



Sentencing Council
Justice & Attorney General

STANDARD NON-PAROLE PERIODS FOR DANGEROUS DRIVING OFFENCES

A Report of the NSW Sentencing Council

January 2011

Standard non-parole periods for dangerous driving offences

A report of the NSW Sentencing Council pursuant to section 100J(1)(c) of the Crimes (Sentencing Procedure) Act 1999.

The views expressed in this report do not necessarily reflect the private or professional views of individual Council members or the views of their individual organisations. A decision of the majority is a decision of the Council – Schedule 1A, clause 12 *Crimes (Sentencing Procedure) Act 1999* (NSW).

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TABLE OF CONTENTS

CHAPTER 1: INTRODUCTION TO THE INQUIRY

BACKGROUND	7
TERMS OF REFERENCE	8

CHAPTER 2: THE STANDARD NON-PAROLE PERIOD SCHEME

BACKGROUND	11
Prescribed SNPP levels	12
Application of the SNPP scheme	14
The meaning and use of SNPP	14
EFFECTS OF THE SNPP SCHEME	15

CHAPTER 3: DANGEROUS DRIVING OFFENCES

BACKGROUND	17
STATUTORY SCHEME	18
SCOPE OF THE OFFENCE	21
SENTENCING GUIDELINE JUDGMENTS	23
Moral culpability and abandonment of responsibility	26
Momentary inattention or misjudgment	27
OTHER SENTENCING CONSIDERATIONS	29
AGGRAVATING FACTORS.....	29

MITIGATING FACTORS.....	31
Section 21A of the Crimes (Sentencing Procedure) Act 1999 (NSW).....	32

CHAPTER 4: STANDARD NON-PAROLE PERIODS FOR DANGEROUS DRIVING OFFENCES—SUMMARY OF SUBMISSIONS

SUBMISSIONS IN FAVOUR.....	35
SUBMISSIONS AGAINST	35
SNPP scheme in general	35
Dangerous driving offences ('s 52A offences') in particular	36
LEVEL OF SNPP FOR DANGEROUS DRIVING OFFENCES	38
IMPLICATIONS OF SETTING SNPP FOR S 52A OFFENCES FOR EXISTING GUIDELINE JUDGMENTS FOR DANGEROUS DRIVING.....	38

CHAPTER 5: THE COUNCIL'S VIEW

RELEVANT FACTORS IN DANGEROUS DRIVING OFFENCES.....	39
SCHEME OF OFFENCES	39
RELEVANCE OF AN APPLICABLE GUIDELINE.....	40
COMPLEXITY OF SENTENCING FOR DANGEROUS DRIVING OFFENCES.....	45
RECOMMENDATION	47

ANNEXURES

ANNEXURE A: Significant amendments to the offences listed under the Table in Division 1A of Part 4 of the <i>Crimes (Sentencing Procedure) Act 1999 (NSW)</i> and the Table itself between 1 February 2003 and 28 May 2010.....	49
ANNEXURE B: JIRS statistics – dangerous driving and aggravated dangerous driving offences.....	69

CHAPTER 1: INTRODUCTION TO THE INQUIRY

BACKGROUND	7
TERMS OF REFERENCE	8

BACKGROUND

In August 2008 the Council published its report, *Penalties relating to Sexual Assault Offences in NSW* (Volume 1).² Chapter 3 of that report considered the maximum penalties for a range of sexual offences and the standard non-parole period (SNPP) scheme, in the context of those sexual offences. In relation to the SNPP scheme the Council made a number of recommendations, suggesting that consideration be given to:

- Monitoring the rates of offending and sentencing patterns for sexual offences not contained in the Table of SNPPs, with a view to their possible inclusion in the Table at a later date (Recommendation 22).
- Confining the relevant provisions of the SNPP regime to adult offenders (Recommendation 23).
- Giving consideration at the time of any wholesale review of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (the CSPA) to standardising the SNPPs for sexual (and other) offences within a band of 40-60% of the available maximum penalty, subject to the possibility of individual exceptions, by reference to an assessment of the incidence of offending and special considerations relating thereto (Recommendation 24).
- Consulting with the NSW Sentencing Council regarding potential additions to the SNPP scheme, involving the level or levels at which the SNPP might be appropriately set (Recommendation 25).
- Giving consideration to the establishment of a transparent mechanism by which a decision is made to include a particular offence in the Table, and by which the relevant SNPP is set (Recommendation 26).
- Consulting with the NSW Sentencing Council regarding the identification of sexual offences that might justify an application for a guideline judgment, following its ongoing monitoring of relevant sentencing patterns (Recommendation 27).

² NSW Sentencing Council, *Penalties relating to Sexual Assault Offences in NSW* (2008) vol 1.

The Council's recommendation that juvenile offenders be excluded from the SNPP scheme³ was implemented by an amendment to the CSPA, which took effect on 1 January 2009.⁴ Section 54D(3) of the CSPA now provides that:

This Division [Part 4 Division 1A (Standard non-parole periods)] does not apply to the sentencing of an offender in respect of an offence if the offender was under the age of 18 years at the time the offence was committed.

The balance of the recommendations made in relation to SNPPs have been referred back to the Council and form the basis of the current inquiry.

TERMS OF REFERENCE

On 30 March 2009, the Attorney General requested that the Council examine SNPPs and guideline judgments, in accordance with the following terms of reference:

1. Monitor the rates of offending and sentencing patterns for sexual offences not contained in the Table of SNPPs, with a view to their possible inclusion in the Table at a later date;
2. Give consideration to standardising the SNPPs for sexual (and other) offences within a band of 40–60% of the available maximum penalty, subject to the possibility of individual exceptions, by reference to an assessment of the incidence of offending and special considerations relating thereto;
3. Consider potential additions to the SNPP scheme, involving the level or levels at which the SNPP might be appropriately set;
4. Give consideration to the establishment of a transparent mechanism by which a decision is made to include a particular offence in the Table, and by which the relevant SNPP is set; and
5. Consider the identification of sexual offences that might justify an application for a guideline judgment, following its ongoing monitoring of relevant sentencing patterns.

In June 2010 the Attorney General requested that, as part of the SNPP reference, the Council review specific dangerous driving offences with a view to their possible inclusion in the SNPP

³ Adopting the submission by the NSW Department of Juvenile Justice (as it then was) that the SNPP regime should not apply to juveniles because of their developmental stage of maturation and the need to preserve judicial discretion in sentencing young offenders, which emphasises rehabilitation.

⁴ Crimes Amendment (Sexual Offences) Act 2008 (NSW) sch 2.4 [4].

scheme. While this issue falls within the ambit of Term 3, for convenience it will be considered as a discrete term of reference, as follows:

6. Consider whether the offences of dangerous driving occasioning death or grievous bodily harm (and the applicable aggravated offences) should be included in the SNPP scheme; if so, at what level should the SNPPs be set, and what, if any, are the implications for the existing guideline judgment in respect of these offences.

This report deals only with this issue and not with the wider questions concerning the SNPP scheme as a whole that have been referred to the Council.

CHAPTER 2: THE STANDARD NON-PAROLE PERIOD SCHEME

BACKGROUND	11
Prescribed SNPP levels	12
Application of the SNPP scheme	14
The meaning and use of SNPP	14
EFFECTS OF THE SNPP SCHEME	15

BACKGROUND

The SNPP scheme was introduced by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW) and took effect on 1 February 2003.⁵ It prescribes the SNPPs for a number of specified serious offences set out in the Table to Division 1A of Part 4 of the CSPA, (SNPP Table).⁶ The SNPP is defined as ‘the non-parole period for an offence in the middle of the range of objective seriousness for offences in that category’.⁷ It ‘provides a reference point or benchmark within the sentencing spectrum’ for a particular offence category.⁸

For present purposes it is unnecessary to examine the SNPP scheme in any significant detail having regard to the limited issue that is being addressed and the fact that the Council has a broader reference on the operation of the scheme generally. It is enough to note that, since its introduction, the SNPP scheme has been widened in its application by the inclusion of offences that did not originally come within the scheme. One offence has been removed from the scheme, namely the offence of unauthorised possession or use of a firearm that is not a prohibited firearm or pistol.

This offence carries a maximum penalty of five years imprisonment.⁹ It was thought that the offence was not of sufficient seriousness to warrant its inclusion in the scheme.

⁵ The Act was assented to on 22 November 2002 and commenced operation 1 February 2003: New South Wales, Government Gazette No 263 of 20 December 2002, 10,741.

⁶ Crimes (Sentencing Procedure) Act 1999 (NSW) s 54A.

⁷ Crimes (Sentencing Procedure) Act 1999 (NSW) s 54A(2).

⁸ New South Wales, Parliamentary Debates, Legislative Assembly, 23 October 2002, 5816 (the Hon Bob Debus MP, Attorney General).

⁹ Section 7 of the Firearms Act 1966 (NSW) was amended to separate the offence of unauthorised possession or use of a prohibited firearm or pistol from the less serious offence of unauthorised possession or use of other firearms (now s 7A of the Firearms Act 1966 (NSW)), and the latter offence was effectively removed from the SNPP Table. A jury can now find the accused guilty of an alternative offence under s 7A of that Act: Crimes Legislation Further Amendment Act 2003 (NSW) s 3 (sch 5[2]–[5]) (commenced on 14 February 2004).

The present issue is whether the scheme should be widened further by the inclusion of certain serious driving offences that are found in the *Crimes Act 1900* (NSW). The current SNPPs and the maximum penalties for the SNPP offences are shown in the table that is Annexure A to this report.

The SNPP scheme was introduced by the Government to provide ‘further guidance and structure to judicial discretion’ and was ‘primarily aimed at promoting consistency and transparency in sentencing and also promoting public understanding of the sentencing process.’¹⁰ It was made clear that it was not a mandatory sentencing scheme, as had been proposed by the then Opposition.¹¹

The levels at which the SNPPs were set took into account a number of factors, as described in the second reading speech:

The standard non-parole periods set out in the Table to the bill have been set taking into account the seriousness of the offence, the maximum penalty for the offence and current sentencing trends for the offence as shown by sentencing statistics compiled by the Judicial Commission of New South Wales. The community expectation that an appropriate penalty will be imposed having regard to the objective seriousness of the offence has also been taken into account in setting standard non-parole periods. The bill provides in section 54A(2) that the standard non-parole period for an offence represents the non-parole period for an offence in the middle of the range of objective seriousness for such an offence.¹²

Prescribed SNPP levels

The SNPPs are set at different levels—ranging from 21.4% of the maximum penalty (for items 20 and 24 in the Table) to 80% of the maximum penalty (for item 9B). Even where offences have the same maximum penalty there is a significant disparity in the levels at which the SNPPs are set.

