.
396 See Table 1-1.
398 Ibid 24.
399 TSAC, above n 20, 76.
400 This is evidenced in the 25 000 people who signed a petition following the death of Sarah Paino, see Jennifer Crawley, ‘Push for Sarah’s Law’, *The Mercury* (Hobart), 6 March 2016.
particular offences ultimately requires an intuitive value judgment about what the particular offence is worth and what it is worth in comparison with other offences.\footnote{This point was made by the TLRI, above n 35, [6.2.12].}

In the context of driving offences that result in death or injury in Tasmania, the Council also reiterates the need for caution in reviewing the statistics, given that low numbers underpin the statistics for many of the categories of offending.

8.1.1 Manslaughter

The data presented in Chapter Three show that in the period 2001–15 all offenders convicted of manslaughter arising out of the use of a motor vehicle received a full-time sentence of imprisonment. In Chapter Four, data showed that that in comparison to sentences imposed for culpable driving causing death in Victoria, Tasmania had a higher imprisonment rate. The Council’s preliminary view is that there does not appear to be any criticism that can be directed at the use of imprisonment (sentence type) for motor manslaughter. It is also noted that all offenders received a period of licence disqualification.

In relation to sentence length, in the period 2008–15, the minimum sentence imposed for a single count of motor manslaughter was five years and the maximum sentence imposed was seven years with a median sentence of five years and eight months. For all counts of motor manslaughter, the sentences ranged from 21 months to seven years with a median sentence of five years and six months. This can be compared with sentencing for manslaughter (excluding driving cases) where the maximum sentence was ten years and the minimum sentence was three years with a median sentence of seven years. As noted in Chapter Three, the Supreme Court has explicitly changed its approach to sentencing for manslaughter committed by culpable negligence in driving a motor vehicle in response to concerns that the current range did not adequately reflect the concern to safeguard road users against reckless drivers\footnote{Shipton v R [2003] TASSC 23.} and an appeal from the DPP based on the submission that the prevailing standard of penalties for motor manslaughter were inadequate and should be increased.\footnote{See Director of Public Prosecutions (Tas) v Watson (2004) 146 A Crim R 223.} This has resulted in a significant increase in sentencing levels with the median for a single count of motor manslaughter increasing from 18 months in the period 1990–2000, to 50 months in the period 2001–07 to 68 months in the period 2008–15. It is noted that the median sentence for this most recent period is similar to the median sentence in Victoria for culpable driving causing death.

The appropriateness of the sentencing practice for motor manslaughter can also be assessed by a comparison to other homicide offences and other serious driving offences. Manslaughter by criminal negligence is a less serious offence than murder (given the absence of the fault element for murder) and sentencing practice reflects this. However, an observation that can be made is that sentencing for murder is considerably more severe than sentencing for manslaughter with the median sentence for murder being 21 years compared to seven years for manslaughter excluding driving cases and five years and four months for motor manslaughter.\footnote{See Table 5-1.}

It could be argued that current sentencing practice reflects the significant difference in culpability that exists between the offences of murder and manslaughter. There is no intention
to kill or cause bodily injury with the knowledge that this was likely to cause death in cases where a driver is convicted of manslaughter by criminal negligence. Similarly, the driver has not been found to have known or to ought to have known that their conduct was likely to cause death.\textsuperscript{406} Instead, the fault element is a gross departure from the expected standards of driving and driving that shows a disregard for the life and safety of others. In relation to the differences between involuntary manslaughter and motor manslaughter, it could be argued that there could be an increase in sentencing levels to provide for greater equivalence between the two categories to reflect the approach of the Court of Criminal Appeal. However, given that there are very few cases involved, it is difficult to determine if there remains a settled sentencing pattern that would indicate that motor manslaughter cases are generally regarded as less serious as other categories of involuntary manslaughter. Instead, the sentencing statistics reflect the particular circumstances of the few cases involved rather than any general trend. The Court of Criminal Appeal has clearly set out the aggravating factors relevant to sentencing for motor manslaughter and there is scope for the court to impose lengthy sentences if appropriate in all the circumstances of the case.

Further, public opinion research does not support a general increase in sentencing levels for motor manslaughter. The Tasmanian Jury study found that jurors were more likely to impose a sentence more lenient than the judge for this offence compared to any other offence category. It would also appear that the community recognises the distinction between the intentional infliction of death (murder) and unintentionally causing death (manslaughter), with intentionally causing death ranking as among the most serious offences.\textsuperscript{407} The VSAC study of public opinion of offence seriousness also found that participants ranked manslaughter, where the conduct of the offender involved throwing a knife at the deceased, as more serious than culpable driving causing death, where the conduct involved driving while intoxicated and doing a ‘burn out’ on a wet road.\textsuperscript{408} It was also noted that there was greater variation in the views of participants about offence seriousness where the offence involved unintentional death. This depended on the ‘different approaches taken in balancing the harm and culpability of these offences’.\textsuperscript{409} This research (as with other public opinion research) also shows the diversity of public opinion and that the community does not speak with one voice.\textsuperscript{410} Research examining community attitudes has also found that those who favoured harsher sentences were ‘apparently more certain of the correctness of their view and less prepared to tolerate the court’s sentence’.\textsuperscript{411} In the Tasmanian Jury Study, it was found that ‘jurors were more tolerant of differences between the judge’s sentence and the juror’s sentence if the judge was tougher than they were but less tolerant of a sentence that was more lenient’.\textsuperscript{412}

As discussed at [2.3.2], sentencing needs to respond to the culpability of the offender and it needs to reflect the harm caused. In the context of driving, bad driving may result in catastrophic harm or no harm at all. The sentence imposed must also correspond to the

\textsuperscript{406} See Figure 2-4.
\textsuperscript{407} VSAC, above n 379, 69.
\textsuperscript{408} See [7.2].
\textsuperscript{409} VSAC, above n 379, 69.
\textsuperscript{411} Ibid 769.
\textsuperscript{412} Warner et al, above n 356, 51.
offence for which the offender has been found guilty. This can be illustrated by demonstrating that the legal consequences that may flow from a person’s conduct in driving at high speed through a red light or driving at excessive speed with a high blood alcohol concentration depends on the outcome of that conduct.

<table>
<thead>
<tr>
<th>Scenario</th>
<th>Legal consequences</th>
<th>Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>No crash and no detection by police.</td>
<td>No consequences.</td>
<td>Not applicable.</td>
</tr>
<tr>
<td>No crash but detected by police.</td>
<td>Reckless or dangerous driving.</td>
<td>Full-time imprisonment unlikely and most likely to receive a fully suspended sentence of imprisonment. Maximum penalty 2 years imprisonment.</td>
</tr>
<tr>
<td>Crash with minor injuries sustained.</td>
<td>Reckless or dangerous driving.</td>
<td>Full-time imprisonment unlikely and most likely to receive a fully suspended sentence of imprisonment. Maximum penalty 2 years imprisonment.</td>
</tr>
<tr>
<td>Crash with serious injuries sustained.</td>
<td>Dangerous driving causing grievous bodily harm.</td>
<td>Likely to receive full-time imprisonment (current range 6–48 months for all counts).</td>
</tr>
<tr>
<td>Crash with death caused.</td>
<td>Manslaughter.</td>
<td>Imprisonment (current range 21–84 months for all counts).</td>
</tr>
</tbody>
</table>

**Question 2**
Do you consider that the types of sentences (imprisonment and licence disqualification) currently used for manslaughter arising out the use of a motor vehicle are appropriate? Why?

**Question 3**
Do you consider that the sentence length currently imposed by the Supreme Court for manslaughter arising out the use of a motor vehicle is appropriate? Why?

### 8.1.2 Death by dangerous driving

The data presented in Chapter Three show that in the period 2001–15 all offenders convicted of causing death by dangerous driving received a full-time sentence of imprisonment. This can be contrasted with earlier periods where some offenders received a suspended sentence. In Chapter Four, data showed that that in comparison to sentences imposed for death by dangerous driving in Victoria, Queensland and New South Wales, Tasmania had a considerably higher imprisonment rate. The Council’s preliminary view is that there does not appear to be any criticism that can be directed at the use of imprisonment (sentence type) for death by dangerous driving. It is also noted that all offenders received a period of licence disqualification.

In relation to sentence length, in the period 2008–15, the minimum sentence imposed for a single count of death by dangerous driving was six months and the maximum sentence imposed was four years with a median sentence of two years and nearly five months. For all counts of death by dangerous driving, the sentences ranged from six months to four years with a median sentence of two years and five months. As with motor manslaughter, there has been a significant increase in sentencing levels for dangerous driving causing death with the
median for a single count increasing from nine months in the period 1990–2000 and 2001–07 to 28.5 months in the period 2008–15. It is noted that the median head sentence imposed in Tasmania is shorter relative to data from New South Wales, Victoria and Queensland. However, it is also noted that there are variations in charging and sentencing practices in all jurisdictions and that a comparison of head sentences does not reflect the time that is actually served in prison, which depends on the operation of the parole system. Further, an assessment of sentencing practice should take into account the use of imprisonment and the length of imprisonment imposed. On this measure, sentencing for dangerous driving causing death in Tasmania is more severe than all other jurisdictions (where data was available), except for the aggravated form of the offence in New South Wales. However, as has been acknowledged, the very small number of offenders in Tasmania means that caution is required.

In comparison with other offences in Tasmania, sentencing for dangerous driving causing death is less severe than manslaughter and more severe than dangerous driving causing grievous bodily harm. The median sentence length for all counts of dangerous driving causing death (27.5 months) is less than for rape (46.5 months) and causing grievous bodily harm (36 months) and more than armed robbery (24 months). However, an assessment of sentencing severity relying on use of imprisonment and sentence length ranks death by dangerous driving as less serious than rape but more serious than both causing grievous bodily harm and armed robbery.

As shown at [2.3.2], an offender convicted of dangerous driving has the same level of fault as an offender convicted of dangerous driving causing death, however, the harm caused is different. In the case of dangerous driving it is the risk of harm that is punished, whereas it is the realisation of that harm which is punished where death results from the offender’s dangerous driving. As discussed at [3.7.2], dangerous driving has a maximum penalty of two years imprisonment (first offence) and only 11.5% of offenders received a sentence of full-time imprisonment.

Question 4
Do you consider that the types of sentences (imprisonment and licence disqualification) currently used for causing death by dangerous driving are appropriate? Why?

Question 5
Do you consider that the sentence length currently imposed by the Supreme Court for causing death by dangerous driving is appropriate? Why?

8.1.3 Grievous bodily harm by dangerous driving

The data presented in Chapter Three show that in the period 2008–15, 87.5% of offenders convicted of causing grievous bodily harm by dangerous driving received a full-time sentence of imprisonment. This can be contrasted with the period 2001–07 where 33.3% of offenders received a sentence of full-time imprisonment. In relation to single counts of causing grievous bodily harm by dangerous driving, there were only two cases in Tasmania in the period 2008–15.

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414 This relates to sentences imposed between 2008–14 (see [5.1.1] and 5.1.2]). The median sentence for all counts of dangerous driving causing death in the period 2008–15 was 29 months (see [3.3.3]).
15, where one offender received a full-time sentence of imprisonment and the other received a partly suspended sentence. This is comparable to the sentences imposed for causing grievous bodily harm by dangerous driving in Victoria, Queensland and New South Wales, where courts only imposed a sentence of immediate imprisonment in a minority of cases and used suspended sentences and other sentencing options. The Council’s preliminary view is that there does not appear to be any criticism that can be directed at the use of imprisonment (sentence type) for causing grievous bodily harm by dangerous driving. It is also noted that all offenders received a period of licence disqualification.

In relation to sentence length, in the period 2008–15, there was only one custodial sentence imposed for a single count of causing grievous bodily harm by dangerous driving and this was six months imprisonment. Longer global sentences have been imposed. In this period, for all counts of causing grievous bodily harm by dangerous driving the minimum sentence was six months and the maximum sentence imposed was four years with a median sentence of two years and three months. As with other serious driving offences, there has been a significant increase in sentencing levels for causing grievous bodily harm by dangerous driving with the median for all counts increasing from nine months in the period 2001–07 to 28 months in the period 2008–15. However, as only one sentence of six months was imposed in Tasmania for a single count of causing grievous bodily harm by dangerous driving in the period 2008–15, this does not allow any meaningful comparison to be made with sentences imposed in other jurisdictions.

In Chapter Five, sentencing for dangerous driving causing grievous bodily harm was compared with similar offences in Tasmania, in particular with the offence of causing grievous bodily harm contained in the Criminal Code (Tas) s 172. It was noted that (in the period 2008–14) all offenders convicted of dangerous driving causing grievous bodily harm received a sentence of full-time imprisonment in contrast to grievous bodily harm in s 172 where only 60.5% of offenders received a full-time imprisonment. Further, that while the maximum term and the median sentence imposed were longer for s 172 than for dangerous driving causing grievous bodily harm (three years compared with two years and three months), an assessment of the relative seriousness of offences that combined sentence type and sentence length found that sentencing practices appear to be generally more severe for driving offences based on an assessment of the relative seriousness of the offences.

