SENTENCING OF DRIVING OFFENCES THAT RESULT IN DEATH OR INJURY

FINAL REPORT No.8

April 2017
About this report

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

In October 2016, the Council released a Consultation Paper which provided an overview of the current sentencing framework in Tasmania with a focus on sentencing for driving offences where death or injury was caused.

The Consultation Paper provided 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 addressed the purposes of sentencing and examined public opinion in relation to sentencing for driving offences where death or injury has been caused. The Consultation Paper then asked for feedback on the appropriateness of sentencing for these offences in Tasmania and possible reform options.

This Final Report makes recommendations to the Attorney-General in relation to sentencing for driving offences where death or injury was caused.

Information on the Sentencing Advisory Council

The Sentencing Advisory Council (the ‘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 report 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.

Acknowledgements

The Council would like to thank all those who provided information in relation to this reference, in particular Betty Evans, Simon Buddle, Martin Crane, Marissa Priest and Wayne Johnson. This Final Report was written by Dr Rebecca Bradfield.
Consultation

Responses to the Consultation Paper were received from:

• F Brinken and A Staples, Prisoners Legal Service Inc (Tas) (Submission 1)
• A Wilkie MP, Independent Member for Dennison (Submission 2)
• L Gregson, community member (Submission 3)
• L Norris, community member (Submission 4)
• J Ingram, community member (Submission 5)
• M Meerding, community member (Submission 6)
• J Harkins, community member (Submission 7)
• D Killick, community member (Submission 8)
• G Bailey, Adviser, Bicycle Network (Submission 9)
• B Clark, community member (Submission 10)
• C Hutchinson, community member (Submission 11)
• S Cooper, community member (Submission 12)
• B Reynolds, community member (Submission 13)
• M Temby, community member (Submission 14)
• M Reid, President Tamar Bicycle Users Group Inc and C Burns, Executive Office, Cycling Tasmania (Submission 15)
• G Wickham, community member (Submission 16)
• J Sturges, community member (Submission 17)
• W Oakley, Community Manager, RACT (Submission 18)
• J Taylor, community member (Submission 19)
• J Conlan-Briggs, community member (Submission 20)
• A Meyer, community member (Submission 21)
• D Wanless, community member (Submission 22)
• S Corney, community member (Submission 23)
• A McGowan, community member (Submission 24)
• D Elliffe, community member (Submission 25)
• K Garner, community member (Submission 26)
• J Hepper, community member (Submission 27)
• S Lewis, community member (Submission 28)
• G Tolond, community member (Submission 29)
• D McCartney, community member (Submission 30)

In addition, as part of the consultation, the Council conducted forums with representatives from road safety and regulation organisations (MAIB, RACT, Road Safety Advisory Council and the Registrar of Motor Vehicles); representatives of the legal community (the Law Society); and organisations that provide victim support (Victim Support Service and Witness Assistance Service). The Council also met with the Director of Public Prosecutions, D Coates SC, the Acting Chief Magistrate, M Daly, and the Chief Justice of the Supreme Court, the Hon A Blow OAM.
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TERMS OF REFERENCE

In October 2015, the then 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.

The following terms of reference were given to the Council:

1. Examine the type and length of sentences for causing death or injury by Supreme and Magistrates Court for the period 1980–2015;
2. Provide a comparison with sentencing in other jurisdictions for similar offences and crimes;
3. Provide 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, provide advice on how best to address this and whether changes to offence provisions and maximum penalties are required.

In October 2016, the Council released a Consultation Paper, Sentencing for Driving Offences that Result in Death or Injury: Consultation Paper, which provided an overview of the current sentencing framework in Tasmania with a focus on sentencing for driving offences where death or injury was caused. This paper addressed Terms of Reference One and Two. It provided 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 addressed the purposes of sentencing and examined public opinion in relation to sentencing for driving offences where death or injury has been caused. The Consultation Paper then asked for feedback on the appropriateness of sentencing for these offences in Tasmania and possible reform options.

In response, the Council received 30 written submissions.

As part of the consultation, the Council conducted forums with representatives from road safety and regulation organisations (MAIB, RACT, Road Safety Advisory Council and the Registrar of Motor Vehicles); representatives of the legal community (the Law Society); and organisations that provide victim support (Victim Support Service and Witness Assistance Service). The Council also met with the Director of Public Prosecutions, D Coates SC, the Acting Chief Magistrate, M Daly, and the Chief Justice of the Supreme Court, the Hon A Blow OAM.

ISSUES TO BE ADDRESSED IN THIS FINAL ADVICE

Based on the Terms of Reference, this Final Report addresses two key concerns:

1. The appropriateness of the current sentencing type and length for driving offences where death or injury has been caused;
2. 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.
The appropriateness of current sentence type and length for driving causing death or injury by driving offences and crimes

A key focus of this Final Report and the deliberations of the Council has been the assessment of the appropriateness of current sentence type and length for driving causing death or injury offences and crimes in Tasmania. As the Council has previously acknowledged, the assessment of the appropriateness of sentencing practice is problematic, given that it is difficult to determine the criteria against which this is to be assessed. As a result, the Council has approached the assessment of the appropriateness of sentencing for driving offences where death or injury has been caused from multiple perspectives, including:

• An analysis of current trends for sentencing for driving offences where death or injury has been caused. This is addressed in Chapter 4, which sets out the current sentencing patterns for driving offences where death or injury has been caused in Tasmania. This chapter addresses Term of Reference One.

• A statistical comparison between the sentences in Tasmania and in other jurisdictions for driving offences where death or injury has been caused. This addresses Term of Reference Two and is contained in Chapter 5. This chapter compares sentencing for driving offences where death or injury has been caused in Tasmania with sentencing for equivalent offences in other jurisdictions. While this is one way of attempting to assess the appropriateness of current sentencing practices, the Council notes that inter-jurisdictional comparisons are problematic. Australian criminal law is not uniform and offence definitions vary between jurisdictions. In addition, sentencing laws are not uniform and there are differences in the sentencing options that are available, in the non-parole periods and parole eligibility provisions (difficulties that are compounded by the use of global sentencing in Tasmania). There are also differences with respect to which offences are dealt with summarily and in higher courts and jurisdictional differences exist in relation to prosecution practices.

• An examination of the sentences imposed for other offences in Tasmania in order to understand the position of driving offences where death or injury has been caused on the penalty scale relative to other offences. This addresses Term of Reference Two and is contained in Chapter 6.

• An analysis, based on the principles of sentencing, of the comments on passing sentence for driving offences where death or injury has been caused in Tasmania. This addresses Term of Reference Two and is addressed in Chapter 7.

• An examination of public opinion in relation to the sentences imposed for driving offences where death or injury has been caused. This addresses Term of Reference Two and is discussed in Chapter 8.

The Council acknowledges that advice as to the appropriateness of sentencing for particular offences ultimately requires an intuitive value judgement about what the particular offence is worth and what it is worth in comparison with other offences.

It is the Council’s view that sentencing must be proportionate to both the harm and the culpability. It is necessary and appropriate that the law has different levels of culpability for homicide and other driving offences arising from the death or serious injury of a person and that the sentence imposed reflects the fault of the offender. The sentence imposed must also correspond to the offence for which the offender has been found guilty. 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.

After examining sentencing patterns for specific offences, it is the Council’s view that:

• The use of imprisonment by the court is appropriate and the approach of the court to sentencing for motor manslaughter, as evident in the current practice of the court, is appropriate.

• The current use of imprisonment and the principles used to determine sentence length for dangerous driving causing death are appropriate.

• The current use of imprisonment and the principles used to determine sentence length for dangerous driving causing grievous bodily harm are appropriate.

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1 Where an offender is convicted of multiple offences, a judge or magistrate 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.
Executive summary

- The types of sentences (predominately suspended sentences) and sentence lengths currently used for causing death and/or grievous bodily harm by negligent driving are generally appropriate.  
- The maximum penalty for negligent driving causing death or grievous bodily harm under the Traffic Act 1925 (Tas) should not be increased at this time.

Reforms

Given the Council’s view that sentencing is not adequate, the Council does not make any recommendations for reform that address sentencing inadequacy. However, the Council has identified reforms that are desirable in order to address negative community perceptions about sentencing and the needs of victims regardless of the view taken on the appropriateness of sentencing. Reforms that address the needs of victim are set out in the Chapter 10. Further, the Council has set out reforms that aim to improve communication with the broader community in relation to sentencing for driving offences where death or serious injury is caused.

In addition, as part of the consultation process, the Council was made aware of concerns in relation to the response to recidivist driving offenders who subsequently commit a driving offence that results in death or serious injury to another person and, particularly, the operation of the driver licencing scheme in relation to these offenders.

Lower level driving offences and repeat offending was raised in submissions received by the Council. An issue that was considered by the Council was the appropriate response to ‘precursor’ offences such as dangerous driving, driving while disqualified and drink driving. The Council’s view is that there is a need to focus on more targeted criminal justice system responses to address the offending behaviour of repeat offenders such as the development of a drink driving court. The introduction of a drink driving list was suggested by the Council in its paper considering the abolition of suspended sentences and is currently being considered by the Tasmania Law Reform Institute. The Council also considers that there is an issue with sentencing for the offence of dangerous driving contained in the Traffic Act 1925 (Tas) s 32(1). Contrary to the approach in respect of other serious traffic offences where there had been a significant increase in the penalty imposed, the sentencing level for dangerous driving appeared to be deceeding. Accordingly, the Council has identified several responses that may be considered to address sentencing concerns in relation to this offence:

1. the prosecution may seek to institute an appeal against the sentence imposed in the Magistrates Court (in appropriate cases);
2. the magistrate be given the discretion to refer a matter to the Supreme Court if the magistrate’s view is that offence was of so serious a nature that it should be tried on indictment;
3. there be a parallel offence of dangerous driving created in the Criminal Code (Tas), so that there would be a summary offence in the Traffic Act 1925 (Tas) and an indictable offence in the Criminal Code (Tas);
4. the offence of dangerous driving could be removed from the Traffic Act 1925 (Tas) and placed in the Criminal Code (Tas) with the other driving offences involving dangerous driving. If dangerous driving was made an indictable offence, an option would be to provide for a court of summary jurisdiction to have jurisdiction to hear and determine the case if the prosecution and the defence consent.

Many submissions received by the Council made reference to the use of licence disqualification as a penalty for drivers where death or serious injury is caused. After consideration, the Council’s view is that there is no need for a change to the current approach of the court to licence disqualification or the provisions in the Sentencing Act 1997 (Tas) s 55 in response to sentencing practices for driving offences where death or serious injury is caused. The Council notes that disqualification is invariably used in cases where death or serious injury has arisen out of the use of a motor vehicle and that long disqualifications have been used if appropriate in the circumstances of the case. As noted at [9.2.4], the use of a suspended sentence containing a condition that the offender not commit an offence punishable by imprisonment during the good behaviour period provides a strong incentive for the offender to comply with the licence disqualification. The Council acknowledges that a licence is not a right and that driving a motor vehicle is accompanied by the risk of significant injury to others in the event that a driver does not have proper regard to the responsibilities attached to driving a vehicle and the safety of other road users. However, the Council notes the importance of a licence for an offender’s rehabilitation and the dangers posed by long periods of disqualification.

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2 It is noted that the Tasmanian Government has stated its intention to abolish suspended sentences and the Council has previously recommended the introduction of a community correction order as a replacement for suspended sentences. Given the use of suspended sentences for negligent driving causing death or grievous bodily harm, the abolition of suspended sentences will clearly have an effect on sentencing for these offences.
The Council also notes the approach of the Registrar of Motor Vehicles to the re-issue of a licence. The Registrar may issue a probationary licence following a court ordered disqualification, which is a licence that has conditions attached to it. Accordingly, the Registrar has a broad discretion to respond to the circumstances of the offending and impose conditions that assist the person to comply with their responsibilities as a driver. The powers of the Registrar are not a mechanism to impose an additional punishment on the offender (at the end of the punishment imposed by the court) but are exercised to address any safety concerns that may exist in relation to an offender’s driving. Currently, the approach to licence conditions tends to be a standardised approach that applies to all offenders. However, a case management approach is being developed by the Department of State Growth, which aims to provide an individualised response that addresses a person’s driving skills as well as any attitudinal requirements that are necessary for safe driving. This case management approach will be applied to people who are returning to driving with histories of repeat offending and will specifically target their individual needs.

The Council supports the case management initiative being developed by the Department of State Growth as an important response to road safety and notes that there is a need for the necessary resources to be provided to support the case management approach.

A key theme in the Council’s research, and one that was identified in the consultation process, is the significant and long-term harm that is caused to family members where people have died as a result by motor vehicle crash. Accordingly, the Council has given consideration to addressing the needs of victims. A clear theme in the forums held with stakeholders and in the submissions received was the unmet needs of victims, particularly in the relation to cases heard in the Magistrates Court. There is an ‘expectation gap’ in relation to what the law can appropriately do by way of penalty (which may not be viewed as being enough by family members) and the offender’s culpability. However, the Council acknowledges that there are limits in the capacity of the conventional criminal justice system to respond to those who have suffered serious injury or to those whose relative has died in a motor vehicle crash. The Council’s view is that sentencing reforms cannot close that ‘expectation gap’ but other restorative justice responses may be able to assist in closing the ‘healing gap’ for some families and victims. Accordingly, the Council considers that the introduction of a restorative justice conferencing pilot for the offences of negligent driving causing death and negligent driving causing grievous bodily harm contained in the Traffic Act 1925 (Tas) should be further explored.

The Council’s view is that there is also a need to improve communication with the broader community in relation to sentencing for driving offences where death and injury occur. Accordingly, the Council recommends that the Magistrates Court give consideration to making comments on passing sentence publicly available in cases of negligent driving causing death or grievous bodily harm.

A further reform identified by the Council is the need to make negligent driving causing death under the Traffic Act 1925 (Tas) s 32(2A) an alternative verdict to dangerous driving causing death, and negligent driving causing grievous bodily harm under the Traffic Act 1925 (Tas) s 32(2B) an alternative verdict to dangerous driving causing grievous bodily harm. This will mean 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 has established that the driving is objectively dangerous, then the jury has the option of finding the offender guilty of the lesser charge based on negligence. This ameliorates difficulties that exist for the prosecution in borderline cases, where, currently, 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. Making provision for an alternative verdict would also allow cases that are borderline dangerous driving/negligent driving to be heard in the Supreme Court with the jury making an assessment of the appropriate offence to reflect the offender’s culpability.
Advice and recommendations

Advice

Chapter 3: Current sentencing framework in Tasmania

Aggravating and mitigating factors

Advice 1 [3.3.3]
That no statutory provision is necessary to create an additional aggravating factor relating to vulnerable road users for driving offences where death or injury is caused.

Chapter 9: Assessing the appropriateness of sentencing for driving offences causing death or injury

Manslaughter

Advice 2 [9.2.1]
The current use of imprisonment and the principles used to determine sentence length for manslaughter arising out the use of motor vehicle are appropriate.

Dangerous driving causing death

Advice 3 [9.2.2]
The current use of imprisonment and the principles used to determine sentence length for dangerous driving causing death are appropriate.

Dangerous driving causing grievous bodily harm

Advice 4 [9.2.3]
The current use of imprisonment and the principles used to determine sentence length for dangerous driving causing grievous bodily harm are appropriate.

Death and/or grievous bodily harm by negligent driving

Advice 5 [9.2.4]
The types of sentences (predominately suspended sentences) and sentence lengths currently used for causing death and/or grievous bodily harm by negligent driving are appropriate.

Chapter 10: Recommendations for reform

Increased maximum penalty for negligent driving causing death or grievous bodily harm under the Traffic Act 1925 (Tas)

Advice 6 [9.2.4]
The maximum penalty for negligent driving causing death or grievous bodily harm under the Traffic Act 1925 (Tas) should not be increased.
Licence disqualification

Advice 7 [10.2]
That no change is required to current approach of the court to licence disqualification or to the provisions contained in the Sentencing Act 1997 (Tas) s 55 in response to sentencing practices for driving offences where death or serious injury is caused.

Guideline judgments

Advice 8 [10.4.3]
That a guideline judgment is not specifically required for driving offences where death or injury is caused.

Recommendations

Chapter 10: Recommendations for reform

Restorative justice

Recommendation 1 [10.3.2]
That restorative justice procedures should be available as a supplementary part of the criminal justice system rather than to divert offenders from the criminal justice system in cases where death or serious injury has been caused by the use of a motor vehicle.

Recommendation 2 [10.3.2]
That the development of a pilot restorative justice program for the offences of negligent driving causing death and negligent driving causing grievous bodily harm contained in the Traffic Act 1925 (Tas) should be further explored.

Availability of comments on passing sentence

Recommendation 3 [10.4.1]
That the Magistrates Court give consideration to making comments on passing sentence publicly available in cases of negligent driving causing death or grievous bodily harm.

Rename negligent driving

Recommendation 4 [10.4.2]
That the offences of negligent driving in the Traffic Act 1925 (Tas) should not be renamed careless driving.

Alternative verdicts

Recommendation 5 [10.5]
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).
1. Introduction

1.1 BACKGROUND TO THIS REPORT

In October 2015, the then Attorney-General and Minister for Justice, the Hon Vanessa Goodwin MLC, requested that the Sentencing Advisory Council (the “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 TLRI, 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 Final Report.

1.2 TERMS OF REFERENCE

The following terms of reference were given to the Council:

1. Examine the type and length of sentences for causing death or injury by Supreme and Magistrates Court for the period 1980–2015;

2. Provide a comparison with sentencing in other jurisdictions for similar offences and crimes;

3. Provide 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, provide advice on how best to address this and whether changes to offence provisions and maximum penalties are required.

1.3 THE CONSULTATION PROCESS

In October 2016, the Council released a Consultation Paper, Sentencing for Driving Offences that Result in Death or Injury: Consultation Paper, which provided an overview of the current sentencing framework in Tasmania with a focus on sentencing for driving offences where death or injury was caused. The Consultation Paper provided 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 addressed the purposes of sentencing and examined public opinion in relation to sentencing for driving offences where death or injury has been caused. The Consultation Paper then asked for feedback on the appropriateness of sentencing for these offences in Tasmania and possible reform options.

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In response, the Council received 30 written submissions.

As part of the consultation, the Council conducted forums with representatives from road safety and regulation organisations (MAIB, RACT, Road Safety Advisory Council and the Registrar of Motor Vehicles), representatives of the legal community (the Law Society) and organisations that provide victim support (Victim Support Service and Witness Assistance Service). The Council also met with the Director of Public Prosecutions, D Coates SC, the Acting Chief Magistrate, M Daly, and the Chief Justice of the Supreme Court, the Hon A Blow OAM.

1.4 THE COUNCIL’S APPROACH

In undertaking this reference, the Council is acutely aware of the significant responsibility that attaches to the use of a motor vehicle and the need for drivers to take special care to avoid risks to their own safety and the safety of others, as well as the potentially catastrophic consequences of bad driving.

In the consultation process, the Council was reminded of the long lasting and devastating consequences for victims and family members, and the consequences for the broader community, when a person dies or is seriously injured on the road. Several submissions spoke from personal experience where a close family member was killed and the Council wishes to particularly acknowledge these people. Other submissions provided information about the experience of cyclists on the road, and recounted stories of their own near misses and/or the experiences of other cyclists. The Council thanks these people for their considered responses and the views expressed have assisted the Council in its examination of the operation of the law in the context of vulnerable road users.

The Council’s view is that the sentences imposed on offenders who have killed or seriously injured another person need to appropriately reflect the harm caused. However, the Council also considers that there is a distinction between the culpability of an offender who knowingly engages in high risk driving behaviour and the culpability of an offender who has caused death or serious injury by inadvertence or momentary inattention. This needs to be reflected in the sentence imposed by the court.

In addition, in terms of the response of the criminal justice system, the Council notes that sentencing is only a small component of this response, which also involves the effectiveness of police enforcement and the charging of offenders by police or the Director of Public Prosecutions.

Further, the Council also recognises the limitations of the criminal law in addressing road safety. This is reflected in the Tasmanian road safety strategy, which aims to foster safer roads, safer vehicles, safer speeds and safer people through its ‘safe systems’ approach. It is also seen in the extensive public education campaigns about driving behaviour that are targeted at changing driver behaviour. The Council also notes new licencing initiatives currently being developed by the Department of State Growth, that include hazard perception testing for driving, which is a national project funded by Austroads and the use of video to demonstrate the application of road rules in real world scenarios, which is presented in different languages to overcome potential language barriers to understanding road rules.

1.5 THE APPROPRIATENESS OF CURRENT SENTENCE TYPE AND LENGTH FOR DRIVING OFFENCES WHERE DEATH OR INJURY IS CAUSED

A key focus of this Final Report 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’. Sentencing should be appropriate, but this ‘begs the question, appropriate to what?’ 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;

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4 Information provided by Martin Crane, 29 November 2016.
6 Ibid 38.
• 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 8.

1.6 SCOPE OF THIS FINAL REPORT

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

Chapter 2 sets out information about crashes in Tasmania that result in serious injury or death and provides an
overview of the driving offences that may arise where death or injury has occurred and the prosecution of these cases.

Chapter 3 provides an overview of the current sentencing framework in Tasmania with a focus on sentencing for
driving offences where death or injury has been caused.

Chapter 4 examines current sentencing patterns for driving offences where death or injury has been caused.

Chapter 5 compares sentencing for Tasmanian driving offences where death or injury has been caused with
sentencing for equivalent offences in other jurisdictions.

Chapter 6 considers sentencing for comparator offences as a means to analyse the appropriateness of sentencing for
these driving offences in Tasmania.

Chapter 7 uses the purposes of sentencing as a measure of the appropriateness of sentencing for driving offences
where death or injury has been caused.

Chapter 8 considers public perception of sentencing for driving offences where death or injury has been caused.

Chapter 9 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 10 sets out the Council’s recommendations for changes to the law.

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 report 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.7 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 offence’.8 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.

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7 Youth Justice Act 1997 (Tas) ss 3 (definition offence, prescribed offence), 161(1)(a).
8 Ibid s 3 (definition offence, prescribed offence).
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 report 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.

Some submissions received by the Council referred to the need to address sentencing for all driving offences and/or the operation of the broader driver licencing system as part of the response to road safety. A detailed examination of these matters is beyond the scope of this review, however, some consideration is given to the issue of driver disqualification and sentencing for other driving offences in Chapter 10.

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9 Ibid s 107(2).
10 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.
Chapter 2 provides information in relation to crashes in Tasmania that result in serious injury or death, the offences that apply in these cases and the prosecution of these offences to provide a context to consider sentencing in cases where death or injury arise from the use of a motor vehicle.

### 2.1 CRASHES IN TASMANIA THAT RESULT IN SERIOUS INJURY OR DEATH

Figure 2-1 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 [1.5], 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 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 2-1.
Figure 2-1: Serious casualty (fatal and serious injury) annual crash numbers by number of units involved in the crash

Table 2-1: All vehicular crashes on Tasmanian roads reported by Tasmanian police, or in the case of property damage only, crashes reported by the public, 2005–15

<table>
<thead>
<tr>
<th>Severity Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fatal</td>
</tr>
<tr>
<td>-------</td>
</tr>
<tr>
<td>2005</td>
</tr>
<tr>
<td>2006</td>
</tr>
<tr>
<td>2007</td>
</tr>
<tr>
<td>2008</td>
</tr>
<tr>
<td>2009</td>
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<tr>
<td>2010</td>
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<tr>
<td>2011</td>
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<tr>
<td>2012</td>
</tr>
<tr>
<td>2013</td>
</tr>
<tr>
<td>2014</td>
</tr>
<tr>
<td>2015</td>
</tr>
<tr>
<td>TOTAL</td>
</tr>
</tbody>
</table>

Source: Unpublished data, Department of State Growth

It is noted that unit refers to the number of vehicles, pedestrians or cyclists involved in a crash.
There has been a reduction over time in the number of crashes on Tasmanian roads resulting in death or serious injury.\(^\text{12}\) This trend has been identified over several decades and has been 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’.\(^\text{13}\) There have also been changes to the licencing process, with more stringent requirements introduced for driving assessment tests. As shown in Figure 2-2, 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 2-2: Number of Tasmanians killed or seriously injured between 1977 and 2015

![Figure 2-2](image)

The difference between the number of Tasmanians killed or seriously injured between 1977 and 2015

| Year | 1977 | 78 | 79 | 80 | 81 | 82 | 83 | 84 | 85 | 86 | 87 | 88 | 89 | 90 | 91 | 92 | 1993 | 94 | 95 | 96 | 97 | 98 | 99 | 00 | 01 | 2002 | 03 | 04 | 05 | 06 | 07 | 08 | 09 | 10 | 11 | 12 | 13 | 14 | 15 |
|------|------|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|
| Fatal | 121  | 140| 160| 157| 152| 149| 144| 143| 132| 129| 122| 119| 116| 113| 110| 109| 107| 105| 102| 99 | 96 | 93 | 90 | 87 | 84 | 81 | 78 | 75 | 72 | 69 | 66 | 63 | 60 | 57 |
| Serious | 135  | 146| 157| 151| 146| 141| 136| 135| 125| 122| 115| 112| 109| 106| 103| 100| 97 | 94 | 91 | 88 | 85 | 82 | 79 | 76 | 73 | 70 | 67 | 64 | 61 | 58 | 55 | 52 | 49 |


Table 2-2 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.\(^\text{14}\) 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.\(^\text{15}\)

\(^\text{12}\) 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 Alexander 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.


\(^\text{14}\) 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.

\(^\text{15}\) 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 ‘inattention’; information provided by Simon Buddle, email 28 June 2016.)
Table 2-2 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 Road Safety Advisory Council has identified speeding as the biggest contributing factor in fatal road crashes and serious injury crashes.\(^\text{16}\) 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%.\(^\text{17}\) However, a survey of driver attitudes in Tasmania found that speeding was not identified as ‘unacceptable driving risk behaviour’.\(^\text{18}\)

### Table 2-2: Serious casualty crash factors – by year

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Inattentiveness</td>
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<td>114</td>
<td>112</td>
<td>130</td>
<td>139</td>
<td>70</td>
<td>11</td>
<td>14</td>
<td>31</td>
<td>36</td>
<td>40</td>
<td>861</td>
</tr>
<tr>
<td>Inexperience</td>
<td>62</td>
<td>72</td>
<td>89</td>
<td>72</td>
<td>103</td>
<td>83</td>
<td>68</td>
<td>66</td>
<td>59</td>
<td>34</td>
<td>32</td>
<td>760</td>
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<td>Excessive speed for the conditions/circumstances</td>
<td>84</td>
<td>79</td>
<td>66</td>
<td>61</td>
<td>69</td>
<td>59</td>
<td>64</td>
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<td>69</td>
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<td>53</td>
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<td>43</td>
<td>45</td>
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<td>Exceeding speed limit</td>
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<td>49</td>
<td>35</td>
<td>40</td>
<td>37</td>
<td>30</td>
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<td>22</td>
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<td>22</td>
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<td>Drugs</td>
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<td>41</td>
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<td>22</td>
<td>30</td>
<td>27</td>
<td>25</td>
<td>31</td>
<td>34</td>
<td>33</td>
<td>25</td>
<td>22</td>
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<td>Unwell/Infirm</td>
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<td>27</td>
<td>27</td>
<td>30</td>
<td>36</td>
<td>33</td>
<td>33</td>
<td>38</td>
<td>16</td>
<td>13</td>
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<td>Pedestrian on road</td>
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<td>22</td>
<td>22</td>
<td>19</td>
<td>28</td>
<td>26</td>
<td>31</td>
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<td>18</td>
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<td>279</td>
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<tr>
<td>Distraction – external to vehicle</td>
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<td>16</td>
<td>25</td>
<td>27</td>
<td>35</td>
<td>30</td>
<td>32</td>
<td>24</td>
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<td>7</td>
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<td>18</td>
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<td>9</td>
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<td>26</td>
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<td>Vehicle defect</td>
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<td>16</td>
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<td>13</td>
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<td>11</td>
<td>13</td>
<td>9</td>
<td>9</td>
<td>11</td>
<td>11</td>
<td>169</td>
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<td>Fail to observe road signs and markings</td>
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<td>10</td>
<td>9</td>
<td>18</td>
<td>19</td>
<td>15</td>
<td>11</td>
<td>22</td>
<td>12</td>
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<td>10</td>
<td>15</td>
<td>18</td>
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<td>66</td>
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<td>11</td>
<td>7</td>
<td>15</td>
<td>12</td>
<td>13</td>
<td>6</td>
<td>9</td>
<td>3</td>
<td>9</td>
<td>110</td>
</tr>
<tr>
<td>Distraction – in vehicle</td>
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<td>14</td>
<td>10</td>
<td>7</td>
<td>11</td>
<td>13</td>
<td>8</td>
<td>10</td>
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<td>72</td>
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<td>8</td>
<td>7</td>
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<td>8</td>
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<td>6</td>
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<td>5</td>
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<td>7</td>
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<td>5</td>
<td>3</td>
<td>8</td>
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<td>54</td>
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<td>Reversing without care</td>
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<td>4</td>
<td>5</td>
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<td>3</td>
<td>6</td>
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<td>53</td>
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<tr>
<td>Using a mobile phone</td>
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<td>1</td>
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<td>2</td>
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<td>5</td>
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<td>5</td>
<td>16</td>
</tr>
<tr>
<td>Total</td>
<td>629</td>
<td>621</td>
<td>649</td>
<td>637</td>
<td>737</td>
<td>568</td>
<td>490</td>
<td>477</td>
<td>439</td>
<td>415</td>
<td>434</td>
<td>6314</td>
</tr>
</tbody>
</table>

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


\(^{17}\) Brian Tefft, ‘Impact Speed and a Pedestrian’s Risk of Severe Injury or Death’ (2013) 50 Accident Analysis and Prevention 871.

\(^{18}\) Road Safety Advisory Council, above n 16.
2.2 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>

While concern was raised in several submissions that the charge of murder was not available where a motor vehicle is used as a weapon, the Council wishes to make it clear that murder is available where an offender has killed another person using a motor vehicle. It is noted that a conviction for murder was obtained in Tasmania in a case where a motor vehicle was used as a weapon. Further, the Council observes that a conviction for murder arising from the use of a motor vehicle may be possible outside of the circumstances where an offender deliberately uses the vehicle as a weapon. Under the Criminal Code (Tas) s 157(1)(c), liability for murder can be established by proving that the offender’s unlawful act or omission was one that offender knew or ought to have known to be likely to cause death. This may apply where there is an inherent inevitability about the consequences of the offender’s actions, such as driving through the CBD in the middle of the day at high speed while ignoring traffic signals and/or while under the influence of drugs and alcohol. However, as was noted in the Consultation Paper, a charge of murder is not generally relied upon in respect of death caused by motor vehicle crashes given that most offenders do not intend to cause injury or death.