For example, items 2, 3, 4, 10, 11 and 13 of the Table are offences with the same maximum penalty of 25 years imprisonment; however, the SNPPs range from seven to 15 years, with the SNPP for item 10 more than doubling that for items 4, 11 and 13:

¹⁰ New South Wales, Parliamentary Debates, Legislative Assembly, 23 October 2002, 5813 (the Hon Bob Debus MP, Attorney General).

¹¹ Ibid.

¹² Ibid.

Item	Offence	Maximum penalty	SNPP
2	Section 26 of the <i>Crimes Act 1900</i> (conspiracy to murder)	25 years	10 years
3	Sections 27, 28, 29 or 30 of the <i>Crimes Act 1900</i> (attempt to murder)	25 years	10 years
4	Section 33 of the <i>Crimes Act 1900</i> (wounding etc with intent to do bodily harm or resist arrest)	25 years	7 years
10	Section 66A (1) of the <i>Crimes Act 1900</i> (sexual intercourse—child under 10) ¹³	25 years	15 years
11	Section 98 of the <i>Crimes Act 1900</i> (robbery with arms etc and wounding)	25 years	7 years
13	Section 112 (3) of the <i>Crimes Act 1900</i> (breaking etc into any house and committing serious indictable offence in circumstances of special aggravation)	25 years	7 years

Similar disparity is evident with respect to the offences set out in items 4B, 4C, 9B and 14 in the Table: each offence carries a maximum penalty of 10 years imprisonment and yet the SNPP for item 9B is at least double that for the other items:

Item	Offence	Maximum penalty	SNPP
4B	Section 35 (2) of the <i>Crimes Act 1900</i> (reckless causing of grievous bodily harm)	10 years	4 years
4C	Section 35 (3) of the <i>Crimes Act 1900</i> (reckless wounding in company)	10 years	4 years
9B	Section 61M (2) of the <i>Crimes Act 1900</i> (aggravated indecent assault)	10 years	8 years
14	Section 154C (1) of the <i>Crimes Act 1900</i> (taking motor vehicle or vessel with assault or with occupant on board)	10 years	3 years

¹³ Item 10 of the SNPP Table also covers s 66A(2), which has a maximum penalty of life imprisonment.

On the issue of disparity, Peter Johnson SC (as he then was) noted that:

There are several offences with the same maximum penalty, but differing standard non-parole periods ... These differing statutory numerical indicators may serve to demonstrate that some offences are regarded by the legislature as being more serious than others, although these offences have the same maximum penalty. Such an approach would involve concepts, which are new to the law of sentencing.¹⁴

There have also been alterations to the length of the SNPP prescribed for various offences since the introduction of the scheme. A table summarising the various amendments made to Table offences since the introduction of the SNPP scheme is set out at Annexure B.

Application of the SNPP scheme

Under the CSPA, the SNPP scheme does not apply to:

- offences dealt with summarily;¹⁵
- offenders sentenced to life imprisonment or another indeterminate period, or detention under the *Mental Health (Forensic Provisions) Act 1990* (NSW);¹⁶ and
- offenders less than 18 years of aged at the time of the offence.¹⁷

A question can be raised as to the width of the application of the SNPP scheme to offences that are not specifically mentioned in the Table but are related to those that are. For example, it has been held that the scheme does not apply to an attempt to commit a Table offence,¹⁸ or an offence of conspiracy to commit a Table offence.¹⁹ Whether the scheme applies to the offence of aiding and abetting a Table offence has not been “authoritatively determined.”²⁰

The meaning and use of SNPP

For present purposes it is unnecessary to investigate in detail how the scheme operates and the manner in which a sentencing court is to approach the task of sentencing of an offence that appears in the Table. In *R v Way*,²¹ the Court of Criminal Appeal (the CCA) considered the

¹⁴ Johnson, P., ‘Reforms to New South Wales Sentencing Law: The Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002’ (2003) 6 *Judicial Review* 314, 335.

¹⁵ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D(2).

¹⁶ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D(1).

¹⁷ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D(3).

¹⁸ *DAC v The Queen* [2006] NSWCCA 265, [9]–[10].

¹⁹ *Diesing v The Queen* [2007] NSWCCA 326.

²⁰ *SAT v The Queen* [2009] NSWCCA 172, [56] (Buddin J, with whom Grove and Howie JJ agreed).

²¹ [2004] NSWCCA 131 ;(2004) 60 NSWLR 168.

application of the SNPP scheme in detail. A number of decisions of that Court have since summarised and refined the steps that the sentencing court should undertake in determining such a sentence and the need to explain how the sentence was derived in some greater detail than might be necessary in sentencing for an offence that does not fall within the Table.²²

Strictly speaking, the SNPP applies only to a case in the middle-range of objective seriousness where the offender was convicted after trial.²³ But where the offender pleads guilty, the SNPP remains ‘a reference point, or benchmark, or sounding board, or guidepost, along with other extrinsic aids such as authorities, statistics, guideline judgments and the specified maximum penalty, as are applicable and relevant.’²⁴

The SNPP scheme, of course, does not operate in isolation from sentencing principles derived from the common law or found in the various provisions of the CSPA. One of the relevant sentencing factors that operates in conjunction with the SNPP scheme is of particular significance to the present issue: the existence of a guideline judgment issued by the CCA in respect of the sentencing for a particular offence. This was recognised in *R v Way*.²⁵

It is unnecessary for present purposes to examine in detail how the SNPP operates in conjunction with the sentencing principles found in the common law or in the CSPA. It is sufficient to note that it was not intended that the scheme would remove the sentencing judge’s discretion or interfere with normal sentencing principles. The SNPP for a particular offence is merely a further indication of the appropriate sentence in addition to the maximum penalty prescribed for the offence. The more serious the offence, the more impact will the maximum penalty have on the determination of the sentence rather than relevant SNPP.²⁶

EFFECTS OF THE SNPP SCHEME

There is a plethora of decisions in the CCA concerned with the operation of the scheme and its implementation by a sentencing judge. It is unnecessary to investigate those decisions for present purposes. But what those cases reveal is the complexity of sentencing in this State caused largely by the introduction of s 21A of the CSPA and the SNPP scheme. They also note the difficulty in applying the apparent illogical and inconsistent SNPPs imposed for certain offences. They further reveal that there has been an increase in the level of sentences for some offences as a result of

²² R v AJP [2004] NSWCCA 434; 150 A Crim R 575 and MLP v R [2006] NSWCCA 271; 164 A Crim R 93 at [33].

²³ R v Way [2004] NSWCCA 131 ;(2004) 60 NSWLR 168.

²⁴ [2004] NSWCCA 131 ;(2004) 60 NSWLR 168 at [122].

²⁵ [2004] NSWCCA 131 ;(2004) 60 NSWLR 168 at [55].

²⁶ R v Mitchell and Gallagher [2007] NSWCCA 296; 177 A Crim R 94.

the scheme.²⁷ This last consequence is notwithstanding that the introduction of the scheme was not intended to increase sentences for the offences falling within the Table.²⁸

There have been a number of studies considering the effect of the scheme on sentences.²⁹ The Sentencing Council has previously reported on the effects of sentences imposed between 1 February 2003 and 31 March 2007.³⁰ Again it is unnecessary for present purposes to consider this report and other studies in detail. But they do indicate both an increase in sentences for some offences for which there is a SNPP but also an increase in consistency in sentencing for some of the Table offences. There was also an increase in the rate of guilty pleas for Table offences while the plea rate for other offences remained stable.

²⁷ See for example *Des Rosier v The Queen* (2006) 159 A Crim R 549 at [36].

²⁸ *R v Way* [2004] NSWCCA 131 ;(2004) 60 NSWLR 168 [141]–[142].

²⁹ Poletti, P. and Vignaendra, S., 'Trends in the Use of s 12 Suspended Sentences (Sentencing Trends & Issues No 34, Judicial Commission of New South Wales, 2005) (online). Poletti, P. and Donnelly, H., 'The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales' (Judicial Commission of NSW, Monograph No 33, 2010).

³⁰ NSW Sentencing Council, Report on Sentencing Trends and Practices 2006–2007.

CHAPTER 3: DANGEROUS DRIVING OFFENCES

BACKGROUND	17
STATUTORY SCHEME	18
SCOPE OF THE OFFENCE	21
SENTENCING GUIDELINE JUDGMENTS	23
Moral culpability and abandonment of responsibility	26
Momentary inattention or misjudgment	27
OTHER SENTENCING CONSIDERATIONS	29
AGGRAVATING FACTORS.....	29
MITIGATING FACTORS	31
Section 21A of the Crimes (Sentencing Procedure) Act 1999 (NSW).....	32

BACKGROUND

Before the repeal of the offence of culpable driving in 1994, it had the following maximum penalties:

- where death was occasioned—five years imprisonment; and
- where grievous bodily harm was occasioned—three years imprisonment.

On 23 December 1994, the offence of culpable driving was replaced by several offences of dangerous driving with increased maximum penalties³¹—namely:

- dangerous driving occasioning death—10 years imprisonment;³²
- aggravated dangerous driving occasioning death—14 years imprisonment;³³

³¹ *Crimes (Dangerous Driving Offences) Amendment Act 1994* (NSW) s 3 (sch 1).

³² *Crimes Act 1900* (NSW) s 52A(1).

³³ *Crimes Act 1900* (NSW) s 52A(2).