As shown at [2.3.2], an offender convicted of dangerous driving has the same level of fault as an offender convicted of dangerous driving causing grievous bodily harm, however, the harm caused is different. In the case of dangerous driving it is the risk of harm that is punished, whereas it is the realisation of that harm which is punished where serious injury results for the offender’s dangerous driving. As discussed at [3.7.2], dangerous driving has a maximum penalty of two years imprisonment (first offence) and only 11.5% of offenders received a sentence of full-time imprisonment.

A comparison can also be made between the judicial approach to causing grievous bodily harm by dangerous driving and the approach of the legislature to other cases where grievous bodily harm is caused. Under the Sentencing Act 1997 (Tas), there is a mandatory minimum sentence of six months imprisonment provided in cases where serious bodily harm is caused to a police officer, if a person knows or ought reasonably be expected to know that bodily harm to a police officer may be caused or may arise from the offence, unless exceptional circumstances exist. As noted at [5.1.4], there would appear to be no inconsistency with the legislative approach to serious injuries caused to police officers and the approach to the courts.
in cases where grievous bodily harm has been caused by dangerous driving. Sentencing data show that all offenders received a sentence of imprisonment with the minimum term imposed being six months imprisonment.

Question 6
Do you consider that the types of sentences (imprisonment/suspended sentence and licence disqualification) currently used for causing grievous bodily harm by dangerous driving are appropriate? Why?

Question 7
Do you consider that the sentence length currently imposed by the Supreme Court for causing grievous bodily harm by dangerous driving is appropriate? Why?

8.1.4 Death or grievous bodily harm by negligent driving
The data presented in Chapter Three show that in the period July 2006 to May 2016 a majority of offenders convicted of causing death by negligent driving or grievous bodily harm by negligent driving received a fully suspended sentence of imprisonment (66.7% for negligent driving causing death (14 out of 21 cases) and 57.1% for negligent driving causing grievous bodily harm (four out of seven cases). In relation to negligent driving causing death 85.7% received a custodial sentence (18 out of 21 cases). A custodial sentence includes a term of imprisonment that is served in prison, as well as sentence of imprisonment that is fully or partly suspended. A fully suspended sentence means that the whole sentence is not activated and the offender is immediately released into the community. A partly suspended sentence means that the offender spends a specified period in prison before being released into the community. Other sentencing options used are community service orders (one case for negligent driving causing death) and fines (two cases for negligent driving causing death and three cases for negligent driving causing grievous bodily harm).

In Chapter Four, a comparison was made between the maximum penalty in Tasmania and the maximum penalties in other jurisdictions. It was noted that there was considerable jurisdictional variation with Tasmania’s maximum penalty of 12 months for negligent driving causing death being greater than the maximum penalty in England for matters heard in Magistrates Court for careless driving (six months) and for non-aggravated offences in New Zealand (three months), the same as the maximum penalty in South Australia and less than the maximum penalty in New South Wales (18 months), the Australian Capital Territory (24 months), New Zealand for aggravated offences (36 months) and England for matters heard on indictment (five years). For negligent driving causing grievous bodily harm, the maximum penalty of six months in Tasmania was higher than the maximum for non-aggravated offences in New Zealand (three months) but less than the maximum in New South Wales (nine months), South Australia (12 months), the Australian Capital Territory (12 months), and New Zealand for aggravated offences (36 months). However, it is recognised that the maximum penalty is rarely imposed. Data also indicate that in comparison to sentences imposed for death by negligent driving and grievous bodily harm by negligent driving in New South Wales, sentencing in Tasmania was more severe as a majority of offenders in New South Wales received a good behaviour bond or other non-custodial sentence rather than a custodial sentence.
In Chapter Five, a comparison was made of sentencing for negligent driving causing death or grievous bodily harm with negligent driving. The level of culpability or blameworthiness of the offender for these offences is the same given that the offence of negligent driving in the Traffic Act 1925 s 32(2) contains the same fault element as the more serious offences of negligent driving causing death or grievous bodily harm. However, the legislature (by providing different maximum penalties) and sentencing practices (by imposing a custodial sentences for a majority of charges) reflect the increased harm caused where death or serious injury is caused. It may be accepted that it is appropriate that the law makes this distinction and imposes a heavier sentence, however, it remains a matter of contention as to the extent that sentencing severity should be increased to reflect the outcome.415

An issue for consideration is whether the use of sentencing options other than immediate imprisonment, in particular the use of suspended sentences, are appropriate for the offences of causing death or grievous bodily harm by negligent driving. It may be argued that a suspended sentence is a proportionate response to the offending as a sentence of imprisonment reflects the significant harm caused but the use of a suspended sentence allows the court to allow for the low culpability of the offender (as compared to murder, manslaughter or dangerous driving). Alternatively, it could be argued that the use of a custodial sentence is too severe to reflect the culpability of an offender for an offence where the fault element is negligence and the driving behaviour relied on consists of momentary inattention. Support for the view that sentencing in Tasmania is too severe can be found by comparing sentencing practice in New South Wales where there is greater use of non-custodial sentencing options, particularly good behaviour bonds, for negligent driving causing death or grievous bodily harm. Others have urged caution against ‘excessively punitive sentencing regime … in which substantial prison sentences may be imposed for tragic driving errors that are not even grave enough to be categorised as “dangerous driving”’.416

Another approach is to focus on the harm caused by the offender’s driving and to argue that where a death has been caused, then the only appropriate sentence is a term of full-time imprisonment. For example, Cycling Tasmania has demanded tougher penalties for negligent drivers who kill other road users and have expressed the view that jail is the only appropriate penalty to deter other road users.417 In a similar vein, the chairman of Pedestrian Council of Australia said that ‘sentences that reflected the serious carnage caused by negligent driving were needed to lessen the trauma. People offend again because they know the courts are soft’.418

In general, suspended sentences have been a controversial sentencing option and concerns have been raised that they do not amount to ‘real’ punishment and that they are viewed by the public and the offenders as a ‘let-off’.419 The Tasmanian Government has indicated its intention to abolish suspended sentences and the Council has previously provided advice to

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415 See for example, R Anthony Duff, ‘Whose Luck Is it Anyway?’ in Chris Clarkson and Sally Cunningham (eds), Criminal Liability for Non-Aggressive Death (Ashgate, 2008) 61, who argues that any increase in sentencing severity should be modest.


the government about sentencing options to replace suspended sentences.\footnote{420} Given the use of suspended sentences for negligent driving causing death or grievous bodily harm, the abolition of suspend sentences will clearly have an effect on sentencing for these offences.

In this context, it is useful to consider these cases decided in 2015 where offenders have been convicted of negligent driving causing death.

<table>
<thead>
<tr>
<th>Circumstances</th>
<th>Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>71-year-old man took the wrong exit on round about and attempted to correct his mistake by performing a U-turn when he thought the road was clear. He collided with another vehicle and killed his partner.</td>
<td>3 month imprisonment fully suspended.\footnote{421}</td>
</tr>
<tr>
<td>64-year-old man had purchased some chairs and carpet and was driving home when two of the chairs dislodged from the ute. A driver in another vehicle swerved to avoid to the furniture, collided with an oncoming vehicle, and was killed.</td>
<td>28 days imprisonment fully suspended and 56 hours community service.\footnote{422}</td>
</tr>
<tr>
<td>Young woman crossed the centre line of the Midland Highway and collided with an oncoming vehicle, killing the driver and seriously injuring the front seat passenger. Woke early to go the gym before her journey, had pulled over to rest twice before the crash and believed that she may have fallen asleep at the wheel.</td>
<td>3 months imprisonment fully suspended.\footnote{423}</td>
</tr>
</tbody>
</table>

These cases demonstrate the terrible consequences that can follow from momentary inattention or other inadvertent failures. They also reflect more generally the assessment of the circumstances in which convictions are obtained for these offences, arising more commonly from inattention than from any conscious decision to commit an offence or take a risk. These cases also highlight the role that chance can play and that, it is noted that there are cases where a ‘small deviation from standards may occasionally have tragic consequences, whereas gross deviations may give rise to no harm at all’.\footnote{424}

Serious offences in criminal law generally require proof of intention or recklessness in contrast with the standard for compensation in tort law, which requires proof of negligence.\footnote{425} In creating an offence that was more serious than the very minor offence of negligent driving to apply in cases where death or serious injury has been caused not by ‘a pattern of bad driving … [but instead] … simply … an act of momentary inattention, lapse of concentration or misjudgment’,\footnote{426} the legislature responded to concerns that the previous law was inadequate. However, in creating an offence that applies at the lower end of culpability, there tends to be media comment when the offender is not imprisoned or only receives a short

\footnote{420} TASC, above n 330.
\footnote{421} The offender was disqualified from driving for 12 months.
\footnote{422} The offender was disqualified from driving for 12 months.
\footnote{423} The offender was disqualified from driving for 18 months.
\footnote{425} Ibid 116.
\footnote{426} Tasmania, \textit{Parliamentary Debates}, House of Assembly, Thursday 6 April 2000, pt 2 43–127 (Patmore)
period of imprisonment. In cases where death has been caused, there tends to be a focus on the sentence received when some of the dissatisfaction actually reflects the offence for which the offender was convicted. There is a belief that a sentence should be imposed that would be appropriate for the more serious offences of murder, manslaughter or dangerous driving causing death. This sentiment is understandable given the enormity of the loss but it does not make the sentence imposed for negligent driving inappropriate. As noted at [1.5] and [2.3.2], magistrates can only impose a sentence for the charge for which the offender was convicted and cannot sentence on the basis of a more serious charge. This highlights the importance of the charging discretion exercised by the DPP in such cases.

It has also been observed that it is rare for criminal liability to attach for civil negligence in relation to the death or injury of a person and even more unusual for imprisonment to be provided for in legislation as a possible punishment. It is also noted that New South Wales, South Australia and the Australian Capital Territory are the only other Australian jurisdictions to have the intermediate offence of negligent driving causing death or grievous bodily harm between dangerous driving causing death and the minor offence of negligent driving.

Another issue is the appropriateness of the sentence length for the offences of causing death and/or grievous bodily harm by negligent driving. It is noted that very few offenders receive a sentence of full-time imprisonment and this makes assessment difficult. However, it could be argued that there is a case for the maximum penalties to be increased to encourage the courts to impose longer sentences in more serious (borderline dangerous driving) cases. As noted above, there is considerable disparity in the maximum penalties provided in other jurisdictions. It has also been noted that in other jurisdictions, the maximum penalty applicable for negligent driving or careless driving causing death or serious injury is considerably less than the maximum penalty that exists for the offences of death or serious injury caused by dangerous driving.

**Question 8**

Do you consider that the types of sentences (predominately suspended sentences) currently used for causing death and/or grievous bodily harm by negligent driving are appropriate? Why?

**Question 9**

Do you consider that the sentence length currently imposed by the Magistrates Court for causing death and/or grievous bodily harm by negligent driving is appropriate? Why?

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427 This was identified as an objection to the creation of the offence of careless driving causing death in England, see Cunningham, above n 327.

428 In the English context, Cunningham has written that the ‘loss of life is the worst harm that can be experienced by humans, both in terms of the direct victim and those loved-ones that he or she leaves behind. It is only natural that the bereaved seek to allocate blame and explain their loss, but the danger of punishing for death those who have driven carelessly is that the only good it will do is to “give fleeting satisfaction — and it would only be fleeting — to some relatives and provide another sacrificial lamb on the alter of a tabloid newspaper”. Even the provision of fleeting satisfaction is doubtful, given that is likely that only in the rarest and most serious of cases (perhaps those in which the correct charge would be [causing death by dangerous driving] rather than [causing death by careless driving]) will the court feel justified in imposing a custodial sentence of anything near the maximum of 5 years’: ibid 311.

429 See [4.2.2], [5.2].
9 Options for reform

The terms of reference request that the Council provide advice on how best to address any finding that the current sentence type and length are not considered appropriate and to consider whether changes to offence provisions and maximum penalties are required. In this consultation paper, the Council has sought feedback from stakeholders about the appropriateness of sentencing practice and, consequently, has not formed a final view on this issue.

However, as part of the consultation process, the Council is seeking feedback on possible mechanisms that may be used to address any finding that sentencing is inappropriate. These are set out at [9.3] and [9.4]. Further, there are some options for reform that may be considered desirable to address community perceptions of sentencing and the needs of victims regardless of the view taken on the appropriateness of sentencing. These are set out at [9.1], [9.2] and [9.5].