Consequently, the focus of the report is on the offences that are generally used in cases where death or injury results from a motor vehicle crash (namely manslaughter, dangerous driving causing death or grievous bodily harm and negligent driving causing death or grievous bodily harm — as discussed in detail in Chapter 3).

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.\(^{23}\)

### 2.3 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).\(^{24}\) 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 the 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. WAS has two officers in Hobart, one in Launceston and one in Burnie. 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.\(^{25}\)

Recently, an important procedural change has been made and it is now the Office of the DPP, rather than Tasmania Police, that prosecute 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 to 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 DPP has developed charging guidelines for serious driving offences that outline factors relevant to the appropriate charge. The aim of the guidelines is to provide consistency to the charging process on a case to case basis as well as between the various regions within the state. The guidelines also 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 inattention, 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.\(^{26}\)

- **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 intoxicated or the vehicle itself in a dangerous condition. The circumstances are not limited to these but there must be some significant feature that makes the driving dangerous.\(^{27}\)

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\(^{23}\) 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, including failing to comply with loading requirements and fined $12 000 and it was observed that ‘can you justify two lives lost for $12 000? … He’s killed two people and he gets to walk away with it. It’s not right’.


\(^{25}\) See further at [7.6] for discussion of interests of the victim in the sentencing process.

\(^{26}\) DPP, above n 24, 47.

\(^{27}\) Ibid 47–48.
• 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 of speed and intoxication.\textsuperscript{28} 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.\textsuperscript{29} 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 sentencer is restricted by any statutory maximum penalty and cannot sentence on the basis of the more serious charge.\textsuperscript{30}

The Law Society commented on the importance of prosecutorial discretion in relation to charging practice and plea negotiation. It was recognised that at the lower level of culpability it was necessary to determine whether the problem lay with sentencing or the charge laid (and the sentencing consequences that follow from that charge). This concern was also evident in a number of submissions received by the Council.

In the submission of the Tamar Bicycle Users Group and Cycling Tasmania, concern was raised about the prosecution of drivers who have been involved in crashes with cyclists where some injury was caused. It was observed that, in one recent case, a cyclist was hit by the wing mirror of a truck resulting in hospitalisation and the driver was issued with an infringement notice with a fine of $140 and three demerit points. In another case, a driver was not charged where they had run into the rear of a cyclist causing broken bones and hospitalisation. These responses were said to be unacceptable.\textsuperscript{31} Another submission recounted personal experiences that raised concern in relation to the failure to charge a driver with negligent driving arising from the infliction of serious injuries on a pedestrian.\textsuperscript{32}

Mr Temby’s submission raised concern about a case where the driver was charged with negligent driving causing death or grievous bodily harm rather than dangerous driving where the driver was unlicensed at the time of the crash and had prior convictions for drink driving. According to his submission, the offender was driving a vehicle: 

unlicensed on a public road yet the behaviour apparently did not qualify as dangerous driving. Despite the Magistrate observing the offender had a clear view on a straight stretch of road on a clear day with a cyclist wearing high visibility clothes, the offender was only prosecuted for negligent driving.\textsuperscript{33}

Similarly, Ms Harkins indicated that her ‘particular interest is in the protection of vulnerable road users such as pedestrians and cyclists from everyday poor driving practices which sometimes result in negligent driving rather than the egregious criminal offences of dangerous driving’.\textsuperscript{34}

In other submissions, a driver’s fault in choosing to drive an unroadworthy vehicle, at excessive speed in the conditions was regarded as being akin to murder: the driver was said to have ‘shown intent’.\textsuperscript{35} It was suggested that ‘death by vehicle, is not seen as an “accident”, it needs to be considered as manslaughter, murder or vehicular manslaughter’.\textsuperscript{36} It was stated that in cases:

where people are affected by compounding serious crash indicators [such as an unroadworthy and unregistered vehicle, excessive speed and under the influence of alcohol and other drugs], then it needs to be considered as a much more serious case and that it is considered under criminal code (such as murder) and that there is no avenue for people to be charged with a lesser charge such as ‘negligent driving causing death’.\textsuperscript{37}

31 Submission 15 (M Reid).
32 Mr Meerding’s submission recounted serious injuries he received as a pedestrian and his frustration and concern that the driver was not charged with an offence of at least negligent driving (Submission 6).
33 Submission 14.
34 Submission 7.
35 Submission 20 (J Conlan-Briggs); Submission 19 (J Taylor).
36 Submission 20 (J Conlan-Briggs); Submission 19 (J Taylor).
37 Submission 20 (J Conlan-Briggs). See also, Submission 19 (J Taylor).
Another submission expressed the view that if death was caused by a motor vehicle, then the appropriate charge was vehicular homicide. In another submission expressed the view that ‘killing someone with a car is murder’. In Ms McCartney’s submission, it was stated that there were cases where car drivers had deliberately hit cyclists and this should be treated as murder.

As with community consultations conducted in Victoria, there was a tendency to focus on the harm caused (the outcome) rather than the culpability of the offender (and the offence for which the offender was convicted) as a key factor. In the submission of the Tamar Bicycle Users Group and Cycling Tasmania with respect to sentencing for negligent driving causing death, comparisons were made between the sentences imposed in Tasmania and the considerably longer sentences imposed in other jurisdictions. It was asserted that:

The difference between these cases and the Tasmania deaths are that drugs, alcohol and texting were involved and two drivers left the scene. While these are compounding circumstances, the outcome was still the same; a driver was negligent and a cyclist died.

Care must be taken in drawing comparisons between cases and jurisdictions. It is necessary to take into account the charges laid and the particular circumstances. While the outcome of various forms of driving behaviour may be the same, (death or serious injury), and while outcome is an important factor in sentencing, a court must also consider the culpability of the offender and the offence for which the offender is convicted. The mainland offenders had been found guilty and sentenced for more serious driving offences (culpable driving causing death, aggravated dangerous driving causing death and dangerous driving causing death) in contrast to the Tasmanian cases, where the drivers were convicted of negligent driving causing death.

A different view expressed was that the nature of the offences of dangerous driving causing death or grievous bodily harm and negligent driving causing death or grievous bodily harm was one of the major causes of public discontent with sentencing. This was on the basis that:

the inclusion of the harm in the description of the offences can give rise to often futile expectations of more severe sentences because of the fact of resultant harm, it might have been less confusing to the public and certainly kinder to victims and their families, if the cobbled-together offences of dangerous and negligent driving causing death or grievous bodily harm had never been created.

Accordingly, the view was expressed that these offences should be abolished with the offences of dangerous driving and negligent driving per se being retained with increased penalties. The Council agrees that the range of offences that potentially apply where a person is killed or seriously injured as a result of a motor vehicle crash is a source of considerable complexity and potential confusion. However, the Council does note that more severe sentences are imposed if death or serious injury are caused by dangerous or negligent driving than if such harm does not result.

The Council recognises that prosecutorial discretion plays an important role in the criminal justice system response to driving offences where death and serious injury are caused and that it is necessary to ensure that the charge for the most appropriate offence is laid. This is also recognised by the Office of the DPP, which has developed charging guidelines to be used for serious offences to provide clear information about the factors taken into account when determining the appropriate charge and to ensure consistency in charging as well as to communicate with the broader community. These guidelines are set out in this report and have been made publicly available by the DPP. Similarly, the Council notes that despite the significant harm caused (death or serious injury), there is a range of offences that potentially apply depending on the culpability of the offender. This is discussed further in Chapter 3.

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38 Submission 13 (B Reynolds).
39 Submission 11 (C Hutchinson).
40 Submission 30.
41 See [8.2].
42 Submission 15 (M Reid).
43 Submission 4 (L Norris).
44 See Figure 3-4; See also [9.2.1].
3. 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.

3.1 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. In addition, in relation to summary offences where death or serious injury is caused, a custodial sentence is typically imposed. This is discussed further in Chapter 4.
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). As noted in Chapter 4, all drivers convicted in the Supreme Court for manslaughter or dangerous driving causing death or grievous bodily harm received a licence disqualification.\(^{45}\) Licence disqualification is discussed further at [10.2].

Restricted licences are available for disqualification ordered under the **Sentencing Act 1997** (Tas) s 55(2).\(^{46}\) 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.\(^{47}\) In *Barrett v Brown*,\(^{48}\) 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 not be contrary to the 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.

### 3.2 PENALTIES FOR PARTICULAR OFFENCES

The **Criminal Code** (Tas) does not contain a legislatively 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.\(^{49}\) 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.\(^{50}\)

This means that ‘sentencing is not arbitrary [and that] it is possible … to identify relatively specific ranges for sentences’.\(^{51}\) The range of sentences imposed for indictable driving offences causing death or grievous bodily harm in Tasmania are discussed in Chapter 3.

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.\(^{52}\)

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45 It is not possible to identify the use of licence disqualification for the summary offences of negligent driving causing death and grievous bodily harm from the Department of Justice data, as these are presented on the basis of the most serious penalty, so that if an offender received a suspended sentence or a fine and a period of disqualification, the data would disclose only the suspended sentence or the fine. However, the Council has listened to the audio recordings of the comments on passing sentence to obtain this information for the period 2008–15.

46 **Sentencing Act 1997** (Tas) s 57.

47 **Vehicle and Traffic Act 1999** (Tas) s 18(5).

48 [2003] TASSC 86.

49 **Criminal Code** (Tas) s 389. The maximum penalty for murder and treason is life imprisonment, **Criminal Code** (Tas) ss 56, 158.

50 **Lovegrove** [1961] TAS SR 106 (Barbury CJ) approved by Cox CJ in **Allen** [1999] TASSC 12, [3].


52 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.
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’.\(^{53}\) 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’.\(^{54}\) Under the *Traffic Act 1925* (Tas) s 32, the maximum penalties are as follows:

<table>
<thead>
<tr>
<th></th>
<th>First offence</th>
<th>Second offence</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Negligent driving causing death</strong></td>
<td>10 penalty units ($1570) and one year imprisonment</td>
<td>20 penalty units ($3140) and two years imprisonment</td>
</tr>
<tr>
<td><strong>Negligent driving causing grievous bodily harm</strong></td>
<td>10 penalty units ($1570) and six months imprisonment</td>
<td>20 penalty units ($3140) and one year imprisonment</td>
</tr>
</tbody>
</table>

### 3.3 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’.\(^ {55}\) 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.\(^ {56}\)

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.\(^ {57}\) 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’.\(^ {58}\)

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54 Freiberg, above n 29, 273.
56 This list is taken from Freiberg, above n 29, 219–20.
3.3.1 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’.59 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.60 This is consistent with the approach of the Supreme Court prior to the introduction of the Sentencing Act 1997 (Tas), where the Supreme Court considered ‘deterrence, prevention, rehabilitation and retribution’ as key principles in the sentencing process.61 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.62

3.3.2 PROPORIONALITY

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.63 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’.64 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.65

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.66 Harm can be defined as ‘the degree of injury done or risked by the act’.67 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’.68 In the case of the driving offences under consideration in this report, there is considerable variability in the culpability of the offender. The culpability and harm hierarchy are set out in Figures 3-1 to 3-4.69

This discussion highlights the complexity of the criminal law and the potential for public dissatisfaction, particularly in cases where there is significant harm caused (for example, death) and low culpability (for example, negligence). This was evident in some submissions received by the Council, where the focus was predominately on the harm caused as the key factor in sentencing. In contrast, Mr Gregson considered that there was a need to have regard to the culpability of the offender as well as the harm caused and to have regard to all the circumstances of the crash. Based on his experience in handing claims under a compulsory third party insurance scheme, he wrote that:

> It is too simplistic to regard fatalities as the only criterion. So many crashes could have resulted in fatalities but for good luck. For instance: Some few years ago an elderly acquaintance wrote her car off, when she failed to give way at an intersection, and sustained a broken leg. If, as was so often the case, there was a passenger in her vehicle that person would most certainly been killed. And that is not an isolated case. It was all too common in the many claims I handled. Some people walked away from a horrendous smash, caused by grossly and deliberate dangerous driving, with minor injuries, while others were killed in relative minor smashes. While the minor smashes may have been inexcusable they were often not the result of grossly and deliberate dangerous driving. Merely a momentary lapse.

Each smash, regardless of the consequences, is a many faceted incident, and should be treated as such.

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59 See ibid. 63–5.
60 See ibid.
61 See ibid.
64 Warner, above n 53, 76.
65 Freiberg, above n 29, 239–42.
67 VSAC, above n 66, 214.
68 Ibid.
69 This is adapted from ibid Figures 1 to 3.
### Figure 3-1: 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 3-2: Culpability

<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(^{71}) (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.(^{72})</td>
<td>Driving a motor vehicle towards another person, not intending to hurt 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 others as to amount to a crime against the State and deserving of punishment.(^{73})</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.(^{74}) 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 persons who may, on occasions, drive with less than due care and attention.(^{75})</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.(^{76})</td>
<td>Being distracted from driving while fiddling with the radio.</td>
</tr>
</tbody>
</table>

\(^{70}\) It is also noted that there are offences of actual and imputed knowledge under the Criminal Code (Tas) such as murder under s 157(1) (b)–(c).

\(^{71}\) 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).

\(^{72}\) Bennett [1990] Tas R 72.

\(^{73}\) Hall, Tas Unreported Serial No 122/1962.

\(^{74}\) Criminal Code (Tas) s 167A.

\(^{75}\) Jiminez v The Queen (1982) 173 CLR 572, 579.

\(^{76}\) Wintulich v Lenthall [1932] SASR 60, 63.
Figure 3-3: Harm hierarchy

<table>
<thead>
<tr>
<th>Harm</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Death</td>
<td>Death occurs where there is an irreversible cessation of all function of the brain or irreversible cessation of circulation of blood in the body.77</td>
</tr>
<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.78</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.79</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.80</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 3-4 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’.81 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,82 dangerous driving causing grievous bodily harm or negligent driving causing grievous bodily harm.83 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).84 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”’.85 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 which is close to aspects of manslaughter’.86

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.87 In this context, as noted at [2.3], the Council observes the importance of prosecution discretion and the need to ensure that the offender is charged with an offence that appropriately corresponds to the culpability of the offender.

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77 Human Tissue Act 1985 (Tas) s 27A.
78 Criminal Code (Tas) s 1.
80 Criminal Code (Tas) s 182(1).
82 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).
84 See [2.3]. This principle was applied in Wahl v Tasmania [2012] TASSCA 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.
86 Ibid [129].
87 See Chapter 4.
### Current sentencing framework in Tasmania

**Figure 3-4: Harm and culpability hierarchy for driving offences**

<table>
<thead>
<tr>
<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</td>
<td>Dangerous driving</td>
<td>Assault (Criminal Code s 184)</td>
<td>21 years</td>
<td></td>
</tr>
<tr>
<td>Injury</td>
<td>Negligent drive cause GBH</td>
<td>Dangerous drive cause GBH</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Grievous bodily harm</td>
<td>Negligent drive cause death</td>
<td>Dangerous drive cause death</td>
<td>Cause GBH (Criminal Code s 172)</td>
<td>21 years</td>
<td></td>
</tr>
<tr>
<td>Death</td>
<td>Negligent drive cause death</td>
<td>Dangerous drive cause death</td>
<td>Manslaughter (Criminal Code s 156)</td>
<td>21 years</td>
<td></td>
</tr>
</tbody>
</table>

- **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).**
- **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 Berndt (1994) 179 CLR 137.**
- **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 act or omission that the offender knew (actual knowledge) or ought to have known was likely to cause death (imputed knowledge), Criminal Code (Tas) s 157(1)(b)–(c).**
3.3.3 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'\(^\text{92}\) whereas mitigating factors have the opposite effect — decreasing the 'harm or culpability, and consequently [decreasing] the proportionate punishment that needs to be imposed'.\(^\text{91}\)

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 R\(^\text{94}\) and R v Whyte\(^\text{95}\) to cases of motor manslaughter and dangerous driving causing death or grievous bodily harm.\(^\text{96}\)

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 driving 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.\(^\text{97}\)

Another relevant factor is the status of the person put at risk. If the person 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,\(^\text{98}\) Blow J indicated that '[a] heavier 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’.\(^\text{99}\) 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’.\(^\text{100}\) The court has emphasised that ‘the protection of the public is a significant factor in determining the length of an appropriate sentence’.\(^\text{101}\) 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.\(^\text{102}\) Different considerations apply to sentencing children on the basis that:

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\(^{92}\) Freiberg, above n 29, 223.

\(^{93}\) Ibid.

\(^{94}\) (1998) 45 NSWLR 209.

\(^{95}\) (2002) 55 NSWLR 252.


\(^{97}\) Charlock v Tasmania Police [2013] TASSC 64 cited in DPP, above n 24, 50–1.

\(^{98}\) Blow J, 20 May 2011 (Sentence).


\(^{100}\) Ibid.


\(^{102}\) TLRI, above n 55, [6.2.13].
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).

In the Consultation Paper, the Council asked for feedback in relation to the current approach of the Tasmanian courts to the relevant aggravating and mitigating factors in cases where a driving offence has resulted in death or injury.

In the forums conducted by the Council, there were no concerns raised about the current approach of the Tasmania Courts.

In contrast, while no concerns were expressed about the current factors used by the court, additional factors were identified. It was suggested that driving whilst disqualified and driving an unregistered and uninsured vehicle should be aggravating factors. Many of the submissions received expressed the view that there was a need for the vulnerability of the victim to be recognised as an important aggravating factor in sentencing, particularly in the context of cyclists.

In Mr Killick’s submission, while general agreement was expressed with the current approach to aggravating and mitigating factors, he stated that, ‘I … strongly believe that when offences are committed against vulnerable road users — such as pedestrians or cyclists — that should be considered an aggravating factor by the sentencing judges or magistrates’.

The Bicycle Network expressed the view that the term ‘vulnerable road user’ should be codified based on the experiences in other jurisdictions as well as that:

The harm visited upon a cyclist or pedestrian is increased compared with the harm that might be caused to a person in another vehicle with the protection afforded by a metal shell. The Tasmanian Government explicitly emphasises that vulnerability of cyclists in its road safety education programs, in the minimum passing distance warning signs and in the legislative change to allow vehicle drivers to cross unbroken white lines when passing cyclists, provided it is safe to do so.

The sentencing process should therefore take account of that increased culpability when an incident involves a vulnerable road user.

Many of the submissions on this issue were in similar terms:

I believe that the vulnerability of the victim or other affected road users should be an important part of the aggravating factors taken into account. Drivers at the wheel of a vehicle weighing more than a tonne and shielded by a strong metal box should be particularly looking out for other road users such as bike riders and pedestrians, who will be seriously maimed or killed if a collision should occur. It should be the clear responsibility of the driver of the heavier vehicle to take every step to avoid hitting more vulnerable road users. A sliding scale of responsibility such as [those] in place in countries like the Netherlands and Denmark should be instituted in Tasmania.

The term ‘vulnerable road users’ should be codified as in Britain, some US states and the ACT.

106 Submission 14 (M Temby).
107 Submission 8.
108 Submission 9 (G Bailey).
Where the driver is recidivist (ie they have a pattern of repeat offending) then they should be removed from our roads, for the protection of all road users.109

The intention of such an amendment would be to enhance the safety of cyclists on the road by acting as a deterrent to drivers of motor vehicles.

In the submission of Mr Wickham, general agreement was indicated for the aggravating and mitigation factors identified. However, the view was expressed that other aggravating features should be ‘evidence of bullying, road rage or other aggressive or intimidating behaviour. Eg prior reports of close passing of cyclists, tailgating etc’.110 The Tamar Bicycle Users Group and Cycling Tasmania expressed the view that there needed to be an adjustment in the ‘charging and sentencing of drivers who hit bike riders in line with the vulnerability of the victim’ and that ‘this may require new laws or regulations with appropriate penalties that positively discriminate for bike riders’.111

The Council has given consideration to concerns raised in submissions about vulnerable road users. It notes that data indicate that in the period 2005–15, 11 cyclists were killed and 92 were seriously injured; 36 pedestrians were killed and 257 were seriously injured in crashes involving another vehicle.112 It also notes the accounts contained in several submissions of death and injuries caused to cyclists as a result of a collision with a vehicle. These submissions recounted personal involvement and/or the experiences of friends:

My husband … has had someone almost pull him off his bike. A man in a moving car reached out of a car window … The man grabbed his clothing.

I have been harassed by drivers aggressively cutting in close to me, by passing so dangerously close, so that I felt them almost brushing against me. I have had things thrown out of the windows of cars at me. I have been pushed along the road by a car who came up behind me.

I am a regular commuter cyclist and experience dangerous driving by car drivers on a frequent basis. I have also had a friend killed and several friends seriously injured by negligent or worse drivers, including a hit and run accident in which the cyclist’s head was run over and the driver did not remain at the scene.

I have been involved in two road incidents, both as a result of drivers who did not look for me or saw me and proceeded anyway.

I have spoken to a man … who thinks it is a fun game to go very close to cyclists, with the intention of frightening and intimidating cyclists.

In the submission of Mr Killick, it was stated that ‘pedestrians and cyclists … are disproportionately represented among the victims of road crashes’.113 This assertion is difficult to verify given that there are no measures by which it would be possible to determine the level of exposure of all road user groups and, on this basis, establish who is over or under-represented in terms of crashes.114 However, for 2016 to date, of the 278 serious casualties recorded, 3 (1.1%) have been cyclists and 23 (8.3%) have been pedestrians.115

The Council has given careful consideration to the submissions received in relation to vulnerable road users, and the concerns raised about the need to improve road safety for pedestrians and cyclists. It has undertaken additional research in relation to the use of the concept of ‘vulnerable road user’ in other jurisdictions, where it has been used for different purposes that relate to civil liability, charging practice, offence structure and sentencing.

A ‘strict liability scheme’ in relation to vulnerable road users is one based on the allocation of fault based on the

109 Submission 12 (S Cooper); Submission 28 (S Lewis); Submission 5 (J Ingram); Submission 24 (A McGowan); Submission 25 (D Elliffe); Submission 27 (J Hepper); Submission 26 (K Garner); Submission 29 (G Tolond); Submission 21 (A Meyer); Submission 10 (B Clark); Submission 11 (C Hutchinson); Submission 22 (D Wanless); Submission 28 (S Lewis); Submission 23 (S Corney). Similar comments were made in Submission 30 (D McCartney).

110 Submission 16.

111 Submission 15 (M Reid).

112 It is noted that the definition of seriously injured is an injury requiring hospitalisation for more than 24 hours. In relation to pedestrians, this figure relates to injuries or death caused as a result of a collision with a vehicle other than the person’s own vehicle, see Appendix C.

113 Submission 8 (D Killick).

114 When it comes to types of vehicles, a measure that is sometimes used to assess differences in the level of risk faced by car drivers as opposed to motorcycle riders is to look at the proportion of vehicle kilometres travelled (VKT) and relate this to the number of injuries. Other measures such as a fatality/casualty rate per 100 000 registered vehicles and a rate per population are also sometimes used. However, the difficulty is that the concept of VKT doesn’t really apply and is not collected for either cyclists or pedestrians, information provided by Simon Buddle, Manager, Crash Data, Department of State Growth, 30 November 2016.

115 Information provided by Simon Buddle, Manager, Crash Data, Department of State Growth, 30 November 2016.
relative vulnerability of the road users. An assumption is made that the driver of the motor vehicle is responsible for the crash on the basis of the 'very speed and weight of the vehicle vis-à-vis a cyclist'.

However, such schemes relate to the attribution of liability in a civil context and not the imposition of penalty following criminal proceedings. The schemes that operate in Denmark and the Netherlands (as well as other European jurisdictions) apply in relation to civil liability for negligence and the payment of compensation following a collision between a motor vehicle and a cyclist or a pedestrian. Where a vulnerable road user is involved, there is a presumption that the driver of the motor vehicle is responsible for the collision with the result that they do not have to prove the driver was at fault. Instead, the driver must show that they were not to blame for the crash. In Denmark and the Netherlands, these rules do not apply in the criminal context and do not 'relate to punishment for the death of the cyclist'.

It is the view of the Council that a strict liability scheme is unsuitable in the criminal context as it would be inappropriate to place the onus on the defendant to show that he or she was not responsible for a crash. It is a fundamental principle of criminal justice in Tasmania that an accused person is presumed to be innocent and that it is for the prosecution to establish criminal liability beyond reasonable doubt. Such a scheme would also be inconsistent with the approach adopted by the courts to the proof of negligence in criminal cases. Courts have expressly excluded the application of the civil maxim res ipsa loquitur (which is 'a convenient tag for the process whereby in civil cases inferences of negligence can be drawn on the balance of probabilities from the fact of an untoward happening') from criminal prosecutions. As the TLRI observed:

Cases where vehicles cross to the wrong side of the road, leave the road, fail to negotiate bends or intersections are examples of events that may give rise to an inference of negligence on the part of the defendant in civil cases. The prosecution cannot rely on this presumption in criminal cases.

However, while strict liability is not appropriate for criminal cases, there are principles that apply in the criminal context that can assist the prosecution to establish negligence beyond reasonable doubt. Courts have accepted that in a criminal case, 'the facts may be so strong that the only inference is that there has been careless driving unless and until something is suggested by a defendant by way of explanation'. This is not strict liability or the direct application of the res ipsa loquitur principle, but it does allow the prosecution to rely on the circumstances in which the crash occurred to allow courts to infer negligence, if the defendant has not provided an adequate explanation for the manner of the driving. For example, this may apply in the case where a driver collides with a cyclist in circumstances of good visibility, such as on a clear day where the cyclist is wearing high-visibility clothing on a straight road. The defendant's explanation then 'must provide a reasonable explanation for the accident' in order to prevent the prosecution from establishing negligence beyond reasonable doubt and this explanation must 'have some basis in reality and evidentiary credibility'.

117 See discussion in Cycle Law Scotland, Report on Strict Liability (2012); Transport, Housing and Local Government Committee, Queensland, Inquiry into Cycling Issues (2013) 72–81. It is noted that in Tasmania, a no-fault compensation scheme exists for people who suffer personal injury as a result of a motor vehicle crash. This includes payment of medical/disability benefits, funeral and death benefits, loss of earnings allowance, and housekeeping allowance. A person can also seek to recover damages at common law if the injury was caused or contributed to by the negligence of another person.
118 Transport, Housing and Local Government Committee, Queensland, above n 116, 72.
119 Cycle Law Scotland, above n 117, 5.
120 John Blackwood and Kate Warner, Tasmanian Criminal Law: Text and Cases Vol 2 (University of Tasmania Press, 4th ed, 2015) 883. It is explained in the following terms: 'if the accident is such as in the ordinary course of driving does not happen if the driver is exercising proper care, the maxim of res ipsa loquitur affords reasonable evidence, in the absence of explanation by the defendant drivers, that the accident arose from a want of care. The maxim applies where the facts of the accident show, first, that there is an absence of explanation of such occurrence that results in the accident; second, that the occurrence was of such a kind it does not ordinarily occur without negligence; and third, that the motor vehicle that caused the accident was under the control of the defendant driver. Thus the unexplained veering out of control of a motor vehicle raises an inference in favour of negligence in a civil action for damages: Maitland City Council v Myers (1988) 8 MVR 113 (NSW)', Douglas Brown, Traffic Offence and Accidents (Lexis Nexis Butterworths 4th ed, 2006) 298.
121 TLRI above n 3, 26.
123 This was set out by Underwood J in Langan v White [2006] TASSC 83 as follows: 'the facts and circumstances of the case may be such that an inference of negligence is the only one reasonably open unless an explanation is offered; ie where a defendant offers no explanation that may be sufficient to convert a prima facie case into one proved beyond reasonable doubt': at [12].
124 Ellis v Cordwell [2014] TASSC 62, [8], [32]. Harper AJ stated that '[t]here is credible evidence points unequivocally towards guilt, and the remaining evidence either lacks credibility or is of very minor relevance, so as to leave no reasonable doubt that an accused is guilty, the fact that the accused has posted a hypothesis consistent with innocence but devoid of evidentiary credibility will not turn the tables': at [32].
An alternative approach to the concept of ‘vulnerable road user’ has been to make this a relevant factor either in terms of prosecution guidance on charging practice, the creation of separate offences that specifically apply to vulnerable road users and/or the introduction of an aggravating factor in sentencing for offences where a vulnerable road user is injured or killed.

In England and Wales, a failure to have regard to vulnerable road users is explicitly recognised as a factor relevant to charging and sentencing practice. The Crown Prosecution Service’s Policy for Prosecuting Cases of Bad Driving sets out examples of circumstances that are likely to be characterised as dangerous driving including ‘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’. However, the reference to vulnerable road users is not included in the examples of dangerous driving provided by the Sentencing Guidelines Council, where the focus tends to be on deliberate driving behaviour such as highly inappropriate speeds, deliberately disregarding traffic lights or signs, racing or competitive driving, aggressive driving, using a mobile phone when avoidably and dangerously distracted, driving with a known dangerous defect or driving when too tired to stay awake. In contrast, careless driving is categorised as inadvertent mistakes and short distractions. In addition, the use of dangerous driving as the charge where a driver kills or injures a cyclist does not appear to correspond with actual charging practice in England and Wales as criticism has been directed by Cycling UK at the prosecution and courts in relation to the use of the offence of careless driving rather than dangerous driving in these circumstances. Cycling UK has asserted that ‘since the introduction of the charge of “causing death by careless driving” in 2008, there has been a sharp drop of around 50% in the number of drivers prosecuted for “causing death by dangerous driving”’.

The Sentencing Guidelines applying in England and Wales that are relevant to causing death by driving provide that a failure ‘to have proper regard to vulnerable road users’ is a factor that may be a determinant of offence seriousness. The guidelines states that:

17. Cyclists, motorbike riders, horse riders, pedestrians and those working in the road are vulnerable road users and a driver is expected to take extra care when driving near them. Driving too close to a bike or horse; allowing a vehicle to mount the pavement; driving into a cycle lane; and driving without the care needed in the vicinity of a pedestrian crossing, hospital, school or residential home, are all examples of factors that should be taken into account when determining the seriousness of an offence.

18. The fact that the victim of a causing death by driving offence was a particularly vulnerable road user is a factor that should be taken into account when determining the seriousness of an offence.

The Sentencing Guidelines Council’s discussion of the concept of ‘failing to have proper regard to vulnerable road users’ suggests that the seriousness does not arise from the vulnerability of the victim but from the failure of the driver to appropriately respond to a situation of recognised danger (such as driving too close, driving on a footpath, failing to drive appropriately in a school zone etc). It does not appear to envisage increased seriousness in circumstances where a driver makes an inadvertent mistake and injures a vulnerable road user. In regard to the sentencing guidelines for dangerous driving causing death, failing to have proper regard to vulnerable road users is provided as an example of level three seriousness (with level one seriousness being the most serious category of offences).