- dangerous driving occasioning grievous bodily harm—seven years imprisonment;³⁴ and
- aggravated dangerous driving occasioning grievous bodily harm—11 years imprisonment.³⁵

The CCA held that significant increases in these statutory maximum penalties ‘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.’³⁶

STATUTORY SCHEME

The offence of dangerous driving is one offence in a statutory scheme of offences set out in the *Crimes Act* dealing with the infliction of injury by the use of a motor vehicle. In *R v Borkowski*,³⁷ Howie J stated:

[55] At the present time, apart from the offences of murder and manslaughter, the *Crimes Act* contains the following provisions: s 51A, predatory driving causing grievous bodily harm; s 52A, dangerous driving; s 53, furious driving; and s 54, negligent act causing grievous bodily harm. Section 52A contains the following offences: dangerous driving causing death, maximum penalty 10 years; aggravated dangerous driving causing death maximum penalty 14 years; dangerous driving causing grievous bodily harm, maximum penalty imprisonment for 7 years; and aggravated dangerous driving causing grievous bodily harm, maximum penalty imprisonment for 11 years. The circumstances of aggravation are set out in s 52A(7) and include: having a concentration of alcohol of at least 0.15; driving at more than 45 kph above the speed limit; driving to escape police pursuit; and driving while driving skills are very substantially impaired by the influence of a drug or drugs.

[56] As the law presently stands, there is a rational, logical and cohesive hierarchy of offences concerned with the infliction of death or serious injury by the use of a motor vehicle. The offences range from negligent driving causing grievous bodily harm (s 42(1)(b) of the *Road Transport (Safety and Traffic Management) Act* with a maximum penalty of 9 months imprisonment) through the driving offences in the *Crimes Act* to manslaughter by gross criminal negligence.

³⁴ *Crimes Act 1900* (NSW) s 52A(3).

³⁵ *Crimes Act 1900* (NSW) s 52A(4).

³⁶ *R v Slattery* (1996) 90 A Crim R 519, 524.

³⁷ [2009] NSWCCA 102.

All of these offences involve varying degrees of negligence, however the actual conduct may be described, ranging from a lack of care and proceeding through dangerousness to culpable negligence: *R v Buttsworth*.³⁸

There is a plethora of offences that may be considered as traffic infractions found in the various pieces of legislation dealing with the control of motor vehicles in general. Although some can be serious offences involving significant prison sentences, such as the offences of driving with more than the prescribed concentration of alcohol, these are summary offences, and, therefore, the SNNP scheme does not apply to them. Although the most serious offence that can be charged for death caused by the use of a motor vehicle, other than murder, is manslaughter, there is no SNNP applicable to that offence. The most serious offence generally charged in relation to death or injury caused by the use of a motor vehicle, and the one most likely to be incorporated into the SNNP scheme if appropriate, is the offence of dangerous driving under s 52A of the *Crimes Act*.

Section 52A(1)–(4) of the *Crimes Act 1900* (NSW) creates four dangerous driving offences as follows:

52A Dangerous driving: substantive matters

(1) Dangerous driving occasioning death

A person is guilty of the offence of dangerous driving occasioning death if the vehicle³⁹ 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,⁴⁰ 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.

³⁸ [1983] 1 NSWLR 658.

³⁹ A 'vehicle' is defined as '(a) any motor car, motor carriage, motor cycle or other vehicle propelled wholly or partly by volatile spirit, steam, gas, oil, electricity, or by any other means other than human or animal power, or (b) a horse-drawn vehicle [;] whether or not it is adapted for road use, but does not mean a vehicle used on a railway or tramway': *Crimes Act 1900* (NSW) s 52A(9).

⁴⁰ In this section, the term 'drug' has the same meaning as it has in the *Road Transport (Safety and Traffic Management) Act 1999* (NSW): *Crimes Act 1900* (NSW) s 52A(9). The *Dictionary to the Road Transport (Safety and Traffic Management) Act 1999* (NSW) defines 'drug' as: '(a) alcohol, and (b) a prohibited drug within the meaning of the *Drug Misuse and Trafficking Act 1985*, not being a substance specified in the regulations as being excepted from this definition, and (c) any other substance prescribed as a drug for the purposes of this definition'.

(2) Aggravated dangerous driving occasioning death

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

(3) Dangerous driving occasioning grievous bodily harm⁴¹

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.

For the purposes of the aggravated forms of the dangerous driving offences (s 52A(2) and (4)), the term 'circumstances of aggravation' is defined to mean:

... any circumstances at the time of the impact occasioning death or grievous bodily harm in which:

- (a) the prescribed concentration of alcohol⁴² was present in the accused's breath or 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

⁴¹ The term 'grievous bodily harm' is defined to include: (a) the destruction (other than in the course of a medical procedure) of the foetus of a pregnant woman, whether or not the woman suffers any other harm, and (b) any permanent or serious disfiguring of the person, and (c) any grievous bodily disease (in which case a reference to the infliction of grievous bodily harm includes a reference to causing a person to contract a grievous bodily disease): Crimes Act 1900 (NSW) s 4(1).

⁴² The 'prescribed concentration of alcohol' is defined as 'a concentration of 0.15 grammes or more of alcohol in 210 litres of breath or 100 millilitres of blood': Crimes Act 1900 (NSW) s 52A(9).

- (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).⁴³

A charge of dangerous driving occasioning grievous bodily harm (s 52A(3)) or its aggravated form (s 52A(4)) is a Table 1 offence⁴⁴—ie, either the prosecutor or the accused can elect to have the offence dealt with on indictment.⁴⁵ Where death was occasioned (s 52A(1) or (2)), the charge is a strictly indictable offence.⁴⁶ If a s 52A offence is dealt with summarily, the maximum term of imprisonment that the Local Court may impose is 18 months.⁴⁷

A person convicted of an offence under s 52A is also subject to licence disqualification, the extent of which depends largely upon the offender's previous traffic record.⁴⁸ It is unnecessary to detail the provisions relating to disqualification in light of the reference being addressed in this Report. This is because any licence disqualification is in addition to any other penalty imposed for the offence.⁴⁹

SCOPE OF THE OFFENCE

Section 52A of the *Crimes Act* creates offences of strict liability: apart from the fact that the act of driving must be voluntary,⁵⁰ it is unnecessary for the prosecution to prove that the accused was aware of the facts that made his driving a breach of the section.⁵¹ For example, there is no requirement that the driver knew that he or she was driving in a manner dangerous to the public. The section applies an objective standard to the actual behaviour of the driver, taking into account 'all matters connected with the management and control of a

⁴³ *Crimes Act 1900* (NSW) s 52A(7).

⁴⁴ *Criminal Procedure Act 1986* (NSW) sch 1 Table 1.

⁴⁵ *Criminal Procedure Act 1986* (NSW) sch 1 Table 1.

⁴⁶ *Criminal Procedure Act 1986* (NSW) sch 1 Table 1.

⁴⁷ *Criminal Procedure Act 1986* (NSW) s 267(4)(a).

⁴⁸ See s 188 of the Road Transport (General) Act 2005 (NSW). Offences under s 25A are "major traffic offences. A 'major offence' is defined as: '(a) a crime or offence referred to in the definition of convicted person in section 188 (1), or (b) any other crime or offence that, at the time it was committed, was a major offence under this Act, the Road Transport (General) Act 1999 or the Traffic Act 1909': Road Transport (General) Act 2005 (NSW): Road Transport (General) Act 2005 (NSW) s 3(1). Section 188(1) of the Road Transport (General) Act 2005 (NSW) defines a 'convicted person' to mean: (a) 'a person who is, in respect of the death of or bodily harm to another person caused by or arising out of the use of a motor vehicle driven by the person at the time of the occurrence out of which the death of or harm to the other person arose, convicted of: (i) the crime of murder or manslaughter, or (ii) an offence under ... the Crimes Act 1900; (b) a person convicted of an offence under section 51A, 51B or 52AB of the Crimes Act 1900'; or (c) a person convicted of an offence under specified provisions of the Road Transport (Safety and Traffic Management) Act 1999 (NSW).

⁴⁹ Road Transport (General) Act 2005 (NSW) s 188(5).

⁵⁰ *Jiminez v The Queen* (1992) 173 CLR 572, 577–9.

⁵¹ *Giorgianni v The Queen* (1985) 156 CLR 473, 479.

car by a driver when it is being driven.⁵² The defence has the evidentiary onus to raise the issue of an honest and reasonable belief that, in the circumstances, it was safe to drive.⁵³ If there is evidence to support such a belief, then the prosecution must negative it beyond reasonable doubt. In practice it is rare for such an issue to be raised. The issue generally litigated is whether the driving was dangerous in all the circumstances.

Dangerous driving offences are not limited to driving that occurred on a road.⁵⁴ Section 52A(5) of the *Crimes Act* sets out the circumstances in which a vehicle is considered to have been involved in an impact occasioning the death of, or grievous bodily harm to, a person. It is unnecessary to set out the various ways in which the offence can be committed, but it would appear that there is little, if any scope, for a death or injury to be caused by the driving of a motor vehicle that does not fall within the scope of the section. There have been rare cases that have fallen outside the section.⁵⁵

The expression 'driving in a manner dangerous to the public' is to be determined by an objective test, and involves a breach of the proper conduct of a vehicle 'so serious as to be in reality and not speculatively, potentially dangerous to others'.⁵⁶ Where inattentiveness is the basis of the allegation that the manner of driving was dangerous, the jury should usually be specifically directed as to the distinction between dangerous driving and negligent driving—ie, that mere negligence would not be sufficient to establish the former offence.⁵⁷

For an offence under the section based upon driving under the influence, there is a conclusive presumption that 'the accused is ... under the influence of liquor if the prosecution proves that the prescribed concentration of alcohol was present in the accused's breath or blood at the time of the impact occasioning death or grievous bodily harm'.⁵⁸ The

⁵² R v Coventry (1938) 59 CLR 633, 639.

⁵³ Jiminez v The Queen supra at 582–3 (Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ); R v Helmling (Unreported, NSW Court of Criminal Appeal, 11 November 1993).

⁵⁴ A road is defined as 'a road or road related area within the meaning of the Road Transport (General) Act 2005 (other than a road or road related area that is the subject of a declaration made under section 15 (1) (b) of that Act relating to all of the provisions of that Act)': Crimes Act 1900 (NSW) s 52A(9).. Under s 3(1) of the Road Transport (General) Act 2005 (NSW), a road means 'an area that is open to or used by the public and is developed for, or has as one of its main uses, the driving or riding of motor vehicles'; and a road-related area means: '(a) an area that divides a road, or (b) a footpath or nature strip adjacent to a road, or (c) an area that is open to the public and is designated for use by cyclists or animals, or (d) an area that is not a road and that is open to or used by the public for driving, riding or parking vehicles, or (e) a shoulder of a road, or (f) any other area that is open to or used by the public and that has been declared under section 15 to be an area to which specified provisions of this Act or the regulations apply'.