9.1 Addressing the needs of victim

Significant and long-term harm is caused to family members where people have died as a result by motor vehicle crash. It is suggested that ‘[f]ew events are more “seismically traumatising” than the loss of a close relative or friend as a result of the actions or negligence of another’.\(^{430}\) Family members tend to ‘view the death … as being the result of senseless, meaningless, irrational act; a preventable death that should not have happened, and; the ultimate violation of their loved one’s life’.\(^{431}\) As noted at [6.6], from the perspective of family members, there is little difference between murder and negligent driving causing death given that the trauma and loss are equivalent. This tends to be evidenced by ‘extremely intense family response and a need to restore a sense of “retaliatory justice”’.\(^{432}\)

There is no research in Tasmania that has examined victim satisfaction or experiences with the criminal justice system or victims’ views on the adequacy of sentencing of offenders, either in general or in relation to driving offences that result in death or serious injury. However, research conducted elsewhere ‘consistently reported victim dissatisfaction with some or all of the processes, actors and institutions making up the criminal justice system’.\(^{433}\) In the context of driving offences resulting in death, public opinion research conducted in England found that relatives of victims expressed dissatisfaction with sentencing and preferred sentences that were much tougher than those expressed by survey participants drawn from the general public.\(^{434}\) There was also concern expressed about the court process in general. Anecdotally, the Council is aware of concerns expressed by family members about the adequacy of sentences received in some cases. This dissatisfaction tends to reflect an expectation that the punishment imposed is a measure of the life lost and a tendency to focus...


\(^{431}\) Bateman, above n 430, 16.

\(^{432}\) Rynearson, above n 430, 173.


\(^{434}\) Ibid viii.
on the harm inflicted rather than the blameworthiness of the offender and consequently a view that the punishment equates to a lengthy period of punishment.

Research examining victim needs has identified two interrelated aspects of justice from the perspective of a victim:

(1) procedural justice which is ‘concerned with the quality of an individual’s experience of the processes that result in the ultimate outcome’. These involve ‘participation and voice’, ‘information and support’, and ‘trust, neutrality and respectful treatment’.

(2) distributive justice which is ‘concerned with the perception of justice arising from outcomes’. Research suggests that victims seek distributive justice in the form of punishment and retribution, deterrence, protection and community safety, and material and emotional restoration.

The Council notes that there have been important changes in the criminal justice system that attempt to accommodate the interests of victims and improve the experiences of victims in terms of procedural and distributive justice. These have included the reception of victim impact statements from victims of crime. In this context, a victim includes the person who has suffered injury as a direct consequence of the offence and members of the immediate family of a deceased victim of an offence. There has also been the adoption of a charter of rights for victims of crime, the creation of a witness assistance service within the Office of the DPP and greater involvement of family members and communication by prosecutors about the court process. As noted at [6.6], in the context of driving offences, there have been recent changes to formally allow victim impact statements to be received in the Magistrates Court in cases where death or serious injury have been caused. This is tied with efforts of Office of the DPP to treat all cases where death or serious injury has been caused (regardless of the charge) with due seriousness by prosecuting these cases in both the Supreme and Magistrates Court, as well as extending witness support services to families. There is also recognition from the courts of the enormous loss suffered by family members where a person is killed as a result of a motor vehicle crash.

However, there have been criticisms of the traditional criminal justice system as a means to ‘deliver emotional reparation to victims for the non-material effects of crime and for failing to meet victims’ procedural justice needs’. For this reason, there have been calls for restorative justice to be incorporated into traditional criminal trial processes as a means of improving outcomes for victims. Restorative justice ‘focuses on repairing the harm caused by the offence, on encouraging offenders to take responsibility for their actions and on

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435 Ibid 19.
436 Ibid.
437 Ibid 21.
438 Sentencing Act 1997 (Tas) s 81A(1). ‘Immediate family’ includes the spouse or partner of the deceased victim, a parent, guardian or step-parent of the deceased victim, a child or stepchild of the deceased victim and a brother, sister, stepbrother or stepsister of the deceased victim. See further [6.6].
439 See [6.6].
440 VLRC, above n 433, 29.
441 Ibid.
increasing victim and community involvement in the criminal justice system’. The Council acknowledges the limits of the conventional criminal justice system as a means to respond to those who have suffered serious injury or to those whose relative has died in a motor vehicle crash. For this reason, the Council seeks feedback on the use of restorative justice principles and practices as a mechanism that could potentially be introduced to respond to the needs of victims.

Based on a victim-focused restorative justice model, a Victorian pilot project has been funded by the Legal Service Board which will provide a restorative justice conferencing program for those affected by a driving offence that resulted in death or serious injury. The following benefits for victims and offenders have been identified:

<table>
<thead>
<tr>
<th>Restorative Justice Conferencing: Benefits for the Victim</th>
<th>Restorative Justice Conferencing: Benefits for the Offender</th>
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<tbody>
<tr>
<td>Opportunity to be directly involved in the justice process.</td>
<td>Opportunity to take responsibility for the offending by understanding the full effect that the offending had on the victim.</td>
</tr>
<tr>
<td>Opportunity to tell the offender directly the impact the offending has had.</td>
<td>Opportunity to apologise.</td>
</tr>
<tr>
<td>Opportunity to receive answers in relation to unresolved questions about the offending.</td>
<td>Opportunity to repair relationships, where appropriate, with the victim, family and broader community.</td>
</tr>
<tr>
<td>Opportunity to resolve relationships with the offender, family or the broader community, where appropriate.</td>
<td>Opportunity to engage in treatment and rehabilitation and to avoid future offending.</td>
</tr>
<tr>
<td>Opportunity to have input into the outcome, including an opportunity to request compensation without needing to go through a formal court process.</td>
<td>Opportunity to make amends by agreeing to the outcomes sought by the victim.</td>
</tr>
</tbody>
</table>

In the context of driving offences where death or serious injury result, the Centre for Innovative Justice considered that restorative justice conferencing was likely to ‘provide particular benefits for victims and offenders for a range of reasons’. These included: the significant harm caused, the rehabilitative potential of restorative justice given the disproportionate number of young offenders, the proportion of cases where the victim and the offender knew each other prior to the crash, and the range of legal responses to road trauma related deaths or injuries (no charges to culpable driving causing death).

The model proposed in Victoria will be a complementary process to the criminal justice system (rather than an alternative process) with the conference potentially being held at a number of different stages in the criminal justice system: post-investigation where decision is made not to proceed with charges, post-prosecution where there is a not guilty finding or pre-sentence where there is a guilty finding or a plea of guilty, or as a post-sentence option. The development of a model similar to the Victorian pilot could be explored in Tasmania.

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443 Centre for Innovative Justice, RMIT University, Background Paper: Restorative Justice Conferencing Pilot.
444 Ibid 2–3.
445 Ibid 5.
Alternatively, greater use could be made of victim/offender mediation. The *Sentencing Act 1997* (Tas) s 84(1) provides that before a court passes sentence on an offender it may, if the offender agrees, order a mediation report and adjourn the proceedings to enable the report be prepared. There is also an informal victim/offender mediation process that may be requested by either party following sentence. These usually occur prior to release from prison and outcomes ‘may include an apology by the offender and/or an explanation of the offender’s actions’. Mediation will only occur if the following criteria are met:

- ensuring both the victim and offender are prepared and able to take part in mediation;
- finding out what each party expects from mediation;
- finding out if the expectations of both are reasonable and are likely to be met;
- ensuring as much as possible, that the process will be positive for all concerned; and
- ensuring that safety of all involved is not compromised.

In its examination of sentencing in Tasmania, the TLRI considered the use of victim/offender mediation under the *Sentencing Act 1997* (Tas) and noted that a lack of resources was identified as a reason why there had been few referrals for mediation reports. After considering the submissions received, the TLRI considered that ‘as a restorative measure it appears to have been overtaken by community conferencing which has a stronger restorative focus from the point of view of the offender and the victim, and has the added advantage of incorporating the community’. There have also been few victim/offender mediations occur outside of the more formal program set out in the *Sentencing Act 1997* (Tas).

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**Question 10**

Do you consider that the interests of victims in cases involving death or injury arising from a motor vehicle crash are adequately recognised? Why?

**Question 11**

If you answered no, please indicate what else you consider could be done to address the needs of victims.

**Question 12**

Should restorative justice procedures be available as a supplementary part of the criminal justice system? If not, why not? If so, in what circumstances and which model?

9.2 **Improved communication with the broader community**

Another avenue for reform may be to enhance communication with the broader community in relation to sentencing for driving offences where death and injury occur. Public opinion research indicates that generally the public lack accurate information about crime and the

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446 Larson, above n 442, 21.
447 Ibid.
449 TLRI, above n 35, 238.
450 Ibid.
451 Larson above n 442, 20.
criminal justice system and that ‘those who have the lowest levels of knowledge … hold the most punitive views’. 452 Research also shows that when people have more information, there is a significant decrease in their level of punitiveness. 453 As noted above, respondents who received more comprehensive information about a case were less punitive and less likely to rate the sentence as lenient when compared to those who were given a newspaper length version. Despite the complexities inherent in improving public knowledge about crime and sentencing, there are some mechanisms that may improve community understanding in cases where death or injury have been caused from a motor vehicle crash.

9.2.1 Magistrates to publish reason for sentence

Sentencing comments are available for the Supreme Court but are rarely made available for sentences imposed in the Magistrates Court. 454 An option to improve communication with the broader community in cases where death or injury has been caused by a motor vehicle crash would be to require magistrates to publish reasons in cases of negligent driving causing death or grievous bodily harm. VSAC has expressed the view that ‘the publication of a judge’s reasons for sentence … is a fundamental resource for community education about sentencing, and a prerequisite to informed community debate and discussion on sentencing issues.’ 455 Further, as noted, if more information is known about a case, then this tends to improve community understanding of the sentence imposed and lead to greater acceptance of that sentence. The Tasmanian Jury Study suggested that ‘there are advantages in making sentencing comments publicly available’ as it found that half (51%) of jurors said that the sentencing comments affected their judgement of the sentence a lot and another 41% said that it had some effect. 456 The Council acknowledges that the requirement to prepare sentencing comments for broader publication would have resource implications and increase the workload of the magistrates. 457

Question 13

Should the Magistrates Court make comments on passing sentence publicly available in cases of negligent driving causing death or grievous bodily harm?

9.2.2 Rename offence careless driving rather than negligent driving

The current offence structure for driving offences that result in death in Tasmania has an offence where the fault element is criminal negligence (manslaughter) and an offence where the fault element is civil negligence (negligent driving causing death). This is potentially

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452 Gelb, Myths and Misconceptions: Public Opinion Versus Public Judgment About Sentencing, above n 356, 14. In the Tasmanian Jury Study, it was found that people who know more about crime are less punitive, Warner, above n 356, 87.
454 The only Comments on Passing Sentence that are currently available are the comments in Tasmania v Ellis, Webster, 25 June 2014 (Sentence).
456 Warner et al, above n 356, 94.
457 See VSAC, above n 455, 247.
confusing and may make it difficult for the public to understand the level of culpability of an offender who has been found guilty of negligent driving causing death.⁴⁵⁸

An option may be to rename the offences careless driving causing death or serious injury to better reflect the lower standard of culpability and to ensure that there is no confusion with culpable or criminal negligence. Careless driving is the terminology used in England and Wales and New Zealand and the fault element for careless driving (as with negligent driving under the* Traffic Act 1925* (Tas)) is falling below the standard of that which would be expected of a competent and careful driver.⁴⁵⁹

<table>
<thead>
<tr>
<th>Question 14</th>
</tr>
</thead>
<tbody>
<tr>
<td>Should the offences of negligent driving in the* Traffic Act 1925* (Tas) be renamed careless driving?</td>
</tr>
</tbody>
</table>

### 9.2.3 Guideline judgments

Guideline judgments have been adopted in other jurisdictions as a means to improve transparency and increase public confidence in sentencing. Comprehensive guidelines for driving offences where death has been caused have been developed in England and Wales and these set out aggravating and mitigating factors as well as the typical sentencing range for different types of driving behaviour reflecting different levels of seriousness. The introduction of guideline judgments is considered further at [9.3.2].

### 9.3 Mechanism to address any finding that sentencing is inappropriate

As indicated, the Council has not formulated a view on the appropriateness of sentencing for driving offences where death or serious injury is caused. However, as part of the consultation process, the Council is seeking feedback on possible mechanisms that may be used to address any finding that sentencing is inappropriate.

#### 9.3.1 Allow time for courts and the Director of Public Prosecutions to respond through submissions and the appeal process

A function of the Sentencing Advisory Council is to improve the quality and availability of information on sentencing in Tasmania. This paper provides in-depth information about current sentencing trends for driving offences that result in death or injury in Tasmania and other jurisdictions, as well as statistical data about sentencing for comparator offences in Tasmania. This information should help to inform the DPP and the courts on sentencing trends and, if there are indications that sentencing is too lenient for some offences, then based on previous experience, it is foreseeable that submissions will be made to the court and the court will adjust its own sentencing practices. This may be particularly helpful in the Magistrates Court, where it has been observed that sentencing comments are not routinely available and that it has been difficult to find information about sentencing practices.

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⁴⁵⁸ Following the introduction of the offence of negligent driving causing death, there was also legal uncertainty about whether the fault element for the offence was culpable negligence or civil negligence, see *Filz v Knox* [2002] TASSC 82.