In the Australian Capital Territory, an offence of aggravated furious, reckless or dangerous driving has been inserted in the Road Transport (Safety and Traffic Management) Act 1999 (ACT), and this provides for a higher maximum penalty than applies for the non-aggravated offence. Circumstances of aggravation include that the ‘person was driving in a way that put at risk the safety of a vulnerable road user’. A vulnerable road user is defined as a ‘road user other

125 See further discussion at [3.1].
127 Ibid.
129 Ibid 6.
130 Ibid 3.
131 Ibid 4–5.
132 Section 7A(1)(a)(vi). Other circumstances of aggravation include: failing to comply with a direction by a police officer to stop the vehicle, driving with the prescribed concentration of alcohol, driving with a prescribed drug in blood, driving under the influence of intoxicating liquor or of a drug to such an extent as to be incapable of having prior control of the vehicle, driving at a speed that exceeded the speed limit by 30% and driving with a person younger than 17 years old in the vehicle, s 7A(1)(a) or that the person was a repeat offender (s 7A(b)).
than the driver of, or passenger in, an enclosed motor vehicle.\textsuperscript{133} The aggravated offence only applies to the more serious driving offences of dangerous driving and reckless driving and not for the offences of negligent driving causing death and negligent driving causing grievous bodily harm.\textsuperscript{134} It is also noted that the offence structure in the Australian Capital Territory differs from the offence structure in Tasmania, as there is no equivalent offences of dangerous driving causing death or grievous bodily harm as exist in Tasmania. Instead, in the Australian Capital Territory, there are the offences of manslaughter, aggravated culpable driving causing death or grievous bodily harm, culpable driving causing death or grievous bodily harm and then negligent driving causing death or grievous bodily harm.

An inquiry into cycling issues undertaken by the Transport, Housing and Local Government Committee in Queensland considered the criminal penalties that apply in the context of the protection of vulnerable road users. It examined the approach in the United States, where several states that had enacted legislation that imposed a greater penalty for the offence of careless or negligent driving where a vulnerable road user was injured or killed. It summarised the approach as follows:

- offences are created for negligent driving or careless driving and if a VRU is injury or killed, the penalty imposed is greater. Penalties typically include a fine, community service or traffic education course and, less typically, a short term of imprisonment.\textsuperscript{135}

In particular, the Committee noted the model legislation drafted by the League of American Bicyclists that:

- defined the term vulnerable road user;
- provided that a person who operates a vehicle in a careless or distracted manner and caused serious physical injury or death to a vulnerable road user is guilty of an offence;
- the person needed to attend a hearing rather than pay a fine in the mail;
- it provided that a person convicted of this offence has their licence suspended for at least six months and has one of the following penalties: (a) a monetary penalty; or (b) serve imprisonment not exceeding 30 days; or (c) participate in a motor vehicle accident prevention course; (d) perform community service.\textsuperscript{136}

It also considered the comments of the Amy Gillett Foundation that:

Currently in Australia, including in Queensland, drivers are not found to have committed an offence when, as a result of their actions, or failure to act, a bike rider is killed or seriously injured.

The main reason for this is the non-existence of a statutory driving offence that adequately addresses the circumstances associated with injury or death of a vulnerable road user who is hit by a car.\textsuperscript{137}

The Parliamentary Committee’s recommendation was that a criminal offence of ‘infliction of injury or death to vulnerable road users’ based on the model statute drafted by the League of American Bicyclists should be created, but it should incorporate a range of penalties that include maximum penalties that are more severe than the existing penalty framework (see s 83 (careless driving of motor vehicles) of the Transport Operations (Road Use Management) Act 1995 (Qld)).\textsuperscript{138} This recommendation was directed at creating an intermediate offence between the dangerous driving offences and careless driving where serious injury or death was caused to a vulnerable road user. Such offences already exist in Tasmania (negligent driving causing death or grievous bodily harm), however, they operate more broadly than the approach adopted in the Queensland recommendation, as they apply generally to all persons injured by a motor vehicle on a public road and not just vulnerable road users.

The Council acknowledges the considerable concern that exists about the safety of cyclists on the roads and the need for drivers to take special care to avoid causing injury or death to vulnerable road users. This is a complex issue with different responses (or proposed responses) evident in different jurisdictions that reflect the offence structure and sentencing practices in those jurisdictions. The Council also notes that other reforms have been proposed by the Tasmanian Government that would amend the road rules to give statutory force to the existing guidelines for

\begin{footnotesize}
\begin{enumerate}
\item Section 7A(4). The following examples are provided: pedestrians, cyclists, motorcyclists, riders of animals, users of motorised scooters, and users of Segways.
\item See Appendix A.
\item Transport, Housing and Local Government Committee, Queensland, above n 116, 82.
\item Ibid 84–85.
\item Transport, Housing and Local Government Committee, Queensland, above n 116, 86 cited in Amy Gillett Foundation, Holding Drivers to Account (2013) 4.
\item Recommendation 30. The maximum penalty for driving without due care and attention or without reasonable consideration for other person using the road or place was a fine of $4400 or six months imprisonment, at 88.
\end{enumerate}
\end{footnotesize}
safe passing distances for motor vehicles when passing cyclists. This is supported by a campaign to educate drivers about the need to maintain a minimum distance when passing cyclists, as well as previous amendments to the road rules that allow a driver to cross double white lines to pass a cyclist.

While the Council considers that improving road safety for vulnerable road users is a priority, the Council’s view is that the approaches in other jurisdictions need to be understood in terms of both offence structure and penalty (rather than looking at either in isolation). Unlike the approach suggested in Queensland and the position in several states in the United States, the Tasmanian offence structure already provides for an offence of negligent driving causing death or serious injury which applies to all road users and not just vulnerable road users. This creates more serious offences than negligent driving per se with increased penalties, including imprisonment. A person convicted of negligent driving typically receives a fine whereas a person convicted of negligent driving causing death or grievous bodily harm typically receives a suspended sentence of imprisonment.

In relation to sentencing for the offences of manslaughter, dangerous driving causing death or grievous bodily harm and negligent driving causing death or grievous bodily harm, the Council does not consider that the vulnerability of the road user should be a separate aggravating feature. The vulnerability of the road user is already relevant to sentencing as it is relevant to the degree of risk posed by the offender’s driving. This reflects the situation in the United Kingdom where the failure of the driver to appropriately respond to a situation of recognised danger (such as driving too close to a cyclist, driving on a footpath, failing to drive appropriately in a school zone etc) is relevant to the seriousness of the offence. The Supreme Court has made strong statements about the seriousness of offending when a driver or passenger of a motor vehicle deliberately targets cyclists. In *R v Campbell*, the offender was convicted of two charges of assault where he deliberately opened his car door and struck a cyclist. In sentencing, Blow J stated that:

> these were serious crimes, involving the use of a car as weapon against a group of defenceless cyclists. Cyclists have as much right to use our roads as motorists. However the prisoner, just for fun, decided to attack these cyclists using his door. He could have caused extremely serious injuries. Fortunately for him, he did not.

Accordingly, Blow J considered that the crime called for a substantial prison sentence. Further, in view of the offender’s record, his Honour imposed a non-parole period, well-above the minimum and disqualified him from driving. The sentence imposed was a sentence of 15 months imprisonment with a non-parole period of 10 months. He was disqualified from holding or obtaining a driver’s licence for five years and he was ordered to pay compensation for the injuries and damage suffered by the cyclists.

The vulnerability of the road user may also mean that the harm caused may be greater than that which would have been occasioned by a person in another motor vehicle and this is also relevant to sentencing. However, in the event that death or serious injury is caused by a motor vehicle, the Council’s view is that the circumstances of the victim (that is whether they were a pedestrian, cyclist or other road user) cannot in itself justify an increase in penalty. It is not appropriate to say that the death of a cyclist or pedestrian automatically warrants a more severe penalty than would be imposed for the death of another driver or passenger in a vehicle. This is a separate issue from the question of whether an act of dangerous driving is aggravated by the vulnerability of the road user (as exists in the ACT legislation). Dangerous driving relates to the risk of injury whereas the risk has already materialised where offences relate to injury or death.

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139 Rene Hidding, ‘Tasmania to Introduce Minimum Passing Laws’ (2016) <http://www.premier.tas.gov.au/releases/tasmania_to_introduce_minimum_passing_laws>. This has also been recommended in Victoria, see Parliament of Victoria, Legislative Council Economy and Infrastructure Committee, Inquiry into the Road Safety Rules 2009 (Overtaking Bicycles) Bill 2015 (2016). This report also provides an overview of the position in other Australian jurisdictions.

140 Road Rules 2009 (Tas) reg 147(2)(c).

141 See Figure 3-4, Table 4-22.

142 See [3.2.2], [4.7.2].

143 12 June 2003 (Sentence).
A further concern that was also raised in many submissions about the aggravating and mitigating factors that apply to sentencing for driving offences was the issue of repeat offenders, in the sense of offenders who had a history of prior driving offences such as drink driving, and driving while disqualified or suspended. Mr Killick expressed the view that ‘significant prior driving convictions or disqualification from holding a licence should be aggravating factors, particularly if a person has been the subject of a series of repeated or escalating sanctions which have failed to deter them from continued offending’. Mr Temby indicated that:

a comprehensive table of aggravating and mitigating circumstances is supported … I note driving whilst disqualified is not generally listed as an aggravated circumstance for escalation of an offence to dangerous driving. The same can be said of an unregistered and uninsured vehicle.145

Ms Sturges stated that ‘I am sick of hearing about repeat offenders driving without a licence, driving while uninsured, driving under the influence, speeding and so on’.146

As noted above, prior driving convictions or disqualification from holding a licence tend to negate mitigation rather than aggravate a sentence. Consequently, offenders with bad driving records will receive a sentence that is more severe than an equivalent offender with a good driving record. As noted in the Director of Public Prosecution Guidelines, ‘these factors are also of considerable weight in respect of personal deterrence and the protection of the public aspect of the sentence’.147 For example, in Shipton v R148 Cox CJ indicated that the offender’s driving record meant that ‘the protection of the public is a significant factor in determining the length of an appropriate sentence in this instance’ and that the appellant’s previous convictions for driving without a licence or driving while disqualified showed that the lack of a licence was not a deterrent to his driving. In Moyle v R,149 Crawford CJ stated that the fact that the offender was driving whilst disqualified was a relevant sentencing consideration as ‘it could be used to deny him leniency and to demonstrate the need for personal deterrence’.150 However, as with other criminal offences, it is a principle of sentencing law that the court cannot give such weight to an offender’s criminal history so as to impose a sentence which is disproportionate to the particular offence.151 Accordingly, the Council’s view is that a prior record is a factor that is taken into account already in sentencing. However, the Council does consider that there is scope to address the criminal justice system’s response to recidivist offenders before they commit an offence that causes death or serious injury to another road user. This is discussed in Chapter 10.

Advice 1

That no statutory provision is necessary to create an additional aggravating factor relating to vulnerable road users for driving offences where death or injury is caused.

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144 Submission 8.
145 Submission 14.
146 Submission 17.
147 Office of the Director of Public Prosecutions, above n 24, 47.
150 Ibid [19].
151 Freiberg, above n 29, 341–42; Warner above n 53, 89–90.
4. Current sentencing practices for driving offences that result in death or injury

4.1 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 on 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, 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, sentencing data has been obtained from the Department of Justice for the period July 2006 to June 2016. These relate to charges finalised and provide information in relation to single and global sentences. In relation to global sentences, again, it is not possible to determine the proportion of the total sentence that relates to each individual count. In addition, the data in relation to global sentences for the Magistrates Court are not categorised according to an assessment of the most serious offence. The Council also listened to the audio comments of the magistrates’ comments on passing sentence for sentences imposed between 2008 to 2015 in the Magistrates Court.

4.2 MANSLAUGHTER

In the period 2001–15, there were 11 convictions for manslaughter arising out the use of a 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. There was a guilty plea in eight cases (72.7%).
4.2.1 OVERVIEW OF OFFENCE

Culpable homicide that is not murder is manslaughter.\(^{152}\) There is no separate offence in Tasmania for ‘motor manslaughter’. However, in this report, 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 \textit{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.\(^{153}\)

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 \textit{Criminal Code} (Tas) s 150. (Section 150 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).\(^{154}\)
- 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 \textit{Criminal Code} (Tas) s 150.\(^{155}\)
- The omission amounts to culpable negligence, which is a question of fact to be decided on the circumstances of each case.\(^{156}\) 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’.\(^{157}\) 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.\(^{158}\)
- 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 \textit{Criminal Code} (Tas) s 167A or reckless or dangerous driving under the \textit{Traffic Act 1925} (Tas) s 32(1) are available.\(^{159}\)

4.2.2 DRIVING BEHAVIOUR

As shown in Table 4-1, 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.\(^{160}\)

<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>

\(^{152}\) \textit{Criminal Code} (Tas) s 159.

\(^{153}\) However note \textit{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 oncoming traffic and the basis for the manslaughter conviction was that the act was commonly known to cause death within the meaning of the \textit{Criminal Code} (Tas) s 156(2)(a).

\(^{154}\) See McCallum [1969] Tas SR 73.

\(^{155}\) See Blackwood and Warner, above n 120, 712.

\(^{156}\) \textit{Criminal Code} (Tas) s 156(3).


\(^{158}\) TLRI above n 55, 18 citing \textit{Hall}, Tas Unreported Serial No 122/1962, 2.

\(^{159}\) \textit{Criminal Code} (Tas) s 334.

\(^{160}\) 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, \textit{DPP}, above n 24, 51 referring \textit{Oxton v R} [2003] TASSC 23 [11] (Cox CJ); \textit{Moyle v R} (2010) 198 A Crim R 592 [18] (Crawford CJ).
### 4.2.3 SENTENCING OUTCOMES

Table 4-2: 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 4-3: 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 4-4: 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 4-5: 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 4-6: 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</td>
<td>Until further order</td>
<td>12</td>
<td>11</td>
<td>81.86</td>
</tr>
</tbody>
</table>

**Use of imprisonment and sentence length**

As shown in Table 4-2, 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.

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161 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.

162 Data from Warner, above n 53, 280.

163 Ibid.

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

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

166 This does not include the indefinite disqualification.

167 It is noted that the two passengers convicted of manslaughter in relation to a motor vehicle crash did not receive licence disqualifications.
Appeal decisions and comments on passing sentence

In 2003, the Court of Criminal Appeal in Shipton v R168 made it clear that sentencing for ‘bad cases of misconduct in the management of motor vehicles’ required ‘considerably higher penalties than in the past’.169 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)’170 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,171 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.172

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.173

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”’.174 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.175

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 manslaughter176 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

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170 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 or her act was likely to cause death (the least serious).
172 Ibid [20].
173 Ibid [18], [21].
174 Ibid [41], [43].
175 Ibid [44].
176 Warner, above n 53, 278.
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, killing the driver of that vehicle. At the time of the crash, the offender was disqualified from driving and had a significant record of driving offences. 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 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.

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 passengers 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 of 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 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 [led] to a conclusion that a significant sentence [was] 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 causing 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.

177 Tennent J, 19 November 2008 (Sentence).
179 Redshaw, Blow J, 11 December 2008 (Sentence).
180 Slicer J, 5 August 2009 (Sentence).
181 Tennent J, 26 March 2007 (Sentence).
182 Pearce J, 5 February 2016 (Sentence).
183 Wood J, 9 August 2016 (Sentence).
4.3 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 the offenders was male. The offenders’ ages ranged from 18 to 51 with the median age of 22.  

4.3.1 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’. 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 persons who may, on occasions, drive with less than due care and attention’. The standard of fault for dangerous driving is a lesser standard than 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); and
- the offender causes the death of another person by driving a motor vehicle dangerously.

The defence of honest and reasonable mistake applies to dangerous driving causing death.

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. This offence exists in all other Australian jurisdictions, except the Australian Capital Territory.

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

4.3.2 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{192} In six cases, the driver was unlicensed or disqualified from driving at the time of the offence.

Table 4-7: Driving behaviour, dangerous driving causing death, 2001–15

<table>
<thead>
<tr>
<th>Driving behaviour</th>
<th>No of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Speed and alcohol/drug affected driving</td>
<td>12</td>
</tr>
<tr>
<td>Alcohol/drug affected driving</td>
<td>4</td>
</tr>
<tr>
<td>Speed</td>
<td>4</td>
</tr>
</tbody>
</table>

4.3.3 **SENTENCING OUTCOMES**

Table 4-8: Dangerous driving causing death, 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\textsuperscript{193}</td>
<td>9</td>
<td>18</td>
<td>3</td>
<td>30</td>
<td>94\textsuperscript{194}</td>
</tr>
<tr>
<td>1990–2000\textsuperscript{195}</td>
<td>9</td>
<td>24</td>
<td>6</td>
<td>14</td>
<td>93\textsuperscript{196}</td>
</tr>
<tr>
<td>2001–15</td>
<td>12</td>
<td>48</td>
<td>6</td>
<td>13</td>
<td>100\textsuperscript{197}</td>
</tr>
</tbody>
</table>

Table 4-9: Dangerous driving causing death, Supreme Court sentences, 2001–15\textsuperscript{198}

<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 4-10: 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 4-11: 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>

\textsuperscript{192} 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{193} Data from Warner, above n 53, 282.

\textsuperscript{194} This includes four fully suspended sentences.

\textsuperscript{195} Data from Warner, above n 53, 282.

\textsuperscript{196} This includes one fully suspended sentence.

\textsuperscript{197} This does not include any suspended sentences.

\textsuperscript{198} This table does not include sentence lengths for suspended sentences.
4. Current sentencing practices for driving offences that result in death or injury

Table 4-12: 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>1978–89</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>2001–15</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 4-8, 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 4-10, 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 of Public Prosecutions v Smithurst 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 months 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’. 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’. This was also the approach of the Court of Criminal Appeal in Acting Director of Public Prosecutions v Rushton, 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.

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’. 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.\(^{208}\) 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).

In the period 2008–15, the highest penalty of four years imprisonment was imposed in two cases. In *Tasmania v Gallagher*,\(^{209}\) 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*,\(^{210}\) 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*,\(^{211}\) 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 the 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)\(^ {212}\) and *Tasmania v Rushton* (33 months).\(^ {213}\) 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 the passenger in that vehicle 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*,\(^ {214}\) where the offender lost control of her vehicle and killed a pedestrian. The offender and her partner 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’.

\(^{208}\) Ibid \([19]\).

\(^{209}\) Slicer J, 18 June 2009 (Sentence).

\(^{210}\) Tennent J, 1 August 2008 (Sentence).

\(^{211}\) Wood J, 1 July 2016 (Sentence).

\(^{212}\) Wood J, 22 May 2015 (Sentence).

\(^{213}\) This case is discussed above.

\(^{214}\) Evans J, 3 November 2011 (Sentence).
4.4 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. There was a guilty plea in seven cases (63.6%).

4.4.1 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.215

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’.216

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.217

Negligent driving causing grievous bodily harm (under the *Traffic Act 1925* (Tas) s 32(2B)) is not an alternative verdict.

4.4.2 DRIVING BEHAVIOUR

As shown in Table 4-13, 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.

Table 4-13: 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 behaviour218</td>
<td>3</td>
</tr>
</tbody>
</table>

4.4.3 SENTENCING OUTCOMES

Table 4-14: Dangerous driving causing grievous bodily harm, Supreme Court sentences, 2001–15219

<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>50220</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>72.7221</td>
</tr>
</tbody>
</table>

---

216   *Criminal Code* (Tas) s 1.
217   Ibid s 334B.
218   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 taking to a friend in the other vehicle.
219   This table does not include sentence lengths for suspended sentences.
220   It is noted that there were two partly suspended sentences imposed.
221   It is noted that there were also two partly suspended and one fully suspended sentence imposed.
Table 4-15: Dangerous driving causing grievous bodily harm, Supreme Court sentences, single count, 2001–15\textsuperscript{222}

<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\textsuperscript{223}</td>
</tr>
<tr>
<td>2008–15</td>
<td>—</td>
<td>6</td>
<td>6</td>
<td>2</td>
<td>1 out of 2 offenders\textsuperscript{224}</td>
</tr>
</tbody>
</table>

Table 4-16: Dangerous driving causing grievous bodily harm, Supreme Court sentences, all counts, 2001–15\textsuperscript{225}

<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>3</td>
<td>33.3\textsuperscript{226}</td>
</tr>
<tr>
<td>2008–15</td>
<td>27</td>
<td>48</td>
<td>6</td>
<td>8</td>
<td>87.5\textsuperscript{227}</td>
</tr>
</tbody>
</table>

Table 4-17: Dangerous driving causing grievous bodily harm, Supreme Court sentences, all counts, 2001–15, licence disqualification period\textsuperscript{228}

<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 4-16, 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\textsuperscript{230} 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 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”.\textsuperscript{231} The court noted that in the circumstances of this case, the injuries

\textsuperscript{222} This table does not include sentence lengths for suspended sentences. Note for each period, only one sentence of full-time imprisonment was imposed.

\textsuperscript{223} It is noted that there was also one partly suspended sentence imposed.

\textsuperscript{224} It is noted that there was also one partly suspended sentence imposed.

\textsuperscript{225} This table does not include sentence lengths for suspended sentences.

\textsuperscript{226} There was only one case where a sentence of immediate imprisonment was imposed.

\textsuperscript{227} It is noted that there was one partly suspended and one fully suspended sentence imposed.

\textsuperscript{228} It is noted that there was one case where a partly suspended sentence was imposed.

\textsuperscript{229} This does not take into account whether disqualification length was from time of sentence or time of release from prison.

\textsuperscript{230} (2010) 198 A Crim R 592.

\textsuperscript{231} Ibid [72].
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,232 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 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 history of driving offences 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,233 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 complainant on the right hand of, 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 in Wahl v Tasmania,234 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.

Sentences in the vicinity of 27 months were imposed in Tasmania v Wessing (27 months),235 Tasmania v Moyle (30 months)236 and Tasmania v Bush.237 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.

232 Porter J, 2 July 2010 (Sentence).
233 Porter J, 22 April 2015 (Sentence).
235 Crawford CJ, 2 March 2010 (Sentence).
236 Wood J, 18 February 2010 (Sentence).
4.5 NEGLIGENT DRIVING CAUSING DEATH

In the period July 2006 to June 2016, there were 28 sentences imposed in relation to charges of negligent driving causing death (21 single sentences and seven global sentences). There was a guilty plea by the defendant in 18 cases (64.3%).

4.5.1 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.\(^{238}\) 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.\(^{239}\)

It is an objective standard and does not contain any requirement for proof of a mental element (such as recklessness).\(^{240}\)

This offence was introduced in 2000 following a recommendation by Coroner Ian Matterson that the government should consider introducing an offence between dangerous driving causing death and negligent driving. This was on the basis that ‘at 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’.\(^{241}\) 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.\(^{242}\)

4.5.2 DRIVING BEHAVIOUR

Table 4-18: Driving behaviour, Negligent driving causing death, 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>2</td>
</tr>
<tr>
<td>Fatigue</td>
<td>3</td>
</tr>
<tr>
<td>Speed</td>
<td>5</td>
</tr>
<tr>
<td>Inattention/error of judgment</td>
<td>12</td>
</tr>
<tr>
<td>Failure to secure load/trailer</td>
<td>2</td>
</tr>
</tbody>
</table>

\(^{238}\) Robertson v Watts, unreported 51/1964 (Crawford J) applied to negligent driving causing death in Filz v Knox [2002] TASSC 82.

\(^{239}\) Wintulich v Lenthall (1932) SASR 60, 63 (Murray K) cited in Robertson v Watts, unreported 51/1964 (Crawford J).

\(^{240}\) Charnock v Tasmania Police [2013] TASSC 64, [27], [31].


\(^{242}\) Ibid.
4. Current sentencing practices for driving offences that result in death or injury

4.5.3 SENTENCING OUTCOMES

Table 4-19: Negligent driving causing death, Magistrates Court sentences by most serious penalty, single count, July 2006 – June 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>2006–07 to 2010–11</td>
<td>1</td>
<td>2</td>
<td>6</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>2011–12 to 2015–16</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>

Table 4-20: Negligent driving causing death, Magistrates Court sentences by most serious penalty, global counts, July 2006 – June 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>2006–07 to 2010–11</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>2011–12 to 2015–16</td>
<td>0</td>
<td>1</td>
<td>2</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Total period</td>
<td>0</td>
<td>1</td>
<td>4</td>
<td>0</td>
<td>2</td>
</tr>
</tbody>
</table>

Table 4-21: Negligent driving causing death, Magistrates Court sentences, all counts, 2008–15, 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>15</td>
<td>60</td>
<td>4</td>
<td>22</td>
<td>100</td>
</tr>
</tbody>
</table>

Use of imprisonment and sentence length

In the period July 2006 to June 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.

There were seven charges where a global sentence was imposed for negligent driving causing death and again the majority of offenders received a fully suspended sentence (57.1%). There was one partly suspended sentence imposed of nine months imprisonment with three 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, details of the offence have not been readily available.244 This was recognised in Charnock v Tasmania Police245 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.246 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.247

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243 This does not take into account whether disqualification length was from time of sentence or time of release from prison.
244 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>.
245 [2013] TASSC 64.
246 Ibid [52].
247 Ibid [54].
In Chamrock 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 elements of the offence. However, the number of people killed and injured justified an increase in the severity of the sentence. 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.

The approach in Chamrock was subsequently used by Magistrate Webster in Cordwell v Ellis, 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. The magistrate also imposed a licence disqualification 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 performing 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.

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248 [2013] TASSC 64.
249 Ibid [49], [50].
250 Ibid [47].
251 Ibid [48].
252 Ibid [55]. The personal circumstances included the remorse of the offender and family circumstances regarding his wife’s health and good prospects of rehabilitation.
253 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.
It is noted that there has been previous comment in the Magistrates Court that has highlighted the importance of 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, the offender was convicted of negligent driving causing death and was sentenced to imprisonment for nine months. In addition, his licence was disqualified for five years. 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 that he could only sentence the offender on the basis of the less serious charge of negligent driving causing death.

In the period 2008 to 2015 (n = 24), the longest sentence imposed was the sentence of nine months imprisonment in Garth. This was the only full-time sentence of imprisonment imposed in this period. The longest partly suspended sentence was in Chamock, where a partly suspended sentence of nine months imprisonment with three months suspended was imposed. A partly suspended sentence of eight months imprisonment with four months suspended was also imposed in a case involving alcohol/drugs as well as speed. In the period, 17 fully suspended sentences were imposed with the longest period of imprisonment being six months. This was imposed in a case where the offender was driving too fast for the conditions and lost control of the vehicle. It was also imposed in a case where the offender was momentarily distracted by taking her eyes away from the road and then lost control of the vehicle when she overcorrected. The shortest period of imprisonment imposed in a case where the sentence was fully suspended was 28 days where the offender failed to adequately secure a chair. The offender in this case was also sentenced to 56 hours community service. The minimum penalty imposed was a fine of $800 in a case involving momentary inattention where the defendant inadvertently drove onto the wrong side of the road while travelling around a corner and collided with a motorcycle that was travelling in excess of the speed limit. The case did not involve alcohol, drugs or speed.

### 4.6 NEGLIGENT DRIVING CAUSING GRIEVOUS BODILY HARM

In the period July 2006 to June 2016, there were 24 sentences imposed in relation to charges of negligent driving causing death (seven single sentences and 17 global sentences). There was a guilty plea by the defendant in 21 cases (87.5%).

#### 4.6.1 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 [4.4.1], 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.
4.6.2 DRIVING BEHAVIOUR

Table 4-22: 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 affected driving</td>
<td>2</td>
</tr>
<tr>
<td>Inattention/error of judgment</td>
<td>7</td>
</tr>
<tr>
<td>Speed</td>
<td>1</td>
</tr>
<tr>
<td>Speed/alcohol affected driving</td>
<td>3</td>
</tr>
<tr>
<td>Unknown</td>
<td>1</td>
</tr>
</tbody>
</table>

4.6.3 SENTENCING OUTCOMES

Table 4-23: Negligent driving causing grievous bodily harm, Magistrates Court sentences by most serious penalty, single count, July 2006 – June 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>2006–07 to 2010–11</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2011–12 to 2015–16</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>

Table 4-24: Negligent driving causing grievous bodily harm, Magistrates Court sentences by most serious penalty, global counts, July 2006 – June 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>2006–07 to 2010–11</td>
<td>0</td>
<td>4</td>
<td>5</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>2011–12 to 2015–16</td>
<td>0</td>
<td>4</td>
<td>2</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Total period</td>
<td>0</td>
<td>8</td>
<td>7</td>
<td>0</td>
<td>2</td>
</tr>
</tbody>
</table>

Table 4-25: Negligent driving causing death, Magistrates Court sentences, all counts, 2008–15, licence disqualified period

<table>
<thead>
<tr>
<th></th>
<th>Median (months)</th>
<th>Max</th>
<th>Min</th>
<th>Total (no)</th>
<th>Disqualification %</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>12</td>
<td>42</td>
<td>4</td>
<td>15</td>
<td>93.3</td>
</tr>
</tbody>
</table>

Use of imprisonment and sentence length

In the period July 2011 to June 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%).

In the period July 2008 to June 2016, there were 17 charges where a global sentence was imposed for negligent driving causing grievous bodily harm and the most common sentence imposed was a partly suspended sentence (47.1%) followed by a fully suspended sentence (41.2%). These partly suspended sentences were as follows: five months with four months suspended; six months with three months suspended; six months with two months suspended; nine months with six months suspended; nine months with three months suspended; 10 months with five months suspended; 10 months with four months suspended and 12 months with four months suspended.

262 There were no cases retrieved from the Department of Justice database for the period 2006–07 to 2010–11.

263 This does not take into account whether disqualification length was from time of sentence or time of release from prison.
Magistrates Court comments on passing sentence and appeal decisions

As discussed above, the decision in Charnock v Tasmania Police264 outlines relevant sentencing considerations for the offence of negligent driving causing grievous bodily harm.

