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**DIRECTOR'S CHAMBERS**



**ODPP**  
New South Wales

YOUR REFERENCE

DATE

10 May 2019

The Hon James Wood AO QC  
Chairperson  
NSW Sentencing Council  
Level 3, Henry Deane Building  
20 Lee Street  
SYDNEY NSW 2000

**By email:** [sentencingcouncil@justice.nsw.gov.au](mailto:sentencingcouncil@justice.nsw.gov.au)  
**Attention:** Joseph Waugh

Dear Mr Wood,

**Repeat Traffic Offenders**

Thank you for the opportunity to respond to the issues raised in the Consultation Paper entitled "Repeat Traffic Offenders" issued in December 2018.

Preliminary Remarks

The vast majority of traffic offences are prosecuted by the Police Prosecution service. In large part, the ODPP does not conduct such matters other than where they are related to a more serious matter which the ODPP is prosecuting, or where the ODPP is the respondent in an appeal against conviction and/or sentence in a traffic matter in the District Court. The key area of involvement for the ODPP in traffic matters is in indictable matters where death or serious injury has been occasioned by driving. These offences represent a very small proportion of the traffic matters dealt with by NSW courts. The ODPP also regularly conducts summary hearings for traffic matters where death or grievous bodily harm was occasioned.

As a result, the experience of ODPP lawyers of the operation of the present penalty regime for recidivist traffic offenders, and our ability to gauge its effectiveness, is somewhat limited. Moreover, given the ODPP's involvement in the District Court appellate jurisdiction, the ODPP sees a disproportionately high number of matters in which the penalty imposed was considered harsh. The ODPP has little visibility of the (majority of) matters in which the offender accepts the punishment handed down in the local court. On the other hand, the ODPP does conduct the serious matters in which grievous harm or death has resulted from driving. It is these offences which may involve a recidivist traffic offender in which a risk to the community has translated into actual harm.

One comment that can be made at the outset is that the present regime of sentencing outcomes for recidivist traffic offenders is unduly complex. In the District court, a jurisdiction where

these offences are not the bread and butter of the judge nor of the prosecutor, this presents real challenges. The Road Transport Act 2013 would without doubt benefit from being rationalised to create a simplified system of offences and penalties.

The Consultation Paper seeks responses in relation to numerous questions. Given the ODPP's limited involvement in the criminal justice system's response to traffic offenders, I will confine my responses to those questions where ODPP experience justifies a comment.

## **Comments**

For convenience, I reproduce below the questions where the ODPP wishes to make a comment.

### **1.1 Identifying repeat offending**

- (1) Is the current list of offences that make up repeat offending for the purposes of the *Road Transport Act 2013* (NSW) appropriate?**
- (2) If not, what changes should be made to this list of offences?**
- (3) What other ways are there to identify repeat traffic offending that gives rise to an ongoing risk of harm to the community?**

**ODPP Comment:** It is the view of the ODPP that the current list of offences which can lead to a determination that an offence is a second or subsequent offence is appropriate and does not need to be expanded.

### **1.2 Dealing with repeat driving offenders**

#### **Considering the existing and possible sentencing and other available responses to repeat driving offenders (outlined in chapters 4-6):**

- (1) What options are appropriate for sentencing repeat driving offenders who may pose an ongoing risk to the community?**
- (2) What sorts of offenders should they target?**
- (3) What changes could be made to the law to make it more effective in dealing with repeat driving offenders who may pose an ongoing risk to the community?**

**ODPP Comment:** The ODPP sees merit in differentiating between "second" and "subsequent" offenders rather than bundling them together. An approach in which the severity of the penalty escalates if the offender commits a third, or fourth offence could provide greater deterrent effect than the present penalty scheme which plateaus after two offences.

The proposal to make the attendance at a specialist course one of the options available to magistrates sentencing for repeat traffic offenders is attractive, however it would need to target the factors particular to each offender.