It is also noted that the existing and effective forum for reviewing sentences, the Court of Criminal Appeal, has previously been utilised to promote an increase in the sentences imposed for dangerous driving causing death and motor manslaughter,\(^{460}\) and there is scope for renewed arguments to made to be in sentencing appeals that the sentencing range is generally too low. Such an argument may provide a mechanism that would lead the Court of Criminal Appeal to provide guidance to sentencing courts and also to determine that heavier sentences are required than in the past. This would need to be monitored.

### 9.3.2 Change to penalty provisions

In previous reports, the Council has identified mechanisms that could be further explored as ways to provide guidance to the court to allow for the incremental increase in sentencing levels in circumstances where sentencing was considered inappropriate. Two of these models were: (1) the creation of a guideline judgment scheme; and (2) the introduction of presumptive sentencing. The Council has previously rejected the introduction of graduated maximum penalties in the *Criminal Code* (Tas) and has strongly recommended against the introduction of mandatory sentencing as mechanisms to provide for the measured increase in sentencing. In responding to concerns about sentencing levels, the Council has sought to recommend approaches that retain the maximum discretion possible for courts. This remains the Council’s approach.

Another option that could be considered, in the context of this paper, is an increase in the maximum penalty for negligent driving causing death or grievous bodily harm.

**Guideline judgments**

In the Council’s consideration of sentencing for sex offences, it identified guideline judgments as a possible mechanism to provide guidance to courts in relation to sentencing for sex offences in Tasmania. It indicates that guideline judgments ‘are a mechanism … to provide broad sentencing guidance beyond the specific facts of a case’.\(^{461}\) As the Council indicated:

> [s]entencing guidelines have the benefit of creating a framework for sentencing decisions, consolidating principles of sentencing for a particular offence, and providing a vehicle for consideration of “interrelationships of sentences for the different forms of the offence”.\(^{462}\)

Other benefits of guideline judgments include the potential to increase penalty levels, to provide consistency and greater transparency in sentencing, and improve public confidence. Guideline judgments also allow the court to recognise the diversity of circumstances that arise and to have discretion to allow this diversity to be taken into account. Guideline judgments can provide a system of guidance that addresses offences at the bottom, middle and top of range. There are indications from other jurisdictions that guideline judgments are an effective means of providing guidance to courts in relation to the imposition of sentence.\(^{463}\) And, for this reason, VSAC has recommended the introduction of an enhanced guideline judgement

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\(^{460}\) See *DPP v Smithhurst* [2011] TASCCA 19; *DPP v Watson* [2004] TASSC 54; *Gallagher v Tasmania* [2009] TASSC 84.

\(^{461}\) VSAC, above n 455, 13.


\(^{463}\) VSAC, above n 455, 131–33.
scheme in Victoria in response to the government’s request for advice on the most appropriate form of sentencing guidance. Accordingly, in the Council’s consideration of the introduction of mandatory sentencing for serious child sex offenders, it reiterated its earlier recommendation that the option of introducing guideline judgments in Tasmania should be further explored.

If sentencing for driving offences where death or injury is caused were considered inappropriate, the introduction of a guideline judgment scheme may be a mechanism to provide for the increase in sentence. However, it is noted that the Tasmanian Court of Criminal Appeal has already adopted a guideline judgment from New South Wales that sets out the relevant sentencing principles that apply in cases of serious driving offences that result in death and serious injury.

**Question 15**
If you think that sentencing is inappropriate, do you consider that the introduction of a guideline judgment scheme in Tasmania should be further considered? Why?

**Standard sentences in the form a legislated guidepost**
In the Council’s consideration of sentencing for sexual offences, it proposed further consideration of a presumptive sentencing scheme as a mechanism to increase sentencing levels, such as the presumptive non-parole period scheme based on the standard non-parole period (SNPP) scheme that exists in New South Wales. An SNPP is a ‘legislated non-parole period intended to provide guidance to the courts on the length of time an offender found guilty of an offence should spend in prison before being eligible to apply for release on parole’. The presumptive non-parole period only applies if the court imposes a sentence of imprisonment and it does not apply to non-custodial sentences. Under the **Crimes (Sentencing Procedure) Act 1999 (NSW)**, the SNPP is the non-parole period for an offence that, ‘taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness’. It is a matter to be taken into account by a court in determining the appropriate sentencing in the particular case without limiting the matters that are otherwise required or permitted to be taken into account in sentencing an offender (including subjective factors personal to the offender). It is not mandatory but rather provides a guidepost to sentencing (along with the maximum penalty) and is not a starting point for the imposition of sentence. Accordingly, it is consistent with instinctive synthesis, which is the process where all considerations relevant to the instant case are simultaneously

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464 Ibid Recommendation 3. See also Chapter Six.
465 TSAC, above n 20, Recommendation 3.
466 See [2.3.3] and Appendix B.
467 See TSAC, above n 20, 91–97.
469 *Crimes (Sentencing Procedure) Act 1999 (NSW)* s 54A(2).
470 Ibid s 54B(2); *Mulrock v The Queen* (2011) 244 CLR 120. Prior to the High Court decision in *Mulrock*, the approach in New South Wales was to ‘determine whether the offence was in the midrange of objective seriousness and then, if it was, to ask whether there were reasons for not imposing the SNPP’: Sentencing Council, NSW, *Standard Non-parole Period Final Report* (2013) [1.13]. This approach was rejected by the High Court.
471 *Mulrock v The Queen* (2011) 244 CLR 120.
unified, balanced and weighed by the sentencing judge in determining the appropriate sentence.\textsuperscript{472}

The Council identified several issues that may arise with the implementation of such a scheme including the process for setting the appropriate term, the compatibility of an SNPP scheme with current sentence practice, the interaction with global sentencing.\textsuperscript{473} The Council noted that the adoption of a standard non-parole period scheme and its structure and its implementation would require further development and close consultation with stakeholders. Issues that the Council identified that would need to be addressed were: the offences to be initially included in the scheme; the procedure for including additional offences in the scheme; the mechanism for setting the presumptive non-parole period; a reconsideration of the relationship between the imposition of the total sentence and the non-parole period; and the interaction of the scheme with global sentencing. It would also be necessary to address the implications of such a scheme on current sentencing practice (for example, top down or bottom up sentencing). Nevertheless, the Council’s view was that there was merit in further investigating the implementation of a standard non-parole scheme in Tasmania on the basis that there was retention of judicial discretion.

The Council has subsequently identified an alternative model for presumptive sentencing based on the work of VSAC that set out a standard sentence scheme. This model is based on the SNPP scheme from New South Wales but operates in relation to the head sentence instead of the non-parole period. The Victorian model sets out the head sentence for offences ‘that represent the sentence for an offence that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness’.\textsuperscript{474} As with the New South approach, the standard sentence is intended to provide a guidepost rather than a starting point or a presumptive sentence and is also intended to be consistent with intuitive synthesis so that the standard sentence is one of the matters to be taken into account in determining the appropriate sentence (along with all the other relevant sentencing factors).\textsuperscript{475} However, unlike the New South Wales model, VSAC recommended that if a standard sentence scheme is introduced, it should be accompanied by a guideline judgment scheme.\textsuperscript{476}

A legislated sentencing scheme (setting out either a standard non-parole period or a standard head sentence) that operates as a guidepost in the exercising of the sentencing discretion may be a response to a determination that sentencing for driving offences that result in death and injury are inappropriate. However, this model is unlikely to be suitable in relation to the summary offences of negligent driving causing death or grievous bodily harm. Presumptive schemes do not apply universally and typically operate in relation to serious offending only. In New South Wales, the SNPP scheme does not apply to offences heard and determined summarily and the recommendation of VSAC was that the standard sentence scheme should not apply to summary offences.\textsuperscript{477}

\textsuperscript{472} See [2.3].
\textsuperscript{473} See TSAC, above n 20, 93–7.
\textsuperscript{474} VSAC, above n 455, 167. It is noted that standard sentence model is not the VSAC’s preferred model for sentencing guidance: at 160. Instead, VSAC preferred model was to develop an enhanced guidelines judgment scheme.
\textsuperscript{475} Ibid Recommendation 7.
\textsuperscript{476} Ibid.
\textsuperscript{477} Ibid 172.
There has also been limited use of presumptive sentencing in other jurisdictions for serious driving offences. In Victoria, culpable driving causing death has been included in the standard sentencing scheme with a standard sentence of 10 years. However, the offences of dangerous driving causing death or grievous bodily harm have not been included in the scheme. In New South Wales, manslaughter and dangerous driving causing death or grievous bodily harm are not included in the SNPP scheme. In 2011, the NSW Sentencing Council gave consideration to the issue of whether a SNPP should be attached to any of the dangerous driving offences contained in the Crimes Act (NSW) and recommended against their inclusion. The NSW Council has also noted that it is appropriate that manslaughter is not included in the SNPP scheme given the wide range of circumstances in which the offence could be committed.

Question 16
If you think sentencing is inappropriate, do you consider that the introduction of a legislated sentencing scheme (setting out either a standard non-parole period or a standard head sentence) should be further considered? Why?

Increase maximum penalty for negligent driving causing death and grievous bodily harm

An option for reform would be for Parliament to amend the Traffic Act 1925 (Tas) to increase the maximum penalty for the offences of negligent driving causing death and grievous bodily harm. Maximum penalties are the highest sentence that a court can impose for an offence and provide an indication of Parliament’s view of the gravity of an offence. In other jurisdictions, increasing the maximum penalty for an offence has been used as a means of signalling to courts that sentences for a particular offence should increase.

An argument could be made that the maximum penalty for negligent driving causing death and grievous bodily harm should be increased in Tasmania to reflect the increase in the level of sentencing imposed by the Supreme Court for the more serious driving offences of dangerous driving causing death or grievous bodily harm and manslaughter. The maximum penalties for negligent driving causing death are currently one year for a first offence and two years for a subsequent offence and for negligent driving causing grievous bodily harm, six months for a first offence and one year for a subsequent offence. These penalty levels were set when the offences were created in 2000. Since that time, there has been significant increase in sentences imposed for dangerous driving causing death or grievous bodily harm and manslaughter.

Alternatively, it could be argued that there is considerable scope to increase the severity of sentencing for negligent driving causing death and grievous bodily harm within the current maximum penalty (given the infrequently use of full-time imprisonment as a sentencing option). Accordingly, an increase in the maximum penalty could be said to be unnecessary. Evidence in other jurisdictions also suggests that increases in maximum penalties have only have a moderate effect on increasing penalty levels. Conversely, concerns may also be

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478 This was not an offence recommended for inclusion in the standard sentencing scheme by VSAC.
481 VSAC, above n 455, 222.
482 Ibid.
483 Ibid 25.
raised that an increase in maximum penalty may inappropriately result in an increase in penalties for drivers whose fault is inadvertence or inattention rather than conscious risk taking.

If maximum penalties are to be increased, it would be necessary to decide on the appropriate increase. There is no clear indication from other jurisdictions as to the appropriate maximum penalty. In setting the level, it would also be necessary to ensure that the level reflected the offence hierarchy for driving offences and, so, it may be necessary to also increase the maximum penalty for reckless or dangerous driving contained in the *Traffic Act 1925* (Tas) s 32(1).484

**Question 17**

If you think that sentencing for negligent driving causing death and grievous bodily harm are inappropriate, do you consider that the maximum penalties for the offences should increased?

**Question 18**

If you consider that the maximum penalties should be increased, please indicate the maximum penalties that you consider appropriate?

**Set out specific aggravating factors for the purposes of sentencing**

An option for reform would be to amend the *Sentencing Act 1997* (Tas) to specify aggravating factors that apply to sentencing in cases of manslaughter arising out of the use of a motor vehicle, dangerous driving causing death or grievous bodily harm and/or negligent driving causing death or grievous bodily harm to create aggravated offences. This may be a means to provide for an increase in penalty for the more serious categories of dangerous or negligent driving causing death or grievous bodily harm.

Aggravated offences for dangerous driving and/or careless/negligent driving exist in a number of jurisdictions with higher maximum penalties. These are as follows:

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Offence and Circumstances of aggravation</th>
</tr>
</thead>
<tbody>
<tr>
<td>NSW</td>
<td>Aggravated dangerous driving if:</td>
</tr>
<tr>
<td></td>
<td>• drove with a blood alcohol concentration of 0.15 or more</td>
</tr>
<tr>
<td></td>
<td>• exceeded the speed limit by more than 45 km/h</td>
</tr>
<tr>
<td></td>
<td>• was escaping pursuit by police</td>
</tr>
<tr>
<td></td>
<td>• had an ability to drive that was very substantially impaired by the fact that under the influence of a drug (other than alcohol) or a combination of drugs.</td>
</tr>
<tr>
<td>WA</td>
<td>Aggravated dangerous driving if:</td>
</tr>
<tr>
<td></td>
<td>• exceeded the speed limit by more than 45 km/h</td>
</tr>
<tr>
<td></td>
<td>• was escaping pursuit by police (it does not matter whether the pursuit had been suspended or terminated at the time of the offence)</td>
</tr>
<tr>
<td></td>
<td>• was unlawfully driving without the consent of the owner.</td>
</tr>
</tbody>
</table>

484 The current maximum penalty is two years imprisonment for a first offence and four years imprisonment for a subsequent offence.