In the period 2008 to 2015 (n = 14),265 the longest sentence imposed was a global sentence of six months imprisonment imposed in Zammit.266 It was not possible to identify the nature of the offender’s conduct from the sentencing comments. However, the magistrate stated that the victim suffered extreme injuries in circumstances where the underlying facts could possibly have supported a more serious charge. The offence was also associated with other serious offending of driving whilst unlicensed in an unregistered vehicle, giving a false name to police and refusing to submit to the taking of a blood sample. This was the only full-time sentence of imprisonment imposed in the cases examined by the Council in this period. The longest partly suspended sentence was a sentence of 12 months imprisonment with four months suspended in a case where the offender was under the influence of alcohol.267 A partly suspended sentence was also imposed in another case involving alcohol/drugs and speed.268

In the period, six fully suspended sentences were imposed with the longest period of imprisonment being four months. This was imposed in a case where the offender drove onto the wrong side of the road knowing that there were oncoming vehicles.269 The shortest period of imprisonment imposed in a case where the sentence was fully suspended was 14 days where the offender drove at a speed that was excessive in the circumstances (but not in excess of the speed limit) and lost control of the vehicle.270 The minimum penalty imposed was a fine of $500, which was imposed in two cases involving momentary inattention/error of judgment. In one case, the offender was reversing out her driveway and stopped to check that it was safe to proceed but failed to check her mirrors.271 In the other case, the offender was affected by the sun and crossed onto the incorrect side of the road.272

4.7 TRENDS ACROSS OFFENCES

4.7.1 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 far 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.273

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/errors of judgment. 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”.274

264 [2013] TASSC 64.
265 It is noted that 16 cases were identified and 14 audio recordings of sentence were provided to the Council.
266 Magistrates Court, 10 July 2015 (Sentence).
267 Holton, Magistrates Court, 14 January 2008 (Sentence).
268 Seif, Magistrates Court, 28 May 2012 (Sentence).
269 Wakefield, Magistrates Court, 7 October 2014 (Sentence).
270 Bromfield, Magistrates Court, 8 October 2014 (Sentence).
271 Howard, Magistrates Court, 12 March 2013 (Sentence).
272 Medwin, Magistrates Court, 14 January 2013 (Sentence).
273 TLRI, above n 3, 22-3.
274 DPP, above n 24, 47.
4.7.2 SENTENCING OUTCOMES

Figure 4-1 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.

Figure 4-1: Driving offences causing death or grievous bodily harm and sentencing disposition, Supreme Court of Tasmania 2008–15

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 [4.6.3]).

Figure 4-2 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 report (manslaughter, dangerous driving causing death, dangerous driving causing grievous bodily harm, negligent driving causing death and negligent driving causing grievous bodily harm).

Figure 4-2: Length of imprisonment for driving offences causing death or grievous bodily harm (all counts), 2008–15

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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 [4.6.3]).

Figure 4-2 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 report (manslaughter, dangerous driving causing death, dangerous driving causing grievous bodily harm, negligent driving causing death and negligent driving causing grievous bodily harm).

Figure 4-2: Length of imprisonment for driving offences causing death or grievous bodily harm (all counts), 2008–15

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Figure 4-2 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 report (manslaughter, dangerous driving causing death, dangerous driving causing grievous bodily harm, negligent driving causing death and negligent driving causing grievous bodily harm).

Figure 4-2: Length of imprisonment for driving offences causing death or grievous bodily harm (all counts), 2008–15
Figure 4.2 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* 275 and *Tasmania v Anderson*,276 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 than 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.277

In order to provide a full picture of the offence hierarchy for dangerous driving and negligent driving offences, Table 4.26 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).*).278

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275 Slicer J, 18 June 2008 (Sentence).
276 Slicer J, 18 June 2008 (Sentence).
277 For example in *Moye 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].
278 See [2.2].

4. Current sentencing practices for driving offences that result in death or injury 47
Table 4-26: Comparative table of selected driving offences, single count, Tasmania, 2008–15\textsuperscript{279}

<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 (only one sentence of imprisonment)</td>
<td>2</td>
</tr>
<tr>
<td>Dangerous driving</td>
<td>20 penalty unit fine and/or 2 years imprisonment (first offence). 40 penalty unit fine and/or 4 years imprisonment (second or subsequent offence)</td>
<td>11.5%</td>
<td>3</td>
<td>131</td>
</tr>
<tr>
<td>Wanton or furious driving causing injury\textsuperscript{280}</td>
<td>2 years imprisonment (summary conviction) 21 years imprisonment (indictable offence)</td>
<td>100% (only involved one case)</td>
<td>Not applicable (sentence of less than 3 months)</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) 20 penalty units and/or 2 years imprisonment (second and subsequent offence)</td>
<td>0%</td>
<td>Not applicable 21</td>
<td></td>
</tr>
<tr>
<td>GBH by negligent driving</td>
<td>10 penalty unit fine and/or 6 months imprisonment (first offence) 20 penalty unit fine and/or 1 year imprisonment</td>
<td>0%</td>
<td>Not applicable 7</td>
<td></td>
</tr>
<tr>
<td>Negligent driving</td>
<td>A 5 penalty unit fine</td>
<td>0%</td>
<td>Not applicable 300</td>
<td></td>
</tr>
</tbody>
</table>

\textsuperscript{279} 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 June 2016.

\textsuperscript{280} This offence is contained in the Police Offences Act 1935 (Tas) s 36(1).
Figure 4-3: Sentencing outcomes by most serious penalty, summary driving offences, single count, Tasmania, July 2006 – June 2016

<table>
<thead>
<tr>
<th>Offence Description</th>
<th>Imprisonment</th>
<th>Fully suspended sentence</th>
<th>Partly suspended sentence</th>
<th>Community service order</th>
<th>Other monetary order</th>
<th>Fine</th>
<th>Good behaviour bond/recognisance order</th>
<th>Other</th>
<th>Licence disqualification</th>
<th>Nominal penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dangerous driving causing death</td>
<td>16.5%</td>
<td>24.4%</td>
<td>9.5%</td>
<td>14.3%</td>
<td>29.1%</td>
<td>0.8%</td>
<td>0.8%</td>
<td>0.8%</td>
<td>14.3%</td>
<td>4.8%</td>
</tr>
<tr>
<td>Dangerous driving causing GBH</td>
<td>22.7%</td>
<td>27.6%</td>
<td>14.3%</td>
<td>3.8%</td>
<td>0.8%</td>
<td>4.8%</td>
<td>4.8%</td>
<td>0%</td>
<td>14.3%</td>
<td>4.3%</td>
</tr>
<tr>
<td>Negligent driving causing death</td>
<td>18.6%</td>
<td>16.6%</td>
<td>11.2%</td>
<td>6.6%</td>
<td>1.8%</td>
<td>1.7%</td>
<td>1.7%</td>
<td>0.3%</td>
<td>0%</td>
<td>1.7%</td>
</tr>
<tr>
<td>Negligent driving causing GBH</td>
<td>11.5%</td>
<td>15.6%</td>
<td>8.9%</td>
<td>2.3%</td>
<td>0.4%</td>
<td>0.6%</td>
<td>0%</td>
<td>0.7%</td>
<td>0.3%</td>
<td>4.1%</td>
</tr>
</tbody>
</table>

4. Current sentencing practices for driving offences that result in death or injury
5.

A comparison of driving offences causing death or serious injury between Tasmania and other jurisdictions

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.

5.1 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.281 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.282

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.283 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.284 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 VSAC’s examination of sentencing for major driving offences, which identified fatigue and inattention as the relevant driver behaviour for culpable driving causing death and dangerous driving causing death (as shown in Table 5-1).

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281 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)(ii)). 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.

282 See TSAC, above n 5, 288.


284 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).
Table 5-1: 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;
- driving when knowingly suffering from a medical or physical condition that significantly and dangerously impairs the offenders 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;

VSAC, above n 281, 27, 38.

5. A comparison of driving offences causing death or serious injury between Tasmania and other jurisdictions 51
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:

- 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 properly and colliding with it);
- Att Gen’s Reference No 4 of 2000 [2001] EWCA Crim 780 (offender unintentionally pressed the accelerator instead of the brake);
- 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.286

In relation to careless driving, the guidelines provide 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).287

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.

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287 Ibid.
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.

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, such as by:

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

5.2 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.

5.2.1 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 5-2 to 5-4 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.288

*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.289 In those 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.290 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).291
Table 5-2: 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.\(^{292}\)

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.\(^{293}\)

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.\(^{294}\)

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.\(^{295}\)

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292 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.
293 Crimes Act 1900 (NSW) s 52A(7).
294 Road Traffic Act 1974 (WA) s 49AB.
295 Criminal Code (Qld) s 328A(4).
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.296

<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>
<tr>
<td>Western Australia</td>
<td>10–20 years. Also a mandatory term of imprisonment of 12 months (if aggravated circumstance)</td>
</tr>
<tr>
<td></td>
<td>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>10 years</td>
</tr>
<tr>
<td>New Zealand</td>
<td>10 years or a $20 000 fine</td>
</tr>
<tr>
<td>England</td>
<td>14 years</td>
</tr>
</tbody>
</table>

**Dangerous driving causing grievous bodily harm**

All jurisdictions (other than the Australian Capital Territory)297 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 bodily harm is caused. In addition, in South Australia, the maximum penalty for culpable driving causing death is the same as for dangerous driving causing grievous bodily harm.298

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296 See Appendix A.

297 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.

298 See Appendix A.
Table 5-4: 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. 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>

5.2.2 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.299 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.300 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.301 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).302 There is also an offence of causing death by driving while unlicensed, disqualified or uninsured, which has a penalty of two years imprisonment.303 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.

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299 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 (<https://www.qld.gov.au/law/crime-and-police/types-of-crime/sentencing-fines-and-penalties-for-offences/>). In Western Australia, the penalty for careless driving is a fine of 12 penalty units, Road Traffic Act 1974 (WA) s 62. A penalty unit is $50.00 (<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 $154.00.
300 Land Transport Act 1998 (NZ) s 39.
301 Ibid s 62.
302 See Appendix A.
303 See Appendix A.
### Negligent driving causing death

Table 5-5: 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 5-6: 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 5-1, there is considerable jurisdictional variation in the maximum penalty for negligent or careless driving causing death or grievous bodily harm.

Figure 5-1: Maximum penalties, cross-jurisdictional comparison, first offence (in months)

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5.3 CUSTODIAL SENTENCES

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 report. 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 report, 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 are 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.

5.3.1 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 5-2. 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 5-2: Sentencing outcomes for manslaughter/culpable driving causing death, Victoria, Tasmania

Dangerous driving causing death

Figure 5-3 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. It is also noted that in New South Wales and Queensland, the sentencing data were 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.

306 VSAC, above n 281, 32. This relates to the period 2006–07 to 2012–13 for charges. The Victorian data include 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.


308 It is noted that Brignell and Donnelly, above n 283, 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.
Figure 5-3 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 5-3: Sentencing outcomes for dangerous driving causing death, Victoria, Queensland, New South Wales, Tasmania**

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*, which reformulated the principles set out in *R v Jurisic*. 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.’ In determining the moral culpability of the offender, the courts have referred to the concept of ‘abandonment of responsibility’, and this concept is:

> 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.

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’. The risk created by the driving and the driver’s awareness of the risk are also relevant to the assessment of moral culpability. 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. However, this does not mean that in other cases a full time custodial sentence can always be avoided.

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309 VSAC, above n 281, 43. This relates to the period 2006–07 to 2012–13 for individual charges.
310 Data obtained from Queensland Sentencing Information Service, November 2008 to October 2015.
311 Data obtained from Judicial Commission of New South Wales, 1 July 2011 to 30 June 2015.
315 Ibid [214].
316 Rosenthal v R [2008] NSWCCA 149 [16].
317 R v Vestafungo [2007] NSWCCA 54 [19].
Dangerous driving causing grievous bodily harm

Figure 5-4 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 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 were 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 5-4 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 do 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 5-4: Sentencing outcomes for dangerous driving causing grievous bodily harm, Victoria, Queensland, New South Wales, Tasmania

![Graph showing sentencing outcomes for dangerous driving causing grievous bodily harm in different states]

LEGEND
- Imprisonment
- Partly suspended sentence
- Fully suspended sentence
- Other

5.3.2 SUMMARY OFFENCES

Negligent driving causing death

Figure 5-5 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 are not available from those jurisdictions. However, it appears that sentences other than full-time

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321 It is noted that Brignell and Donnelly, above n 283, 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.

322 VSAC, above n 281, 65. This relates to the period 2006–07 to 2012–13 for individual charges.

323 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.

324 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 offenders (n = 53) received a sentence of immediate imprisonment. Partly suspended sentences are not a sentencing option in New South Wales.

imprisonment are used in 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 5-5: Sentencing outcomes for negligent driving causing death, New South Wales, Tasmania

<table>
<thead>
<tr>
<th></th>
<th>New South Wales (n = 132)</th>
<th>Tasmania (n = 10)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Imprisonment</td>
<td>4.5%</td>
<td>80%</td>
</tr>
<tr>
<td>Community Service Order</td>
<td>21.2%</td>
<td>6%</td>
</tr>
<tr>
<td>Other</td>
<td>74.3%</td>
<td>0%</td>
</tr>
</tbody>
</table>

LEGEND

- Imprisonment
- Community Service Order
- Partly suspended sentence
- Good behaviour bond
- Fully suspended sentence
- Fine

*figures do not sum to total due to rounding

As shown in Figure 5-5, 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 5-6 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 are not available from those jurisdictions. However, it appears that sentences other than full-time imprisonment are used in those jurisdictions.

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326 See for example, Sean Fewster, ‘Driver Who ran Down Cyclist Spared Jail Time’, The Advertiser (Adelaide), 6 May 2016 (11 weeks suspended sentence and 200 hours community service); Andrew Dowdell, ‘Grieving Dad Spared Jail Time’, The Advertiser (Adelaide), 2 April 2016 (4 months suspended sentence); Andrew Hough, ‘Crash Death Mum Spared Prison’, The Advertiser (Adelaide), 17 March 2016 (4 months suspended sentence); Michael Inman, ‘Widow Escapes Penalty for Crash’, The Canberra Times (Canberra), 23 October 2013 (no conviction recorded).


329 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 two in the higher court.


331 See, for example, Alexandra Back, ‘Elderly Driver Fined for Scooter Collision’, The Canberra Times (Canberra), 2 April 2016 ($2200 fine).
Figure 5-6: Sentencing outcomes for negligent driving causing grievous bodily harm, New South Wales, Tasmania

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.

5.4 SENTENCE LENGTH

This report uses the median sentence length imposed for an offence as the basis of inter-jurisdictional comparison. 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.’ It is less likely to be skewed by outlier sentences than the mean (average) sentence. 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’.

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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333 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.
334 July 2011 to May 2016 (charges).
335 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.
336 Brignell and Donnelly, above n 283, 7.
337 Ibid.
338 Stephens v Queen [2016] VSCA 121 [37] (Redlich, Santamaria and Beach JJA).
5.4.1 INDICTABLE OFFENCES

Manslaughter/culpable driving causing death

Figure 5-7 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 six months.339

Figure 5-7: Median head sentence for manslaughter/culpable driving causing death (in months), Victoria,340 Tasmania341

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.342

Dangerous driving causing death

Figure 5-8 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 sentence was between 13 months and 18 months and the longest sentence was between eight years and one day and nine years.343

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340 VSAC, above n 281, 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.
342 VSAC, above n 281, 33.
343 Queensland Sentencing Information Service.
In Tasmania, the range for a single count of dangerous driving causing death was six months to 48 months (four years).

Table 5-7: 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</td>
<td>Between 13 and 18</td>
<td>Between 109 and 120</td>
</tr>
<tr>
<td>Qld – Aggravated dangerous driving</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 5-8: Median head sentence for dangerous driving causing death, Victoria, Queensland, New South Wales, Tasmania

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. This observation acknowledges that 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. 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’. Using this measure, as shown in Table 5-8, 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.

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344 VSAC, above n 281, 43. This relates to the period 2006–07 to 2012–13 for individual charges.
345 Brignell and Donnelly, above n 283, 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.
346 Data obtained from Judicial Commission of New South Wales, 1 July 2011 to 30 June 2015.
348 Brignell and Donnelly, above n 283, 26. It is also noted that the offence in Queensland covers death and grievous bodily harm.
350 Ibid 8. This calculation excludes partly and fully suspended sentences from the calculation of the median sentence.
Table 5-8: 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%</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*, 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 imposed for cases of dangerous driving causing death which fell within or above the mid-category of seriousness. The court’s conclusion on the inadequacy of current sentencing practice was based on the reasoning set out in *Harrison v The Queen* (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. 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 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.

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351 This relates only to dangerous driving causing death, see Brignell and Donnelly, above n 283, 25.
352 [2016] VSCA 121.
353 Ibid [33].
355 Ibid [40]-[41].
357 Ibid [231].
358 Ibid.
In England, the sentencing guidelines for causing death by dangerous driving provide as follows:359

<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>8 years custody</td>
<td>7–14 years</td>
</tr>
<tr>
<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.360</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Level 2</th>
<th>Driving that created a substantial risk of danger.361</th>
</tr>
</thead>
<tbody>
<tr>
<td>5 years custody</td>
<td>4–7 years custody</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Level 3</th>
<th>Driving that created a significant risk of danger.362</th>
</tr>
</thead>
<tbody>
<tr>
<td>Where the driving is markedly less culpable than for this level, reference should be made to the starting point and range for the most serious level of causing death by careless driving.</td>
<td></td>
</tr>
<tr>
<td>3 years custody</td>
<td>2–5 years custody</td>
</tr>
</tbody>
</table>

**Dangerous driving causing grievous bodily harm**

Figure 5-9 provides a comparison of the median head sentence for dangerous driving causing grievous bodily harm in Victoria and New South Wales. It shows that the median sentences in New South Wales for aggravated offences were the highest (two years and seven months) and in Victoria, the lowest (18 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 2008–15.363

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 5-9:** Median head sentence for dangerous driving causing grievous bodily harm, Victoria,364 New South Wales (in months)365

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359 Sentencing Guidelines Council, above n 126, 10–12.

360 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.

361 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.

362 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: ibid.

363 In the remaining case, the offender received a partly suspended sentence.

364 VSAC, above n 281, 65. This relates to the period 2006–07 to 2012–13 for individual charges.

365 Data obtained from Judicial Commission of New South Wales, 1 July 2011 to 30 June 2015.
5.4.2 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:366

<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:367

<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 driving</td>
<td>36 weeks custody</td>
<td>High level community order – 2 years custody</td>
</tr>
<tr>
<td>Careless or inconsiderate driving arising from momentary inattention with no aggravating factors</td>
<td>Community order (medium)</td>
<td>Low level community order to high level community order</td>
</tr>
</tbody>
</table>

Negligent driving causing grievous bodily harm

In New South Wales, it is very rare for an offender to be imprisoned for the offence of negligent driving causing grievous bodily harm (seven out of 1044 offenders). In cases where full-time imprisonment was imposed, the median sentence was six months, the minimum sentence was three months and the maximum sentence was eight months. No sentences of full-time imprisonment were imposed for negligent driving causing grievous bodily harm in Tasmania.

366 Sentencing Guidelines Council, Magistrates’ Court Sentencing Guidelines, above n 328, 118A.
367 Sentencing Guidelines Council, Causing Death by Driving, above n 126.
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 report, 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.

6.1 INDICTABLE OFFENCES

6.1.1 USE OF IMPRISONMENT

Table 6-1 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 6-1: 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 (2 1 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>

368 Excluding two life sentences
369 Excluding two life sentences.
6.1.2 LENGTH OF IMPRISONMENT

Figure 6-1 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 6-2 and 6-3 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 6-2 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 6-1: Median imprisonment term for comparator offences (all counts): Supreme Court, 2008–14 (in months)

Figure 6-2: Range of imprisonment terms, comparator crimes, Supreme Court sentences, all counts, 2008–14
6.1.3 RELATIVE SERIOUSNESS OF THE OFFENCES

As discussed at [5.4.1], 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 report 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 6.1: 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>
6.1.4 DISCUSSION

Manslaughter

As indicated at [4.2.3], 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’.370

Further, there were 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. This relates to the observation of the DPP that in making comparisons with other manslaughter convictions regard needed to be had to the antecedents of the offender, and noted that in the other manslaughter cases, the offender tended to be older and with a more extensive criminal record when compared to motor manslaughter cases which tended to involve younger offenders who did not have bad prior records. In examining sentencing data involving small numbers of offenders, the data tend to reflect the circumstances of the individual cases involved rather than any particular trend to treat one type of manslaughter differently from another. It was also observed that driving offenders also received long driving disqualifications and these needed to be considered as part of the overall punishment imposed on the offender.

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’.371 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.372 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 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.373

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.374 Another sentence of eight years imprisonment was imposed in a case where a 20-year-old offender shot the deceased in the chest.375

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 fully suspended 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.376 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).

371 Criminal Code (Tas) s 156(a).
372 Tasmania v K, Crawford CJ, 28 July 2010 (Sentence).
373 See Tasmania v Keene, Crawford CJ, 18 March 2011 (Sentence); Tasmania v Williams, Porter J, 30 June 2010 (Sentence).
374 Tasmania v Bowden, Tennent J, 29 April 2015 (Sentence).
375 Tasmania v Price, Estcourt J, 21 September 2015 (Sentence).
376 Tasmania v Anglin, Tennent J, 13 April 2015 (Sentence).
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.377

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.378 It was 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 [3.3.2] and [4.7.2], 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).

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 of 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 [6.1.3]).

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 [4.7.2], 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. In addition, unlike dangerous driving causing death or grievous bodily harm where the trend in the Supreme Court has been for all offenders to be sentenced to a full-time sentence of imprisonment with longer sentences being imposed, it appears that fewer offenders convicted of dangerous driving are receiving a custodial sentence.379

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377 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.
378 TSAC, above n 5, 53.
379 See [10.1.1].
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 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 to 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.

6.2 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 workplace 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 causing 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 June 2016, 77% of offenders received a fine. In the same period, offenders convicted of negligent driving causing death or grievous bodily harm were most likely to receive a custodial sentence.

Table 6-2: Negligent driving causing death or grievous bodily, Magistrates Court sentences, single count, July 2006 – June 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 bodily harm (n= 7)</td>
<td>0</td>
<td>0</td>
<td>57.1%</td>
<td>0</td>
<td>42.9%</td>
</tr>
</tbody>
</table>

*figures do not sum to total due to rounding

380 Work Health Act 2012 (Tas) ss 31, 32.
381 Ibid s 31.
382 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.
383 See Figure 4-3. This relates to single counts.
7. 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.

7.1 PROPORTIONALITY AND RETRIBUTION

Retribution is a common law purpose of sentencing, but is not stated explicitly as a purpose in the Sentencing Act 1997 (Tas). In Australia, the concept of proportionality operates to set the limits of permissible retribution. 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. 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 3, 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. In Tasmania v Horsten, 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 retribution must be measured and that the criminal justice system, by the sentence imposed, cannot undo the harm.

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384 This is accessible from the Inglis Clarke Library website <http://catalogues.lawlibrary.tas.gov.au/textbase/SentSearch.htm>.
385 The other limiting principle at common law is parsimony: see Warner, above n 53, 75.
386 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)(a); 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).
388 See [2.2].
390 6 December 2011 (Sentence).
391 Tasmania v M, Slicer J, 20 December 2007 (Sentence). See discussion at [6.6].
7.2 DENUNCIATION

The 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. The court's awareness of community concern about serious driving offences has been reflected in the general increase in the level of sentences. As recognised by Pearce J in Tasmania v Triffett:

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.

Similarly, in the Director of Public Prosecutions (Acting) v Rushton, Tennent J stated 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 of a person or persons. As a consequence, sentences imposed for this crime have trended upwards.

In Tasmania v Bush, Wood J observed that 'sentences are now more severe than they were previously reflecting the community's justifiable concern about such driving'.

7.3 DETERRENCE

The 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 Wahl v Tasmania:

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.

Similarly, in 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 offender.' The need for general deterrence has been said to 'overwhelm considerations such as good character and remorse.'

7.4 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. Community protection is specifically identified as one of the purposes of sentencing in Tasmania. This umbrella term covers retribution, deterrence and rehabilitation as well as incapacitation. 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.
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.404 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.405

7.5 REHABILITATION

Rehabilitation is recognised as an aim of sentencing in Tasmania under the Sentencing Act 1997 (Tas) s 3(e)(i). 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’.406

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’.407 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.408

Offender rehabilitation was a focus in many of the submissions received by the Council, with the Bicycle Network specifically referring to the need for sentencing to have a greater focus on offender rehabilitation.

7.6 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.409 The interests of victims may include:

- punishment, deterrence, rehabilitation and protection of the community; and
- recognition of the harm resulting from driving offences 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,410 ‘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 statements in relation to indictable offences and not in relation to summary offences (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.411

In sentencing offenders for driving offences where death or injury has been caused, the comments of the court demonstrate 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,412 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,413 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,414 Crawford CJ also referred to the inability of the sentence imposed to provide recompense for the life lost: ‘No sentence of the Court will return [the deceased’s] life or otherwise put the effects of the crime to nought’.

411 See Crimes (Miscellaneous Amendments) Act 2016 (Tas) s 16.
412 Wood J, 22 May 2015 (Sentence).
413 Blow J, 20 May 2011 (Sentence).
414 Crawford CJ, 8 February 2006 (Sentence).
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.415 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.416 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’.417 Accordingly, the Council is mindful of the need to develop a more nuanced understanding of public opinion.

In developing its recommendations, the Council has also considered the views contained in the responses received to the Consultation Paper. These are set out in Chapter 9.

8.1 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,418 there have only been a small number of studies that have examined perceptions 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.

415 TSAC, above n 5, 64.
416 Freiberg, Donnelly and Gelb, above n 409, 132.
8.1.1 TASMANIA

The Tasmanian Jury Study sought to gauge public opinion by ascertaining the perceptions of jurors in relation to sentencing.419 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.420 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.421 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. Six jurors in culpable driving trials participated in Stage Two. 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%)).422

8.1.2 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.423

The study examined a number of issues:

(1) public perceptions of the relative seriousness of the offences of causing death by careless or inconsiderate driving, 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.424 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”’.425 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’.426

(2) the importance of mitigating and aggravating factors. The research found that prior convictions had a highly significant influence on sentencing severity in the survey results and greatly influenced the responses of participants in the focus group.427 Similarly, the absence of prior convictions was an important mitigating factor.428

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420 Warner et al, above n 418, 35.
421 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).
422 Ibid 50.
423 Hough et al, above n 417, vi.
424 Ibid vii.
425 Ibid 15.
427 Ibid 39.
428 Ibid 45.
However, the youth of an offender was given little weight as a mitigating factor.\footnote{429}{Ibid 43.} It also found that the public tended to place less importance on mitigating factors than aggravating factors.\footnote{430}{Ibid 47.}

(3) 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.\footnote{431}{Ibid 20–4.} 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’.\footnote{432}{Ibid 34.} The study found that ‘many individuals suggested sentences that are similar to, or more lenient that the Panel’s proposal’.\footnote{433}{Ibid ii.}

The findings from the interviews with relatives of victims found that they preferred sentences were much tougher than those expressed by survey participants.\footnote{434}{Ibid viii.} 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 irrevocably changed’.\footnote{435}{Ibid 54.} 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.\footnote{436}{Ibid 60.}

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:

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’.\footnote{437}{Ibid 5, referring to Anthony Doob and Julian Roberts, Sentencing: An Analysis of the Public’s View (Department of Justice Canada, 1983).} 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.\footnote{438}{Ibid.}

2. 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 offences 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’.\footnote{439}{Ibid 6, referring to David Dejoy and Judith Klippel, ‘Attributing Responsibility for Alcohol Related Near-Miss Accidents (1984) 15 Journal of Safety Research 107.}

3. A study of public attitudes to drink driving offences conducted in 1996 by Applegate et al 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.\footnote{440}{Ibid, referring to Brandon Applegate et al, ‘Determinants of Public Punitiveness Towards Drunk Driving: A Factorial Survey Approach’ (1996) 13 Justice Quarterly 57.}
8.2 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 thought was more serious in each pair; and (2) ‘category’ or ‘coded’ rating or ranking, which asked participants to indicate how serious they thought offences were 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 performs a 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 based on intention:

- 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;
- 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.

441 VSAC, Community Attitudes to Offence Seriousness (2012).
442 Ibid 13.
443 Ibid 20.
444 Ibid 21.
445 Ibid 33.
446 It is noted that this refers to criminal negligence.
447 VSAC, above n 441, 33.
448 Ibid 33, 42.
449 Ibid 63.
450 Ibid.
• if there was no intention to cause very serious harm and a lower level of culpability due to dangerous
   behaviour with an unforeseen outcome; participants tended to see these offences as more akin to ‘accidental’
   causation of harm.\textsuperscript{451}

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.\textsuperscript{452}

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 quantity) (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).\textsuperscript{453}

\textsuperscript{451} Ibid 65.
\textsuperscript{452} Ibid 65–7.
\textsuperscript{453} Ibid Appendix 5.
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 4);
- a statistical comparison between sentences imposed for driving offences causing death or injury in Tasmania and in other jurisdictions (Chapter 5);
- 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 6);
- an analysis of sentencing decisions for driving offences causing death or injury in Tasmania assessed according to the principles of sentencing (Chapter 7); and
- an examination of public opinion in relation to the sentences imposed for driving offences causing death or injury (Chapter 8).

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

9.1 GENERALLY

9.1.1 SUBMISSIONS

In addition to comments on sentencing for particular offences, the Council also received submissions and feedback at the forums it held that related to sentencing for driving offences generally. The MAIB and the RACT expressed the view that the primary concern from their perspective was ensuring that appropriate disincentives were in place to encourage drivers to take responsibility on the road. The RACT stated that ‘[g]iven the high frequency of reoffending, perhaps the balance has not yet been achieved’. However, as discussed at [10.1], a distinction needs to be made between reoffending for the offences that are addressed in this report and reoffending for traffic offences generally.

Many other submissions also expressed concerns about repeat offenders and the need to develop a response that would assist to increase road safety. However, this did not necessarily mean that there was a call for greater use of imprisonment. In contrast, the Bicycle Network emphasised that the courts needed a range of responses beyond imprisonment. It referred to the ‘Back on Track’ program as a good example of a remedial, court-ordered program to educate convicted drivers. It drew attention to a program in Ontario that operates for repeat drink drivers. It also considered that technology has the potential to play an important role in monitoring convicted drivers, building on number-plate recognition technology and combined with GPS technology.