⁵⁵ R v B (1990) 12 MVR 540 and R v Kinghorne (1982) 8 A Crim R 41.

⁵⁶ McBride v The Queen (1966) 115 CLR 44, 50.

⁵⁷ R v Hopton (Unreported, NSW Court of Criminal Appeal, 8 October 1998).

⁵⁸ *Crimes Act 1900* (NSW) s 52AA(1).

'prescribed concentration of alcohol' is defined as 'a concentration of 0.15 grammes or more of alcohol in 210 litres of breath or 100 millilitres of blood'.⁵⁹

The fact that a driver was adversely affected by alcohol at the time of the impact is relevant to the issue of whether he or she was driving dangerously.⁶⁰ However, the mere fact that a driver had consumed alcohol is of itself irrelevant unless the amount of alcohol consumed was 'such as would adversely affect a driver, or alternatively, that the driver was in fact adversely affected'.⁶¹

There is a statutory defence provided.⁶² Once the prosecution has proved the elements of the offence of dangerous driving, the onus is on the defence to prove, on the balance of probabilities, that there was no causal connection between, on the one hand, the manner or speed of driving or the fact that the accused was under the influence of drug and/or alcohol, and, on the other, the death or grievous bodily harm caused by the impact.⁶³

SENTENCING GUIDELINE JUDGMENTS

In 1998, the CCA issued a guideline judgment in *R v Jurisic*⁶⁴ on the basis that there was a 'pattern of inadequacy' of sentences for these offences.⁶⁵ The guideline was reformulated in *R v Whyte* in 2002 ('the *Whyte* guideline').⁶⁶

In the *Whyte* guideline, the CCA described the characteristics of a 'frequently recurring' case under s 52A of the *Crimes Act* as follows:

- (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.

⁵⁹ *Crimes Act 1900* (NSW) s 52AA(7).

⁶⁰ *R v McBride* [1962] 2 QB 167, 172, applied in *R v Thorpe* [1972] 1 WLR 342, 344–5 and *R v Woodward* [1995] 2 Cr App R 388, 392–3, 395; and referred to in *R v Owens* (1987) 30 A Crim R 59, 65–6.

⁶¹ *R v McBride* [1962] 2 QB 167, 172.

⁶² *Crimes Act 1900* (NSW) 52A(8).

⁶³ *R v F* [1957] SR(NSW) 543.

⁶⁴ (1998) 45 NSWLR 209.

⁶⁵ *R v Jurisic* (1998) 45 NSWLR 209, 229–30.

⁶⁶ *R v Whyte* [2002] NSWCCA 343; (2002) 55 NSWLR 252.

- (vi) Genuine remorse.
- (vii) Plea of guilty of limited utilitarian value.⁶⁷

The CCA held that the maximum penalties for the s 52A offences showed that the Parliament regarded them to be serious offences despite the lack of intention to cause death or grievous bodily harm.⁶⁸ When determining the appropriateness and the length of a sentence by way of full-time custody, the degree of ‘moral culpability’, which is ‘a critical component of the objective circumstances of the offence’, must be given close attention.⁶⁹

In a typical case, ‘[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 misjudgement’.⁷⁰

The aggravating factors that increased moral culpability of the offender included:

- [216] ...
- (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 [or aggressive] 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.
 - (x) Degree of sleep deprivation.
 - (xi) Failing to stop.⁷¹

In this 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

⁶⁷ R v Whyte [2002] NSWCCA 343; (2002) 55 NSWLR 252, [204].

⁶⁸ R v Whyte [2002] NSWCCA 343; (2002) 55 NSWLR 252, [205].

⁶⁹ R v Whyte [2002] NSWCCA 343; (2002) 55 NSWLR 252, [205].

⁷⁰ R v Whyte [2002] NSWCCA 343; (2002) 55 NSWLR 252, [214].

⁷¹ R v Whyte [2002] NSWCCA 343; (2002) 55 NSWLR 252, [216]–[217].

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.⁷²

For the typical case involving a non-aggravated dangerous driving offence under s 52A(1) or s 52A(3), the guideline is ‘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.’⁷³

For an aggravated form of the offence under s 52A(2) or s 52A(3) of the *Crimes Act* ‘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.’⁷⁴

The CCA emphasised that the guideline judgment is not prescriptive:

“The guideline is ... 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 s 21A of the *Crimes (Sentencing Procedure) Act*.”⁷⁵

Although the guideline is used as a guide or check, it does not function as a checklist:

“..... The factors in the list set out in *Whyte*, as indicative of a typical case, do not operate as a checklist, the presence or absence of characteristics having some mathematical relationship with the sentence to be imposed. They merely describe the typical case and were not intended to circumscribe the sentencing judge’s discretion in the way the applicant suggests. If the applicant does not fall within a typical case for whatever reason, then the guideline is of less assistance than it might otherwise have been.”⁷⁶

Although the *Whyte* guideline focuses on the objective circumstances of the offence, the subjective circumstances, for example contrition and high prospects of rehabilitation, should be considered and may be entitled to considerable weight.⁷⁷

⁷² R v Whyte [2002] NSWCCA 343; (2002) 55 NSWLR 252, [228].

⁷³ R v Whyte [2002] NSWCCA 343; (2002) 55 NSWLR 252, [229]. In R v Nguyen [2008] NSWCCA 113, [48], the CCA held that the reference in the Whyte guideline to three years is not prescriptive.

⁷⁴ R v Whyte [2002] NSWCCA 343; (2002) 55 NSWLR 252, [231].

⁷⁵ R v Whyte [2002] NSWCCA 343; (2002) 55 NSWLR 252, [232], applied in *Money v The Queen* [2007] NSWCCA 317, [16].

⁷⁶ R v Berg [2004] NSWCCA 300; (2004) 41 MVR 399, [21].

⁷⁷ R v Tzanis [2005] NSWCCA 274; (2005) 44 MVR 160, [28].

Moral culpability and abandonment of responsibility

Under the *Whyte* guideline, the offender's degree of moral culpability is 'a critical component of the objective circumstances of the offence.'⁷⁸ It is relevant to both whether a sentence of imprisonment should be imposed, and the appropriate sentence length.⁷⁹ While a full-time custodial sentence is necessary where the offender is found to have abandoned responsibility for his or her own conduct, it does not follow that an offender who was found not to have abandoned responsibility necessarily had low moral culpability⁸⁰ and could avoid a full-time custodial sentence.⁸¹

Since the concept of abandonment of responsibility or high moral culpability is focused on the objective circumstances of the offence, '[i]t 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.'⁸² Deciding whether the offender has abandoned responsibility for his or her own conduct 'involves an element of judgment on which sentencing judges could reasonably differ.'⁸³ The expressions 'abandonment of responsibility' and 'high moral culpability' are 'necessarily flexible' and are 'not intended to ... become terms of art in this branch of sentencing law.'⁸⁴

In *R v Khatter*⁸⁵ [, Simpson J (dissenting) held:

Offences under s 52A are not divided into those of momentary inattention and those of abandonment of responsibility. Those are the two extremes. There are shades and gradations of moral culpability in different instances of the offence and it is proper for the courts to recognise a continuum, rather than a dichotomy, when assessing moral culpability.

Sully J (Carruthers AJ concurring) agreed with these remarks, while differing from her Honour in the disposition of the appeal.⁸⁶

The sentencing court must 'make a finding of where, on the scale of criminality represented by the offence of dangerous driving, the [offender's] culpability lay'.⁸⁷ The CCA held that a finding that the offender's moral culpability was 'significantly below the upper end of the

⁷⁸ R v Whyte [2002] NSWCCA 343; (2002) 55 NSWLR 252 at [205]; R v Errington (2005) 157 A Crim R 553, [27].

⁷⁹ R v Whyte [2002] NSWCCA 343; (2002) 55 NSWLR 252, [214], [229]–[230].

⁸⁰ DPP (NSW) v Samadi [2006] NSWCCA 308, [21].

⁸¹ R v Dutton [2005] NSWCCA 248, [29].

⁸² Rosenthal v The Queen [2008] NSWCCA 149, [16].

⁸³ R v Whyte [2002] NSWCCA 343; (2002) 55 NSWLR 252, [220].

⁸⁴ Markham v The Queen [2007] NSWCCA 295, [25].

⁸⁵ [2000] NSWCCA 32 at [31].

⁸⁶ R v Errington (2005) 157 A Crim R 553, [27].

⁸⁷ DPP (NSW) v Samadi [2006] NSWCCA 308, [21].

scale, yet not at the very lowest point in the scale' was not an adequate assessment of the objective gravity of the offence because '[w]ithin those parameters lies a considerable continuum of criminality'.⁸⁸

In determining the level of moral culpability, all the circumstances must be taken into account; '[i]t is erroneous to take a restrictive view of the circumstances that can lead to the conclusion that there is a high degree of moral culpability'.⁸⁹ One circumstance that must be taken into account is the element of risk and the driver's awareness of the risk:

Where ... a person takes control of a motor vehicle in circumstances where they know they represent a real risk to others and it is a risk over which they have no control, they must expect that, if the risk materialises, the penalty which will be imposed will reflect the fact that their offending had a high degree of criminality. A licence to drive a motor vehicle is a privilege which carries with it significant obligations. Those obligations require the driver to not only drive safely on the road but also to ensure that by reason of their physical health and capacity they do not endanger the lives of others. If that obligation is not met and injury or death is occasioned to others, a severe penalty will be appropriate in most cases. Every user of the road accepts a risk of injury or death. Those risks are only acceptable if other users of the road do what they can to minimise or avoid identifiable risks.⁹⁰

Although high moral culpability is shown where one or more of the aggravating factors numbered (iii)–(xi) in *Whyte* is present to a material degree, 'there may be other factors that reflect on the degree of moral culpability involved in a particular case and the factors identified in *Whyte* can vary in intensity'.⁹¹ This list of factors is 'illustrative, not definitive' of what represents 'abandoning responsibility'.⁹²

Any person who drives a motor vehicle upon a public street with a high range prescribed concentration of alcohol (PCA) has, without more, a high degree of moral culpability, which is sharply increased where such behaviour caused death or serious injury to others.⁹³

Momentary inattention or misjudgement

In the *Whyte* guideline, 'momentary inattention or misjudgement' was given as an example of low moral culpability.⁹⁴ The CCA held that non-custodial sentences for dangerous driving

⁸⁸ DPP (NSW) v Samadi supra at [21].