485 In the period 1 July 2011 to 30 June 2015, there were 24 convictions for aggravated dangerous driving causing death and 92 convictions for dangerous driving causing death and 44 convictions for aggravated dangerous driving causing grievous bodily harm and 181 convictions for dangerous driving causing grievous bodily harm. Aggravated offences accounted for 25% of convictions.
<table>
<thead>
<tr>
<th>State</th>
<th>Aggravated dangerous driving if:</th>
</tr>
</thead>
</table>
| Qld       | • adversely affected by an intoxicating substance  
           | • was taking part in an unlawful race or speed trial  
           | • was excessively speeding.                         |
| SA        | Aggravated dangerous driving if:  
           | • exceeded the speed limit by more than 45 km/h  
           | • was escaping pursuit by police  
           | • was in a street race  
           | • was disqualified or suspended from holding driver’s licence  
           | • committed the offence was part of a prolonged, persistent and deliberate course of very bad driving  
           | • drove with a blood alcohol concentration of 0.08 or more  
           | • drove under the influence of an intoxicating liquor or drugs  
           | • drove with a prescribed drug in his/her blood.                                             |
| ACT       | Aggravated culpable driving if it is committed against pregnant woman and resulted in loss of or serious harm to pregnancy or death or serious harm to a child born alive.  
           | It is not an aggravated offence if D can prove on balance of probabilities that did not know, and could not reasonably have known, that the woman was pregnant. |
| NZ        | • Causing death or bodily injury while committing drink driving offence.  
           | • Causing death while committing drink driving offence.  
           | Aggravated careless driving if:  
           | • driving the motor vehicle at a speed exceeding the applicable speed limit  
           | • driving the motor vehicle in such a manner as to commit an offence against the regulations or the rules concerning the manner in which a driver may overtake another vehicle or concerning the part of the road on which a driver may drive his or her motor vehicle. |
| Eng/Wales | • Causing death by careless driving when under the influence of drugs or alcohol.  
           | • Causing death by driving while unlicensed, disqualified or uninsured.                         |

It is noted that there has been considerable criticism of the English provisions that create the offences of causing death by careless driving when under the influence of drugs or alcohol and causing death by driving while unlicensed, disqualified or uninsured.\(^{486}\) In relation to driving under the influence of drugs or alcohol, it could be argued that this offence is appropriate because ‘the doctrine of proper fault comes into play here in that a drink-driver who drives carelessly and kills is more blameworthy than a sober careless driver’.\(^{487}\) However, the provision is criticised because there is ‘no requirement that the carelessness be caused by the fact that the defendant was under the influence’.\(^{488}\) There is greater concern expressed in relation to the offence of causing death by unlicensed, disqualified or uninsured driving as there is no requirement for there to be any fault with the manner of driving.\(^{489}\)

Many of these aggravating features reflect the factors that have already been identified by Tasmanian courts as aggravating features for sentencing in cases of serious driving offences and would already generally result in higher sentences than cases without these features. However, an option for reform would be to expressly set out these matters in statute as aggravating features for the purposes of sentencing.

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\(^{487}\) Cunningham, above n 348, 111.

\(^{488}\) Ibid.

\(^{489}\) Ibid.
Question 19
If you think that sentencing is inappropriate, do you consider that aggravating features should be set out as matters relevant to sentence in the Sentencing Act 1997 (Tas)? Why?

9.3.3 Other responses

Alternative verdicts

An alternative verdict means a verdict of guilty in respect of an offence that is different from the offence with which the accused was charged. As noted in Chapter Three, the Criminal Code (Tas) provides for alternative verdicts where certain crimes are charged relevant to driving offences where death or injury is caused. For example, dangerous driving causing death is an alternative verdict available where an offender is charged with manslaughter. However, negligent driving causing death under the Traffic Act 1925 (Tas) s 32(2A) is not an alternative verdict to dangerous driving causing death and negligent driving causing grievous bodily harm under the Traffic Act 1925 (Tas) s 32(2B) is not an alternative verdict for dangerous driving causing grievous bodily harm. This means that if the prosecution charges an offender with dangerous driving causing death or grievous bodily harm and the jury is not satisfied that the prosecution have established that the driving is objectively dangerous, then the jury does not have the option of finding the offender guilty of the lesser charge based on negligence. This presents difficulties for the prosecution in borderline cases, where a decision needs to be made as to whether to proceed with the indictable offence of dangerous driving causing death or grievous bodily harm (and risk no conviction at all) or to proceed with the summary offence of negligent driving causing death or grievous bodily harm. The Tasmania Law Reform Institute has previously recommended that negligent driving causing death (Traffic Act 1925 s 32(2A)) or grievous bodily harm (Traffic Act 1925 (Tas) s 32(2B)) should be specified as alternatives to dangerous driving causing death (Criminal Code (Tas) 167A) or grievous bodily harm (Criminal Code (Tas) s 167B).490

Question 20
Should the Criminal Code (Tas) be amended to provide that negligent driving causing death (Traffic Act 1925 s 32(2A)) or grievous bodily harm (Traffic Act 1925 (Tas) s 32(2B)) are alternative verdicts to dangerous driving causing death (Criminal Code (Tas) 167A) or grievous bodily harm (Criminal Code (Tas) s 167B)?

490 TLRI, above n 194, Recommendation 9.
### Appendix A: Driving offences that result in the death or injury

#### Jurisdiction | Offences and maximum penalties
--- | ---
New South Wales  | • Manslaughter *(Crimes Act 1900 (NSW) ss 18, 24)* – 25 years imprisonment.  
                  | • Aggravated dangerous driving occasioning death *(Crimes Act 1900 (NSW) s 52A(2))* – 14 years imprisonment.  
                  | • Dangerous driving occasioning death *(Crimes Act 1900 (NSW) s 52A(1))* – 10 years imprisonment.  
                  | • Aggravated dangerous driving occasioning grievous bodily harm *(Crimes Act 1900 (NSW) s 52A(4))* – 11 years imprisonment.  
                  | • Dangerous driving occasioning grievous bodily harm *(Crimes Act 1900 (NSW) s 52A(3))* – 7 years imprisonment.  
                  | • Wanton or furious driving causing bodily harm *(Crimes Act 1900 (NSW) s 53)* – 2 years imprisonment.  
                  | • Unlawfully or negligently causing grievous bodily harm *(Crimes Act 1900 (NSW) s 54)* – 2 years imprisonment.  
                  | • Negligent driving causing death *(Road Transport Act 2013 (NSW) s 117(1)(a))* – 30 penalty units and/or imprisonment for 18 months (in the case of a first offence) or 50 penalty units and/or imprisonment for 2 years (second or subsequent offence).  
                  | • Negligent driving occasioning grievous bodily harm *(Road Transport Act 2013 (NSW) s 117(1)(b))* – 20 penalty units and/or imprisonment for 9 months (in the case of a first offence) or 30 penalty units and/or imprisonment for 12 months (second or subsequent offence).  
Victoria  | • Manslaughter *(Crimes Act 1958 (Vic) s 5)* – Level 3 penalty (20 years imprisonment).  
        | • Culpable driving causing death *(Crimes Act 1958 (Vic) s 318(1))* – Level 3 penalty (20 years imprisonment) and/or Level 3 fine. The baseline sentence is 9 years, which is the median sentence that Parliament intends for the offence.  
        | • Negligently cause serious injury *(Crimes Act 1958 (Vic) s 24)* – Level 5 penalty (10 years imprisonment).  
        | • Dangerous driving causing death *(Crimes Act 1958 (Vic) s 319(1))* – Level 5 penalty (10 years imprisonment).  
        | • Dangerous driving causing serious injury *(Crimes Act 1958 (Vic) s 319(2))* – Level 6 penalty (5 years imprisonment).  
Queensland  | • Manslaughter *(Criminal Code (Qld) ss 303, 310)* – Life imprisonment.  
          | • Dangerous operation of a vehicle causing death or grievous bodily harm *(Criminal Code (Qld) ss 328A(4))* – 10 years unless circumstances of aggravation or if the offender knows or reasonably ought to have known that the other person was injured or killed and leaves the scene other than to seek medical assistance of other help before a police officer arrives when the penalty is 14 years.  
          | • Unlawfully cause grievous bodily harm *(Criminal Code (Qld) ss 320)* – 14 years.  
South Australia  | • Manslaughter *(Criminal Law Consolidation Act 1935 (SA) s 13(1), (2))* – life imprisonment and court must disqualify from driving for 10 years or such longer period as the court orders.  
               | • Death caused by culpably negligent, reckless or dangerous driving *(Criminal Law Consolidation Act 1935 (SA) s 19A(1))* – 15 years imprisonment and

---

Note the penalty for negligent driving that does not cause death or grievous bodily harm is 10 penalty units.

Although this offence does not relate only to driving, it is predominately used for serious injury caused by negligent driving: see VSAC, above n 46, 6. The standard of negligence is the same as that which is required to be established for the offence of culpable driving causing death (criminal negligence): at 5.
<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Offences and maximum penalties</th>
</tr>
</thead>
</table>
| Western Australia   | • Manslaughter (*Criminal Code* (WA) s 280(1)) – life imprisonment.  
|                     | • Unlawfully cause grievous bodily harm (*Criminal Code* (WA) s 297(1)) – 10 years.  
|                     | • Dangerous driving causing death or grievous bodily harm (*Road Traffic Act 1974* (WA) s 59) – 20 years if death caused and in circumstances of aggravation; 14 years if grievous bodily harm caused and in circumstances of aggravation; 10 years if death caused; 7 years if grievous bodily harm caused. There is also a mandatory licence disqualification of at least 2 years. If the offence is committed in circumstances of aggravation, then the court must impose a sentence of at least 12 months, which cannot be suspended. If death is not caused, then the offender may be tried summarily and the penalty is imprisonment for 3 years or a fine of 720 PU and a mandatory licence disqualification of at least 2 years. |
| Australian Capital Territory | • Manslaughter (*Crimes Act 1900* (ACT) s 15) – 20 years imprisonment.  
|                     | • Aggravated culpable driving causing death (*Crimes Act 1900* (ACT) s 29(3)) – 16 years imprisonment.  
|                     | • Culpable driving causing death (*Crimes Act 1900* (ACT) s 29(2)) – 14 years imprisonment.  
|                     | • Aggravated culpable driving causing grievous bodily harm (*Crimes Act 1900* (ACT) s 29(5)) – 12 years imprisonment.  
|                     | • Culpable driving causing grievous bodily harm (*Crimes Act 1900* (ACT) s 29(4)) – 10 years imprisonment.  
|                     | • Negligent driving causing death (*Road Transport (Safety and Traffic Management) Act 1999* (ACT) s 6(1)(a)) – 200 penalty units and/or imprisonment for 2 years.  
|                     | • Negligent driving occasioning grievous bodily harm (*Road Transport (Safety and Traffic Management) Act 1999* (ACT) s 6(1)(b)) – 100 penalty units and/or imprisonment for 1 year. |
| Northern Territory  | • Manslaughter (*Criminal Code* (NT) s 161) – life imprisonment.  
|                     | • Negligently cause serious harm (*Criminal Code* (NT) s 174E – 10 years imprisonment.  
|                     | • Dangerous driving causing death (*Criminal Code* (NT) s 174F(1)) – 10 years imprisonment.  
|                     | • Dangerous driving causing serious harm (*Criminal Code* (NT) s 174F(2)) – 7 years imprisonment. |
| Tasmania            | • Manslaughter (*Criminal Code* (Tas) ss 159, 389(3)) – 21 years imprisonment.  
|                     | • Dangerous driving causing death (*Criminal Code* (Tas) s 167A, 389(3)) – 21 years imprisonment. |