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454 This is the approach that the Council adopted in its consideration of the appropriateness of sentencing for sex offences, see TSAC, above n 5.
455 Submission 18 (W Oakley).
456 Submission 15 (M Reid).
Many of the submissions addressed the issue of licence disqualification in response to questions about the adequacy of sentencing. In the Bicycle Network’s submission, a recommendation was made that sentencing be used as a tool to change driver behaviour and to further educate drivers on their responsibility as a key to reducing risk for all road users. It considered that community protection would be enhanced if drivers were kept off the road for longer by increasing the terms of licence disqualification, including for an indefinite period, until a driver was competent to get behind the wheel. Rehabilitation was also stressed as an important sentencing consideration. It suggested that a number of strategies should be adopted to change driver behaviour for recidivist drivers, including:

- longer disqualifications;
- extending vehicle confiscations;
- banning recidivist drivers with serious convictions from owning any sort of vehicle;
- mandatory medical checks for repeat offenders before they can regain their licence;
- random drug and alcohol testing for repeat offenders before they can regain their licence;
- being forced to face the injured victim and/or family of those killed;
- tougher conditions on restricted licences and no access to such a licence if the offender is convicted of an indictable offence;
- use of emerging technologies to monitor recidivist drivers; and
- community service orders that directly assist victims and families.457

Similar suggestions were made in several other submissions.458

Mr Temby also considered that there should be consistency with other Australian states in relation to penalties. He also submitted that there was a need to consider sentencing practices for a range of driving offences and not just those that result in death or injury. He identified offences that involved exceeding the speed limit by 45 km/h or more, driving under the influence where an offender’s blood alcohol exceeds 0.2, hooning such as fishtailing, burnouts or street racing and instances of road rage that should result in an immediate confiscation of the offender’s vehicle and the loss of licence for an extended period.459

Other responses called for the greater use of imprisonment to act as a deterrent. Ms Sturges stated that:

as a society we demand strict sentencing when people act recklessly with guns, acknowledging the devastating impact they can cause. With more high profile stories and media attention on the horrific incidents occurring on our roads, we seem to be demanding similar sentencing for people that are reckless with a vehicle.460

Mr Reynolds was concerned that the negligent use of a vehicle was not treated in the same way as negligent use of a firearm. He considered that there was too much focus on the manner of driving and not enough focus on the outcome in cases involving vehicle.461 Ms McCartney stated that motorists are more likely to take greater care when approaching cyclists and pedestrians if they understand that they will face a jail sentence if they kill or maim them.462

The Council received a submission from Mr Wilkie MP who indicated that many constituents had raised with him their concerns regarding this issue, ‘so many in fact that I feel there genuinely is a mood in the community for reform’. Mr Wilkie considered that there appeared to be an issue of inconsistent sentencing and suggested that the development of a benchbook may be appropriate.463

457 Submission 9 (G Bailey).
458 Submission 30 (D McCartney); Submission 21 (A Meyer); Submission 10 (B Clark); Submission 11 (C Hutchinson); Submission 12 (S Cooper); Submission 22 (D Wanless); Submission 23 (S Corney); Submission 24 (A McGowan); Submission 25 (D Elliffe); Submission 26 (K Garner); Submission 28 (S Lewis); Submission 27 (J Hepper); Submission 29 (G Tolond).
459 Submission 14.
460 Submission 17.
461 Submission 13.
462 Submission 30.
463 Submission 2 (A Wilkie).
9.1.2 THE COUNCIL’S VIEWS

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.’ As the data in Chapter 5 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.

The Council’s view is that the differences in sentencing levels between all jurisdictions suggest 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.

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 the same period, there has been an increase in the number of motor vehicles registered in Tasmania from 362,134 in 2005 to 457,629 in 2015. In Tasmania, the rate of death as a result of road trauma has fallen from 1.12 per 100,000 people in 2006 to 0.66 per 100,000 people in 2015. This was the largest decrease 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. 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’. This view was also reflected in some of the submissions received by the Council.

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:

> 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

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464 Freiberg, Donnelly and Gelb, above n 409, 37.
465 Ibid 106.
466 See Figure 2-1.
467 See Table 2-1.
468 ABS, above n 12, Table 1; Motor Vehicle Census, Australia (2005) 11.
469 Bureau of Infrastructure, Transport and Regional Economics, Road Trauma Australia 2015 Statistical Summary (BITRE, 2016) 24.
471 TSAC, above n 5, 76.
472 This is evidenced in the 25,000 people who signed a petition following the death of Sarah Pano, see Jennifer Crawley, ‘Push for Sarah’s Law’, The Mercury (Hobart), 6 March 2016.

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announced 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.476

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’.477

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.478

The Council agrees with this view that sentencing must be proportionate to both the harm and the culpability. 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.

Further, the Council observes that despite the focus of the courts and in the submissions received 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,479 research suggests that increasing sentence severity does not better deter would be offenders (marginal deterrence) or reduce crime rates.480 This was recognised by the Full Bench of the Supreme Court of South Australia in R v Payne,481 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’.482 Evidence also suggests that increasing penalties does not work to

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476 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.
477 Hough et al, above n 417, 1.
481 (2004) 89 SASR 49 [49].
482 Mirko Bagaric and Richard Edney, Australian Sentencing (Westlaw AU, n.d.) [860.2100].
deter the particular offender from re-offending (that is, specific deterrence). 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. In contrast, the likelihood of detection does have an effect on recidivism rates.

While the reality is that some offenders, as summed up by Tennent J in Tasmania v Harris, ‘were an accident waiting to happen’, increasing the penalty for driving offences where death or injury is caused is unlikely to be successful in preventing harm given that many drivers would not associate their bad driving with driving that is likely to cause death or injury. This is discussed further at [10.1].

The Council also does not consider that the sentencing data presented in this report demonstrates inconsistency of sentencing for any of the offences. Rather, the Council notes that there are relatively few offenders who are convicted of these offences and the sentences imposed reflect the diversity of circumstances of the particular cases. Further, the Council notes that there has been a trend for more severe sentencing for cases where death or injury has been caused by the use of a motor vehicle.

9.2 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 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.

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.

9.2.1 MANSLAUGHTER

The data presented in Chapter 4 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. It also revealed that in comparison to sentences imposed for culpable driving causing death in Victoria, Tasmania had a higher imprisonment rate.

The Council’s preliminary view was 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 2.1 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 10 years and the minimum sentence was three years with a median sentence of seven years. As noted in Chapter 4, 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 need to safeguard road users against reckless drivers. This change in approach was also precipitated by an appeal from the DPP based on the submission that 

483 Bagaric and Alexander, above n 480, 45.
484 Mullen et al, above n 405, 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 Driver: A Study of One Thousand Offenders’ (1981) 14 Australian and New Zealand Journal of Criminology 225, 237. However, note Briscoe, above n 13, who 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.
485 19 November 2008 (Sentence).
487 This point was made by the TLRI, above n 55, [6.2.12].
the prevailing standard of penalties for motor manslaughter were inadequate and should be increased.\(^{489}\) 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.

As discussed at [3.3.2], the Council’s view is that 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 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>

**Submissions**

In the Consultation Paper, the Council asked whether the types of sentences (imprisonment and licence disqualification) currently used for manslaughter arising out the use of a motor vehicle were appropriate and whether the sentence lengths currently imposed by the Supreme Court for manslaughter arising out the use of a motor vehicle were appropriate.

In consultations with the Council, the DPP, Mr Coates SC, commented on the increases in sentencing levels for motor manslaughter and causing death by dangerous driving and indicated that his office had made a concerted effort to bring about this increase given the historically low sentences imposed. He considered that sentences had risen and expressed the view that it could not be said that sentencing levels had plateaued and appeared to be continuing to rise.

Other support was expressed in relation to sentencing for manslaughter. Mr Foon, on behalf of the Law Society, indicated that sentencing type and level were, in his view, appropriate. Mr Killick generally thought that sentences were appropriate both in terms of type and length. However, he considered that serious cases of driving causing death should always be accompanied by a very lengthy period of disqualification from holding or obtaining a driving licence (from upwards of five years to a lifetime ban from driving) for the protection of the community. He also thought that more sentencing options should be provided.\(^{490}\) Mr Wickham stated that the penalty type for manslaughter was correct but thought that there should be longer disqualification, especially ‘where a person has shown to have disregard for the safety of others the courts should more often consider lifetime bans from driving’.\(^{491}\)

Several submissions stated that there should be severe penalties but argued that the penalties imposed needed to be effective and questioned whether ‘it [has] been demonstrated that imprisonment changes the way people drive

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489 See Director of Public Prosecutions (Tas) v Watson (2004) 146 A Crim R 223.
490 Submission 8.
491 Submission 16.
upon their release. These submissions suggested a greater range of responses (other than imprisonment) such as forcing offenders to meet victims/victims’ family, to apologise to them and be assisted to understand the impact that their actions have had on other members of the community. They also considered that a significant period of community service or community orders that directly benefit the victim’s family or community would be appropriate. A further suggestion was to ban the offender from driving for a longer period of time. It was also stated that a maximum penalty for particularly heinous killing and maiming on the road could be greater than seven years and the periods allowed before parole could be greater.

Ms Cooper indicated that she did not think that sentencing types currently used were appropriate because her view was that she ‘didn’t think that punitive responses like imprisonment work to change the way people drive. It’s too late after the fact and it’s too much eye-for-an-eye’. Instead, licence disqualification was appropriate because if ‘a driver has been careless and endangered lives, then yes, it’s appropriate that they are no longer allowed the privilege and responsibility of driving.’ In terms of sentence length, Ms Cooper considered that if the actions were ‘deliberate, then the car is being used as a weapon and the community should be protected from someone who does this’. However, ‘if it was carelessness or an accident then prison is not appropriate. If someone is chronically careless when driving, they shouldn’t be allowed to drive a car’.

Ms Cooper was also supportive of restorative justice methods where the offender meets with the affected people. This was considered to be a much better response as it allowed the offender to see how their actions affected others. She also raised the possibility of ‘visible community service’ for the purpose of educating drivers. However, she also expressed reservations because she did not ‘believe in humiliation as a punishment’:

Visible community service would be good — if we were talking about educating drivers. I’m in two minds about this, as I don’t believe in humiliation as a punishment. But some sort of visibility around places where accidents occurred, the circumstances, and reporting by media that doesn’t pit car against bike or car against pedestrian. We need to talk about human beings who are making choices — and if you make a bad choice while you’re safely inside a car and kill a vulnerable person on foot or on a bike, then we need to talk about the implications of that. Offenders should be given cycling training so they know what it feels like to be a vulnerable road user.

The Council’s views

In forming its views on the appropriateness of sentencing practice for motor manslaughter, the Council has taken into account the views expressed in the submissions. The Council observes that a theme in the submissions received was that there was a need to change the behaviour of drivers convicted of manslaughter for community protection but that this did not inevitably mean longer sentences of imprisonment. Rather, the submissions indicated that there was a desire for sentences that reflected the seriousness of the offender’s conduct but that also made the offender aware of the seriousness of their conduct. In addition, there was a desire for longer periods of disqualification to protect the community.

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.

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. 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

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9. Assessing the appropriateness of sentencing for driving offences causing death or injury

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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. This point was made by the DPP. Further, 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.497

Moreover, 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.498 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.499 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’.500 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.501 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’.502 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’.503

As discussed at [4.2.2], the courts have recognised the seriousness of the offender’s conduct and the community
expectation that the offender will receive a significant penalty. The court has clearly set out the principles to
sentencing that apply in Shipton, and these have been applied in subsequent cases. The Council observes that
sentencing levels for this offence have increased and there are indications that sentences are continuing to increase.
The Council notes that the maximum penalty that has currently been imposed is seven years. However, the Council
considers that there is scope for the court to impose a longer sentence if it were warranted in the circumstances
of the individual case. 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.504 Accordingly, the Council’s view is that the use of imprisonment by the
court is appropriate and the approach of the court to sentencing for motor manslaughter as evident in the current
practice of the court is appropriate. The issue of licence disqualification is considered separately at [10.2].

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**Advice 2**

*The current use of imprisonment and the principles used to determine sentence length for manslaughter arising
out the use of motor vehicle are appropriate.*

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497 It is noted that in *The Queen v Kilic* [2016] HCA 48, the High Court accepted that current sentencing practices may provide ‘a relevant
“yardstick” by which a sentencing court can attempt to achieve consistency in sentencing and in the application of relevant sentencing
principles but that the requirement to have regard to the sentences imposed in those cases does not mean that the range of sentences
imposed in the past fixes the boundaries within which future sentences must be passed; rather the range of sentences imposed in
the past may inform a “broad understanding of the range of sentences that would ensure consistency in sentencing and a uniform
application of principle”: at [22].

498 VSAC, above n 441, 69.

499 See [7.2].

500 VSAC, above n 441, 69.

501 See also Austin Lovegrove, ‘Public Opinion, Sentencing and Lenience: An Empirical Study Involving Judges Consulting the Community’

502 Ibid 769.

503 Warner et al, above n 418, 51.

9.2.2 DEATH BY DANGEROUS DRIVING

The data presented in Chapter 4 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. The data also showed 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 was 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 New South Wales, Victoria and Queensland.

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 for 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 [3.3.2], 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 [4.7.2], 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.

Submissions

In the Consultation Paper, the Council asked whether the types of sentences (imprisonment and licence disqualification) currently used for dangerous driving causing death were appropriate and whether the sentence lengths currently imposed by the Supreme Court for dangerous driving causing death were appropriate.

Many of the submissions received in relation to causing death by dangerous driving were expressed in similar terms to the submissions received in relation to sentencing for manslaughter.

In consultations with the Council, the DPP, Mr Coates SC, commented (as with sentencing for motor manslaughter) on the increases in sentencing levels for causing death by dangerous driving and the concerted effort of his office to bring about this increase given the historically low sentences imposed. He considered that sentences had risen and expressed the view that it could not be said that sentencing levels had plateaued and that they appeared to be continuing to rise.

Mr Killick thought that, generally, sentences were appropriate both in terms of type and length but considered that serious cases of driving causing death should always be accompanied by a very lengthy period of disqualification to protect the public. Similarly, Mr Wickham expressed the view that the sentence type was appropriate but considered that there should be a lifetime ban imposed if the offender had shown disregard for the safety of others. He also thought that the sentence imposed should be more akin to murder if the action causing death was shown to be deliberate.

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505 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]).

506 Submission 8.

507 Submission 16.
Other submissions were the same as the comments made in relation to sentencing for manslaughter and focused on the need for effective penalties to be imposed as well as the need for other options to be used. The view was also expressed that four years imprisonment was insufficient for particularly heinous instances of this offence. Ms Cooper also reiterated her comments (detailed above) in relation to the need for effective sanctions.

**The Council’s view**

As with sentencing practice for motor manslaughter, in forming its views on the appropriateness of sentencing practice for dangerous driving causing death, the Council has taken into account the views expressed in the submissions. Again, the Council observes that a theme in the submissions received was that there was a need to change the behaviour of drivers convicted of dangerous driving causing death for community protection but that this did not inevitably mean longer sentences of imprisonment in all cases. Rather, the submissions indicated that there was a desire for sentences that reflected the seriousness of the offender’s conduct but that also made the offender aware of the seriousness of their conduct. In addition, there was a desire for longer periods of disqualification to protect the community.

The Council notes that sentencing length in Tasmania for dangerous driving causing death is shorter than other jurisdictions (where data are available). 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 were 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.

The Council also notes that sentencing for dangerous driving causing death is considerably more severe than sentencing for dangerous driving, which is an offence with the same level of fault as dangerous driving causing death, however, the harm caused is different.

As discussed at [4.3.3], the courts have recognised the seriousness of the offender’s conduct and the community expectation that the offender will receive a significant penalty. The court has clearly set out the principles to sentencing and these have been applied in subsequent cases. The Council observes that sentencing levels for this offence have increased and there are indications that sentences are continuing to increase. The Council notes that the maximum penalty that has currently been imposed is four years. However, the Council considers that there is scope for the court to impose a longer sentence if it were warranted in the circumstances of the individual case. 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. Accordingly, the Council’s view is that the use of imprisonment by the court is appropriate and the approach of the court to sentencing for dangerous driving causing death as evident in the current practice of the court is appropriate. The issue of licence disqualification is considered separately at [10.2].

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**Advice 3**

The current use of imprisonment and the principles used to determine sentence length for dangerous driving causing death are appropriate.
9.2.3 GRIEVous BODILY HARM BY DANGEROus drivInG

The data presented in Chapter 4 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, 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 was 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 6, 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 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 [3.3.2], 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 [4.7.2], 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 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 [6.1.4], there would appear to be 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.
**Submissions**

In the Consultation Paper, the Council asked whether the types of sentences (imprisonment and licence disqualification) currently used for dangerous driving causing grievous bodily harm were appropriate and whether the sentence lengths currently imposed by the Supreme Court for dangerous driving causing grievous bodily harm were appropriate.

Many of the submissions received in relation to causing grievous bodily harm by dangerous driving were expressed in similar terms to the submissions received in relation to sentencing for manslaughter and dangerous driving causing death.

Mr Killick thought that, generally, sentences were appropriate both in terms of type and length but considered that serious cases of driving causing death should always be accompanied by a very lengthy period of disqualification to protect the public.\(^{513}\) Similarly, Mr Wickham expressed the view that the sentence type was appropriate but considered that there should be a lifetime ban imposed if the offender had shown disregard for the safety of others.\(^{514}\)

Other submissions were the same as the comments made in relation to sentencing for manslaughter and focused on the need for effective penalties to be imposed as well as the need for other options to be used.\(^{515}\) The view was also expressed that four years imprisonment was insufficient for particularly heinous instances of this offence.\(^{516}\) Ms Cooper also reiterated her comments (detailed above) in relation to the need for effective sanctions.\(^{517}\)

**The Council’s view**

As with sentencing practice for motor manslaughter and dangerous driving causing death, in forming its views on the appropriateness of sentencing practice for dangerous driving causing grievous bodily harm, the Council has taken into account the views expressed in the submissions. The Council notes that these were in the same terms as the submissions received for dangerous driving causing death.

There are relatively few cases of dangerous driving causing grievous bodily harm, which means that it is problematic to make comparisons with other jurisdictions or to identify a clear range given that sentences considered in the report tend to reflect the individual circumstances of the cases involved rather than any general trend. However, the Council notes that there is a trend for more severe sentencing evident in the approach of the Supreme Court for serious driving offences generally and that this has been accepted as applying to dangerous driving causing grievous bodily harm.\(^{518}\) The courts have recognised the gravity of the offender’s conduct in serious driving offences and the community expectation that the offender will receive a significant penalty. In sentencing for dangerous driving causing death, the court has applied the sentencing principles set out in relation to motor manslaughter and dangerous driving causing death.

The Council also notes that 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. Sentencing practice for the offence also seems appropriate based on an assessment of other offences in the hierarchy of offences that apply where injury or death is caused through the use of a motor vehicle.

Accordingly, the Council’s view is that the use of imprisonment by the court is appropriate and the approach of the court to sentencing for dangerous driving causing grievous bodily harm as evident in the current practice of the court is appropriate. The issue of licence disqualification is considered separately at [10.2].

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513 Submission 8.
514 Submission 16.
515 Submission 24 (A McGowan); Submission 25 (D Elliffe); Submission 27 (J Hepper); Submission 26 (K Gamer); Submission 29 (G Tolond); Submission 21 (A Meyer); Submission 10 (B Clark); Submission 11 (C Hutchinson); Submission 22 (D Wanless); Submission 30 (D McCartney); Submission 28 (S Lewis); Submission 23 (S Corney).
516 Submission 24 (A McGowan); Submission 25 (D Elliffe); Submission 27 (J Hepper); Submission 26 (K Gamer); Submission 29 (G Tolond); Submission 21 (A Meyer); Submission 10 (B Clark); Submission 30 (D McCartney); Submission 23 (S Corney).
517 Submission 12.
9. Assessing the appropriateness of sentencing for driving offences causing death or injury

9.2.4 DEATH OR GRIEVOUS BODILY HARM BY NEGLIGENT DRIVING

The data presented in Chapter 4 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 a 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). It is also noted that all but one offender in the period 2008–15 received a period of licence disqualification.

In Chapter 5, 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). It was also noted that Tasmania’s maximum penalty is 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 considering the appropriateness of sentencing for negligent driving causing death and grievous bodily harm, the Council sought feedback in the Consultation Paper on whether Parliament should amend the Traffic Act 1925 (Tas) to increase the maximum penalty for these offences. The Council noted that 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.520 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.521

In the Consultation Paper, the Council indicated that an argument could be made that the maximum penalty for negligent driving causing death and grievous bodily harm should be increased in Tasmania as this is necessary 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.

519 The offender was not sentenced to a period of licence disqualification in the case of Howard, Magistrates Court (Sentence), where the offender injured a pedestrian while reversing out of her driveway. She had stopped to check but failed to look in her mirrors and only looked over her shoulders. She did not see a woman crossing the road using a mobility frame who was unable to move out of the way due to her limited mobility.


521 Ibid.
These penalty levels were set when the offences were created in 2000. Since that time, there has been a significant increase in sentences imposed for dangerous driving causing death or grievous bodily harm and manslaughter.

Alternatively, the Consultation Paper indicated that 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 infrequent 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 had a moderate effect on increasing penalty levels. Conversely, concerns may also be 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, the Council indicated that 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).

Submissions

In the Consultation Paper, the Council asked whether the types of sentences (predominately suspended sentences) currently used for causing death and/or grievous bodily harm by negligent driving were appropriate and whether the sentence lengths currently imposed by the Supreme Court for causing death and/or grievous bodily harm by negligent driving were appropriate. The Council also asked for feedback in relation to an increase in the maximum penalty for these offences.

The Prisoners Legal Service’s (PLS) view was that the type of sentence imposed was appropriate for the following reasons:

- Suspended sentences are often misunderstood by the community, which has a tendency to see them as a nominal punishment and not as truly punitive. However, there is no evidence that suspended sentences are seen by offenders as a ‘soft option’. The experience of legal practitioners and the PLS is that offenders understand that if they breach the sentence they will, unless they can show it would be manifestly unjust to do so, go to prison. In fact some offenders have the view that a straight, short jail term is an easier option because once it is served the punishment is at an end.
- It is a secondary concern and possibility relating to sentencing procedure that the more universal actual sentences of imprisonment become, the more likely they are to be used to react to lapses in attention (amounting to negligent driving) as opposed to omissions which are so aggravating as to warrant incarceration as a punishment.

The PLS indicated that it was more difficult to assess the appropriateness of the length of a term of imprisonment.

In the Council’s consultation with the DPP, Mr Coates SC, indicated that, generally, he did not think that sentencing levels were inappropriate but considered that there was scope to increase the maximum penalty to deal with the very top end of serious cases of negligent driving causing death or grievous bodily harm. He indicated that there was scope to increase sentences in line with increases in penalties for the more serious offences of manslaughter and dangerous driving causing death or grievous bodily harm, suggesting that it may be appropriate to increase the maximum penalty to two to three years, with a corresponding increase for negligent driving cause grievous bodily harm.

In its submission, the Bicycle Network recommended that negligent driving causing death or grievous bodily harm should be made indictable offences dealt with in the Supreme Court rather than as summary offences in the Magistrates Court. Its view was that this was appropriate for the following reasons: (1) the DPP already prosecutes these offences in the Magistrates Court; (2) to recognise the complexity of the cases and the serious harm caused; and (3) to accommodate borderline cases. Similarly, Mr Killick’s submission expressed the view that these offences should be indictable offences and dealt with in the Supreme Court, given that court’s jurisdiction to already deal with matters such as wounding or assault where a fatality may not have resulted and/or injuries may be relatively minor. This was considered appropriate to improve sentencing consistency and also to underline the seriousness of the conduct.

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522 Ibid 25.
523 The current maximum penalty is two years imprisonment for a first offence and four years imprisonment for a subsequent offence.
524 Submission I (F Brinken and A Staples).
525 Submission 9 (G Bailey).
526 Submission 8.
The Bicycle Network also expressed the view that the current maximum penalties for the offences ‘do not reflect the gravity of an offence that results in death’. This was a particular concern where an offender was a repeat offender (that is, where a person has caused death twice as a result of their negligence behind the wheel).\(^{527}\) This was echoed in the submission of Mr Killick, who did not consider that the sentences imposed for negligent driving causing death or grievous bodily harm reflected the seriousness of these offences. His view was that a suspended sentence and relatively short licence suspension was not an appropriate penalty for an offence involving death or the causing of serious bodily harm to another person. This was particularly the case where an offender had serious prior convictions for traffic offences. Comparison was made to sentences imposed for offences of minor frauds and relatively small cannabis crops, which he stated routinely attract longer sentences, despite involving relatively minimal trauma to the community. In his submission, Mr Killick stated that the maximum penalty should be increased to three years and that the offences should also carry a lengthy disqualification from holding a licence — up to life where the court cannot be satisfied that a person will no longer pose a risk to others on the roads.\(^{528}\)

Other submissions also expressed the view that sentencing for negligent driving causing death was inappropriate. Mr Wickham stated that home detention should be used rather than a suspended sentence and that the maximum penalty should be increased to ten years.\(^{529}\) Mr Temby thought that the penalties imposed were manifestly inadequate.\(^{530}\) Ms Harkins also considered that the use of suspended sentences for negligent driving causing death or grievous bodily harm were inadequate, other than in cases where there was the lowest level of culpability and/or where the driver clearly suffered as a result of the incident, such as through the loss of a loved one or severe injury. In other cases, the view was expressed that ‘a suspended sentence is not sufficient to send a clear message to society that careless driving is unacceptable. A motor vehicle is a potentially lethal weapon and driving a vehicle should be treated just as seriously as the use of a weapon’. Ms Harkins focused on the impact of suspended sentence on the driver’s life, which was said to be mild compared to the impact on the life of the victim. It was her view that a suspended sentence did not send a message of denunciation and did not act as a deterrent. Accordingly, it was indicated that the maximum penalty should be increased, with a maximum penalty of at least five years being appropriate.\(^{531}\)

Other respondents also questioned the use of suspended sentences but did not suggest that the solution to the perceived inappropriateness of sentence type was greater use of imprisonment. Instead, the focus of these respondents was on incentives and mechanisms to change behaviours. These submissions stated that they were:

- not greatly in favour of prison sentences unless the offender is incapable of change. It is more likely that constructive community orders, restorative justice, and forcing the offender to walk in the shoes of the victim/vulnerable road user will be effective in changing the attitudes and behaviours of the offender. I would like to see more on these approaches. Penalties for recidivism should be increased — along the lines of increasing the period for which the offender is prohibited from owning and driving a motor vehicle.\(^{532}\)

Similarly, Ms Cooper asserted that suspended sentences were not appropriate because they do not address issues relating to lack of driving skills, lack of attention or malice towards vulnerable road users. Her view was that restorative justice offered a far more nuanced response and therefore was potentially more effective at reducing rates of reoffending. She wanted to see restorative justice incentives and mechanisms used to change an offender’s behaviour, and did not want to see offenders punished, unless they acted with malice and used a motor vehicle as a weapon.\(^{533}\)

Other submissions also focused on the need to improve driver behaviour as part of the criminal justice system response. Mr Killick considered that there was a need to be able to impose driver training as part of a penalty before a licence could be regained. Additionally, he was of the view that penalties could include the installation of speed or driver monitoring equipment in an offender’s vehicle in much the same manner that alcohol interlock devices are used.\(^{534}\) The Bicycle Network also recommended that ‘sentences [be] used as a tool to change driver

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\(^{527}\) Submission 9 (G Bailey).

\(^{528}\) Submission 19.

\(^{529}\) Submission 14.

\(^{530}\) Submission 14. Other submissions referred to the inadequacy of sentencing in a particular case, see for example, Submission 19. (B Clark); Submission 17 (J Sturges); Submission 20 (I Conlon-Briggs); Submission 19 (J Taylor).

\(^{531}\) Submission 8.

\(^{532}\) Submission 24. (A Mcgowan); Submission 25 (D Bliffie); Submission 27 (I Hepper); Submission 26 (K Garner);

\(^{533}\) Submission 24. (A Mcgowan); Submission 25 (D Bliffie); Submission 27 (I Hepper); Submission 26 (K Garner);

\(^{534}\) Submission 29. (G Tolond); Submission 21 (A Meyer); Submission 20 (B Clark); Submission 11 (C Hutchinson); Submission 22 (D Wanless); Submission 30. (D McCartney); Submission 28 (S Lewis); Submission 23 (S Corney).
behaviour and to further educate drivers on their responsibilities [as] a key to reducing risk for all road users. It was considered that there needs to be a greater focus on the rehabilitation of offenders.535

The Council’s view

Sentence type and length

As with sentencing practice for motor manslaughter and dangerous driving causing death or grievous bodily harm, in forming its views on the appropriateness of sentencing practice for negligent driving causing death and grievous bodily harm, the Council has taken into account the views expressed in the submissions. There appears to be much greater concern expressed in relation to sentencing in the Magistrates Court for these offences with many submissions focusing on the harm caused with less consideration given to the culpability of the offender; in most submissions, culpability was overshadowed by the harm. While some submissions called for a more punitive response, this was not universal, with other submissions highlighting the need for effective responses to address the driving behaviour of the offender.

In light of the submissions received, the Council has given consideration to 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.

The following discussion of suspended sentences needs to be viewed in the context of the Tasmanian Government’s intention to abolish suspended sentences. Given the use of suspended sentences for negligent driving causing death or grievous bodily harm, the proposed abolition of suspended sentences will clearly have an effect on sentencing for these offences. The Council has previously provided advice to the government about sentencing options to replace suspended sentences.536 As part of this advice, the Council recommended that a new intermediate sentencing order called the Community Correction Order (the ‘CCO’) be introduced. This order draws on aspects of the suspended sentence, as well as the probation and community service order to provide the courts with a flexible sentencing order to address the offender and the offence. The proposed CCO would allow a court to make an order only with core conditions (which would be akin to a suspended sentence with the only condition being that the offender not commit an offence punishable by imprisonment). However, the court would also have a range of conditions that could be tailored to the offender if appropriate in the circumstances of the case, such as participation in education or other programs, taking part in assessment and treatment for alcohol or drug dependency, submitting to alcohol or drug testing, the use of alcohol exclusion and curfew, as well as judicial monitoring.537

It could be argued that, by focusing on the harm caused by the offender’s driving, a term of full-time imprisonment is the only appropriate penalty where a death has been caused. For example, Cycling Tasmania has previously 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.538 In a similar vein, the chairman of Pedestrian Council of Australia has 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’.539 There was support for this view in some of the submissions received.

On the other hand, 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 (suspended 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. Submissions received by the Council also questioned the use of suspended sentences for this offence and suggested alternatives to imprisonment. Other commentators have urged caution against an ‘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”.

After considering these opinions, the Council’s view is the use of suspended sentences (rather than actual
imprisonment), while they are still available as a sentencing option, is an appropriate sentencing response, where it
reflects the circumstances of the case. This allows the court to mark the seriousness of the offence (given that death
has occurred) but to also appropriately reflect the blameworthiness of the offender.