⁸⁹ R v Gardiner [2004] NSWCCA 365, [41].

⁹⁰ Gillett v R [2006] NSWCCA 370; (2006) 166 A Crim R 419, 437–8. See also SBF v R [2009] NSWCCA 231 (2009) 53 MVR 438, [126].

⁹¹ Gonzalez v The Queen [2006] NSWCCA 4, [13], citing R v Tzanis [2005] NSWCCA 274; (2005) 44 MVR 160, [25].

⁹² R v Errington (2005) 157 A Crim R 553, [36].

⁹³ R v Veatufunga [2007] NSWCCA 54; (2007) MVR 324, [19].

⁹⁴ R v Whyte [2002] NSWCCA 343; (2002) 55 NSWLR 252, [214].

offences are ‘almost invariably confined to cases involving momentary inattention or misjudgement’.⁹⁵

An example of a case of momentary attention is *R v Pyritz*.⁹⁶ The offender’s driving caused a collision because she had suddenly realised that her friend had left some shopping in her car and was momentarily preoccupied with the need to return the shopping. While the failure to observe a vital road sign may, in certain circumstances, be characterised as ‘a momentary lapse of attention’, it is not to be considered insignificant or something which may be lightly excused, given the danger it poses to the public.⁹⁷

It is clear that the number of persons injured or killed is a relevant circumstance chiefly because there will be a separate charge laid in respect of each victim. Notwithstanding that there was a single act of driving that resulted in more than one death or injured person, there should normally be some accumulation of the sentence imposed for each offence in order to represent the total criminality resulting from the driving.⁹⁸ As the offences under s 52A are result offences, in that their seriousness depends not only upon the objective nature of the driving, but also upon the result of the driving.

So the seriousness of the injury inflicted is a relevant consideration in determining the gravity of the offence in addition to an objective evaluation of the nature of the driving. In *R v Dutton*,⁹⁹ the offender was driving under the influence of alcohol when her vehicle collided with a parked utility. The victim, who was sitting in the front passenger seat of the offender’s vehicle, had her left arm extended out the window. The collision resulted in the victim’s left hand being severed from her arm. The CCA emphasised the importance of the degree of injury to victims of dangerous driving offences:

The offence is to a very large extent a result crime and that of course is why the maximum penalty differs depending upon whether the result of the driving is death or injury. This is not to suggest that the quality of the offending driving is not also a very significant matter, as is made clear by the guideline judgment in *Whyte* (2002) 55 NSWLR 252. But when looking at whether there are aggravating factors derived from the nature of the driving or the degree of intoxication of the driver in determining whether the offender had “abandoned responsibility for his or her own conduct”, the court cannot lose sight of the

⁹⁵ R v Jurisic (1998) 45 NSWLR 209, 231; R v Piscinieri [2007] NSWCCA 265 (2007) 48 MVR 437, [75]. Note, however, that this is not intended to be prescriptive: R v Whyte [2002] NSWCCA 343; (2002) 55 NSWLR 252 [206], [212]–[214].

⁹⁶ R v Pyritz (1998) 29 MVR 90.

⁹⁷ R v Swift (Unreported, NSW Court of Criminal Appeal, 11 April 1991).

⁹⁸ R v Price [2004] NSWCCA 186; R v Janceski [2005] NSWCCA 281; 64 NSWLR 10.

⁹⁹ [2005] NSWCCA 248.

consequences of the driving reflected by the degree of injury caused to the victim.¹⁰⁰

OTHER SENTENCING CONSIDERATIONS

It is unnecessary for present purposes to consider what has been said about sentencing for dangerous driving offences other than by way of the guideline judgments or their application. But there are many decisions that have stressed the need for general deterrence, even where the offender is a youth.¹⁰¹ In addition, retribution remains an important sentencing purpose in such cases.¹⁰²

Where a dangerous driving offence is committed with a very significant blood alcohol reading and causes serious injury to the victim, a full-time custodial sentence should almost always be imposed to adequately reflect the need for punishment, as well as specific and general deterrence.¹⁰³ This is especially so where the offender also has previous convictions for driving a motor vehicle with a PCA.¹⁰⁴

AGGRAVATING FACTORS

The Court has, since the *Whyte* guideline, given particular consideration to what could be seen as aggravating factors, either subjective to the offender or objective in the circumstances surrounding the driving and its results. As was noted above, one of the aggravating factors is the extent and nature of the injuries inflicted.¹⁰⁵ Another aggravating factor is the number of persons put at risk. In *R v Price*,¹⁰⁶ Simpson and Howie JJ said:

..... It must be the case that the moral culpability of a driver of a bus full of passengers who is driving dangerously is worse than the moral culpability of the lone person driving the family vehicle in the same manner. So in the present case the fact that the respondent was driving two passengers in his

¹⁰⁰ R v Dutton [2005] NSWCCA 248, [27].

¹⁰¹ R v Musumeci (Unreported, NSW Court of Criminal Appeal, 30 October 1997). In *SBF v The Queen* supra at [152], general deterrence was held to be a 'very significant factor' on sentencing an offender who was 17 years and two weeks old at the time of the offences, and who drove a vehicle at a grossly excessive speed while affected by alcohol, resulting in the death of two of the passengers and grievous bodily harm to the third passenger.

¹⁰² Ibid.

¹⁰³ R v Carruthers [2008] NSWCCA 59; (2008) 182 A Crim R 481, [32].

¹⁰⁴ R v Carruthers [2008] NSWCCA 59; (2008) 182 A Crim R 481, [32] [30].

¹⁰⁵ R v Dutton [2005] NSWCCA 248.

¹⁰⁶ R v Price [2004] NSWCCA 186.

vehicle at the time of the accident increased his moral culpability for driving in a manner dangerous or under the influence of alcohol.¹⁰⁷

Loss of life, on the other hand, is not relevant to an assessment of moral culpability. Thus in *TG v R*,¹⁰⁸ the CCA held that the sentencing judge erred in taking into account the number of deaths as a factor relevant to an assessment of the offender's moral culpability.

The *Whyte* guideline indicated that another aggravating factor in dangerous driving cases is the 'length of the journey during which others were exposed to risk'.¹⁰⁹ In *R v Takai*,¹¹⁰ Simpson J (with whom Dunford J agreed) held that 'logically, "the journey" contemplated by Spigelman CJ [in *Whyte*] was the intended journey, and not the journey attenuated by the collision'. Her Honour also stated:

There is no absolute demarcation of what is a "long journey" or a "not long journey", or a "short journey"; the danger created by the length of the journey will vary according to other circumstances, such as the time at which it is undertaken, the amount of traffic, and the locale.¹¹¹

A failure to stop is an aggravating factor relevant to the assessment of the moral culpability of the offender.¹¹² It can be taken into account when sentencing for dangerous driving even though the offender is also being sentenced for an offence of failing to stop.¹¹³

Prior convictions for driving offences are not relevant to the objective seriousness of the offence but could be 'indicative of an attitude of disobedience to the law and as requiring that some increased weight be given to retribution and deterrence'.¹¹⁴ The fact that a driver was disqualified or on bail for other offences is not relevant to the question of whether he or she has abandoned responsibility, even though they are relevant to the issues of personal and general deterrence.¹¹⁵

The conduct of the victim cannot be considered as mitigating the offender's criminal behaviour in putting members of the public, including his or her passenger, at risk. Thus, in *R v Dutton*, the fact that the passenger had extended her arm out of the window was

¹⁰⁷ R v Price [2004] NSWCCA 186 [36].

¹⁰⁸ TG v R [2010] NSWCCA 28 at [27]-[29].

¹⁰⁹ R v Whyte [2002] NSWCCA 343; (2002) 55 NSWLR 252, [216] (item (vii)).

¹¹⁰ R v Takai [2004] NSWCCA 392; (2004) 149 A Crim R 593.

¹¹¹ R v Takai [2004] NSWCCA 392; (2004) 149 A Crim R 593 [39].

¹¹² R v Whyte [2002] NSWCCA 343; (2002) 55 NSWLR 252, [217] (item (xi)).

¹¹³ Shumack v R [2008] NSWCCA 311; (2008) 191 A Crim R 513.

¹¹⁴ R v Nguyen [2008] NSWCCA 113, [51]. See also R v Scicluna (Unreported, NSW Court of Criminal Appeal, 19 September 1991).

¹¹⁵ Rosenthal v R [2008] NSWCCA 149, [17].

irrelevant, regardless of whether the offender was aware the fact.¹¹⁶ In *R v Errington*, the CCA held that the sentencing judge erred in taking into account as a mitigating factor the fact that the victim had been drinking heavily and was apparently willing to travel in a vehicle driven by someone who she must have known was grossly intoxicated.¹¹⁷

The CCA, in *R v Berg*,¹¹⁸ held that the fact that the passenger suffered injuries that led to his death because he was not wearing a seat belt was an *aggravating* factor in the circumstances of the case. It was commented in *R v Dutton* that '[a] driver is responsible for the safety of his or her passenger even to the point of controlling what the passenger does in the vehicle.'¹¹⁹

Although the victim's culpability clearly must not be taken into account in mitigation, 'it will usually be relevant to the assessment of the seriousness of the offender's conduct, and therefore to the offender's culpability.'¹²⁰

MITIGATING FACTORS

The Court has also given further guidance as to what matters may or may not amount to mitigating factors in sentencing for dangerous driving. Although normally general deterrence is not as important a factor when sentencing young offenders as when sentencing adults,¹²¹ this principle does not apply to dangerous driving cases, given the prevalence of such offences among young drivers and the need to deter such behaviour.¹²² Where a young male offender commits a dangerous driving offence, evidence as to the immaturity of young males cannot operate in mitigation.¹²³ A young male, old enough to hold a drivers licence, 'is to be assumed to be mature enough to comply with its conditions and the traffic rules' and general deterrence may be a dominant factor in sentencing young offenders because, for example, the fact that young men may see themselves as 'bullet proof'.¹²⁴

¹¹⁶ R v Dutton [2005] NSWCCA 248, [36].