## **2. Driving offences involving harm or a high risk of harm**

### **2.1 Driving offences resulting in death**

**(1) Are the maximum penalties for driving offences resulting in death appropriate? If not, what should they be?**

**(2) Are the sentencing outcomes for driving offences resulting in death appropriate? Bearing in mind the availability of new sentencing orders, what should the sentencing outcomes be, and how could they be achieved?**

### **2.2 Driving offences resulting in injury**

**(1) Are the maximum penalties for driving offences causing injury appropriate? If not, what should they be?**

**(2) Are the sentencing outcomes for driving offences causing injury appropriate? Bearing in mind the availability of new sentencing orders, what should the sentencing outcomes be, and how could they be achieved?**

**ODPP Comment:** The present penalties for driving in a manner dangerous occasioning death or grievous bodily harm, including the aggravated forms, range from 7 years to 14 years. The offence is a table 1 offence where death is not occasioned.

The guideline judgment in *Whyte* (2002) 55 NSWLR 252 indicated that for the non-aggravated offence 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. An increase on those indicative sentences is to be factored in where the offence is the aggravated form.

The ODPP is of the view that the presently available penalties for offences under sec 52A are appropriate. The guideline judgment has the effect that youth, good character and a clear record are not afforded the same weight for dangerous driving offences as they are for other offences. Prior to this, the sentences for sec 52A offences tended to be overly lenient as many offenders presented with strong subjective factors which operated to reduce the sentence to a point where it lost its deterrent value.

One aspect of this bears comment. The advertising campaigns which are designed to minimise driving offences which entail a high risk of injury (eg PCA, speeding, mobile phone use) often focus on the likelihood of being caught by police. Many in the community believe that the loss of their licence and a heavy fine is the worst outcome they will face if they are detected. Not many turn their mind to the possibility of going into custody as a possible outcome. The deterrent effect of the custodial penalties which are to be imposed following *Whyte* is not achieved without community awareness that full-time custody will be the likely outcome, even for a person of good standing within the community, if speed or their level of intoxication causes them to harm or even kill another person while driving. There is scope for community awareness raising about this reality. In addition to public advertising campaigns, such education could be made mandatory for second time offenders committing driving offences which carry a high risk of injury.

### **2.3 Identifying other offences that carry a high risk of harm**

**(1) What other driving offences should be considered in the group of offences carrying a high risk of harm?**

**(2) Are the maximum penalties for these other offences appropriate? If not, what should they be?**

**(3) Are the sentencing outcomes for these other offences appropriate? Bearing in mind the availability of new sentencing orders, what should the sentencing outcomes be, and how could they be achieved?**

**ODPP Comments:** The ODPP considers that the offences identified as carrying a high risk of harm are appropriate. In relation to some, in particular the use of a mobile phone, it can be difficult to attribute a high risk of harm to that offence because there is usually no evidence to prove that it was the use of the device which caused a collision. However, the danger inherent in using a mobile phone while driving is so high as to warrant its inclusion.

There is a significant number of offences prosecuted by this Office in which serious harm or death is caused by driving in circumstances where inattention is involved. In the ODPP's experience, crash investigators and prosecutors often suspect that a mobile phone may have been the cause of the driver's inattention however that can be impossible to prove. Further research on driver distraction caused by mobile phone use is warranted, including an analysis of whether technology could offer investigators the means of ascertaining whether mobile phone use was at play in a collision.

### **2.4 Speeding offences**

**(1) Are the maximum penalties for high range speeding offences appropriate? If not, what should they be?**

**(2) Are the sentencing outcomes for high range speeding offences appropriate? Bearing in mind the availability of new sentencing orders, what should the sentencing outcomes be, and how could they be achieved?**

**ODPP Comments:** The ODPP considers that the penalties for speeding offences are in the main appropriate.

### **2.5 Alcohol and drug-related driving offences**

**(1) Are the maximum penalties for alcohol and drug related driving offences appropriate? If not, what should they be?**

**(2) Are the sentencing outcomes for alcohol and drug related driving offences appropriate? Bearing in mind the availability of new sentencing orders, what should the sentencing outcomes be, and how could they be achieved?**

**ODPP Comments:** The ODPP considers that the penalties for alcohol and drug-related offending are in the main appropriate.