In this context, it is useful to consider 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</td>
<td>3 months imprisonment fully suspended.</td>
</tr>
<tr>
<td>correct his mistake by performing a U-turn when he thought the road was</td>
<td></td>
</tr>
<tr>
<td>clear. He collided with another vehicle and killed his partner.</td>
<td></td>
</tr>
<tr>
<td>Older man had purchased some chairs and carpet and was driving home</td>
<td>28 days imprisonment fully suspended and</td>
</tr>
<tr>
<td>when one of the chairs dislodged from the ute. A driver in another vehicle</td>
<td>56 hours community service.</td>
</tr>
<tr>
<td>swerved to avoid the furniture, collided with an oncoming vehicle, and</td>
<td></td>
</tr>
<tr>
<td>was killed.</td>
<td></td>
</tr>
<tr>
<td>Young woman crossed the centre line of the Midland Highway and</td>
<td>3 months imprisonment fully suspended.</td>
</tr>
<tr>
<td>collided with an oncoming vehicle, killing the driver and seriously injuring</td>
<td></td>
</tr>
<tr>
<td>the front seat passenger. Fell asleep at the wheel.</td>
<td></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’. The reality that sometimes momentary inattention may have no consequences at
all and on other occasions it may have catastrophic consequences (although the fault of the offender is the same in
both cases) has been observed by magistrates in passing sentences for these cases.

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. 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’, the legislature responded to concerns that the previous law was inadequate. However, an offence
that applies at that the lower end of culpability that occurs in circumstances where the victim dies or suffers severe
injury tends to lead to media commentary when the offender is not imprisoned or only receives a short 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

541 The offender was disqualified from driving for 12 months.
542 The offender was disqualified from driving for 12 months.
543 The offender was disqualified from driving for 18 months.
544 Andrew Ashworth, ‘Taking the Consequences’ in Stephen Shute, John Gardner and Jeremy Horder (eds), Action and Value in Criminal
545 Ibid 116.
547 This was identified as an objection to the creation of the offence of careless driving causing death in England, see Cunningham, above n 486.
make the sentence imposed for negligent driving inappropriate.\textsuperscript{548}

In making its assessment of the appropriateness of sentencing for negligent driving causing death and grievous bodily harm, the Council stresses that it is important to recognise the offence structure as well as the penalties imposed. The Council highlights that driving is the only circumstance in Tasmania where a person has a risk of imprisonment arising from negligence (other than culpable negligence) in relation to the death or serious injury of a person.

As indicated, there are no equivalent offences 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. Further, while criminal liability for negligent conduct does exist in relation to death or serious injury that occurs in a workplace situation, imprisonment is not a sentencing option unless a person is reckless in relation to risk of death or serious injury to a person.\textsuperscript{549} Moreover, it is noted that New South Wales, South Australia and the Australian Capital Territory are the only other Australian jurisdictions that have an intermediate offence of negligent driving causing death or grievous bodily harm between dangerous driving causing death and the minor offence of negligent or careless driving.\textsuperscript{550}

The Council also notes that penalties imposed for negligent driving causing death and grievous bodily harm are considerably more severe than sentences for negligent driving in recognition of the harm caused.\textsuperscript{551} In Chapter 6, 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 sentence for a majority of charges) reflect the increased harm caused where death or serious injury is caused. The Council accepts that it is appropriate that the law makes this distinction and imposes a heavier sentence, however, it does not consider that sentencing severity should be further increased to reflect the outcome.\textsuperscript{552}

The Council accepts that suspended sentences are a controversial sentencing option and that concerns have been previously raised that they do not amount to ‘real’ punishment and that they are viewed by the public and the offenders as a ‘let-off’.\textsuperscript{553} Similar concerns about the effectiveness of suspended sentences as punishment were evident in the submissions received. However, as the PLS stated, the suspended sentence is a misunderstood sanction. Suspended sentences can be supported on the basis that they are an effective deterrent and allow offenders to avoid short prison sentences, which has a protective effect against re-offending.\textsuperscript{554} Research in other jurisdictions has compared the rates of reoffending for offenders given suspended sentences and other sentencing options and found that a suspended sentence is more effective than actual imprisonment. However, it is less clear that a suspended sentence is more effective than other community-based sanctions.\textsuperscript{555}

In the context of negligent driving offences where death or serious injury has been caused, magistrates seek to protect the public through the conditions imposed on the offender through the suspended sentence. These typically require that the offender be of good behaviour for a specified period and not commit an offence punishable by imprisonment in that period. This means that if the offender commits any traffic offences punishable by imprisonment (for example, drink driving, driving while disqualified, negligent driving causing death/grievous bodily harm, dangerous driving, reckless driving), then the offender has breached the suspended sentence order. If an offender commits an offence punishable by imprisonment, there is a presumption that the court must activate the

\textsuperscript{548} 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 altar 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.

\textsuperscript{549} See [6.2].

\textsuperscript{550} See [5.2.2].

\textsuperscript{551} See [6.2].

\textsuperscript{552} See also, 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 where death is caused should be modest.

\textsuperscript{553} See Lorana Bartels, ‘An Examination of the Arguments For and Against the Use of Suspended Sentences’ (2010) 12 Flinders Law Journal 119, for a review of the critique of suspended sentences.

\textsuperscript{554} TSAC, above n 536, 13.

suspended sentence (that is, the offender must serve the period of imprisonment imposed) unless activation of the original sentence would be unjust.\textsuperscript{556} Consequently, these types of orders reinforce the licence disqualification order made by the court given that driving during the period of disqualification exposes the offender to the risk that, if caught and convicted, they will serve the sentence of imprisonment. The issue of licence disqualification is discussed further at [10.2].

The Council has also given consideration to whether the sentence length imposed is adequate, and the related issue of whether the maximum penalties for negligent driving causing death and grievous bodily harm are sufficient. In making an assessment of the appropriateness of the sentence length for the offences of causing death and/or grievous bodily harm by negligent driving, the Council notes that very few offenders receive a sentence of full-time imprisonment and this makes assessment of sentence length difficult. However, as noted at [2.3] and [3.3.2], 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. The Council’s view is that, as a general principle, longer periods of imprisonment would not be proportionate to the culpability of the offender given that the standard is civil negligence. This particularly applies where the offender’s fault does not include deliberately risky driving behaviour such as speeding and/or drink driving but rather involves inattention or inadvertence.

**Maximum penalty**

The Council has also given consideration as to whether an increase the maximum penalty for the offences should be increased. The DPP has suggested that an increase in the maximum penalty contained in the *Traffic Act 1925* (Tas) may be appropriate to allow the court to impose longer sentences in more serious cases of negligent driving causing death or grievous bodily harm where the conduct borders on dangerous driving. There was also support for increasing the maximum penalty in other submissions received by the Council.

In considering the case for increasing the maximum penalty, the Council recognises that there are cases at the upper end of seriousness of negligence that are borderline to the culpability of dangerous driving causing death or grievous bodily harm and that these cases create dilemmas in sentencing. Some overlap in culpability is inevitable as it is difficult to make a clear distinction as to when driving is ‘negligent’ and when it is considered to be ‘dangerous’, and the issue is whether there is scope for that overlap to be reflected in the sentence imposed for negligent driving causing death or grievous bodily harm within the current penalty structure.

It could be argued that the maximum penalty for a first offence of 12 months (where death is caused) and six months (where grievous bodily harm is caused) do not provide sufficient scope for magistrates to impose appropriate sentences in cases at the upper level of seriousness (cases which may be viewed as borderline dangerous driving cases). There has also been no increase in the maximum penalty for these offences to reflect the increase in sentences imposed in the Supreme Court for the more serious driving offences. Accordingly, it could be argued that there is scope to increase the maximum penalties. The Council has considerable sympathy for this view.

On the other hand, it could be argued that an increase in the maximum penalty is likely to be counter-productive from the perspective of community satisfaction with sentencing. There is community concern about the sentence imposed for cases of negligent driving causing death and grievous bodily harm given the substantial gap that exists between the harm caused and the sentence imposed. This concern is understandable given that a person has died or been seriously injured as a result of the offender’s driving. In contrast to murder or manslaughter (other offences involving death) a suspended sentence or a short sentence of actual imprisonment may not seem enough. However, the harm caused is not the only focus in the imposition of a proportionate sentence — the sentence must also reflect the culpability of the offender and the offence for which the offender has been convicted. An offender convicted of negligent driving causing death or grievous bodily harm can only be sentenced on the basis that the fault is negligence and not on the basis that there was dangerous driving or culpable negligence.\textsuperscript{557} Accordingly, increasing the maximum penalty to accommodate borderline cases is unlikely to make a practical difference in sentencing for a majority of cases and this is likely to exacerbate the current dissatisfaction from families and the broader community by increasing the ‘expectation’ gap.

In addition, although there is a significant difference in Tasmania between sentencing for negligent driving causing death or grievous bodily harm and more serious driving offences, this reflects the position in other jurisdictions, where the maximum penalty applicable for negligent driving or careless driving causing death or serious injury

\begin{itemize}
    \item \textsuperscript{556} Sentencing Act 1997 (Tas) s 27.
    \item \textsuperscript{557} See [3.3].
\end{itemize}
is substantially 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 9-1 and 9-2.

Figure 9-1: Maximum penalties, offence comparison where death caused, first offence (in months)
Further, an increase to the maximum penalties could be taken as a signal that there should be a general increase in sentencing levels for all offences of negligent driving causing death and grievous bodily harm, rather than only providing scope to increase the sentence imposed in the worst category of cases. This would be contrary to the Council’s view that sentencing levels are generally appropriate.

After weighing up the competing views, the Council has been influenced by concerns that that increasing the maximum penalty may exacerbate community concern about sentencing rather than alleviate it and so considers that increasing the maximum penalty is not appropriate at this stage. The Council also considers that there is scope to increase the penalty imposed in a serious example of negligent driving causing death or grievous bodily harm within the existing penalty structure. It is noted that the maximum penalty was not imposed in the period 2006 to 2016 with a majority of offenders receiving a suspended sentence. The longest global sentence of full time imprisonment imposed was nine months for negligent driving causing death and the longest sentence imposed for a single count was six months. There were also partly suspended sentences imposed with the longest being a global sentence of twelve months imprisonment with four months suspended for negligent driving causing grievous bodily harm. The longest partly suspended sentence imposed for negligent driving causing death was a global sentence of nine months imprisonment with three months suspended. There is scope for the prosecution to make a submission (in an appropriate case) that a case is the worst category of the offence and accordingly, that the maximum penalty ought to be imposed. In determining whether an offence falls within the ‘worst category’ the nature of the crime and the circumstances of the offender are considered and an offence may be considered a ‘worst category’ offence even if it is ‘possible to imagine an even worse instance of the offence’.

Further, Crown appeals against sentence have been effective in increasing sentencing levels for driving offences heard in the Supreme Court and this may be a mechanism used to increase sentencing for negligent driving offences where death or injury is caused.

However, the Council’s view is that the appropriateness of the maximum penalty for negligent driving causing death and grievous bodily harm may need to be revisited in the future. As set out at [10.5], the Council has recommended that the Criminal Code (Tas) be amended so that the offence of negligent driving causing death is provided as an alternative verdict to dangerous driving causing death and negligent driving causing grievous bodily harm is provided as an alternative verdict to dangerous driving causing grievous bodily harm. The intention of these recommendations is to provide greater scope for the prosecution to allow for ‘borderline’ cases to be dealt with in the Supreme Court rather than the prosecution having to make a choice between the more serious charge of dangerous driving and the lesser charge of negligent driving (as is currently the case). However, it is difficult to predict how juries will approach these cases. ‘Borderline’ offenders may be convicted of the more serious charge of dangerous driving causing death or grievous bodily harm and consequently receive longer sentences. On the other hand, juries may compromise and deliver ‘merciful’ verdicts and the sentencing judge may be unduly constrained by the maximum penalty for negligent driving causing death or grievous bodily harm. Accordingly, the operation of the reform to alternative verdicts (if implemented) and sentencing practice for the offence would need to be monitored.

Advice 5

The types of sentences (predominately suspended sentences) and sentence lengths currently used for causing death and/or grievous bodily harm by negligent driving are generally appropriate.

Advice 6

The maximum penalty for negligent driving causing death or grievous bodily harm under the Traffic Act 1925 (Tas) should not be increased at this time.

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558 The Queen v Kilic [2016] HCA 48 [18].
10.

Recommendations 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 the Consultation Paper, the Council sought feedback on possible mechanisms that may be used to address any finding that sentencing is inappropriate. However, given the Council’s view that sentencing is not inadequate, the Council does not make any recommendations for reform that address sentencing inadequacy.

The Consultation Paper also set out some options for reform that may have been considered desirable to address community perceptions of sentencing and the needs of victims regardless of the view taken on the appropriateness of sentencing. Reforms that address the needs of victims are set out in this chapter. In addition, the Council has considered reforms that aim to improve communication with the broader community in relation to sentencing for driving offences where death or serious injury is caused.

Further, as part of the consultation process, the Council was made aware of concerns in relation to the response to recidivist driving offenders who subsequently committed a driving offence that resulted in death or serious injury to another person and, particularly, the operation of the driver licencing scheme in relation to these offenders.

10.1 LOWER LEVEL DRIVING OFFENCES AND REPEAT OFFENDING

As indicated, a frequent theme in the submissions received by the Council was the issue of repeat offenders. This can be understood in two ways: (1) preventing offenders who have been convicted of causing death or serious injury by driving from reoffending in the same way; and (2) responding to offenders who had previously committed driving offences, such as speeding, drink driving, driving while disqualified. While a detailed review of sentencing for all driving offences is beyond the scope of this report, this section considers the risk posed by drivers who engage in high risk driving and the legal response to these ‘precursor’ offences as a means of preventing serious injury or death.

10.1.1 RECIDIVISM AND RISK

Research indicates that a proportion of drivers are recidivist offenders. In relation to drink driving, research suggests that a ‘small segment of the drinking and driving population … drink heavily on a frequent or episodic basis and drive with very high BACs’\(^{559}\). In NSW, research conducted in 2009 found that 15.5% of drink drivers returned to court for another drink driving offence within five years.\(^{560}\) Victorian data from 2009 showed that, overall, 28% of offenders convicted of drink driving were repeat offenders, with repeat offenders accounting for 39% of offenders convicted of driving with a high range blood alcohol level (.15 and over).\(^{561}\) In a 2014 examination of effective drink driving prevention and enforcement strategies, Terer and Brown state that research ‘shows between 20 and 30 percent of drink drivers reoffend’\(^{562}\).

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562 Terer and Brown, above n 484, 1.
Self-report studies also highlight the extent of recidivism with a Queensland study finding that 27% of offenders who had been convicted for the first time of drink driving admitted to engaging in drink driving in the six months after the conviction.\(^563\) Victorian research found that 32% of drivers sentenced for driving whilst disqualified or suspended had a previous conviction for driving while disqualified or suspended.\(^564\) Queensland research found that 69% of offenders convicted for a speeding offence had one or more re-offence and 43.5% had two or more re-offences.\(^565\) More recent research examining speeding drivers has highlighted the evidence that suggests that there are ‘subgroups of speeding drivers’ with a distinction made between ‘a driver who unintentionally commits two low range speeding offences’ and ‘a driver who persistently, intentionally and excessively exceeds speed limits’.\(^566\) In attempting to identify the characteristics of persistent speeders, this research identified subsets of speeding drivers and found that repeat high-range offenders\(^567\) were more likely to have committed a range of previous traffic offences, including drink driving, unlicensed driving, dangerous driving, seatbelt or ‘other’ offences compared to other groups of speeding drivers.\(^568\)

The Council does not have any information about the recidivism rates for Tasmanian offenders convicted of driving offences generally.

There is no empirical research conducted in the Tasmanian context that has examined the contribution of repeat drink drivers or repeat traffic offenders to crashes that result in fatalities and serious injuries. However, 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’.\(^569\) Research conducted in other jurisdictions suggests that recidivist drink drivers are responsible for a disproportionate number of crashes which result in death or serious injury.\(^570\) Research also suggests that a proportion of disqualified drivers continue to drink drive during the period of licence disqualification, and that there is an over-representation of disqualified drivers in serious crashes.\(^571\) As noted at [2.1], the Road Safety Advisory Council has identified speeding (either exceeding the speed limit or driving too fast for the conditions) as the biggest contributing factor to fatal and serious road crashes in Tasmania. Other research has ‘highlighted the relationship between high-range speeding offences and a greater likelihood of subsequent speeding and other traffic offences, as well as crash involvement’.\(^572\)

Many offenders convicted of very serious driving offences (motor manslaughter and dangerous driving causing death/ grievous bodily harm) had a pattern of risky driving. 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 prescribed 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.


564  VSAC, Driving While Disqualified or Suspended (Report, 2009) 29.


567  This was defined as two or more speeding offences in the study period where at least two offences were for a recorded speed of 30 km/hr or more above the speed limit, ibid 6.

568  Watson et al, above n 566, 21.

569  Department of Infrastructure, Energy and Resources, above n 12, 15.


571  Elizabeth Richardson, A Driving While Intoxicated/Suspended Court List for Victoria 2013 (Background Paper, Monash University, 2013) 6.

572  Watson et al, above n 566.
This suggests that many 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.

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. Many traffic offences are committed in Tasmania each year which involve risky driving behaviour (such as speeding or drink driving) and, further, not all of these offences are detected by Tasmania Police. In the period 2015–16, Tasmania Police identified 28 088 high-risk traffic offenders. There were 20 522 infringement notices issued for exceeding the speed limit by 15 km/h or more and 2319 drivers were charged with exceeding the prescribed blood alcohol limit or driving under the influence of intoxicating liquor. There were 1939 drivers confirmed to be driving under the influence of a proscribed illicit drug in their system. Tasmania Police issued 3273 infringement notices for driving whilst using a mobile phone. In the same period, there were 8.8% of people who self-reported driving whilst the alcohol limit in the previous six months and 5.7% of people who self-reported driving whilst impaired by medication or other drugs in the previous six months.

In the period 2014–15, 56.4% of people reported driving at more than 10 km/h above the speed limit. In the period 2015–16, Tasmania Police identified 28 088 high-risk traffic offenders. In the same period, there were 8.8% of people who self-reported drinking whilst over the alcohol limit in the previous six months and 5.7% of people who self-reported drinking whilst impaired by medication or other drugs in the previous six months.

In an appropriate case, this may encourage ‘an offender to confront and address any underlying problem with alcohol at an early stage’ and also encourage ‘an offender to confront and address any underlying problem with alcohol at an early stage’ and also increase the likelihood that the offender will return to the licensing system. This could involve the earlier return of an offender’s licence by a court on condition that an alcohol interlock device be fitted.

The criminal justice system must also be involved in maximising the detection of these offences, as well as appropriate sentencing responses to these less serious offences. In this regard, the Council notes the recommendations of VSAC in relation to the development of effective responses to the offence of driving while disqualified or suspended such as deterring offenders by increasing detection through greater use of technology, greater flexibility in the use of impoundment and immobilisation of vehicles to remove the opportunity and temptation to drive and earlier interventions for drink drivers. This could involve the earlier return of an offender’s licence by a court on condition that an alcohol interlock device be fitted. In an appropriate case, this may encourage ‘an offender to confront and address any underlying problem with alcohol at an early stage’ and also increase the likelihood that the offender will return to the licensing system.
expressed by Tasmanian magistrates and Tasmania Police. As a result, the TLRI submitted an application and obtained funding from the Solicitor’s Guarantee Fund to examine:

- The adequacy of the current sentencing regime for drink driving offences;
- The application of non-traditional criminal justice responses to the problem of recidivist drink drivers;
- National and international research literature on non-traditional approaches adopted elsewhere;
- Whether a therapeutic jurisprudential approach might be appropriate in the context of recidivist drink driving;
- Which approach offers the best model for achieving behavioural and attitudinal change in the recidivist drink driver.

As an initial step, the TLRI is developing a profile of characteristics of repeat drink drivers in Tasmania in order to determine the optimum response to recidivist drink driving.

The TLRI is also preparing a Consultation Paper that will consider options for reform which may improve the effectiveness of the criminal justice response to repeat drink drivers by exploring sentencing options that are more likely to influence offenders’ perceptions of the risks represented by their behaviour and bring about lasting attitudinal change. The Consultation Paper will seek feedback on a possible model of a driving while intoxicated list for Tasmania involving the following: (1) the structure of the court including whether it should be pre-sentence or whether it should apply post-conviction/sentence; (2) the target audience and eligibility criteria; (3) the conditions of the order that should be available to the DWI court; the referral and assessment process for participation in the DWI court; (4) the services that need to be available as part of treatment and rehabilitation; (5) the program phases; (6) the need for supervision and judicial monitoring; (7) appropriate evaluation of the effectiveness of the DWI court; and (8) issues of sustainability, resources and funding.

In consultations conducted for this reference by the Council, the DPP raised concerns about the sentences that were being imposed for the offence of dangerous driving contained in the Traffic Act 1925 (Tas) s 32(1). The DPP expressed the view that contrary to the approach in other serious traffic offences where there had been a significant increase in the penalty imposed, the sentencing level for dangerous driving appeared to be deceasing now that the offence was heard only in the Magistrates Court. Until 2000, a person charged with reckless or dangerous driving, contrary to the Traffic Act 1925 (Tas), had the option of being tried in the Magistrates Court or by the Supreme Court. In addition, the magistrate could decide that the offence was of so serious a nature that it should be tried on indictment in the Supreme Court and the offence was deemed to be a crime.

In the Consultation Paper, the Council reported that of the single sentences imposed for dangerous driving in the period July 2006 to May 2016, full-time imprisonment was imposed in 11.5% of cases, a partly suspended sentence imposed in 8.4% of cases and a fully suspended sentence was imposed in 23.4% of cases (43.3% custodial sentences). The median sentence imposed was three months. Figure 10-1 sets out the use of the different sentencing options for the period July 2006 to June 2016. It shows that while the use of custodial sentences has increased over the periods 2006–07 to 2010–11 and 2011–12 to 2015–16, the use of imprisonment has deceased from 14.4% to 4.9%.

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584 It is noted that in dismissing an appeal against a sentence of two and a half years imprisonment imposed on an offender to numerous offences including dangerous driving, Pearce J expressed the view that the increase in sentences for serious cases of dangerous driving causing death and grievous bodily harm should extend to dangerous driving, Brown v Lusted and Parker [2015] TASSC 45 [17].

585 Traffic Act 1925 (Tas) s 32(4AA) repealed by the Driving Offences (Miscellaneous Amendments) Act 2000 (Tas).

586 The penalty for dangerous driving is 20 penalty units and/or two years imprisonment for a first offence and 40 penalty units and/or four years imprisonment for second and subsequent offence. It is noted that the applicable maximum fine for the offence increased from 10 to 20 penalty units (first offence) and 20 to 40 penalty units (second offence) in November 1999.
Figure 10-1: Sentencing outcomes by most serious penalty, dangerous driving, single count, Tasmania, July 2006 to June 2016

Sentencing data presented for the period 1980–89, indicated that 78% of sentences for single counts of ‘dangerous driving’ in the Supreme Court were custodial and for the period from 1990–2000, 93% were custodial. It was observed that in the Supreme Court, less than 25% of prison sentences were suspended. In both periods, the median sentence was three months. In these periods, there was limited data from the Magistrates Court and reported sentences for single counts of dangerous driving imposed in the Magistrates Court in the southern Tasmania in 1999 and 2000, found that 93% of sentences were custodial with most being wholly suspended. The sentences ranged from 28 days to four months with a median of three months.

As a consequence, the DPP suggested considering giving jurisdiction to hear dangerous driving cases back to Supreme Court by putting the offence in the Criminal Code (Tas) to reflect the seriousness of the offence. Similarly, it is the Council’s view that this is a serious driving offence involving the exposure of members of the public to danger. Although injury or death has not materialised, the offence has the same fault element as applies for dangerous driving causing death or grievous bodily harm. Although there are some difficulties in making comparisons with sentencing data for earlier periods given that there was limited data from the Magistrates Court, the data available suggests that there has been a decrease in the use of imprisonment as a sanction and a decrease in the use of custodial sanctions. The median sentence has remained unchanged. This does not reflect the changing view expressed by the Supreme Court about the seriousness of offences involving risky driving behaviour and the need to increase the appropriate sentence.

The Council shares the concerns raised by the DPP about sentencing levels for dangerous driving. The Council’s view is that this is a serious driving offence given that the fault element for this offence is the same as dangerous driving that causes death or grievous bodily harm and the role of risky driving behaviour in cases where death or injury is caused. Accordingly, the Council has identified several responses that may be considered to address sentencing concerns in relation to this offence:

1. the prosecution may seek to institute an appeal against the sentence imposed in the Magistrates Court (in the appropriate case);

587 See [3.3.2].
2. the magistrate be given the discretion to refer a matter to the Supreme Court if the magistrate’s view is that
offence was of so serious a nature that it should be tried on indictment. 588
3. there be parallel offence of dangerous driving created in the Criminal Code (Tas), so that there would be a
summary offence in the Traffic Act 1925 (Tas) and an indictable offence in the Criminal Code (Tas). 589
4. the offence of dangerous driving could be removed from the Traffic Act 1925 (Tas) and placed in the Criminal
Code (Tas) with the other driving offences involving dangerous driving. If dangerous driving was made an
indictable offence, an option would be to provide that the Magistrates Court would have jurisdiction to hear
and determine a case if the prosecution and the defence consent. 590

10.2 LICENCE DISQUALIFICATION

Many submissions received by the Council made reference to the use of disqualification as a penalty for drivers
where death or serious injury is caused. This included the need to impose longer disqualification periods than are
currently imposed by courts. 591 and the need to impose a lifetime ban on driving where a person has shown to have
disregard for the safety of others 592 or where the offender was a repeat offender. 593 The Tamar Bicycle Users Group
and Cycling Tasmania proposed that the ‘terms of reference … [be expanded] to include identifying and sentencing
persistent offenders and irresponsible drivers and removing them from the road’. There were also suggestions for
mandatory medical checks for repeat offenders before they can regain their licence and driver training courses for
repeat offenders.

10.2.1 LENGTH OF DISQUALIFICATION

As noted at [3.1], 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 of the use of
the motor vehicle or convicted of negligent driving causing death or grievous bodily harm. There is no limit to the
period of disqualification that can be imposed and the court may order that the offender be disqualified, either for
a specified period or until further ordered by the court. The court may also order that the offender is not to be
granted a licence unless the offender passes such driving tests or attends a driver training course or both as directed
by the Registrar of Motor Vehicles.

In imposing a licence disqualification, ‘the main purpose … is primarily to prevent and discourage conduct which
is a menace to public safety rather than to punish’. 594 Accordingly, as Warner observes, ‘offences such as motor
manslaughter, causing death by dangerous driving, reckless or dangerous driving and driving under the influence
almost invariably justify disqualification’. 595 All drivers convicted in the Supreme Court for manslaughter or dangerous
driving causing death or grievous bodily harm received a licence disqualification. 596 Similarly, all but one offender
convicted in the Magistrates Court for negligent driving causing death or grievous bodily harm received a period of
licence disqualification.

However, the issue raised in the submissions received is whether longer periods of disqualification are appropriate.

588 This was the position that previously existed in relation to dangerous driving where the offender could elect to have the matter dealt
with in the Supreme Court or the magistrate could decide that it should be dealt with in the Supreme Court.
589 This is the position in relation to other offences such as assault (Police Offences Act 1925 (Tas) s 35; Criminal Code (Tas) s 184).
590 This is the position in relation to aggravated assault under the Firearms Act 1996 (Tas) s 115(3).
591 Submission 8 (D Killick); Submission 24 (A McGowan); Submission 25 (D Elliffe); Submission 27 (J Hepper); Submission 26 (K
Gamer); Submission 29 (G Tolond); Submission 12 (S Cooper); Submission 21 (A Meyer); Submission 10 (B Clark); Submission 11 (C Hutchison); Submission 22 (D Wanless); Submission 30 (D McCartney); Submission 28 (S Lewis); Submission 23 (S Corney);
Submission 14 (M Temby); Submission 9 (G Bailey).
592 Submission 16 (G Wickham); Submission 8 (D Killick); Submission 9 (G Bailey).
593 Submission 24 (A McGowan); Submission 25 (D Elliffe); Submission 27 (J Hepper); Submission 26 (K Gamer); Submission 29 (G
Tolond); Submission 12 (S Cooper); Submission 21 (A Meyer); Submission 10 (B Clark); Submission 11 (C Hutchison); Submission 22 (D Wanless); Submission 30 (D McCartney); Submission 28 (S Lewis); Submission 23 (S Corney).
595 Ibid 168.
596 It is not possible to identify the use of licence disqualification for the summary offences of negligent driving causing death and grievous
bodily harm from the Department of Justice data, as these are presented on the basis of the most serious penalty, so that if an offender
received a suspended sentence or a fine and a period of disqualification, the data would disclose only the suspended sentence or the
fine. However, the Council has listened to the audio recordings of the comments on passing sentence to obtain this information for the
Table 10-1 sets out the licence disqualification periods imposed in the Supreme Court in the period 2001–15 and shows that the median driving disqualification imposed for serious driving offences was three years. Table 10-2 sets out the licence disqualification periods imposed in the Magistrates Court in the period 2008–15 and shows that the median driving disqualification imposed for negligent driving causing death was one year and three months and the median driving disqualification imposed for negligent driving causing grievous bodily harm was one year.

Table 10-1: Supreme Court sentences, 2001–15, Licence disqualification period

<table>
<thead>
<tr>
<th>Offence</th>
<th>Maximum</th>
<th>Median</th>
</tr>
</thead>
<tbody>
<tr>
<td>Manslaughter</td>
<td>Until further order</td>
<td>36 months</td>
</tr>
<tr>
<td>Death by dangerous driving</td>
<td>60 months</td>
<td>36 months</td>
</tr>
<tr>
<td>Dangerous driving causing grievous bodily harm</td>
<td>72 months</td>
<td>36 months</td>
</tr>
</tbody>
</table>

Table 10-2: Magistrates Court sentences, 2008–15, Licence disqualification period

<table>
<thead>
<tr>
<th>Offence</th>
<th>Maximum</th>
<th>Median</th>
</tr>
</thead>
<tbody>
<tr>
<td>Death by negligent driving</td>
<td>60 months</td>
<td>15 months</td>
</tr>
<tr>
<td>Negligent driving causing grievous bodily harm</td>
<td>42 months</td>
<td>12 months</td>
</tr>
</tbody>
</table>

While there was support in some of the submissions for longer driver disqualifications, the Registrar of Motor Vehicles cautioned against excessively long periods of disqualification. His view was that there was societal benefit from a person having a licence in terms of connectedness with the community, employment and health outcomes. A long period of disqualification encouraged driving without a licence, given generally poor public transport and de-aggregated communities in Tasmania. The Registrar’s view was that this was undesirable given that, as a principle, people should be ideally kept within the licencing system, with appropriate conditions placed on their licence to encourage complaint behaviour. These comments were echoed by the Law Society who highlighted the importance of a licence for employment and the reality that regional remoteness in Tasmania with limited public transport created an increased temptation to drive without a licence.