¹¹⁷ R v Errington (2005) 157 A Crim R 553, [27]–[28].

¹¹⁸ R v Berg [2004] NSWCCA 300; (2004) 41 MVR 399.

¹¹⁹ R v Dutton [2005] NSWCCA 248, [35].

¹²⁰ R v Janceski [2005] NSWCCA 281; 64 NSWLR 10, [29].

¹²¹ R v C (Unreported, NSW Court of Criminal Appeal, 12 October 1989); R v GDP (1991) 53 A Crim R 112, 116.

¹²² R v Smith (1997) 95 A Crim R 373, 375. A different statement of principle in this case concerning home detention was disapproved of in R v Jurisic (1998) 45 NSWLR 209, 215, 249.

¹²³ R v TG [2010] NSWCCA 28, [33].

¹²⁴ SBF v R [2009] NSWCCA 231; (2009) 53 MVR 438, [151].

Since many, if not most, offenders who were found guilty of dangerous driving offences were of good character, 'the courts need to tread warily in showing leniency for good character to avoid giving the impression that persons of good character may, by their irresponsible actions at the time, take the lives of others and yet receive lenient treatment.'¹²⁵ Although the prior good character of the offender is given less weight in dangerous driving cases than in other cases, the offender is entitled to have his or her otherwise good character taken into account in mitigation of the sentence, even in cases where the offender does not have a good driving record.¹²⁶

The *Whyte* guideline indicated that a frequently recurring dangerous driving case usually involves a victim who is a stranger to the offender, and no or limited injury to the driver's intimates.¹²⁷ In *R v Howcher*,¹²⁸ Hulme J noted that, although the fact that the victim is not a stranger does not of itself justify leniency, 'the offender's relationship with the victim may be some indication of extra-curial suffering flowing from the occurrence'. In *R v Dutton*, it was held that the impact of the offence on the offender's mental health was clearly a relevant mitigating factor on the same basis as if he or she had suffered a physical injury, as was the fact that the offender had rendered assistance and support to the victim after the accident.¹²⁹

In *Hughes v R* the CCA stressed that 'leniency does not derive from the mere fact that the deceased was not a stranger ..., but from the consequential quality and depth of the remorse and shock'.¹³⁰ There it was held that the despair and depression experienced by the offender at the death of the victim (who was the offender's pregnant partner) was a 'significant element of mitigation' in that case. The fact that the offender was badly injured in the accident may be taken into account when sentencing for dangerous driving offences.¹³¹

Section 21A of the *Crimes (Sentencing Procedure) Act 1999 (NSW)*

It is unnecessary to consider each of the factors set out in s 21A of the *Crimes (Sentencing Procedure) Act 1999 (NSW)* as either aggravating or mitigating an offence of dangerous driving. However, most factors have been taken into account in the *Whyte* guideline and

¹²⁵ R v MacIntyre (1988) 38 A Crim R 135, 139; R v Musumeci (Unreported, NSW Court of Criminal Appeal, 30 October 1997); R v Howland (1999) 104 A Crim R 273, [24].

¹²⁶ R v Ryan (2003) 39 MVR 395, [43]–[45].

¹²⁷ R v Whyte [2002] NSWCCA 343; (2002) 55 NSWLR 252, [204] (items (iv)–(v)).

¹²⁸ R v Howcher [2004] NSWCCA 179; (2004) 146 A Crim R 371 at 16.

¹²⁹ R v Dutton [2005] NSWCCA 248, [38].

¹³⁰ [2008] NSWCCA 48; (2008) 185 A Crim R 155, [23].

¹³¹ R v Turner (Unreported, NSW Court of Criminal Appeal, 12 August 1991); Rosenthal v R [2008] NSWCCA 149, [20].

there is a risk of double counting if the guideline is applied and then matters are taken into account again by considering the factors in s 21A.

One of the matters that has been of concern and led to complexity in sentencing for dangerous driving offences is whether the aggravating factor that ‘the offence was committed without regard for public safety’ applies.¹³² In *R v McMillan*, the CCA held that since the offence of driving under the influence of alcohol is premised on the fact that driving in such a condition is dangerous to other road users, the fact that the driving was without regard for public safety cannot be taken into account as an aggravating factor under the provision.¹³³ This approach was applied in *Elyard v The Queen*,¹³⁴ where the CCA held that, in order to avoid double counting, ‘the inherent characteristics of an element of an offence should also not be treated as aggravating factors if they merely reflect the policy underlying the offence’. Basten JA stated that, since it was an inherent characteristic of aggravated dangerous driving offences that they are committed without regard for public safety,

...Acting without regard for public safety should not, in such a case, be given additional effect as an aggravating factor in its own right, unless the circumstances of the case involved some unusually heinous behaviour, or inebriation above the statutory precondition.¹³⁵

Similarly, Howie J stated:

The prohibition against taking that aggravating factor into account is not universal because, in a particular case, the lack of regard for public safety may be so egregious that it transcends that which would be regarded as an inherent characteristic of the offence.¹³⁶

It should be noted that there is already a degree of complication in sentencing for dangerous driving offences arising both from the application of the *Whyte* guideline and the application of s 21A, with the risk of double counting being particularly significant. This arises because matters mentioned in s 21A have already been taken into account in the formulation of the guideline or because factors of aggravation mentioned in s 21A(1) may also be an inherent characteristic of the offence.

¹³² Crimes (Sentencing Procedure) Act 1999 (NSW) s 21A(2)(i).

¹³³ *R v McMillan* [2005] NSWCCA 28, [38]–[39].

¹³⁴ *Elyard v R* [2006] NSWCCA 43; (2006) 45 MVR 402.

¹³⁵ *Elyard v R* [2006] NSWCCA 43; (2006) 45 MVR 402 [10]

¹³⁶ *Elyard v R* [2006] NSWCCA 43; (2006) 45 MVR 402 [43].

CHAPTER 4: STANDARD NON-PAROLE PERIODS FOR DANGEROUS DRIVING OFFENCES—SUMMARY OF SUBMISSIONS

SUBMISSIONS IN FAVOUR.....	35
SUBMISSIONS AGAINST	35
SNPP scheme in general	35
Dangerous driving offences ('s 52A offences') in particular	36
LEVEL OF SNPP FOR DANGEROUS DRIVING OFFENCES	38
IMPLICATIONS OF SETTING SNPP FOR S52A OFFENCES FOR EXISTING GUIDELINE JUDGMENTS FOR DANGEROUS DRIVING.....	38

SUBMISSIONS IN FAVOUR

There were no submissions in favour of extending the scheme to dangerous driving offences – The Commissioner of Police, while noting that the scheme may have value in promoting sentencing consistency, recognised the difficulty in applying the scheme to offences where the circumstances varied greatly.¹³⁷

SUBMISSIONS AGAINST

SNPP scheme in general

- Standard non-parole periods (SNPPs) have increased sentence severity and gaol population in NSW, and the imprisonment rate in NSW is higher than in any other jurisdiction (except US). Therefore, NSW should consider reducing the number of matters, which attract SNPPs. In fact the scheme should be abolished.¹³⁸
- SNPPs are unnecessary to guide judicial discretion or promote more consistent sentencing; adequate guidance is provided by legislation, common law and transparent appeal process.¹³⁹

¹³⁷ Submission 9b: The Commissioner of Police dated 14 September 2010.

¹³⁸ Submission 1a: The Hon Justice R O Blanch, Chief Judge of the District Court of New South Wales dated 11 May 2009.

¹³⁹ Submission 5a: The Shopfront Youth Legal Centre dated 25 June 2009.

Dangerous driving offences ('s 52A offences') in particular

- The statutory scheme for dangerous driving offences is reasonably detailed.¹⁴⁰
- Existing guideline judgments in relation to dangerous driving occasioning death or grievous bodily harm are comprehensive and provide useful guidance in sentencing.¹⁴¹
- Sentencing practices for s 52A offences are satisfactory, as demonstrated by the fact that:
- Crown appeals in s 52A matters to the CCA account for a tiny proportion of the overall number of Crown appeals (as shown by statistics maintained by the NSW Office of the Director of Public Prosecutions (ODPP) Research Unit); and
- There is no pattern of lenient sentencing for these offences, especially after the promulgation of guideline judgments in *Jurisic*¹⁴² and *Whyte*¹⁴³—Judicial Commission study showed that *Jurisic* resulted in significant positive changes in sentencing, including: more consistent sentencing, higher penalties, reduction in the number of Crown appeals and increase in the number of severity appeals.¹⁴⁴
- Offending which constitutes a s 52A offence varies widely and sentencing for such an offence involves an element of judgment—especially having regard to the fact that it is usually committed by persons of otherwise good character, thus requiring a wide discretion in sentencing.¹⁴⁵

Applying SNPPs to dangerous driving offences would result in:

- Offenders being dealt with in the District Court being subject to a SNPP, while those disposed of in the Local Court would not;¹⁴⁶
- Sentencing anomalies because of the availability of the alternative verdict of dangerous driving for the offences of: (a) murder and manslaughter; (b) injuries

¹⁴⁰ Submission 10b: Director of Public Prosecutions for New South Wales; Submission 8b Legal Aid Commission dated 15 September 2010.

¹⁴¹ Submission 5a: The Shopfront Youth Legal Centre dated 25 June 2009.

¹⁴² *R v Jurisic* (1998) 45 NSWLR 209.

¹⁴³ *R v Whyte* [2002] NSWCCA 343; (2002) 55 NSWLR 252.