The ODPP is aware of concern in some quarters about the recent introduction of penalty notices being issued for the offences of Low Range PCA and driving with the presence of an illicit

drug. One of the justifications for the new measures was the high proportion of section 10s which were being ordered by courts in such matters, and the fact that the offending driver would retain their licence until a court had determined otherwise. Under the new scheme, the driver can still elect to have the matter dealt with at court however his or her licence will be automatically suspended. The ODPP is of the view that the immediacy of the suspension and use of the penalty notice is likely to act as a significant deterrent to drink driving, in circumstances where the community perception may have been spreading that PCA offences were often able to be “beaten” at court.

### **3. Sentencing principles**

#### **3.1 Guideline judgments**

**(1) Do the guideline judgments on dangerous driving and high range prescribed concentration of alcohol continue to be appropriate?**

**(2) If not, how should they be changed?**

**(3) What other driving offences could be subject to guideline judgments?**

**(4) What should those guidelines contain?**

**ODPP Comment:** The 2004 Guideline in relation to High Range PCA offending continues to provide appropriate guidance to courts in sentencing these types of matters.

It is noted that since 2004, the community has witnessed the advent of far more options for paid transportation which will enable drivers to reach their destination other than by getting behind the wheel if they become inebriated. Whereas in 2004 the only options available were public transport and taxis, both of which could on occasion be very limited in their availability, there are now numerous app-based ride-sharing services available and public transport continues to have a greater coverage than was the case 15 years ago. There are therefore fewer circumstances in which a driver should be severely inconvenienced by not being able to drive their vehicle.

Similarly, the 2002 Guideline Judgment on dangerous driving in *Whyte* continues to be an appropriate guide to judges sentencing offenders for that offence. It is only worth considering whether the *Whyte* guideline needs to be updated to include as an aggravating factor the degree to which the use of a smart device was the cause of the inattention in the driver leading to the collision. The guideline presently refers to such matters as speed and erratic driving as aggravating factors. In more recent times, phone use may also be involved. There is no principled reason why a speeding driver should be treated any more seriously than a driver who is engaging in texting (for example) while driving.

The use of mobile phones has expanded exponentially over the last 17 years since 2002. The first iPhone was released in 2007. Mobile data is now far more available and affordable. The law has arguably not kept up with the trends.

### **3.2 Objective circumstances**

- (1) Are the sentencing principles that relate to objective circumstances appropriate for dealing with repeat driving offenders?**
- (2) If not, what changes should be made and how could they be achieved?**

**ODPP Comment:** The ODPP does not consider that the objective circumstances appropriate for dealing with repeat driving offenders need to be changed.

### **3.3 Subjective circumstances**

- (1) Are the sentencing principles that relate to subjective circumstances appropriate for dealing with repeat driving offenders?**
- (2) If not, what changes should be made and how could they be achieved?**

**ODPP Comment:** The ODPP does not consider that the subjective circumstances appropriate for dealing with repeat driving offenders need to be changed.

### **3.5 Repeat offending**

- (1) Are the sentencing principles relating to repeat offending appropriate for dealing with repeat driving offenders?**
- (2) If not, what changes should be made and how could they be achieved?**

**ODPP Comment:** There is an issue in relation to sec 21A(2) of the Crimes (Sentencing Procedure) Act which is identified at para 3.69ff of the Consultation Paper. The ODPP would support an amendment to that section so that rather than referring to “record of previous convictions” at sec 21A(2)(e) the section read “previous offending”. In the context of the significant number of section 10 (no conviction recorded) orders made in the local court for traffic offences which offences carry a high risk of harm to others, the present wording restricts the ability of a sentencing court to take into account offences where there was a finding of guilt which resulted in a section 10 order.

## **5. Suspension, disqualification and unauthorised driving**

### **5.1 Licence suspension**

- (1) Does the system of licence suspension for driving offences adequately deal with repeat traffic offenders?**
- (2) How could the current system be adjusted to deal with repeat traffic offenders more effectively?**

**ODPP Comment:** While the ODPP is cognisant that the system of demerit point and automatic suspensions can be onerous on those whose employment or family circumstances require them to have a licence, the ODPP supports the continuation of the system. One advantage is the direct link between the offending conduct and the suspension of the licence. It is difficult to envisage any other practical means of penalising traffic offending which would be likely to be

more effective. Making driver education more available as a component of the sentence may also have some benefit. It can presently only be imposed where the demerit limit has been exceeded twice in 5 years for unrestricted drivers, which is a small percentage of drivers.