In determining the length of disqualification, an offender’s prior record is relevant to the period imposed given that this relates to ‘driver’s attitude to his responsibility to other road users’. This is evident in cases where an offender with a bad driving record is disqualified for a long period of time. However, a licence disqualification is also punitive and the court needs to have regard to it in determining the effect of the total sentencing order. The Supreme Court has also recognised that length of disqualification is relevant to an offender’s rehabilitation and that a long period of disqualification may be counter-productive by encouraging non-compliance (that is, driving while disqualified).

There are limitations in relying on disqualification periods for recidivist offenders given that the ‘effectiveness of disqualification is dependent on whether it actually prevents drink drivers from driving’. For example, in the context of drink driving, evidence shows 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. Repeat offenders may be less likely to be deterred by disqualification given their ‘longer histories of punishment avoidance’ based on their experience that it is unlikely that they will be detected if they continue to drive (and drink drive). In-depth interviews with offenders have 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’.

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597 Warner, above n 53, 169.
598 See for example, Tasmania v Doddridge, 5 August 2009, Slicer J (Sentence) — eight years; Tasmania v Horrocks, 19 November 2008, Tennent J (Sentence) — 15 years; Shipton v R [2003] TASSC 23 — until further order.
599 Warner, above n 53, 169.
601 Elder et al, above n 405; Brown et al, above n 405; Voas et al, above n 405; Mullen et al, above n 405, 637.
602 Lenton et al, above n 405, 637.
603 Ibid 642. See also, Sheehan et al, above n 405, 4.
Loss of a licence can cause considerable financial difficulties for offenders and offenders may risk driving without a licence to avoid this problem. Research has found that employment and work related commitments are the most frequently cited reasons as to why disqualified drivers continue to drive.604

In considering the issue of licence disqualification for offences resulting in death or injury from the use of a motor vehicle, the Council has also given consideration to the approaches in other jurisdictions. It is noted that South Australia, lengthy periods of disqualification are mandated following a conviction for manslaughter, death by culpable driving or dangerous driving, while in Western Australia there is mandatory licence disqualification of at least two years.605 However, mandatory periods of disqualification are not typically prescribed as a penalty for these offences.

After consideration, the Council’s view is that there is no need for a change to the current approach of the court to licence disqualification or the provisions in the Sentencing Act 1997 (Tas) s 55 in response to sentencing practices for driving offences where death or serious injury is caused. The Council notes that disqualification is invariably used in cases where death or serious injury has arisen out the use of a motor vehicle and that long disqualifications have been used if appropriate in the circumstances of the case. As noted at [9.2.4], the use of a suspended sentence containing a condition that the offender does not commit an offence punishable by imprisonment during the good behaviour period provides a strong incentive for the offender to comply with the licence disqualification. The Council acknowledges that a licence is not a right and that driving a motor vehicle is accompanied by the risk of significant injury to others in the event that a driver does not have proper regard to the responsibilities attached to driving a vehicle and the safety of other road users. However, the Council notes the importance of a licence for an offender’s rehabilitation and the dangers posed by long periods of disqualification. The Council also notes the approach of the Registrar of Motor Vehicles to the re-issue of a licence (discussed at [10.2.2]).

Advice 7

That no change is required to current approach of the court to licence disqualification or to the provisions contained in the Sentencing Act 1997 (Tas) s 55 in response to sentencing practices for driving offences where death or serious injury is caused.

10.2.2 RE-LICENCING PROCEDURE

Several submissions received by the Council raised issues relating to the re-licencing of offenders (following a period of disqualification). These included suggestions for mandatory medical checks for repeat offenders before they can regain their licence, random drug and alcohol tests for repeat offenders before they can regain their licence and the use of emerging technologies to monitor recidivist drivers. In response, the Council notes that the issue of a licence following a period of disqualification is an administrative decision of the Registrar of Motor Vehicles and that the Registrar already has considerable discretion in relation to licencing for returning drivers.

An offender who is disqualified from driving for less than four months has their licence suspended and for four months or more has their licence cancelled.606 A person whose licence is cancelled needs to apply to have their licence re-issued at the end of the period of court ordered disqualification and, as an initial requirement, needs to satisfy the Registrar that they are a ‘suitable’ person to hold a driving licence.607 This requires the person to provide a ‘show cause’ letter to the Registrar, that outlines their suitability to have a licence re-issued. This may provide evidence of rehabilitation and strategies that the offender has put in place as protection against re-offending or evidence of an offender’s attitudinal change to driving.608 The Registrar may also require a doctor’s report if relevant to the circumstances of the offence. For example, if the driving involved drink driving or drug driving, then the

604 VSAC, above n 564, 33; S Lenton et al, above n 405, 638.
605 See Appendix A.
606 Vehicle and Traffic Act 1999 (Tas) s 19(3); Sentencing Act 1997 (Tas) s 55(4).
607 Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2010 (Tas), reg 19(1)(g).
608 Information provided by Registrar of Motor Vehicles, 29 November 2016.
Registrar may require a letter from a medical practitioner that specifies that the offender does not abuse alcohol or drugs. An offender may also be required to undertake a road rules knowledge test and/or undertake a practical driving test.\(^{609}\)

The Registrar may also issue a probationary licence following a court ordered disqualification.\(^ {610}\) This is a licence which has conditions attached to it, which may include:

- times when the customer can drive;
- where the customer can drive;
- the maximum number of demerit points allowed;
- a zero blood-alcohol limit;
- licence to be carried at all times when driving; or
- any other condition imposed by the Registrar of Motor Vehicles.\(^ {611}\)

Accordingly, the Registrar has a broad discretion to respond to the circumstances of the offending and impose conditions that assist the person to comply with their responsibilities as a driver. The powers of the Registrar are not a mechanism to impose an additional punishment on the offender (at the end of the punishment imposed by the court) but are exercised to address any safety concerns that may exist in relation to an offender’s driving.

As part of the consultation process, the Council has consulted with the Registrar and other key staff members to develop an understanding of the re-licencing procedure. Currently, the approach to licence conditions tends to be a standardised approach that applies to all offenders. However, a case management approach is being developed that aims to provide an individualised approach that addresses a person’s driving skills as well as any attitudinal requirements that are necessary for safe driving.\(^ {612}\) This case management approach will be applied to people who are returning to driving with histories of repeat offending and will specifically target their individual needs. For example, offenders may be required to attend an educational program as a condition of obtaining a licence. This may involve sober driving, anger management, or driver awareness education. This will require partnering with service providers in the community with the necessary expertise to deliver the programs. Other conditions may relate to the use of technology such as speed limiters on a motor vehicle.

The Council supports the case management initiative being developed by the Department of State Growth as an important response to road safety and notes that the need for the necessary resources to be provided to support the case management approach.

### 10.3 ADDRESSING THE NEEDS OF VICTIMS

#### 10.3.1 THE EXPERIENCES OF VICTIMS

A key theme in the Council’s research, and one that was identified in the consultation process, is the 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”.\(^ {613}\) 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’.\(^ {614}\) 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”’.\(^ {615}\)


\(^{610}\) *Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2010* (Tas), reg 22(10).

\(^{611}\) Department of State Growth, Transport, above n 609.

\(^{612}\) An illustration of the flexibility that exists in relation to the conditions that the Registrar can impose was the requirement that a taxi driver who was refusing to take guide dogs in his vehicle attend Guide Dogs Tasmania for an education course about the challenges faced by people who are blind or visually impaired.


\(^{614}\) Bateman, above n 613, 16.

\(^{615}\) Rynearson, above n 613, 173.
Submissions

In the Consultation Paper, the Council asked whether respondents considered that the interests of victims in cases involving death or injury arising from a motor vehicle crash are adequately recognised, and what else could be done to address the needs of victims.

Submissions received by the Council from family members directly affected by the death of a close relative as a result of another person’s driving expressed the view that they had a ‘sense of justice denied’ and questioned ‘what is a life worth?’ Another response from an individual personally affected by death and serious injury arising from a motor vehicle crash, highlighted the potential lifelong consequences with trauma from the crash still felt nearly sixty years later and the emotions raised when she ‘had to see the offender once released from prison going about his life knowing he served less than six months’ jail for each life he stole’.

Long-term trauma was also reported by the MAIB, who indicated that for some people, there is a high level of resentment because of a view that the person who caused the harm had not been adequately punished and a difficulty getting over the circumstances of the accident. Conversely, in discussions with the Witness Assistance Service (WAS) and the Victim Support Service (VSS), it was noted that not all victims want an offender to be prosecuted and a lengthy sentence of imprisonment imposed, especially where the parties were close family or friends, and that these people may experience trauma if a prosecution proceeds.

The sentence imposed on an offender was also identified as a means by which the interests of victims in cases involving death or injury arising from a motor vehicle crash were not adequately recognised. Mr Wickham’s view was that the impact of the offence on the victim was not adequately recognised and reflected in the sentences given. He considered that there should be provisions for a lifetime driving ban and the selling of vehicles and other assets to support victims. He also thought that there should be community consultation with the accused present, so that those affected could tell their stories. Other submissions attributed the problem to a difficulty in understanding the rationale for the sentence, and that the victim’s family may sometimes ‘rather the offender be required to undertake a more constructive penalty (such as community orders) than simple jail term. Sometimes they want to look the offender in the eye and get a real apology from them’.

WAS also reported that families were concerned with the time involved in criminal prosecution and could not understand why some offenders did not enter a plea of guilty. In the experience of WAS, from the point of view of families, an early plea was beneficial and it was upsetting for families if proceedings continued on. However, submissions received by the Council from family members directly affected by proceedings continued. On the contrary, other submissions highlighted concerns with procedural matters as contributing to the inadequate response to the needs of victims. The Bicycle Network considered that there was a failure to adequately explain the complexities of a court hearing and processes, including why a jury is not able to hear of a defendant’s previous driving record. Mr Killick considered that there was a need to explain the use of victim impact statements so that others affected by the offence could make a statement, such as those who witnessed the offence or close friends.

The Council’s views

There is no empirical 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’.

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’. In the context of driving offences resulting in death, public opinion research conducted in England found that relatives of victims

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616 Submission 30 (D McCartney); Submission 12 (S Cooper); Submission 29 (G Tolond). The Bicycle Network also considered that there should be a clear explanation to victims and to families of the sentencing process and all the matters a judge should consider when exercising judicial discretion, Submission 9 (G Bailey).

617 Submission 19 (J Taylor); Submission 20 (J Conlan-Briggs).

618 Submission 9 (G Bailey).

619 Submission 8.


621 Ibid 29.
expressed dissatisfaction with sentencing and preferred sentences that were much tougher than those expressed by survey participants drawn from the general public. 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 was also reflected in the submissions received. This dissatisfaction tends to reflect an expectation that the punishment imposed is a measure of the life lost and a tendency to focus on the harm inflicted rather than the blameworthiness of the offender and, consequently, a view that ‘true’ punishment should equate to a lengthy period of imprisonment. However, the Council stresses that the sentence imposed on an offender cannot reflect the victim’s view of the appropriate sentence or depend on whether the victim is forgiving or punitive, but instead needs to be imposed by an objective and impartial tribunal.

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, greater involvement of family members and increased communication by prosecutors about the court process. WAS and prosecutors from the Office of the DPP are involved in explaining the charging decision to the victim or the family of a deceased victim and involve the family in any decision to accept a plea to a lesser offence (such as dangerous driving causing death rather than manslaughter). As noted at [6.6], in the context of driving offences, there have also been recent changes to formally allow victim impact statements to be received in the Magistrates Court in cases where death or serious injury has 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. These developments are welcome and the Council highlights the need for support services to be appropriately funded.

The role of the victim in the criminal trial is multi-faceted and raises many complex issues beyond the scope of this reference. However, the Council does acknowledge there are limits in the capacity of the conventional criminal justice system to respond to those who have suffered serious injury or to those whose relative has died in a motor vehicle crash. A clear theme in the forums held with stakeholders and in the submissions received was the unmet needs of victims, particularly in the relation to cases heard in the Magistrates Court. There is an ‘expectation’ gap in relation to what the law can appropriately do by way of penalty (which may not be viewed as being enough by family members) and the offender’s culpability. The Council’s view is that sentencing reforms cannot close that expectation gap but other responses may be able to assist in closing the ‘healing gap’ for some families and victims.

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622 Ibid viii.
624 Ibid 19.
625 Ibid.
626 Ibid 21.
627 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].
628 See [6.6].
629 See for example, the recent report of the VLRC, above n 623.
10. Recommendations for reform

10.3.2 REFORMATIVE JUSTICE

**Overview of restorative justice**

Restorative justice has been increasingly incorporated into traditional criminal trial processes as a means of improving outcomes for victims.630 It is viewed as a response to the desire by many victims of crime for ‘a more meaningful and inclusive way to participate, including [a] more effective means of conveying their story and the impact of offending’.631 Restorative justice ‘focuses on repairing the harm caused by the offence, on encouraging offenders to take responsibility for their actions and on increasing victim and community involvement in the criminal justice system’.632

The following benefits for victims and offenders have been identified:633

<table>
<thead>
<tr>
<th>Restorative Justice Conferencing: Benefits for the Victim</th>
<th>Restorative Justice Conferencing: Benefits for the Offender</th>
</tr>
</thead>
<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>

Evaluations of restorative justice indicated that it ‘can deliver positive outcomes for victims who want to participate and are ready to do so, including victims of serious and violent crime’.634

Key principles have been identified in the delivery of best practice restorative justice conferencing:

- One of more conference or meetings are conducted in person, by video link, though representatives, or through written correspondence.
- There is rigorous assessment of suitably, extensive preparation and debriefing, and an impartial, skilled and professional facilitator.
- Victims and offenders give free and informed consent to participation, and have the right to seek legal advice and to withdraw at any time.
- Offenders fully accept responsibility for the crime charged.
- There are safeguards to protect the safety, privacy and legal rights of victims and offenders.
- Victims and offenders are actively involved. Active involvement does not require victims to speak directly to offenders. It refers to the opportunity to consent to restorative justice and contribute to the direction and goals of the process.
- The process is dialogue-driven rather than settlement-driven. Reaching an outcome or agreement, whether financial, symbolic or otherwise, should be an option but not the predetermined aim.
- Agreements, where reached, are fair, reasonable and capable of being fulfilled by the offender.

630 Ibid.
631 Ibid 174.
633 Centre for Innovative Justice, RMIT University, Background Paper: Restorative Justice Conferencing Pilot, 2–3.
• Offender participation in restorative justice after a guilty plea and before sentencing may be taken into account at the discretion of the sentencing judge. Restorative justice can interact with the criminal justice system in different ways. It can be used as a mechanism to divert an offender from formal court proceedings such as applies with youth justice conferencing in Tasmania, where an offender can be referred by the police or the Magistrates Court (Youth Division). It can be used as a means to arrive at the sentence (such as operates with circle or forum sentencing). Alternatively, it can be used to supplement the formal court process so that it does not replace the usual sentencing process and instead has a supplementary role to the formal court process, which ‘allows public accountability, denunciation, deterrence and punishment to occur in those cases where a prosecution can proceed’. Restorative justice can also operate post sentence.

**Development of restorative justice conferencing in the adult jurisdiction**

**Victoria**

A legislated restorative justice process is not available in Victoria for indictable offences committed by adult offenders. However, based on a victim-focused restorative justice model, a Victorian pilot project has been funded by the Legal Service Board and is being conducted by the Centre for Innovative Justice. The pilot will provide a restorative justice conferencing program for those affected by a driving offence that resulted in death or serious injury. 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 laid at one end of the scale to an offender charged with culpable driving causing death at the other end of the scale).

The pilot that is operating in Victoria is a complementary process to the criminal justice system (rather than an alternative process) with a 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, pre-sentence where there is a guilty finding or a plea of guilty, or as a post-sentence option. This framework was selected to provide maximum flexibility for victims in relation to when the conference can happen, where it will take place and also who will attend the conference. This was contrasted with traditional criminal justice approach, which typically has an inflexible timeline and procedures from the victim’s point of view.

The program is currently accepting referrals and aims to conduct 10 conferences by the end of 2017. Referrals can come from victims or offenders and possible participants are initially screened for eligibility, which involves an assessment in relation to the following criteria: (1) has there been an offence that has involved a collision which has resulted in death or serious injury; (2) has the person been affected as the victim (which includes family members) or as an offender; (3) was the driver an adult; (4) are there any concerns about capacity to consent; (5) does the person understand the process and are their reasons for wanting to take part in restorative justice conference compatible with the underlying rationale of restorative justice. If a person is eligible, contact is then made with the other party to determine whether they wish to participate. Once there are two parties willing to participate, a convenor is engaged who will undertake a professional assessment as to whether it is safe and appropriate to proceed with a conference.

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635 VLRC, above n 623, 175–6.
636 See also Larson, above n 632.
637 Ibid.
638 VLRC, above n 623, 177.
639 Ibid 176.
640 Centre for Innovative Justice, RMIT University, above n 633.
641 Ibid 5.
642 Information provided by Nareeda Lewers, 30 November 2016.
643 Ibid.
New Zealand

There is a long history of restorative justice within the criminal justice system in New Zealand with the *Sentencing Act 2002* (NZ) s 25 allowing a court to adjourn sentencing to allow a restorative justice conference to take place. There is also a requirement for District Court judges to adjourn sentencing to allow inquiries to be made to determine whether a restorative justice process is appropriate in the circumstances of the case where:

- the offender has pleaded guilty;
- there are one or more victims;
- a restorative justice process has not occurred; and
- appropriate restorative justice processes can be accessed.\(^644\)

The District Court has jurisdiction for driving offences where death or injury is caused other than for cases of manslaughter and murder. Restorative justice has such a central role in the criminal justice system in New Zealand, that ‘it is presumed that restorative justice conference will take place in all criminal matters unless the parties do not wish to participate’.\(^645\) The outcomes arising from a restorative justice conference are taken into account in sentencing.\(^646\)

**England and Wales**

Pre-sentence restorative justice is available in England and Wales, with the court having power to defer sentencing to allow for a restorative justice meeting to take place.\(^647\) Guidance provided by the Ministry of Justice indicates that it ‘is envisaged that pre-sentence RJ will fit within wider RJ strategies to make RJ available at all stages of the criminal justice system’.\(^648\) It also indicates that restorative justice may be appropriate for any offence and that ‘evidence suggests that the greater the harm experienced the more effective RJ can be’.\(^649\) The aims identified of pre-sentence restorative justice are to:

- provide victims with the opportunity to take part in a restorative justice activity at an early stage of the criminal justice system;
- offer victims greater direct involvement in the criminal justice process, give victims a voice and increase victim satisfaction; and
- reduce re-offending.\(^650\)

Following the restorative justice activity, a report is prepared for the court that contains information about the people who participated, any outcome agreement or plan and the view of the victim and the facilitator. While the court may have regard to the report and also to the offender’s participation in the restorative justice activity, ‘these considerations, together with consideration of other factors of the case remain entirely a matter for the court to interpret and come to a sentencing decision about’.\(^651\)

**Australian Capital Territory**

As noted by the Victorian Law Reform Commission (VLRC), the Australian Capital Territory is the first Australian jurisdiction ‘to adopt legislation that allows the use of restorative justice as a supplementary response to the formal criminal process for serious offending’.\(^652\) Serious offending is defined as an offence punishable by imprisonment for a term longer than 14 years (if the offence relates to money or other property) or 10 years (in any other case).\(^653\) Restorative justice is also available in relation to less serious offences. An offender must accept responsibility for the commission of the offence before being eligible to take part in restorative justice\(^654\) and a court must take account

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\(^644\) *Sentencing Act 2002* (NZ) s 24A.


\(^646\) *Sentencing Act 2002* (NZ) ss 8(j), 10.

\(^647\) *Powers of Criminal Courts (Sentencing) Act 2000* (UK) s 1ZA.


\(^649\) Ibid 7.

\(^650\) Ibid 4.

\(^651\) Ibid 11.

\(^652\) VLRC, above n 623, 181; *Crimes (Restorative Justice) Act 2004* (ACT), as amended by the *Crimes (Sentencing and Restorative Justice) Amendment Act 2016* (ACT).

\(^653\) *Crimes (Restorative Justice) Act 2004* (ACT) s 12. It is noted that sexual offences and domestic violence are currently excluded.

\(^654\) Ibid s 19.
of this acceptance of responsibility in sentencing an offender.\textsuperscript{655} However, a court must not impose a more severe sentence on an offender because they have not taken part in restorative justice.\textsuperscript{656}

**New South Wales**

In New South Wales, there is a post-sentence restorative justice process that is facilitated by Corrective Services NSW. This is a prison-based program where the victim-offender conference may not take place until many months or years after the offending behaviour.\textsuperscript{657} The average length of time for sentencing to referral was 3.6 years with a median time of 23 months.\textsuperscript{658} In the period 1999 to 2013, over half of the Victim Offender Conferences related to cases where death had occurred — murder (26%), manslaughter (18%) and driving causing death (11%).\textsuperscript{659} The aims of Victim Offender Conferencing are to:

- meet the unmet justice needs of victims of crime;
- facilitate a consensus about how to reduce the harm caused by the offending; address the issues left unresolved by the court system;
- provide a process for converting hostility into dialogue;
- provide the people who are victims of crime with a space to have a voice and ask questions, to express how they feel, and have a say on how the harm can be repaired.\textsuperscript{660}

Once there is a referral, there is a rigorous assessment process with only a small number of referrals resulting in a face-to-face conference.\textsuperscript{661} There is also an extensive preparation process that precedes the conference.\textsuperscript{662}

**Existing framework in Tasmania**

There are several mechanisms that exist in Tasmania that could be used to allow for a pre-sentence meeting between the offender and victim, including potentially a restorative justice conference.

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. However, 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.\textsuperscript{663} 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’.\textsuperscript{664}

Amendments proposed to the **Sentencing Act 1997** (Tas), following recommendations of the Council, will allow the court to adjourn proceedings to defer sentencing of an offender for a number of purposes, including to allow the offender to participate in a pre-sentence program.\textsuperscript{665} This provision would allow the court to defer sentencing to allow an offender to take part in a restorative justice conference.

There is also an informal victim/offender mediation process that may be requested by either party following sentence.\textsuperscript{666} 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’.\textsuperscript{667} 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 parties are reasonable and are likely to be met;

\textsuperscript{655} Crimes (Sentencing) Act 2005 (ACT) s 33(1)(x).
\textsuperscript{656} Ibid s 34(1)(g).
\textsuperscript{658} Bolitho, above n 657, 262.
\textsuperscript{659} Ibid.
\textsuperscript{660} Ibid 261 referring to Corrective Services NSW (2015).
\textsuperscript{661} Ibid 262.
\textsuperscript{662} Ibid 262–3.
\textsuperscript{663} TLRI above n 55, 238.
\textsuperscript{664} Ibid.
\textsuperscript{665} Sentencing Amendment Bill 2016 (Tas) s 24.
\textsuperscript{666} Larson, above n 632, 21.
\textsuperscript{667} Ibid.
recommendations for reform

10. Recommendations for reform

- ensuring as much as possible, that the process will be positive for all concerned; and
- ensuring that the safety of all involved is not compromised.668

There have also been few victim/offender mediations occur outside of the more formal program set out in the Sentencing Act 1997 (Tas).669 However, the Council is aware anecdotally of informal discussions that have taken place between victims and offenders in cases where death has been caused by the use of a motor vehicle.

Submissions

The Council sought feedback in the Consultation Paper on the use of restorative justice principles and practices as a mechanism that could potentially be introduced to respond to the needs of victims.

In the forums conducted by the Council, there was support for investigating the option of introducing a restorative justice approach to address unmet victim needs, particularly in relation to the offences of negligent driving causing death and grievous bodily harm. WAS and the VSS highlighted the severe trauma experienced by families and supported a restorative justice approach if it was properly resourced and appropriately supported. The Law Society was generally supportive of exploring a restorative justice program provided it was consensual and that any issues that may arise from relationship between the restorative justice conference and other proceedings (particularly civil compensation claims) were resolved. The forum with the MAIB, RACT, Road Safety Advisory Council and the Registrar of Motor Vehicles was also supportive of pursuing a pilot program in the Magistrates Court to assist victims, and indicated that there were existing funding sources available that could potentially provide financial support towards the development of such a pilot.

The Deputy Chief Magistrate indicated that the Magistrates Court was open to exploring a pilot restorative justice program for families and victims in cases of negligent driving causing death and grievous bodily harm. Similarly, the DPP indicated that such a program may be useful in cases where death was caused by negligent driving because of the disparity between the harm caused and the culpability of the offender.

Widespread support was also expressed in the submissions received for the use of restorative justice conferencing as a means to address the concerns of victims and to assist in an offender’s rehabilitation by making the offender aware of the consequences of their actions.670 The Bicycle Network stated that ‘[w]hile mediation is available under Sentencing Act 1997 in Tasmania, restorative justice conferencing is a preferable model. However, unlike mediation, this process must be fully resourced so that every victim that requires it, can participate in a timely way throughout the often long criminal-justice process’.

The Council’s views

As indicated, the Council recognises that there are limits in the capacity of the conventional criminal justice system to respond to those who have suffered serious injury or to those whose relative has died in a motor vehicle crash. There are unmet needs of victims, particularly in the relation to cases heard in the Magistrates Court and the Council’s view is that restorative justice practices may be able to assist in closing the ‘healing gap’ for some families and victims. There are also limits to the ability of mediation as a means to respond to the needs of victims.

Accordingly, the Council considers that the introduction of restorative justice conferencing pilot for the offences of negligent driving causing death and negligent driving causing grievous bodily harm contained in the Traffic Act 1925 (Tas) should be further explored. This was supported in the submissions received and in the consultations with stakeholders. In particular, the Council notes the willingness of the Magistrates Court to explore a pilot restorative justice program for families and victims in cases of negligent driving causing death and grievous bodily harm.

The Council considers that it is appropriate, given the harm caused, that the restorative justice procedures should be available to supplement the criminal justice system rather than to divert offenders from the criminal justice system.

669 Larson above n 632, 20.
670 Submission 15 (M Reid); Submission 24 (A McGowan); Submission 25 (D Elliffe); Submission 27 (J Hepper); Submission 26 (K Garner); Submission 29 (G Tolond); Submission 12 (S Cooper); Submission 21 (B Clark); Submission 11 (C Hutchinson); Submission 22 (D Wanless); Submission 30 (D McCartney); Submission 28 (S Lewis); Submission 23 (S Corney); Submission 16 (G Wickham). In Ms Sturges’ submission, the desire was expressed for offenders to be forced to engage with their victims to fully understand the lifelong impact their actions have caused (Submission 17).
However, there are many outstanding issues to be considered, including the structure of the program, the relationship with sentencing, as well as issues connected with an offender’s civil liability for negligence arising out of the motor vehicle crash. As the VLRC has cautioned, the parameters of any pilot project need to be well developed so as to avoid ‘misunderstanding and inflated expectations about what restorative justice is and can achieve, [that may] contribute to unease about incorporating it into criminal justice systems’. There is a need for further research and consultation.

The Council also notes that it has identified several sources of funding that may provide financial support towards the development of such a pilot.

**Recommendation**

1. That restorative justice procedures should be available as a supplementary part of the criminal justice system rather than to divert offenders from the criminal justice system in cases where death or serious injury has been caused by the use of a motor vehicle.

2. That the development of a pilot restorative justice program for the offences of negligent driving causing death and negligent driving causing grievous bodily harm contained in the *Traffic Act 1925* (Tas) should be further explored.

### 10.4 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 criminal justice system and that ‘those who have the lowest levels of knowledge … hold the most punitive views’. Research also shows that when people have more information, there is a significant decrease in their level of punitiveness. 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.

The Council has identified several mechanisms that may be considered in order to improve community understanding of the relevant offences and sentencing principles that apply where death or serious injury is caused by the use of a motor vehicle.

#### 10.4.1 MAGISTRATES TO PUBLISH REASONS FOR SENTENCE

Sentencing comments are available for the Supreme Court but are rarely made available for sentences imposed in the Magistrates Court. In the Consultation Paper, the Council suggested that 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.

**Submissions**

There was general support in the submissions received and in the consultations forums for sentencing comments from the Magistrates Court to be made publicly available in cases of negligent driving causing death or grievous bodily harm. The RACT indicated that it experienced ‘quite an influx of member correspondence following high profile incidents, with inadequate sentencing being a common sentiment’. It suggested that ‘one measure that may...’
enhance the public’s understanding of offending behaviour is increased disclosure of case based comments and information’. Similarly, the PLS expressed the view that the Magistrates Court should make comments in passing sentence publicly available in cases of negligent driving causing death or grievous bodily harm as this would be useful to improve public understanding of the sentence imposed in these cases. According to the PLS:

This would provide the public with an understanding of how the court manages these offences and decides upon the sentence it thinks to be appropriate to the offence.

Public misunderstanding of sentencing for driving offences is one of the causes of the Consultation Paper’s production; and the publicising of reasons would ameliorate the public’s lack of understanding of the law and the sentencing process. If comments were published, public reactions to sentencing would inevitably be more informed and constructive. Greater public access to the court’s decision-making would mean additionally that the change of the name of negligent driving to careless … would be spurious and unnecessary.

Other submissions also supported making the sentences publicly available as a means of improving community knowledge.675

Other submissions went further and suggested that the courts should disclose even more information. Mr Killick suggested that not only the comments on passing sentence, but also an audio or video record of proceedings be made available. The Bicycle Network considered that the Magistrates Court decisions should be publicly available where a driver is convicted of a driving offence or had their licence disqualified. It also considered that there should be greater communication from the Supreme Court to inform the public and thereby increase the deterrent effect of sentences imposed, such as the publication of the details of the sentence in a more accessible format ‘to allow the public to understand the reasons for the sentence imposed and the post-imprisonment restraints that are imposed on drivers to reduce their risk of reoffending’. There was a suggestion that the court ‘should publish details of penalties, including complete driving record and previous penalties imposed. It should also publish the victim impact statement’.

The Council’s views

The Council acknowledges the strong support received in the consultation process for the Magistrates Court to make comments on passing sentence publicly available 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.’676 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.677 While the Council acknowledges that the requirement to prepare sentencing comments for broader publication would have resource implications and increase the work-load of the magistrates,678 the Council considers that it is desirable in the interests of improving community understanding of the sentencing process for these significant cases. The Council does not, however, consider that this is appropriate for all driving offences. Accordingly, the Council recommends that the Magistrates Court give consideration to making comments on passing sentence publicly available in cases of negligent driving causing death or grievous bodily harm.