¹⁴⁴ Submission 10b: Director of Public Prosecutions for New South Wales; Submission 8b Legal Aid Commission dated 15 September 2010

¹⁴⁵ *Ibid.*

¹⁴⁶ Submission 10b: Director of Public Prosecutions for New South Wales dated 10 August 2010.

caused by furious driving; and (c) causing grievous bodily harm—as these other offences are not within the SNPP scheme;¹⁴⁷

- Inconsistency with offences under s 52B of the *Crimes Act* (dangerous navigation), which do not attract a SNPP. In the interest of consistency, s 52B should also attract a SNPP—but two of the four s 52B offences can be dealt with summarily and would therefore be exempt from the SNPP regime;¹⁴⁸
- An increase in the number of severity appeals and costs (to the defence, the Crown and the CCA)—because experience with SNPPs was that they created undue complexity and sentencing errors that had to be resolved and paid for by way of appeal proceedings;¹⁴⁹
- Undue complexity because s 52A offences already have two reference points for sentencing—the maximum penalty and the *Whyte* guideline. Accordingly, the inclusion of such offences in the SNPP scheme would not promote the aims of the scheme, namely, transparency and better public understanding of sentencing;¹⁵⁰
- Heavier sentences, which would require an increase in funding for custodial facilities;¹⁵¹
- Increased difficulty in sentencing young offenders, especially since SNPPs do not apply to children;¹⁵²
- Increased need for continuing legal education programs, thus exacerbating the cost pressures;¹⁵³ and
- The sentencing discretion for motor vehicle manslaughter (with no SNPP) being subsequently constrained if the jury found the accused guilty of the lesser offence under s 52A of the *Crimes Act* instead.¹⁵⁴

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Submission 10b: Director of Public Prosecutions for New South Wales; Submission 8b Legal Aid Commission dated 15 September 2010.

¹⁵¹ Submission 10b: Director of Public Prosecutions for New South Wales dated 10 August 2010.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

LEVEL OF SNPP FOR DANGEROUS DRIVING OFFENCES

- While the inclusion of s 52A offences in the SNPP scheme is undesirable, if a SNPP were to be set for such offences, the SNPP level should not be out of proportion to the statutory maximum penalty. Logically the SNPP should be set at half the statutory maximum penalty for each of the offences.¹⁵⁵

IMPLICATIONS OF SETTING SNPP FOR S 52A OFFENCES FOR EXISTING GUIDELINE JUDGMENTS FOR DANGEROUS DRIVING

- SNPPs only apply to adult offenders but the guideline judgment applies to young offenders as well—since one of the characteristics of a typical case set out in *Whyte* is being a young offender.¹⁵⁶
- One characteristic in *Whyte* is that a plea of guilty is of limited utilitarian value, compared with SNPP, which is intended for mid-range cases where the offender was convicted *after* trial.¹⁵⁷
- *Whyte* refers to a head sentence, while SNPP refers to a non-parole period; thus the guideline of 3 years imprisonment in the case of death—or 2 years in the case of grievous bodily harm—might result in a very low SNPP. In addition, s 44(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) requires that a balance of term should not be set in excess of one-third of the non-parole period in the absence of special circumstances.¹⁵⁸
- *Whyte*'s typical case where the offender's moral culpability is high may be hard to reconcile with the SNPP's reference to an offence in the middle of the range of objective seriousness.¹⁵⁹ *R v Way*¹⁶⁰ made it clear that a typical or common case does not necessarily equate to an offence in the mid-range of seriousness. If an offence was found in the mid-range but also has the characteristics of a typical case, this may result in two competing sentences.¹⁶¹
- Currently no offences have both a SNPP and a directly applicable guideline judgment, so there is no guidance on how both regimes could operate together.¹⁶²
- Having three reference points for s 52A offences—maximum penalty, SNPP and guideline judgment—would present difficulties.¹⁶³

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ (2004) 60 NSWLR 168; [2004] NSWCCA 131.

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Ibid.

CHAPTER 5: THE COUNCIL'S VIEW

RELEVANT FACTORS IN DANGEROUS DRIVING OFFENCES	39
SCHEME OF OFFENCES	39
RELEVANCE OF AN APPLICABLE GUIDELINE	40
COMPLEXITY OF SENTENCING FOR DANGEROUS DRIVING OFFENCES	45
RECOMMENDATION	47

RELEVANT FACTORS IN DANGEROUS DRIVING OFFENCES

There are in the Council's opinion three major factors in considering whether the SNPP scheme should be extended to dangerous driving offences: (a) there exists a statutory scheme within the *Crimes Act* for driving offences that result in death or serious injury; (b) there are relevant guideline judgments applying to the most frequent of those offences that come before the higher courts for sentencing; (c) there is already a degree of complexity in sentencing for dangerous driving offences.

SCHEME OF OFFENCES

As has already been noted,¹⁶⁴ the *Crimes Act* contains a scheme of offences of differing seriousness in relation to the infliction of injury by the use of a motor vehicle. The scheme is based upon the degree of negligence in relation to the use of the vehicle and the harm occasioned. It is, unlike the SNPP, consistent and logical in its approach. The offences have, what appear to be, appropriate maximum penalties that realistically reflect the seriousness of those offences depending upon the nature of the act of driving and the injury caused. There has been no criticism, to the Council's knowledge, of the appropriateness of those maximum penalties. The offences range from the infliction of actual bodily harm by furious driving carrying a maximum penalty of imprisonment for 2 years¹⁶⁵ through to manslaughter carrying a maximum penalty of imprisonment of 25 years.¹⁶⁶

¹⁶⁴ See (a) above.

¹⁶⁵ *Crimes Act 1900* (NSW) s 53.

¹⁶⁶ *Crimes Act 1900* (NSW) s 24.

The reference does not propose that the SNPP scheme be applied to the offences in the Act less serious than dangerous driving offences and it does not apply to manslaughter. Therefore, there would only be one part of the statutory scheme to which the SNPP scheme would apply. Further, a dangerous driving offence resulting in the infliction of grievous bodily harm can be dealt with in the Local Court and, in such a case, the scheme would not apply. In addition, young people commit a not insignificant number of these offences, as the *Whyte*¹⁶⁷ guideline recognises, and, in respect of some of those offenders, the scheme would be inapplicable because they would be under the age of 18.

Of course there is a considerable degree of subjectivity on the part of the prosecutor in determining what offence to charge against an alleged offender in a dangerous driving case, the first being whether to charge an offence of dangerous driving rather than negligent driving, the difference in the two offences being the degree of seriousness of the driving. Although the matters giving rise to an aggravated dangerous driving offence are matters that have a degree of objective measurement, for example the PCA reading of the driver or the speed of the vehicle,¹⁶⁸ there is a very considerable discretion residing in the prosecutor whether to charge aggravated dangerous driving or manslaughter. The distinction between the two offences has been described as a “fine one”¹⁶⁹. It would be a somewhat curious result that by charging a more serious offence, manslaughter, the offender would not be subject to a SNPP, yet an SNPP would apply to the less serious offence of aggravated dangerous driving.

RELEVANCE OF AN APPLICABLE GUIDELINE

As has been noted, the *Whyte* guideline applies to dangerous driving cases resulting in death or grievous bodily harm. That guideline was a reworking of an earlier guideline and has been the subject of a large number of decisions by the CCA refining or amplifying it to give further assistance to the sentencing courts. There has been no suggestion, as noted in the Police Commissioner’s submission, that there has been any persistent leniency in the imposition of sentences for the offences covered by the guideline.

Although the guideline does not explicitly deal with aggravated dangerous driving offences, it does recognise that there should be an increase in the sentence proposed in the guideline

¹⁶⁷ R v Whyte [2002] NSWCCA 343; (2002) 55 NSWLR 252.

¹⁶⁸ Crimes Act 1900 (NSW) s 52A(7).

¹⁶⁹ Thompson v R [2007] NSWCCA 299, [15].

for aggravated offences.¹⁷⁰ The CCA has noted that there has been insufficient increase in sentences for aggravated dangerous driving causing grievous bodily harm from the guideline judgment.¹⁷¹ Howie J stated:

[49] It should be noted that the maximum penalty for an offence under s 52A(4) is greater than that for a non-aggravated offence causing death, the maximum penalty for an offence under s 52A(1) being 10 years. Parliament should be taken as being of the view that generally an offence under s 52A(4) is slightly more serious than an offence under s 52A(1) notwithstanding that the consequences of the driving will be less serious. Yet the statistics show that sentences for an offence under s 52A(1) are markedly more severe than those for an offence under s 52A(4): only 14 per cent of head sentences are less than 3 years.

[50] This difference is perhaps understandable in that the courts will generally consider that an offence in which a death has been occasioned will be more serious than where death did not occur. This no doubt reflects community attitudes. But the offence of dangerous driving has two features: the driving and the result. The aggravated form of the offences reflects the aggravated criminality of the driving by reason of the presence of one of the facts set out in s 52A(7). Each of those facts represent a very significant increase in the criminality from the non-aggravated form of the offence whatever might be the other objective facts of the particular offence for which sentence is being passed.

This trend appears to have continued since 2005 when the other comments were made,¹⁷² the easiest response is for the Director of Public Prosecutions to lodge a Crown appeal in an appropriate case. The guideline judgment for the non-aggravated offence remains a point of reference, as does the maximum penalty, and should indicate a manifestly inadequate sentence for the aggravated offence where the sentence does not markedly differ from the guideline. It is not the purpose of an SNPP to increase the range of sentences, although it is acknowledged that in some case this has occurred.

It was recognised, when the SNPP scheme was introduced into Parliament, that there were guidelines in place for certain offences, including s 52A offences, and that offences subject to a guideline were not included in the Table. The Attorney General stated:

It is proposed that the guideline judgments already promulgated by the Court of Criminal Appeal should continue to be used by the courts when sentencing for these offences. Guideline judgments will continue to play an important role

¹⁷⁰ R v Whyte [2002] NSWCCA 343; (2002) 55 NSWLR 252, [231].

¹⁷¹ See R v McMillan [2005] NSWCCA 28.

¹⁷² See the statistics in Annexure B.

with respect to the offences that are not part of the standard non-parole scheme.¹⁷³

There is nothing before the Council, which would indicate that a different policy should now be followed.

The view has been expressed that guideline judgments are preferable to SNPPs¹⁷⁴ and that SNPPs sit uncomfortably with guideline judgments as a way of improving consistency in sentencing.¹⁷⁵ Advocates of guideline judgments argue that such judgments:

- are narrative guidance from judges themselves and are therefore both authoritative and inclusive of the judiciary;¹⁷⁶
- show responsiveness by the judiciary to community concerns and willingness to self-regulate;¹⁷⁷
- represent a further shift towards judicial accountability and transparency;¹⁷⁸
- cover more details than legislation could;¹⁷⁹
- involve careful deliberation and input from different persons with an interest in the result;¹⁸⁰
- appear to be effective in reducing disparity and enhancing consistency in sentencing;¹⁸¹

¹⁷³ Hansard, Legislative Assembly, 23 October 2002, p5815.