## **5.2 Licence suspension**

**(1) Does the system of licence suspension for driving offences adequately deal with repeat traffic offenders?**

**(2) How could the current system be adjusted to deal with repeat traffic offenders more effectively?**

**ODPP Comment:** One of the proposals raised in the course of discussion in the Consultation Paper is the possible introduction of a “good behaviour licence” which would be an option available in lieu of a section 10 order (para 5.54). The proposal would allow the offender to keep driving under strict conditions, with the potential for a lengthier disqualification period than would have otherwise have applied, if the conditions are breached. The ODPP supports introducing this kind of flexibility into the sentencing options available to judicial officers. It is our experience that some District Court judges hearing severity appeals on traffic matters where there is a mandatory minimum period of disqualification for conviction, are persuaded to substitute a section 10 order for the local court conviction in order to avoid the application of the disqualification period. This option would provide an attractive alternative however it should only be available in cases where the court would otherwise have awarded a section 10.

In the same vein, the proposal to allow judicial officers to order a period of disqualification where an offender is found guilty but no conviction is recorded (they are given a section 10 order) would be useful where the court is persuaded that a conviction is not warranted for reasons unrelated to a proven manner of illegal driving.

## **6.4 Specialist traffic courts or lists**

**(1) Would a specialist traffic court or list be effective in dealing with repeat traffic offending? If so, why? If not, why not?**

**(2) What type of specialist traffic court or list could be introduced in NSW to deal with repeat traffic offending?**

**ODPP Comment:** The discussion in the Consultation Paper about specialist traffic courts suggests that there is as yet no firm data which justifies their introduction. The sheer number of driving-related matters which pass through the local courts would make it difficult to limit participation to offenders who would benefit from the programs offered by such a jurisdiction. The costs would be significant. The ODPP has been involved in the Drug Court from its inception and notes that it has enjoyed significant success in lowering recidivism among drug offenders. It is easier in that context however to set and enforce appropriate pre-conditions for entry into the program given, among other things, the smaller pool of potential participants. At this point the ODPP believes that further study of the viability of a specialist traffic court and its potential to have a positive impact on recidivist traffic offenders is warranted before that proposal can be supported.

### **6.5 Prevention courses**

- (1) How effective are the various prevention courses for traffic offenders in NSW?**
- (2) What could be done to make existing courses more effective in reducing recidivist traffic offending?**
- (3) What further courses could be introduced to help reduce recidivist traffic offending? In what circumstances could they be most effectively deployed?**

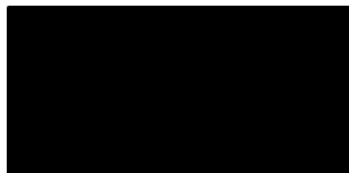
**ODPP Comment:** The ODPP supports the use of courses and education as part of the suite of measures available to reduce recidivism in traffic offending. The studies referred to in the Consultation Paper point to the effectiveness of such courses in changing behaviour. The ODPP would support the increased availability of education programs which would be an option available to sentencing courts in combination with other sentencing outcomes. The costs of such programs are likely to be significant and while the ODPP does not comment on the best method to achieve the necessary funding, it does seem possible that any costs could largely be off-set by savings associated with reduced levels of traffic-related injury and, as a consequence, commensurately fewer court proceedings.

### **6.6 Stricter penalties**

- (1) Should stricter penalties be introduced for repeat traffic offenders?**
- (2) If so, what offences should be subject to these stricter penalties?**

**ODPP Comment:** The ODPP is not persuaded that stricter penalties, including higher fines, longer periods of incarceration or more onerous supervision conditions will result in a reduction in recidivist traffic offending.

Yours faithfully,



**Peter McGrath SC**  
**Acting Director of Public Prosecutions**