Recommendation

3. That the Magistrates Court give consideration to making comments on passing sentence publicly available in cases of negligent driving causing death or grievous bodily harm.

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675 Submission 30 (D McCartney); Submission 12 (S Cooper); Submission 29 (G Tolond); Submission 15 (M Reid); Submission 16 (G Wickham); Submission 7 (J Harkins).
676 VSAC, above n 520, 247.
677 Warner et al, above n 418, 94.
678 See VSAC, above n 520, 247.
10.4.2 RENAME THE OFFENCE CARELESS DRIVING RATHER THAN NEGLIGENT DRIVING

Another mechanism that was suggested in the Consultation Paper as a possible means to improve public understanding of the offences of negligent driving causing death or grievous bodily harm contained in the Traffic Act 1925 (Tas) would be to rename the offences careless driving rather than negligent driving.

Submissions

There was some support expressed in the consultation forums with the MAIB, the RACT, the Road Safety Advisory Group and the Registrar of Motor Vehicles for the change of name to make clear the distinction between culpable negligence (manslaughter) and the summary offence of negligent driving causing death and also to reflect an offender’s culpability. The DPP was agnostic about changing the name of the offence provided the test for liability remained the same. The Law Society did not have a view on whether the name should change but did not oppose it.

In contrast, other submissions received by the Council were of the view that the name should not change on the ground that the use of ‘careless’ would fail to recognise the responsibilities attached to driving and the seriousness of the offence. The Tamar Bicycle Users Group stated that:

negligent driving should remain as this implies a failure to exercise the care that a reasonably prudent person would exercise in the circumstances where the term ‘careless’ has no implication of ‘duty of care’ and could imply a lower level of responsibility for actions.679

Similarly, other responses stated that ‘the driver must be required to take full responsibility and accountability for their actions when driving. “Careless” sounds like a watering down of the description’680 and that ‘careless’ ‘sounds almost benign. Driving a large heavy vehicle is a serious responsibility. It’s not a right’.681

In her submission, Ms Harkins said that while the renaming may be an attempt to clarify the name, it was ‘arguable [that] “careless” is not a strong enough word. Perhaps an additional description such a “culpable careless driving” may add more gravity’. She also suggested that there should be an offence of negligent causing death and/or grievous bodily harm of a vulnerable road user with the onus placed on defendant to show why he or she was not negligent.682

These submissions add support to the PLS’s view that the name of the offence would not alter public opinion in relation to the offence. The PLS indicated that the offence name should not be changed on the basis that it was ‘spurious and unnecessary’:

It is not the case that using the word ‘negligent’ or ‘careless’ will cause an offence to seem more or less offensive, or that one word or the other is harder to understand in itself; it is rather that the public, in order to understand the sense in which the word ‘negligent’ is used, must have greater access to the court’s comments on passing sentence, and thus to the context of its use.683

The Council’s views

As discussed at [3.3.2], there is potential for confusion in the offence structure that applies in Tasmania for driving offences that result in death. 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). There is also an offence of dangerous driving causing death. This is potentially 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.684 Renaming the offences careless driving causing death or serious injury may assist to make the distinction between manslaughter and the summary offence clearer.

679 Submission 15 (M Reid).
680 Submission 30 (D McCartney); Submission 29 (G Tolond).
681 Submission 12 (S Cooper). Submission 16 (G Wickham) and Submission 8 (D Killick) also opposed the renaming of the offence.
682 Submission 7.
683 Submission 1 (F Brinken and A Staples).
684 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.
The use of ‘careless’ rather than ‘negligent’ may also better reflect the lower standard of culpability and thereby 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.\textsuperscript{685}

However, the consultation process revealed that there was no consensus that the change of name would be desirable and/or helpful.

While the Council acknowledges that the use of negligence to describe the most serious offence (manslaughter) and the least serious offence (negligent driving causing death) is confusing, the Council considers that changing the name to ‘careless’ would not necessarily improve community understanding of the offence structure or the level of culpability of the offender.

Accordingly, it is the Council’s view that the offences of negligent driving in the Traffic Act 1925 (Tas) should not be renamed careless driving.

**Recommendation**

4. That the offences of negligent driving in the Traffic Act 1925 (Tas) should not be renamed careless driving.

### 10.4.3 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. These guidelines 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 Consultation Paper sought feedback on whether a guideline judgment scheme should be introduced in Tasmania with a view to improving public understanding of sentencing.

**Submissions**

There was support expressed in some of the submissions received for the use of a guideline judgment scheme to better communicate with the public, as well as to provide for more consistent sentencing.\textsuperscript{686} In the forum that was held with the representative of the Law Society, it was recognised that guideline judgments may be an effective tool for explaining sentencing to the public. Mr Killick expressed the view that guideline judgments may have some value but stressed that it was necessary for courts to have a wider range of sentencing options over and above prison and licence disqualification.\textsuperscript{687} The Bicycle Network also considered that other responses were required to change the behaviour of convicted drivers.\textsuperscript{688}

In the Consultation Paper, the Council stated that guideline judgments 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 were seen by the Bicycle Network to be beneficial on the basis that they retained judicial discretion, which was in its view an important feature of the sentencing process.\textsuperscript{689} On the other hand, the PLS was concerned that a guideline judgement would unduly restrict judicial discretion. Its view was that a guideline judgment scheme ‘would not be more useful than a (non-exhaustive) list of mitigating and aggravating factors for the court to consider and to apply to a sentencing range’. Rather, it was concerned that such a scheme:

\textsuperscript{686} Submission 30 (D McCartney); Submission 12 (S Cooper); Submission 29 (G Tolond); Submission 16 (G Wickham); Submission 7 (J Harkins).
\textsuperscript{687} Submission 8 (D Killick).
\textsuperscript{688} Submission 9 (G Bailey).
\textsuperscript{689} Ibid.
might cause the court to be, or to think itself to be, beholden to a sentence which is inappropriate to the offence, in spite of whichever mitigating or aggravating factors have occurred. The other troubling aspect of a guidelines judgment scheme is that it is ossifying, and restricts the capacity of sentencing judges in individual cases. These schemes can also be viewed to have the effects of the courts becoming legislators, effectively setting the sentence and the factors to be taken into account. 690

The Council’s views

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. As has been pointed out by VSAC, guideline judgments ‘are a mechanism … to provide broad sentencing guidance beyond the specific facts of a case’. 691 Guideline judgments were considered to be preferable to any form of mandatory sentencing scheme as they allow the court to recognise the diversity of circumstances that arise and to have discretion to allow this diversity to be taken into account. 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. 692

While the Council still considers that a guideline judgement scheme would be preferable to any form of mandatory sentencing and considers that there is merit in further exploring such a scheme for Tasmania, its view is that a guideline judgment is not necessarily an appropriate response in the context of driving offences causing death. The Tasmanian Court of Criminal Appeal has already clearly articulated the relevant sentencing principles that apply in cases of serious driving offences that result in death and serious injury. 693 These principles are well understood and applied by the courts. Instead, the challenge is how to better communicate those principles to the broader community to improve the community’s understanding of sentencing in these cases.

In this regard, there are several mechanisms that can be used to improve public understanding. First, the Council considers that making the sentencing comments publicly available will be helpful to provide better information to the community about sentencing in these difficult cases. Second, the Council notes that the DPP has prepared charging guidelines for serious driving offences and that these guidelines also provide a clear overview of the sentencing factors that are taken into account by the court. These guidelines will be made publicly available once finalised. Third, a function of the Sentencing Advisory Council is to improve the quality and availability of information on sentencing in Tasmania. This report provides in-depth information about current sentencing trends and the principles used by the courts in sentencing for driving offences that result in death or injury in Tasmania.

Accordingly, the Council’s view is that a guideline judgment is not specifically required for driving offences where death or injury is caused.

Advice 8
That a guideline judgment is not specifically required for driving offences where death or injury is caused.

10.4.4 SET OUT SPECIFIC AGGRAVATING FACTORS FOR THE PURPOSES OF SENTENCING

In the Consultation Paper, the Council asked for feedback on whether 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. This was provided as an option for reform in the event that sentencing was considered to be inappropriate. However, this could also be used as a means to communicate with the public (rather than a mechanism to provide for an increase in penalty).

690 Submission 1 (F Brinen and A Staples).
691 VSAC, above n 520, 13.
692 TSAC, above n 5, Recommendation 3.
693 See [2.3.3] and Appendix B.
The Council noted that 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>
<tr>
<td>Qld</td>
<td>Aggravated dangerous driving if:</td>
</tr>
<tr>
<td></td>
<td>• adversely affected by an intoxicating substance</td>
</tr>
<tr>
<td></td>
<td>• was taking part in an unlawful race or speed trial</td>
</tr>
<tr>
<td></td>
<td>• was excessively speeding.</td>
</tr>
<tr>
<td>SA</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</td>
</tr>
<tr>
<td></td>
<td>• was in a street race</td>
</tr>
<tr>
<td></td>
<td>• was disqualified or suspended from holding driver’s licence</td>
</tr>
<tr>
<td></td>
<td>• committed the offence as part of prolonged, persistent and deliberate course of very bad driving</td>
</tr>
<tr>
<td></td>
<td>• drove with a blood alcohol concentration of 0.08 or more</td>
</tr>
<tr>
<td></td>
<td>• drove under the influence of an intoxicating liquor or drugs</td>
</tr>
<tr>
<td></td>
<td>• drove with a prescribed drug in his/her blood.</td>
</tr>
<tr>
<td>ACT</td>
<td>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.</td>
</tr>
<tr>
<td></td>
<td>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.</td>
</tr>
<tr>
<td>NZ</td>
<td>• Causing death or bodily injury while committing drink driving offence.</td>
</tr>
<tr>
<td></td>
<td>• Causing death while committing drink driving offence.</td>
</tr>
<tr>
<td></td>
<td>Aggravated careless driving if:</td>
</tr>
<tr>
<td></td>
<td>• driving the motor vehicle at a speed exceeding the applicable speed limit</td>
</tr>
<tr>
<td></td>
<td>• 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.</td>
</tr>
<tr>
<td>Eng/Wales</td>
<td>• Causing death by careless driving when under the influence of drugs or alcohol.</td>
</tr>
<tr>
<td></td>
<td>• Causing death by driving while unlicensed, disqualified or uninsured.</td>
</tr>
</tbody>
</table>

The Council noted that 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 in cases without these features. However, it sought feedback on whether an option for reform would be to expressly set out these matters in statute as aggravating features for the purposes of sentencing.

694 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.

10. Recommendations for reform
Submissions

As indicated at [10.4.3] the PLS expressed the view that a guideline judgment would not be more useful than ‘a (non-exhaustive) list of mitigating and aggravating factors for the court to consider and to apply to a sentencing range’.

The Bicycle Network noted that various aggravating features have already been identified when sentences are passed in Tasmanian courts. It considered that ‘setting these out in statute would add another layer of consistency, an important component in maintaining public confidence in the sentencing process, and add to the efficiency of a judgment guidelines system’. Other submissions also supported the creation of a statutory list of aggravating features.

The Council’s views

The Council considers that there is a need to improve public understanding in relation to sentencing for driving offences where death or injury results, but it does not consider that the creation of a statutory list of aggravating factors is desirable. As discussed at [3.3.3], the Tasmanian Court of Criminal Appeal has clearly stated the relevant sentencing principles that apply in cases of serious driving offences that result in death and serious injury, and these principles are well understood and applied by the courts. Accordingly, as indicated at [3.3.3], the Council’s view is that it is undesirable 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.

However, as noted, the challenge is to communicate these principles to the broader community to improve the community’s understanding of sentencing in these cases and the Council has identified several mechanisms that may achieve this outcome.

10.5 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 4, the Criminal Code (Tas) provides for alternative verdicts where certain crimes are charged relevant to driving offences where death or injury results. 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 has 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.

10.5.1 SUBMISSIONS

In the Consultation Paper, the Council sought feedback on whether the Criminal Code (Tas) should 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). There was support in several submissions for this proposal.

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695 Submission 1 (F Brinken and A Staples).
696 Submission 7 (J Harkins); Submission 8 (D Killick); Submission 16 (G Wickham); Submission 14 (M Temby).
697 Submission 7 (J Harkins); Submission 8 (D Killick); Submission 16 (G Wickham); Submission 30 (D McCartney); Submission 12 (S Cooper); Submission 29 (G Tolond).
The DPP also supported the amendment to the Criminal Code (Tas) to create alternative verdicts but noted that there were some potentially negative consequences that may arise. The DPP cautioned that there may be more trials for charges of dangerous driving causing death or grievous bodily harm given that the alternative verdict of negligent driving causing death or grievous bodily harm created a compromise option for the jury. This may have negative consequences for the family of the victim as it extends the time involved in finalising the court process.

The Law Society also raised concerns about alternative verdicts on the basis that there was a risk that DPP will charge with a higher offence of dangerous driving at the upper end of negligent driving because they are confident that a conviction will certainly be obtained for the lesser charge and, conversely in dangerous driving cases, there is a risk juries will compromise.

10.5.2 THE COUNCIL’S VIEWS

The Council has taken account of the submissions received and the views expressed by the DPP that such a reform is desirable. The Council also notes that the TLRI 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). The Council also notes that some submissions expressed the view that negligent driving causing death or serious injury should be heard in the Supreme Court.

The Council does not accept that these offences should be made crimes and it is not appropriate for all cases to be heard in the Supreme Court, given the fault element for the offence and the low level of culpability of the offender to establish liability for the offence. However, making provision for an alternative verdict would allow cases that are borderline dangerous driving/negligent driving to be heard in the Supreme Court with the jury making an assessment on the appropriate offence to reflect the offender’s culpability.

The Council has also had regard to the possibility that such an amendment may result in more trials and that this may add to the trauma of family members by prolonging the legal process. However, in borderline cases, the availability of an alternative verdict may allow the offender to be charged with the more serious offence of dangerous driving causing death with the option for a conviction for negligent driving causing death to be considered in a single trial. Accordingly, on balance, the Council’s view that it is appropriate that a jury should make the decision as to culpability of the offender in cases at the upper end of negligent driving causing death or grievous bodily harm than potentially overlap with dangerous driving.

As noted at [9.2.4], the implications of this amendment for sentencing for negligent driving causing death or grievous bodily harm should be monitored.

Recommendation

5. 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).

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698 TLRI, above n 3, Recommendation 9.
699 Submission 8 (D Killick); Submission 14 (M Temby). In Submission 9 (G Bailey), it was suggested that it should be made an indictable offence.
700 It is noted that the Supreme Court routinely give directions to juries in drug cases where an indictable offence is applicable, such as trafficking, that if the jury acquit for the indictable offence, they have to decide if the offender is guilty of a summary offence.
References

Amy Gillett Foundation, *Holding Drivers to Account* (2013)


Bagaric, Mirko and Richard Edney, *Australian Sentencing* (Westlaw AU, n.d.)


Brown, Thomas, Maurice Dongier, Marie Quinnet, James Tremblay, Florence Chanut, Lucie Legault, Ng Mien Kwong and 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

Bureau of Infrastructure, Transport and Regional Economics, *Road Trauma Australia 2015 Statistical Summary* (BITRE, 2016)

Casey, Louise, *Review into the Needs of Families Bereaved by Homicide* (Commissioner for Victims and Witnesses in England and Wales, 2011)

Centre for Innovative Justice, RMIT University, *Background Paper: Restorative Justice Conferencing Pilot*


Cunningham, Sally, ‘Punishing Drivers Who Kill: Putting Road Safety First?’ (2007) 27 *Legal Studies* 288
Cunningham, Sally, ‘Vehicular Homicide: Need for a Special Offence’ in Christopher Clarkson and Sally Cunningham (eds), Criminal Liability for Non-Aggressive Deaths (Ashgate, 2008)


Cycling UK, Cycling UK Campaigns Briefing: Prosecutors and Courts (2014)


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


Duff, R Anthony, ‘Whose Luck Is it Anyway?’ in Chris Clarkson and Sally Cunningham (eds), Criminal Liability for Non-Aggressive Death (Ashgate, 2008)


Fell, James, ‘Update: Repeat DWI Offenders Involved in Fatal Crashes in 2010’ (2014) 15 Traffic Injury Prevention 431


Gelb, Karen, Measuring Public Confidence in Sentencing (VSAC, 2008)

Gelb, Karen, More Myths and Misconceptions (VSAC, 2008)

Gelb, Karen, Alternatives to Imprisonment: Community Views in Victoria (VSAC, 2011)


Henderson, Michael, ‘Defining the Problem and Tasks of the Summit’, Drink Driving Recidivism Summit (Australian Advisory Committee on Road Trauma, 1996)


Hoel, Adrian and Karen Gelb, Sentencing Matters: Mandatory Sentencing (VSAC, 2008)


Joudo Larson, Jacqueline, Restorative Justice in the Australian Criminal Justice System (Australian Institute of Criminology, AIC Reports and Public Policy Series 127)


Longo, M, C Hunter and R Loan, ‘South Australian Drivers Involved in Non-fatal Crashes: How Many are Drink Driving Recidivists?’, Drink Driving Recidivism Summit (Australian Advisory Committee on Road Trauma, 1996)


Maderson, Jane, Victor Siskind, Chris Bain and Barry Watson, Speeding Recidivism and Road Safety (2004)

McKenzie, Alexander, Drinking, Driving and Tragedy: An Options Paper for a New Approach to Drink Driving, University of Tasmania with the Magistrates Court of Tasmania (2013)


Office of Road Safety, Western Australia, Drink Driving Fact Sheet (2014)

Parliament of Victoria, Legislative Council Economy and Infrastructure Committee, Inquiry into the Road Safety Rules 2009 (Overtaking Bicycles) Bill 2015 (2016)

Richardson, Elizabeth, A Driving While Intoxicated/ Suspended Court List for Victoria 2013 (Background Paper, Monash University, 2013)


Ryan, Anthony, Anna Ferrante, Nini Loh and Rina Cercarelli, ‘Repeat Drink Driving Offenders in Western Australia. 1984-1994,’ Drink Driving Recidivism Summit (Australian Advisory Committee on Road Trauma, 1996)


Sentencing Advisory Council, Victoria, Driving While Disqualified or Suspended (Report, 2009)


Sentencing Advisory Council, Victoria, Community Attitudes to Offence Seriousness (2012)


Sentencing Rules 2009 (Overtaking Bicycles) Bill 2015


Sheehan, Mary, Barry Watson, Cynthia Schonfield, Angela Wallace and Bradley Partridge, ‘Drink Driver Rehabilitation and Education in Victoria’ (RACV Research Report 05/01, 2005)


Tefft, Brian, ‘Impact Speed and a Pedestrian’s Risk of Severe Injury or Death’ (2013) 50 Accident Analysis and Prevention 871


Transport, Housing and Local Government Committee, Queensland, Inquiry into Cycling Issues (2013)


Voas, Robert, Scott Tippetts and John McKnight, ‘DUI Offenders Delay License Reinstatement: A Problem?’ (2010) 34 *Alcoholism: Clinical and Experimental Research* 1282


Warner, Kate and Julia Davis, ‘Using Jurors to Explore Public Attitudes to Sentencing’ (2012) 52 *British Journal of Criminology* 93

Warner, Kate, Julia Davis, Maggie Walter, Rebecca Bradfield and Rachel Vermey, ‘Public Judgement on Sentencing: Final Results from the Tasmanian Jury Sentencing Study’ (Trends and Issues in Criminal Justice No 407, Australian Institute of Criminology, 2011)


Yeo, Stanley, ‘Manslaughter v Special Homicide Offences: An Australian Perspective’ in Chris Clarkson and Sally Cunningham (eds), *Criminal Liability for Non-Aggressive Death* (Routledge, 2008)
## Appendix A: Driving offences that result in death or injury

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Offences and maximum penalties</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>New South Wales</strong></td>
<td></td>
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</tbody>
</table>
| • 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 injury702 (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). |

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

702 Although this offence does not relate only to driving, it is predominately used for serious injury caused by negligent driving: see VSAC, above n 66, 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.
### Appendix A: Driving offences that result in death or injury

<table>
<thead>
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<th>Jurisdiction</th>
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</tr>
</thead>
<tbody>
<tr>
<td><strong>Queensland</strong></td>
<td>• Manslaughter (<em>Criminal Code</em> (Qld) ss 303, 310) – Life imprisonment.</td>
</tr>
<tr>
<td></td>
<td>• Dangerous operation of a vehicle causing death or grievous bodily harm (<em>Criminal Code</em> (Qld) ss 328A(4)) – 10 years unless circumstances of aggravation or if the offender knows or reasonably</td>
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<td>is found to have known that the other person was injured or killed and leaves the scene other than to seek medical assistance or other help before a police officer arrives when the penalty is</td>
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<td>14 years.</td>
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<tr>
<td></td>
<td>• Unlawfully cause grievous bodily harm (<em>Criminal Code</em> (Qld) ss 320) – 14 years.</td>
</tr>
<tr>
<td><strong>South Australia</strong></td>
<td>• Manslaughter (<em>Criminal Law Consolidation Act 1935</em> (SA) ss 13(1), (2)) – life imprisonment and court must disqualify from driving for 10 years or such longer period as the court orders.</td>
</tr>
<tr>
<td></td>
<td>• Death caused by culpably negligent, reckless or dangerous driving (<em>Criminal Law Consolidation Act 1935</em> (SA) ss 19A(1)) – 15 years imprisonment and disqualification for 10 years or such longer</td>
</tr>
<tr>
<td></td>
<td>period as the court orders (1st offence) or life imprisonment and disqualification for 10 years or such longer period as the court orders (subsequent offence or first offence that is aggravated).</td>
</tr>
<tr>
<td></td>
<td>• Serious bodily harm caused by culpably negligent, reckless or dangerous driving (<em>Criminal Law Consolidation Act 1935</em> (SA) ss 19A(3)) – 15 years imprisonment and disqualification for 10 years or such longer period as the court orders (1st offence) or life imprisonment and disqualification for 10 years or such longer period as the court orders (subsequent offence or first offence that is aggravated).</td>
</tr>
<tr>
<td></td>
<td>• Aggravated driving (cause death or serious bodily harm) without due care or attention (<em>Road Traffic Act 1961</em> (SA) ss 45(1), (2), (3)(a)) – 12 months imprisonment and a mandatory licence disqualification of not less than 6 months. 703</td>
</tr>
<tr>
<td><strong>Western Australia</strong></td>
<td>• Manslaughter (<em>Criminal Code</em> (WA) s 280(1)) – life imprisonment.</td>
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<tr>
<td></td>
<td>• Unlawfully cause grievous bodily harm (<em>Criminal Code</em> (WA) s 297(1)) – 10 years.</td>
</tr>
<tr>
<td></td>
<td>• Dangerous driving causing death or grievous bodily harm (<em>Road Traffic Act 1974</em> (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.</td>
</tr>
<tr>
<td></td>
<td>• 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.</td>
</tr>
<tr>
<td><strong>Australian Capital</strong></td>
<td>• Manslaughter (<em>Crimes Act 1900</em> (ACT) s 15) – 20 years imprisonment.</td>
</tr>
<tr>
<td>Territory</td>
<td>• Aggravated culpable driving causing death (<em>Crimes Act 1900</em> (ACT) s 29(3)) – 16 years imprisonment.</td>
</tr>
<tr>
<td></td>
<td>• Culpable driving causing death (<em>Crimes Act 1900</em> (ACT) s 29(2)) – 14 years imprisonment.</td>
</tr>
<tr>
<td></td>
<td>• Aggravated culpable driving causing grievous bodily harm (<em>Crimes Act 1900</em> (ACT) s 29(5)) – 12 years imprisonment.</td>
</tr>
<tr>
<td></td>
<td>• Culpable driving causing grievous bodily harm (<em>Crimes Act 1900</em> (ACT) s 29(4)) – 10 years imprisonment.</td>
</tr>
<tr>
<td></td>
<td>• Negligent driving causing death (<em>Road Transport (Safety and Traffic Management) Act 1999</em> (ACT) s 6(1)(a)) – 200 penalty units and/or imprisonment for 2 years.</td>
</tr>
<tr>
<td></td>
<td>• Negligent driving occasioning grievous bodily harm (<em>Road Transport (Safety and Traffic Management) Act 1999</em> (ACT) s 6(1)(b)) – 100 penalty units and/or imprisonment for 1 year.</td>
</tr>
<tr>
<td><strong>Northern Territory</strong></td>
<td>• Manslaughter (<em>Criminal Code</em> (NT) s 161) – life imprisonment.</td>
</tr>
<tr>
<td></td>
<td>• Negligently cause serious harm (<em>Criminal Code</em> (NT) s 174E) – 10 years imprisonment.</td>
</tr>
<tr>
<td></td>
<td>• Dangerous driving causing death (<em>Criminal Code</em> (NT) s 174F(1)) – 10 years imprisonment.</td>
</tr>
<tr>
<td></td>
<td>• Dangerous driving causing serious harm (<em>Criminal Code</em> (NT) s 174F(2)) – 7 years imprisonment.</td>
</tr>
</tbody>
</table>

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<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Offences and maximum penalties</th>
</tr>
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<tbody>
<tr>
<td><strong>Tasmania</strong></td>
<td>• Manslaughter (<a href="https://example.com">Criminal Code (Tas) ss 159, 389(3)</a>) – 21 years imprisonment.</td>
</tr>
<tr>
<td></td>
<td>• Dangerous driving causing death (<a href="https://example.com">Criminal Code (Tas) ss 167A, 389(3)</a>) – 21 years imprisonment.</td>
</tr>
<tr>
<td></td>
<td>• Dangerous driving causing grievous bodily harm (<a href="https://example.com">Criminal Code (Tas) ss 167B, 389(3)</a>) – 21 years imprisonment.</td>
</tr>
<tr>
<td></td>
<td>• Wanton or furious driving causing injury (<a href="https://example.com">Police Offences Act 1935 (Tas) s 36(1)</a>) – 2 years imprisonment (summary conviction), 21 years imprisonment (indictable offence).</td>
</tr>
<tr>
<td></td>
<td>• Negligent driving causing death (<a href="https://example.com">Traffic Act 1925 (Tas) s 32(2A)</a>) – 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 (<a href="https://example.com">Traffic Act 1925 (Tas) s 32(2B)</a>) – 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><strong>England and Wales</strong></td>
<td>• Manslaughter – life.</td>
</tr>
<tr>
<td></td>
<td>• Causing death by dangerous driving (<a href="https://example.com">Road Traffic Act 1988 (UK) s 1)</a> – 14 years imprisonment.</td>
</tr>
<tr>
<td></td>
<td>• Causing death by careless driving when under the influence of drugs or alcohol (<a href="https://example.com">Road Traffic Act 1988 (UK) s 3A)</a> – 14 years imprisonment.</td>
</tr>
<tr>
<td></td>
<td>• Causing serious injury by dangerous driving (<a href="https://example.com">Road Traffic Act 1988 (UK) s 1A)</a> – 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 (<a href="https://example.com">Road Traffic Act 1988 (UK) ss 2B, 3ZA)</a> – 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 (<a href="https://example.com">Road Traffic Act 1988 (UK) s 3ZB)</a> – 2 years imprisonment.</td>
</tr>
<tr>
<td></td>
<td>• Wanton and furious driving (<a href="https://example.com">Offences Against the Person Act 1861 (UK) s 35)</a> – 2 years imprisonment.</td>
</tr>
<tr>
<td><strong>New Zealand</strong></td>
<td>• Manslaughter (<a href="https://example.com">Crimes Act 1961 (NZ) s 177)</a> – life imprisonment.</td>
</tr>
<tr>
<td></td>
<td>• Dangerous driving causing death (<a href="https://example.com">Land Transport Act 1988 (NZ) ss 7, 36AA)</a> – 10 years imprisonment or a fine not exceeding $20,000.</td>
</tr>
<tr>
<td></td>
<td>• Causing death while committing drink driving offence (<a href="https://example.com">Land Transport Act 1988 (NZ) s 61(3AA)</a> – 10 years imprisonment or a fine not exceeding $20,000.</td>
</tr>
<tr>
<td></td>
<td>• Causing bodily injury while committing drink driving offence (<a href="https://example.com">Land Transport Act 1988 (NZ) s 61(3)</a> – 5 years imprisonment or a fine not exceeding $20,000.</td>
</tr>
<tr>
<td></td>
<td>• Dangerous driving causing injury (<a href="https://example.com">Land Transport Act 1988 (NZ) ss 7, 36)</a> – 5 years imprisonment or a fine not exceeding $20,000.</td>
</tr>
<tr>
<td></td>
<td>• Causing death while committing drink driving offence (<a href="https://example.com">Land Transport Act 1988 (NZ) s 62)</a> – 3 years imprisonment or a fine not exceeding $10,000.</td>
</tr>
<tr>
<td></td>
<td>• Aggravated careless driving causing injury or death (<a href="https://example.com">Land Transport Act 1988 (NZ) s 39)</a> – 3 years imprisonment or a fine not exceeding $10,000.</td>
</tr>
<tr>
<td></td>
<td>• Careless driving causing injury or death (<a href="https://example.com">Land Transport Act 1988 (NZ) ss 8, 38)</a> – 3 months or a fine not exceeding $4500.</td>
</tr>
</tbody>
</table>
Appendix B: Jurisic and Whyte guideline judgments

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 impermissibly 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:

> “(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.

> (2) 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.”
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.

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.”

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

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.

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.”

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”.

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.

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 Mulighan J. This appears to me to perform a similar function to the formulation “abandoned responsibility for his or her own conduct” in *Jurisic*.

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.

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*.

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.

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

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.
Appendix B: Jurisic and Whyte guideline judgments

(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 Hallocoélu* (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 Lambros* (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 Hallockglo* 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.
Appendix C: Vehicular crashes on Tasmanian roads involving injury to vulnerable road users

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<th>Injury</th>
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<th>2007</th>
<th>2008</th>
<th>2009</th>
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<th>2011</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
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<td>4</td>
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<td>3</td>
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Source: Unpublished data, Department of State Growth

704 Most, if not all, of what are classified as single road-user pedestrian crashes are situations where a driver has been run over by their own vehicle, usually in cases where they get out of their car to open a gate or garage door and the car rolls into them.
### TABLE C2 – BICYCLIST INJURY, TASMANIA, 2005–15

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Source: Unpublished data, Department of State Growth
### TABLE C3 – MOTORCYLIST INJURY, TASMANIA, 2005–2015

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*Source: Unpublished data, Department of State Growth*