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Offences and maximum penalties</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>years imprisonment.</td>
</tr>
<tr>
<td></td>
<td>• Dangerous driving causing grievous bodily harm (Criminal Code (Tas) s 167B, 389(3)) – 21 years imprisonment.</td>
</tr>
<tr>
<td></td>
<td>• Wanton or furious driving causing injury (Police Offences Act 1935 (Tas) s 36(1)) – 2 years imprisonment (summary conviction), 21 years imprisonment (indictable offence).</td>
</tr>
<tr>
<td></td>
<td>• Negligent driving causing death (Traffic Act 1925 (Tas) s 32(2A) – a fine not exceeding 10 penalty units and/or imprisonment for a term not exceeding 1 year (first offence) and a fine not exceeding 20 penalty units and/or imprisonment for a term not exceeding 2 years (subsequent offence).</td>
</tr>
<tr>
<td></td>
<td>• Negligent driving causing grievous bodily harm (Traffic Act 1925 (Tas) s 32(2B) – a fine not exceeding 10 penalty units and/or imprisonment for a term not exceeding 6 months (first offence) and a fine not exceeding 20 penalty units and/or imprisonment for a term not exceeding 1 year (subsequent offence).</td>
</tr>
<tr>
<td></td>
<td>• Manslaughter – life.</td>
</tr>
<tr>
<td>England and Wales</td>
<td>• Causing death by dangerous driving (Road Traffic Act 1988 (UK) s 1) – 14 years imprisonment.</td>
</tr>
<tr>
<td></td>
<td>• Causing death by careless driving when under the influence of drugs or alcohol (Road Traffic Act 1988 (UK) s 3A) – 14 years imprisonment.</td>
</tr>
<tr>
<td></td>
<td>• Causing serious injury by dangerous driving (Road Traffic Act 1988 (UK) s 1A) – in Magistrates Court – level 5 fine and/or 6 months imprisonment, Crown Court – 5 years imprisonment and/or a fine.</td>
</tr>
<tr>
<td></td>
<td>• Causing death by careless or inconsiderate driving (Road Traffic Act 1988 (UK) s 2B, s3ZA) – maximum penalty for offence tried on indictment 5 years; in magistrates court 6 months imprisonment and/or level 5 fine.</td>
</tr>
<tr>
<td></td>
<td>• Causing death by driving while unlicensed, disqualified or uninsured (Road Traffic Act 1988 (UK) s 3ZB) – 2 years imprisonment.</td>
</tr>
<tr>
<td></td>
<td>• Wanton and furious driving (Offences Against the Person Act 1861 (UK) s 35) – 2 years imprisonment.</td>
</tr>
<tr>
<td>New Zealand</td>
<td>• Manslaughter (Crimes Act 1961 (NZ) s 177 – life imprisonment.</td>
</tr>
<tr>
<td></td>
<td>• Dangerous driving causing death (Land Transport Act 1988 (NZ) ss 7, 36AA) – 10 years imprisonment or a fine not exceeding $20 000.</td>
</tr>
<tr>
<td></td>
<td>• Causing death while committing drink driving offence (Land Transport Act 1988 (NZ) s 61(3AA)) – 10 years imprisonment or a fine not exceeding $20 000.</td>
</tr>
<tr>
<td></td>
<td>• Causing bodily injury while committing drink driving offence (Land Transport Act 1988 (NZ) s 61(3)) – 5 years imprisonment or a fine not exceeding $20 000.</td>
</tr>
<tr>
<td></td>
<td>• Dangerous driving causing injury (Land Transport Act 1988 (NZ) ss 7, 36) – 5 years imprisonment or a fine not exceeding $20 000.</td>
</tr>
<tr>
<td></td>
<td>• Causing death while committing drink driving offence (Land Transport Act 1988 (NZ) s 62) – 3 years imprisonment or a fine not exceeding $10 000.</td>
</tr>
<tr>
<td></td>
<td>• Aggravated careless driving causing injury or death (Land Transport Act 1988 (NZ) s 39) – 3 years imprisonment or a fine not exceeding $10 000.</td>
</tr>
<tr>
<td></td>
<td>• Careless driving causing injury or death (Land Transport Act 1988 (NZ) ss 8, 38) – 3 months or a fine not exceeding $4 500.</td>
</tr>
</tbody>
</table>
Appendix B: Jurisic and Whyte guideline judgment

R v Whyte (2002) 55 NSWLR 343

Court of Criminal Appeal: Spigelman CJ Mason P Barr J Bell J McClellan J

15 April, 20 August 2002

[Extract [194] – [234]]

Review of the Jurisic Guideline

194. Section 37A of the Crimes (Sentencing Procedure) Act 1999, as inserted by the 2001 Act, empowers this Court to give a guideline judgment on its own motion “in any proceedings considered appropriate by the Court”. In my opinion, for the reasons given above, it is “appropriate” to give a guideline judgment with respect to s52A of the Crimes Act 1900 in the present proceedings. It is not necessary to decide whether the guideline for this offence contained in Jurisic was valid, nor, if not originally valid, whether it was validated by the retrospective provisions of the 2001 Act.

195. The majority judgment in Wong cast doubt on the use to which sentencing judges could put the Jurisic guideline (and for similar reasons the Henry guideline) in respects not clarified by s37A. In particular, it is desirable to clarify the degree of ‘prescription’, or rather lack thereof, in that guideline. By invoking s37A to give a guideline to replace the Jurisic guideline, the force of the guideline will now be stated in statutory terms as a guide which must be taken into account.

196. Furthermore, this Court should, in my opinion, amend some of the terminology of the Jurisic guideline which may suggest a degree of prescription beyond its use as an “indicator”, as originally stated in Jurisic.

197. Finally, it is desirable to state more fully the particular case to which the numerical guideline applies, in a form similar to the Henry guideline.

198. The joint judgment in Wong identified the limited bases upon which an appellate court may interfere with the exercise of a discretion and said at [58]:

“… for a court to state what should be the range within which some or all future exercises of discretion should fall, must carry with it a set of implicit or explicit assumptions about what is, or should be regarded as, the kind of case which would justify a sentence within the specified range. It is those assumptions that may reflect or embody the relevant principle, not the result.”

199. In this regard, the table in Wong, based only on quantity, differs from the form of guideline identified in both Jurisic and Henry, where the “assumptions about what is, or should be regarded as, the kind of case which would justify a sentence within the specified range” are stated by reference to a wide range of considerations of a frequently recurring kind.

200. The table in Wong provided numerical guidance for all relevant offenders. The numerical guidance in Jurisic and Henry related to cases with particular identified characteristics. The guideline in Henry is, however, more clearly of this character.
201. In my opinion, the Court of Criminal Appeal may give a numerical guideline where the judgment indicates with sufficient detail the kind of case for which that guideline is regarded as appropriate. It is that detail which, to adopt the words of the joint judgment quoted three paragraphs above, ‘reflects or embodies’ the relevant principles.

202. In *Mallet*, where the High Court rejected a presumption of equal division of property in matrimonial proceedings, their Honours did identify particular kinds of cases in which equality would be appropriate. (See e.g. Dawson J at 646-647.) With respect to certain identified cases, Deane J said at 640.9:

“… the notion of equality is likely to offer an acceptable and useful starting point…”

203. In *McDonnell*, McLachlin J said that the starting point approach is based on identifying a “typical case”. (See at [58], [59], [61], [85], [86].) The guideline in *Henry* was of this character (see at [162]). The guideline in *Jurisic* was also of this character, although less clearly so. Under the new statutory basis for guideline judgments, sentencing judges must take guidelines into account. It appears to me to be desirable to reformulate the *Jurisic* guideline in order to ensure that the guidance is stated in a form that is not impossibly prescriptive.

204. A frequently recurring case of an offence under s52A has the following characteristics.

(i) Young offender.
(ii) Of good character with no or limited prior convictions.
(iii) Death or permanent injury to a single person.
(iv) The victim is a stranger.
(v) No or limited injury to the driver or the driver’s intimates.
(vi) Genuine remorse.
(vii) Plea of guilty of limited utilitarian value.

205. As the Parliament has made clear, in the maximum penalties for the offence, conduct which causes death or grievous bodily harm, even in the absence of any intention to cause such injury, is to be regarded as a serious crime. However, in determining the appropriateness of full time custody and the length thereof, the sentencing judge must give close attention to the degree of moral culpability involved. This is a critical component of the objective circumstances of the offence.

**Custodial Sentence**

206. The guideline set out in *Jurisic* consisted of two distinct propositions. The first limb of the guideline was in the following terms (at 231E):

“A non-custodial sentence for an offence against s52A should be exceptional and almost invariably confined to cases involving momentary inattention or mis-judgment.”

207. In *Jurisic* at 217-219, I referred to numerous prior decisions of this Court which contained guidelines of this general character. In the case of eight different offences, there were observations to the effect that a custodial sentence was required, save in...
exceptional circumstances. In the case of fourteen other offences, there were observations to the effect that a substantial period of imprisonment was ordinarily required.

208. The joint judgment in Wong at [61]-[62] expressly approved the form that “guidance” took in the decision of the Full Court of the Supreme Court of South Australia in Police v Cadd. That guidance was at 171:

“…that the punishment should be imprisonment ‘in the ordinary case of contumacious offending by a first offender, but the circumstances of the offending or the offender may dictate some less severe form of punishment…”

209. The joint judgment in Wong at [62] paraphrased this passage in the formulation “the punishment should be imprisonment in the ordinary case of contumacious offending”. Their Honours noted that the “real content of the guidance” was in the reasons, where meaning was given to the word “ordinary” in the expression “ordinary case of contumacious offending”. In the Addendum in Police v Cadd, it was stated that the explanation of this phrase was to be found in the judgment of Mullighan J. Mullighan J explained his use of the word “contumacious” at 179:

“It means something more than mere intention to drive disqualified which is an essential element of the charge. It is committing the offence with an attitude of total disregard of the disqualification in disobedience to the authority which imposed it.”

210. The two other members of the majority would have gone further than Mullighan J. Doyle CJ contended that the offence there under consideration would “ordinarily” warrant imprisonment and that a suspension of such a sentence would be “unusual” (see at 166.5, 167.8 and 168.7). Bleby J formulated the guidance in terms of imprisonment as being “appropriate” for what Mullighan J described as a “contumacious offender … in most cases … unless quite extraordinary personal or other circumstances demand otherwise” (at 209.3).

211. The approval by the joint judgment in Wong of the common ground formulation of the majority in Cadd, and the reasons given therefore, do suggest an implicit disapproval of the further formulations of Doyle CJ and Bleby J. The latter are similar to the first limb of the Jurisic guideline. I do not understand Kirby J to have agreed with the joint judgment in this regard. As I have shown in Jurisic, guidance in this form has been given on numerous occasions by this Court. The position in New South Wales is, in any event, now affected by statute.

212. A guideline under s37A is a matter to be taken into account. The first limb of the Jurisic guideline, with the terminology “should be” and “almost invariably confined to”, has a more prescriptive tone than that which is suggested by the statutory formulation. In view of the apprehension about the practical effect of a guideline, to which I have referred above, it is appropriate to reformulate the guideline.

213. Since the decision of this Court in Jurisic the Parliament has enacted s5 of the Crimes (Sentencing Procedure) Act 1999 which provides:

“5(1) A court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate.
A court that sentences an offender to imprisonment for 6 months or less must indicate to the offender, and make a record of, its reasons for doing so, including its reasons for deciding that no penalty other than imprisonment is appropriate.”

This statutory directive requires an amendment to the first limb of the Jurisic guideline.

214. The guideline this Court should give pursuant to s37A of the Crimes (Sentencing Procedure) Act 1999 with respect to the typical case identified above is:

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

The Numerical Guideline

215. The second limb of the guideline in Jurisic at 231 was as follows:

“With a plea of guilty, wherever there is present to a material degree any aggravating factor involving the conduct of the offender, a custodial sentence (minimum plus additional or fixed term) of less than three years (in the case of dangerous driving causing death) and less than two years (in the case of dangerous driving causing grievous bodily harm) should be exceptional.”

216. I had earlier set out a list of aggravating factors which had been established in the authorities as follows:

(i) Extent and nature of the injuries inflicted.
(ii) Number of people put at risk.
(iii) Degree of speed.
(iv) Degree of intoxication or of substance abuse.
(v) Erratic driving.
(vi) Competitive driving or showing off.
(vii) Length of the journey during which others were exposed to risk.
(viii) Ignoring of warnings.
(ix) Escaping police pursuit.”

217. Further consideration of the authorities would cause me to amend this list by changing (v) to read “erratic or aggressive driving” and adding:

(x) Degree of sleep deprivation.
(xi) Failing to stop.

218. I went on to say at 231:

“Paragraph (i) and par (ii) focus on the occurrence, whereas pars (iii)-(ix) refer to the conduct of the offender. The presence of these latter factors may indicate that the offender has abandoned responsibility for his or her own conduct. When the presence of such a factor can be so described,
then it can be said to be present to a material degree for purposes of determining an appropriate sentence.”

219. It was after this passage that the two limbs of the guideline in *Jurisic* were set out.

220. I said at 231 that the formulation of whether “the relevant aggravating factor manifest[s] in the circumstances of the case, that the offender has abandoned responsibility for his or her own conduct” involves an element of judgment on which sentencing judges could reasonably differ.

221. I also said at 231:

“The period of three or two years, once the threshold of abandoning responsibility has been reached, is a starting point. The presence of additional aggravating factors, or their increased intensity, will determine the actual sentence.”

222. As indicated above, Kirby J’s reasoning in *Wong* turned in part on the impermissibility of judicial creation of a subcategory or subset of an offence defined by statute. Also as indicated above, the joint judgment made comments critical of such conduct, but its reasoning did not turn on this proposition. The statutory power to give guidelines now vested in the Court by s37A should not be exercised in such a way that the guideline can be categorised as a “subcategory” or “subset” of an offence defined by statute. It was submitted that the *Jurisic* guideline was of this character because of the reference to “abandonment of responsibility”.

223. As set out above, the guideline in *Jurisic* was expressed in terms of an aggravating factor involving the offender’s conduct being present “to a material degree”. The factors identified all related to the moral culpability of the offender. The reference to ‘abandonment of responsibility’ was one formulation for describing a high degree of moral culpability. The case law subsequent to *Jurisic* does not suggest that it has been applied as if it were a statutory test.

224. The joint judgment in *Wong* referred with approval at [61]-[62] to the judgment in *Cadd* which identified a relevant differentiating factor for sentencing purposes to be “the ordinary case of contumacious offending”, as explained in the judgment of Mullighan J. This appears to me to perform a similar function to the formulation “abandoned responsibility for his or her own conduct” in *Jurisic*.

225. I should note that no issue of quantum arose in *Cadd*. This is understandable as the maximum sentence for the offence with which the Court was there concerned was only six months imprisonment.

226. In *Wong*, the “subset” or “subcategory” point arose in the context of considering the Canadian case of *McDonnell*, in which the majority identified the references in prior Canadian intermediate appellate decisions to “major sexual assault” as such a category. It is desirable to reformulate the *Jurisic* guideline to ensure that it does not suffer from the same inadequacy and is more clearly of the character of “contumacious offending” referred to in *Cadd*.

227. Furthermore, the terminology of the second limb of the *Jurisic* guideline may be seen to have an undesirably prescriptive tone, notwithstanding the express observations that it was not to be prescriptive. Again a reformulation is suggested.
228. In the above list of aggravating factors, items (iii)-(xi) are frequently recurring elements which directly impinge on the moral culpability of the offender at the time of the offence. Individually, but more often in some combination, they may indicate that the moral culpability is high. One way of expressing such a conclusion is to ask whether the combination of circumstances are such that it can be said that the offender has abandoned responsibility for his or her own conduct. That is not the only way of expressing such a conclusion.

229. The guideline for offences against s52A(1) and (3) for the typical case identified above should be:

   Where the offender’s moral culpability is high, a full time custodial head sentence of less than three years (in the case of death) and two years (in the case of grievous bodily harm) would not generally be appropriate.

230. In the case of a low level of moral culpability, a lower sentence will, of course, be appropriate.

231. In the case of the aggravated version of each offence under s52A, an appropriate increment to reflect the higher maximum penalty, and what will generally be a higher level of moral culpability, is required. Other factors, such as the number of victims, will also require an appropriate increment.

232. The guideline is, to reiterate, a “guide” or a “check”. The sentence imposed in a particular case will be determined by the exercise of a broad discretion taking into account all of the factors required to be taken into account by s21A of the Crimes (Sentencing Procedure) Act.

233. This guideline focuses attention on the objective circumstances of the offence. The subjective circumstances of the offender also require consideration. For the reasons I have given above, when discussing the proportionality cases, particularly Dodd, this approach reflects the principle of proportionality as discussed in those cases. No submission was made to this Court that the new s21A of the Crimes (Sentencing Procedure) Act inserted by the 2002 Act, affects this line of authority.

234. Insofar as this guideline involves a “two step” approach to sentencing it is, in my opinion, as a “check” for the reasons given above, consistent with an ultimate decision that involves the exercise of a broad discretion, sometimes referred to as an instinctive synthesis.
Driving causing death: Guidelines

The proceedings before the Court involve s 52A of the Crimes Act 1900 which is concerned with dangerous driving occasioning death or grievous bodily harm. The development of Australian legislation and sentencing practice in this respect is, as I will show below, very similar to the development in England which was described by Lord Bingham in his address to the Police Foundation in the following way:

“... when differences of opinion arise on issues of sentencing between the judges and an identifiable body of public opinion, the judges are bound to reflect whether it may be that the public are right and they are wrong. In two instances which occur to me, rape and killing by dangerous driving, I think it is true that public opinion (reinforced in the latter case by legislation) brought home to the judges that they had on occasion failed in their sentences to reflect the seriousness with which society regarded these offences.”

I agree with Lord Bingham. The seriousness with which society regards offences — reflected in the maximum permissible penalties, as amended from time to time — is an important consideration in sentencing decisions. Significant disparity between public opinion and judicial sentencing conduct will eventually lead to a reduction in the perceived legitimacy of the legal system.

As in England, it appears that trial judges in New South Wales have not reflected in their sentences the seriousness with which society regards the offence of occasioning death or serious injury by dangerous driving. The existence of such disparity constitutes an appropriate occasion for the promulgation of a guideline judgment by a Court of Criminal Appeal. That is what occurred in England with respect to offences cognate with that in the instant case.

The first occasion on which the Court of Appeal (Criminal Division) of the High Court of Justice laid down a guideline for sentencing for such an offence was in R v Guilfoyle (1973) 57 Cr App R 549. The court was concerned with the offence of causing death by dangerous driving. The court said (at 552):

“Cases of this kind fall into two broad categories; first, those in which the accident has arisen through momentary inattention or misjudgment, and, secondly, those in which the accused has driven in a manner which has shown a selfish disregard for the safety of other road users or of his passengers, or with a degree of recklessness. A subdivision of this category is provided by the cases in which an accident has been caused or contributed to by the accused's consumption of alcohol or drugs.”

The court went on to note that in the first kind of case a fine may be appropriate but in the second kind of case a custodial sentence was called for.
The court returned to the issue of the guidelines for such offences in *R v Boswell* [1984] 3 All ER 353. The court noted (at 356) that since *R v Guilfoyle* the offence had been narrowed by requiring recklessness and the maximum penalty had been increased from two years to five years. This made it clear that under the new offence anyone convicted would fall into the more serious of the two categories identified in *R v Guilfoyle*. Delivering the judgment of the court Lord Lane CJ said (at 356) with respect to the new offence:

“To be guilty the defendant must have created an obvious and serious risk of injury to the person or damage to property and must either have given no thought to the possibility of that obvious risk, or have seen the risk and nevertheless decided to run it.

It is not possible (it needs hardly to be said) to say in advance what the proper sentence should be in any particular case. However the duty of the court is to reflect the concern of Parliament and also, which is sometimes forgotten, to reflect the concern of the public about these matters.”

His Lordship went on to refer to the criminal statistics for reckless driving which indicated:

(i) It was an offence almost exclusively committed by males;

(ii) The majority of offenders did not receive a custodial sentence;

(iii) Of those who did receive a custodial sentence, the large majority received sentences of six months or under and almost all of them received sentences of twelve months or under.

His Lordship went on to say (at 356):

“Those figures seem to us to show that the offence is regarded by the courts as less serious than in fact it is: less serious than Parliament intended it to be and less serious than the public in general regard it. It is a trite observation, and I make no apologies for making it, that the motor car is a potentially lethal instrument. Any driver who fails to realise that what he is doing at the wheel is creating a risk when to any ordinary person such risk would be obvious, or, even worse, sees the risk and nevertheless takes a chance on avoiding disaster and so kills, is prima facie deserving a severe punishment. In our view such punishment should in many cases involve immediate loss of liberty.”

His Lordship went on to identify a list of aggravating and mitigating factors for the offence. The mitigating factors were:

(i) If the offence was caused by a momentarily reckless error of judgment;

(ii) Good driving record and good character;

(ii) Plea of guilty;

(iv) Genuine remorse or shock, sometimes occasioned by the fact that the victim is a close relative or friend.

*Appendix B*
Amongst aggravating features, his Lordship identified:

(i) Consumption of alcohol or drugs and the extent thereof;

(ii) Excessive speed particularly in competitive driving against another vehicle and showing off;

(iii) Disregard of warnings from passengers;

(iv) Prolonged, persistent and deliberate course of very bad driving … a person who over a lengthy stretch of road ignores traffic signals, jumps red lights, passing other vehicles on the wrong side, driving with excessive speed, driving on the pavement and so on;

(v) Other offences committed at the same time, for example, driving whilst disqualified;

(vi) Previous convictions for motoring offences;

(vii) Number of people injured or killed;

(viii) Other behaviour at the time of the offence, for example, failure to stop or attempts to escape;

(ix) Reckless driving in the course of attempting to avoid detection or apprehension.

His Lordship indicated (at 357) that whenever such an aggravating feature was present then a custodial sentence is generally necessary. His Lordship went on to state that the maximum terms of twelve to eighteen months, as then usually imposed by the courts, were too low given the presence of any of the aggravating features identified. Implicitly, his Lordship was saying that some combination of such aggravating features must have been present in other cases and had not been reflected in the sentences imposed.

In England the offence was further amended by the Road Traffic Act 1991 (UK). This established a broader offence of causing death by dangerous driving, replacing the offence of “causing death by reckless driving” and a new offence of “causing death by careless driving when under the influence of drink or drugs”. The maximum sentence in respect of each was originally five years imprisonment. However, within a few years the maximum sentence for both offences was increased from five years to ten years.

These legislative changes required a reconsideration of the guideline case of R v Boswell. The opportunity to do so came before the Court of Appeal (Criminal Division) in Attorney-General’s References Nos 14 and 24 of 1993 (1994) 15 Cr App R (S) 640. Lord Taylor CJ set out the recent legislative history and said (at 643):

“These reforms show an intention by Parliament to strengthen the criminal law, to reduce death on the roads by increasing the punishment available to the courts, and by specifically targeting those who cause death while driving with excess alcohol. The five year maximum sentence for causing death by dangerous driving has been doubled. In tandem with that, causing death by the less serious form of culpable driving, characterised as careless, carries
the same maximum sentence if coupled with driving whilst unfit through drink or over the limit. The latter offences do not require proof of a cause or connection between the drink and the death.”

His Lordship went on to outline the aggravating features set out by Lord Lane CJ in *R v Boswell* and, referring to the new offence of careless driving rather than dangerous driving, his Lordship said (at 643):

“Thus where a driver is over the limit and kills someone as a result of his careless driving, a prison sentence will ordinarily be appropriate. The length of sentence will of course depend upon the aggravating and mitigating circumstances in a particular case. But especially on the extent of the carelessness and the amount the defendant is over the limit. In an exceptional case, if the alcohol level at the time of the offence is just over the borderline, the carelessness is momentary, and there is strong mitigation, a non-custodial sentence may be possible. But in other cases a prison sentence is required to punish the offender, to deter others from drinking and driving, and to reflect the public's abhorrence of deaths being caused by drivers with excess alcohol.”

His Lordship went on (at 644) to indicate the amendments to the guideline judgment in *R v Boswell* which were appropriate in the light of developments since that time:

“Since Parliament has thought it right and necessary not merely to increase but to double the maximum sentence for offences under sections 1 and 3A of the 1988 Act (as amended) the guidelines in *Boswell* need to be reconsidered. Clearly the statements of principle in that case and the examples of aggravating and mitigating circumstances still stand, but at page 260 of the report, there appears the following statement:

‘Drivers who for example in racing on the highways and/or driving with reckless disregard for the safety of others after taking alcohol should understand that in bad cases they will lose their liberty for two years or more.’

In our judgment the phrase ‘two years or more’ should now read ‘upwards of five years’ and in the very worst cases, if contested, sentences will be in the higher range of those now permitted by Parliament.

**Section 52A of the Crimes Act:**

Legislative development in Australia has been in the same direction as that of England. The considerations which have been taken into account in the development of the English guidelines in this regard, including the list of aggravating and mitigating factors, have also been applied in decisions of this Court.

Prior to 1994, s 52A of the *Crimes Act* contained an offence of culpable driving applying to situations where death or grievous bodily harm was occasioned by the impact of a motor vehicle, in circumstances in which the driver was either under the influence of liquor or drugs or travelling at speed or in a dangerous manner. The maximum penalty for the offence occasioning death was five years and for the offence occasioning grievous bodily harm was three years.
A new s 52A came into force on 23 December 1994. That provision now relevantly reads:

“(1) Dangerous driving occasioning death. A person is guilty of the offence of dangerous driving occasioning death if the vehicle driven by the person is involved in an impact occasioning the death of another person and the driver was, at the time of the impact, driving the vehicle:

• (a) under the influence of intoxicating liquor or of a drug; or
• (b) at a speed dangerous to another person or persons; or
• (c) in a manner dangerous to another person or persons.

A person convicted of an offence under this subsection is liable to imprisonment for 10 years.

(2) Aggravated dangerous driving occasioning death. A person is guilty of the offence of aggravated dangerous driving occasioning death if the person commits the offence of dangerous driving occasioning death in circumstances of aggravation. A person convicted of an offence under this subsection is liable to imprisonment for 14 years.

(3) Dangerous driving occasioning grievous bodily harm. A person is guilty of the offence of dangerous driving occasioning grievous bodily harm if the vehicle driven by the person is involved in an impact occasioning grievous bodily harm to another person and the driver was, at the time of the impact, driving the vehicle:

• (a) under the influence of intoxicating liquor or of a drug; or
• (b) at a speed dangerous to another person or persons; or
• (c) in a manner dangerous to another person or persons.

A person convicted of an offence under this subsection is liable to imprisonment for 7 years.

(4) Aggravated dangerous driving occasioning grievous bodily harm. A person is guilty of the offence of aggravated dangerous driving occasioning grievous bodily harm if the person commits the offence of dangerous driving occasioning grievous bodily harm in circumstances of aggravation. A person convicted of an offence under this subsection is liable to imprisonment for 11 years.

…

(7) Circumstances of aggravation. In this section, ‘circumstances of aggravation’ means any circumstances at the time of the impact occasioning death or grievous bodily harm in which:

• (a) the prescribed concentration of alcohol was present in the accused's 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).

(8) Defences. It is a defence to any charge under this section if the death or grievous bodily harm occasioned by the impact was not in any way attributable (as relevant):

• (a) to the fact that the person charged was under the influence of intoxicating liquor or of a drug or a combination of drugs; or
• (b) to the speed at which the vehicle was driven; or
• (c) to the manner in which the vehicle was driven.”

The new s 52A re-defined the offences and increased the maximum penalty for driving occasioning death to ten years, or fourteen in circumstances of aggravation, and in the case of grievous bodily harm increased the penalty to seven years, or eleven years in the case of circumstances of aggravation. Four categories of offence are thus created.

The new s 52A arose from a report of the Parliamentary Staysafe Committee which was requested by the Attorney-General to review the offences. The report was tabled in parliament in March 1994: Staysafe No 25, March 1994. This Court had also indicated the need for increased maximum penalties: *R v Heinrich* (1992) 61 A Crim R 212 at 220; *R v Garlick* (1994) 73 A Crim R 433 at 439-440.

When introducing the amending legislation the Attorney-General said (*Hansard*, Legislative Council 27 October 1994 at 4793):

“… it is clear that one of the major problems with the legislation as it presently stands is that it fails to act as a strong deterrent. Almost every day there are reports in the media of yet another death on the road arising out of the actions of a driver who is either under the influence of alcohol and/or driving in a manner or at a speed which is dangerous to other persons.

In many cases the drivers and those killed or injured are young people or children. This is a senseless waste of young lives. The Government is of the view that there is a need to send a strong message to the community that dangerous driving, wherever it occurs, will not be tolerated.”

The Attorney-General went on to note that the increase in penalties was designed to more accurately reflect the seriousness of the offence with a view to convictions acting as a strong deterrent. The Attorney-General concluded (at 4794):

“… the Government is sending a message to the community and to the courts that dangerous driving which kills or maims will be severely punished wherever and whenever it occurs.”
The level of community concern about the conduct proscribed by s 52A, as reflected in this substantial increase in the maximum penalties, must be reflected in the sentences which trial courts impose. The concerns manifested by parliament in this way, must be given effect to by the courts.

The approach to sentencing for offences under s 52A, which has been developed in a line of decisions in this Court, was summarised by Hunt CJ at CL in R v Musumeci (Court of Criminal Appeal, 30 October 1997, unreported) which, in many respects is a guideline judgment, although not called such. Omitting his Honour's detailed references, he said (at 4-5):

“This Court has held that a number of considerations which had to be taken into account when sentencing for culpable driving must also be taken into account when sentencing for this new offence of dangerous driving.

1. The legislature has always placed a premium upon human life, and the taking of a human life by driving a motor vehicle dangerously is to be regarded as a crime of some seriousness.

2. The real substance of the offence is not just the dangerous driving; it is the dangerous driving in association with the taking of a human life.

3. Such is the need for public deterrence in this type of case, the youth of any offender is given less weight as a subjective matter than in other types of cases.

4. The courts must tread warily in showing leniency for good character in such cases.

5. So far as youthful offenders of good character who are guilty of dangerous driving, therefore, the sentence must be seen to have a reasonable proportionality to the objective circumstances of the crime, and persuasive subjective circumstances must not lead to inadequate weight being given to those objective circumstances.

6. Periodic detention has a strong element of leniency built into it and, as presently administered, it is usually no more punitive than a community service order.

7. The statement made by this Court in relation to the previous offence of culpable driving — that it cannot be said that a full-time custodial sentence is required in every case — continues to apply in relation to the new offence of dangerous driving. As that offence is committed even though the offender has had no more than a momentary or casual lapse of attention, there must always be room for a non-custodial sentence (although that does not mean that a non-custodial sentence is ordinarily appropriate in such a case), but the case in which a sentence other than one involving full-time custody is appropriate must be rarer for this new offence.”

Although said in the context of dangerous driving causing death, his Honour's comments can be readily adapted to the cognate offence of dangerous driving causing grievous bodily harm.

His Honour's reference to the need for public deterrence under point 3, reflects his Honour's own earlier expressed view, with regard to the former s 52A in R v Speer (Court of Criminal
Appeal, 11 December 1990, unreported); R v Manwarring (Court of Criminal Appeal, 13 April 1994, unreported); R v Slattery (1996) 90 A Crim R 519 at 523:

“… it is important that such sentences should act as a public deterrent in relation to such culpable driving.”

His Honour had also said in the context of the former s 52A in R v Hallocoglu (1991) 29 NSWLR 67 at 77:

“The variety of circumstances which give rise to a conviction for culpable driving is so great that there is no normal range of penalties; so that guidance cannot be given specifically as to just when a full-time custodial sentence is required.”

I agree with his Honour that it is very difficult to assess the degree of culpability in dangerous driving cases because of the wide range of behaviour which may constitute the offence. Furthermore, absent a defence under s 52(8) that the injury was not in any way attributable to the dangerous elements of speed, alcohol, etc, a guilty plea or verdict does not establish a clear causal link between that element and the death or injury. Rather, such is presumed.

However, in R v Slattery his Honour also said, about the new s 52A:

“The action of the legislature in almost tripling the maximum sentence for a particular type of offence must be taken by the courts as reflecting community standards in relation to the seriousness of that offence, and the courts are required to give effect to the obvious intention of the legislature that the existing sentencing patterns are to move in a sharply upward manner.”

Despite clear indications from this Court concerning the seriousness of this offence, there has been a continued flow of, almost invariably successful, Crown appeals from sentences for offences under s 52A: R v Savka (1996) 88 A Crim R 393; R v Slattery; R v Sellers (1997) 92 A Crim R 381; R v Smith (1997) 95 A Crim R 373; R v Tapfield (Court of Criminal Appeal, 30 July 1997, unreported); R v Musumeci; R v Milsom (Court of Criminal Appeal, 10 December 1997, unreported); R v Kalanj (Court of Criminal Appeal, 18 December 1997, unreported); R v Lambrinos (Court of Criminal Appeal, 17 July 1998, unreported); R v Black (Court of Criminal Appeal, 23 July 1998, unreported); R v Byrne (Court of Criminal Appeal, 5 August 1988, unreported); R v Thackray (Court of Criminal Appeal, 17 August 1998, unreported).

Statistics are kept by the Judicial Commission of New South Wales with respect to offences. In the case of the former s 52A, where the maximum penalty was five years if death resulted and three years for grievous bodily harm, the statistics record 361 cases of death and 220 cases of grievous bodily harm over the period 1990 to May 1998. Only eighty-one of the 361 cases involving death resulted in a full-time imprisonment and a further seventy-eight cases involved periodic detention. Of the eighty-one cases of imprisonment, fifty-nine involved a sentence of two years or less and all but three were less than two and a half years, being half the maximum. Of the 220 cases involving grievous bodily harm, only twenty-four involved a sentence of full-time imprisonment and twenty-two involved periodic detention. Of the
twenty-four cases in which imprisonment was ordered, sixteen were for a period of eighteen months or less, being half the then maximum.

It appears that patterns of sentencing under the former s 52A did not reflect the seriousness with which the community regarded the offences. Further, whilst the degree to which heavy sentences result in general deterrence is not easy to establish, it does not appear that the objective of such deterrence was adequately reflected in the sentences issued.

This Court has made clear in the authorities summarised in *R v Musumeci* and in *R v Slattery*, that a sharp upward movement in penalty is appropriate for the new s 52A. The Judicial Commission statistics are not as comprehensive as is desirable to assess fully the response to the new level of penalty. Such indications as exist, however, do not suggest that the response of trial judges has fully reflected these considerations, as the number of successful Crown appeals against sentence itself attests.

The only category in which there are a reasonable number of cases in the database involves a contravention of s 52A(1)(c): dangerous driving occasioning death by driving in a dangerous manner. Of the forty-five cases under this new provision, only fifteen have resulted in a sentence of full-time imprisonment and another eleven involve periodic detention. Of the fifteen cases of imprisonment, all but one involved a full-term of five years or less, being half the maximum. Indeed, ten of the fifteen were for three years or less and nine of the fifteen had minimum or fixed terms of only twelve months.

Separate statistics do not exist for s 52A(1)(b) — dangerous driving causing death involving speed. In the case of s 52A(1)(a) — dangerous driving causing death involving drugs or alcohol — the statistics have only recorded seven cases, all of which resulted in imprisonment. This is a very small sample. Although little weight can be attributed to the figure, all cases were for five years or less, being half the maximum term.

In the case of s 52A(3)(a) — dangerous driving occasioning grievous bodily harm under the influence — only six cases are recorded, of which three led to full-time imprisonment, all for three and a half years or less being half the maximum. For s 52A(3)(c) — grievous bodily harm occasioned by dangerous driving — there are sixteen cases, seven resulted in imprisonment, all but one of which was for three years or less. Again there are no statistics for s 52A(3)(b), that is, the offence involving speed.

There have been fourteen cases of the aggravated offence of causing death under s 52A(2), for which the maximum penalty is fourteen years. All resulted in imprisonment, with full terms in eight of the fourteen cases being four years or less, four at five years and two at six years. None reached seven years, half the maximum.

In the case of the aggravated offence of occasioning grievous bodily harm under s 52A(4), there were eighteen cases of which fourteen resulted in full-time imprisonment. Of those fourteen cases, nine involved sentences of three years or less and all were five years or less, against a maximum of eleven years.
The statistics for the new s 52A must be treated with some caution. In the case of the offences involving death, it is likely that the Crown will have pursued a case of manslaughter in the worst cases. In all but one category, the total number of cases recorded is small.

Nevertheless such impression as one does glean is that the pattern of inadequacy that appears to have existed under the former s 52A, has not changed to any appreciable degree.

Notwithstanding the reasoning of Hunt CJ at CL in *R v Hallocoğlu* that there is no normal range of penalties for this offence, some further guidance from this Court is needed. This is an appropriate situation in which to promulgate a guideline judgment of the character developed by the English Court of Appeal.

The nature of the offence is not such that the Court can devise a simple table in which indicative penalties are linked to a quantitative measure of the offence. English guideline judgments have been of that character in appropriate circumstances: theft, by value of property (*R v Clark* [1998] Crim LR 227); possession of various quantities of a particular drug (*R v Wijs* [1998] Crim LR 587); fraudulent evasion of tax, by amount evaded (*R v Dosanjh* [1998] Crim LR 593); importation of particular drugs, by quantity (*Aramah v The Queen* (1982) 4 Cr App R (S) 407). What can be done, however, in case of an offence covering a wide range of conduct which varies qualitatively rather than quantitatively, is to indicate in a general way the kind of case which would usually require a particular kind or level of sentence, whilst acknowledging that there will always be exceptional cases.

The list of mitigating and aggravating factors, conveniently collected by Lord Lane CJ in *R v Boswell* and quoted above, are reflected in the judgments of this Court to which I have made reference. The presence or absence of these factors — and their degree — will determine the appropriate penalty. A survey of the authorities indicates that the following factors arise:

(i) Extent and nature of the injuries inflicted.

(ii) Number of people put at risk.

(iii) Degree of speed.

(iv) Degree of intoxication or of substance abuse.

(v) Erratic driving.

(vi) Competitive driving or showing off.

(vii) Length of the journey during which others were exposed to risk.

(viii) Ignoring of warnings.

(ix) Escaping police pursuit.

A number of these factors are reflected in the definition of circumstances of aggravation in s 52A(7), for purposes of the two higher offences.
Paragraph (i) and par (ii) focus on the occurrence, whereas pars (iii)-(ix) refer to the conduct of the offender. The presence of these latter factors may indicate that the offender has abandoned responsibility for his or her own conduct. When the presence of such a factor can be so described, then it can be said to be present to a material degree for purposes of determining an appropriate sentence.

In my opinion this Court should promulgate the following guidelines:

1. A non-custodial sentence for an offence against s 52A should be exceptional and almost invariably confined to cases involving momentary inattention or mis-judgment.

2. With a plea of guilty, wherever there is present to a material degree any aggravating factor involving the conduct of the offender, a custodial sentence (minimum plus additional or fixed term) of less than three years (in the case of dangerous driving causing death) and less than two years (in the case of dangerous driving causing grievous bodily harm) should be exceptional.

I realise that the formulation I propose — does the relevant aggravating factor manifest, in the circumstances of the case, that the offender has abandoned responsibility for his or her own conduct — introduces an element of judgment on which reasonable minds may differ. Nevertheless the formulation of the issue in such a way will serve the objective of consistency of sentencing with respect to conduct that the community has indicated plainly that it wishes to deter and condemn.

The period of three or two years, once the threshold of abandoning responsibility has been reached, is a starting point. The presence of additional aggravating factors, or their increased intensity, will determine the actual sentence. This is also the approach in the English guideline judgment on rape: *R v Billam* [1986] 1 WLR 349; [1986] 1 All ER 985.