¹⁷⁴ Anderson, J., 'Standard Minimum Sentencing and Guideline Judgments: An Uneasy Alliance in the Way of the Future' (2006) 30(4) *Criminal Law Journal* 203, 219, 223.

¹⁷⁵ *Ibid*, 220.

¹⁷⁶ *Ibid*, 218, 223; Anderson, J., "Leading Steps Aright": Judicial Guideline Judgments in New South Wales' (2004) 16(2) *Current Issues in Criminal Justice* 140, 151; Cowdery, N., 'Guideline Judgments: It Seemed Liked a Good Idea at the Time' (Paper presented at the International Society for the Reform of the Criminal Law 20th International Conference, 2–6 July 2006) 19.

¹⁷⁷ Cowdery, above n 175, 21.

¹⁷⁸ Anderson, J., "Leading Steps Aright": Judicial Guideline Judgments in New South Wales' (2004) 16(2) *Current Issues in Criminal Justice* 140, 151, 156.

¹⁷⁹ Anderson, above n 173, 218.

¹⁸⁰ *Ibid*, 220.

¹⁸¹ *Ibid*, 219; Anderson, above n 177, 151; Cowdery, above n 175, 19.

- are non-binding, which ensures that judges are assisted, but not restricted, by sentencing statistics and numerical guideline judgments in exercising their sentencing discretion;¹⁸²
- are a better benchmark for showing persistent leniency than inconsistent sentencing outcomes in similar cases;¹⁸³
- strengthen public confidence in sentencing by improving the transparency of the reasons for sentencing decisions;¹⁸⁴
- promote awareness of appellate guidance, which is conducive to consistent sentencing;¹⁸⁵
- are less likely to be inappropriately influenced by community sentiment, because judges are arguably less likely to yield to popular demand for excessively punitive sentences than politicians;¹⁸⁶
- are flexible enough to ensure individualised justice;¹⁸⁷ and make more extreme and unreasonable proposals, such as grid sentencing, less attractive.¹⁸⁸

Potential disadvantages of guideline judgments have been identified as the following:

- place pressure on the courts to impose harsher sentences—for example, in NSW ‘consistency’ appears to be equated with more severe penalties;¹⁸⁹
- unduly fetter judicial discretion;¹⁹⁰
- may be overly prescriptive and there is a danger that judges would adhere to them uncritically or ignore matters not mentioned in the guideline judgments;¹⁹¹

¹⁸² Warner, K. (2003) ‘The Role of Guideline Judgments in the Law and Order Debate in Australia’ (2003) 27(1) *Criminal Law Journal* 8, 21.

¹⁸³ Ibid, 22.

¹⁸⁴ Ibid, 22.

¹⁸⁵ Ibid 22; Anderson, above n 177, 156.

¹⁸⁶ Warner, above n 181, 22.

¹⁸⁷ Ibid 22; Anderson above n 177, 156.

¹⁸⁸ Brown, D., ‘The Politics of Law and Order’ (2002) 40(9) *Law Society Journal* 64, 66; Cowdery, above n 175, 19.

¹⁸⁹ Warner, above n181, 21–2.

¹⁹⁰ Brown, above n 187, 66; Schroff, D, ‘The Future of Guideline judgments’ (2002-2003) 14 *Current Issues in Criminal Justice* 316, 321, Cowdery, above n 175, 19–20.

¹⁹¹ Cowdery, above n 175, 20.

- prevent a global consideration of the ultimate sentence;¹⁹²
- leave subjective circumstances of the case largely to be considered in isolation;¹⁹³
- do not accommodate cases where a term of imprisonment is imposed but replaced by non-custodial penalties in exceptional circumstances;¹⁹⁴
- may be difficult to reconcile with common law and statutory requirements;¹⁹⁵
- can be a fertile ground for further appeals;¹⁹⁶
- leave out many critical sentencing factors and their effects;¹⁹⁷
- present constitutional problems in their application to Commonwealth offences;¹⁹⁸
- inappropriately allow judicial engagement with community sentiments and popular views and appear to be a concession by the judiciary that there is a ‘law and order crisis’;¹⁹⁹
- result in an increase in the severity of sentences;²⁰⁰
- result in greater incarceration rates;²⁰¹
- focus on leniency of sentences;²⁰²
- cover only a narrow range of offences;²⁰³
- are delivered infrequently without any overall strategy, and therefore while they promote consistency within a particular offence category, there is no consideration of consistency with sentencing levels for other offence categories;²⁰⁴

¹⁹² Ibid 20.

¹⁹³ Ibid 19.

¹⁹⁴ Ibid 20.

¹⁹⁵ Ibid 19.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

¹⁹⁹ Brown, above n 187, 66; Anderson., above n 177, 151–2.

²⁰⁰ Brown, above n 187, 66.

²⁰¹ Brown, above n 187, 66.

²⁰² Brown, above n 187, 66.

²⁰³ Anderson, above n 177, 156–7.

²⁰⁴ Anderson, above n 177, 152.

- are not sufficiently flexible;²⁰⁵
- are not sufficiently detailed given the reluctance of the CCA to provide more sophisticated forms of guidance;²⁰⁶
- require significant resources from all the parties involved, such as the DPP;²⁰⁷ and
- may not provide the guidance on the weight and effect of various sentencing factors, which is of the most practical assistance.

By repeating them, it should not be assumed that the Council agrees with these criticisms of guideline judgments but there is no necessity to debate the issue here. There is no suggestion from those that criticise guideline judgments that the SNPP scheme is preferable. We do not see that SNPPs would escape the majority of criticisms made of guideline judgments even if those criticisms are justified.

COMPLEXITY OF SENTENCING FOR DANGEROUS DRIVING OFFENCES

The complexity of sentencing for dangerous driving offences on the present law has been noted. It is derived from the interaction of the guideline judgments with s 21A of the CSPA. It includes the risk of double counting aggravating and mitigating factors by applying both the guideline and then having regard to the matters listed in s 21A. It is made more complicated by the fact that factors inherent in dangerous driving offences, such as the offence being committed without regard for public safety, is also an aggravating factor under s 21A(2)(i).

The introduction of the SNPP scheme to dangerous driving offences would add to the complexity of sentencing for these offences unless the guideline judgments were to be made redundant by the introduction of a SNPP. True it is that the guideline judgments are concerned with the overall sentence to be imposed, but the imposition of a standard non-parole period will generally identify the appropriate balance of term. For example, a standard non-parole period of 3 years must carry with it a balance of term of 1 year by the application of s 44 of the CSPA. One of the reasons to depart from a standard non-parole period is the finding of special circumstances to reduce the non-parole period.

²⁰⁵ Anderson, above n 177,156.

²⁰⁶ Anderson, above n 177, 157.

²⁰⁷ Cowdery, above n 175, 17.

As has been noted, the stated aim of the SNPP scheme was to enhance consistency and transparency in sentencing. That is the same aim of a guideline judgment. There is nothing to suggest that the guideline judgment for dangerous driving offences does not achieve that aim. Although there has been some criticism of the sentences imposed for aggravated offences resulting in grievous bodily harm, if necessary, that is a matter that can be addressed by Crown appeals in appropriate cases. The introduction of a SNPP for one part of the statutory scheme of driving offences in the Crimes Act, and a relatively small part of it, would tend to interfere with the consistent, logical approach that presently exists and within which the guideline judgment operates.

The SNPP scheme has introduced a degree of complexity into sentencing that has resulted in a significant number of appeals by both the Crown and the offender²⁰⁸. One result of the fact that there are at least two different sentencing schemes in operation, one for offences falling within the SNPP scheme and one for those not within the scheme, is that many District Court judges are applying the method for determining the application of a SNPP to cases where the scheme does not apply. This has led to appeals and criticism by the CCA upon the failure of sentencing courts to keep the two sentencing processes separate.²⁰⁹ To apply the SNPP scheme to aggravated dangerous driving offences would mean in effect that there were three.

As with manslaughter, there can be a wide variety of factors involved in sentencing for dangerous driving offences of both a subjective and objective nature. As the sentencing discretion is very wide in manslaughter offences because of the range of circumstances in which the offence can be committed, so it is with dangerous driving offences. For driving cases of manslaughter the CCA has given guidance as to appropriate sentences both in offender's appeals and a Crown appeal²¹⁰. This is because driving manslaughter offences have common factors so that sensible comparisons can be made.

But just as with driving manslaughter cases, the facts and circumstances of dangerous driving cases, even of an aggravated nature, will vary so greatly that it would be difficult for the court to determine an offence of midrange objective seriousness upon which the SNPP would be based.

²⁰⁸ McClelland CJ at CL in *R v Knight* [2007] NSWCCA 283; 176 A Crim R 338 at [2].

²⁰⁹ See for example *Sivell v R* [2009] NSWCCA 286 and *Georgopolous v R* [2010] NSWCCA 246.

²¹⁰ See for example *R v Cameron* [2005] NSWCCA 359; 157 A Crim R 70 and *R v Borkowski* [2009] NSWCCA 102; 195 A Crim R 1.

RECOMMENDATION

The Council sees no justification in increasing the complexity of sentencing for dangerous driving offences by introducing a SNPP for those offences or some of them. The Council recommends that there be no standard non-parole period fixed for any dangerous driving offences contained in the Crimes Act.

ANNEXURE A

SIGNIFICANT AMENDMENTS TO THE OFFENCES LISTED UNDER THE TABLE IN DIVISION 1A OF PART 4 OF THE CRIMES (SENTENCING PROCEDURE) ACT 1999 (NSW) AND THE TABLE ITSELF BETWEEN 1 FEBRUARY 2003 AND 28 MAY 2010

Item	Offence	SNPP (as a percentage of the maximum penalty)		Maximum penalty		Change(s) to the SNPP Table between 1/2/2003 and 28/5/2010, and the commencement date(s) of the change(s)	Significant change(s) to the substantive offence provision between 1/2/2003 and 28/5/2010, and commencement date(s) of the change(s) ²¹¹
		1/2/2003	28/5/2010	1/2/2003	28/5/2010		
1A	<p>Murder—where the victim was a police officer, emergency services worker, correctional officer, judicial officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the</p> <p>Murder—where the victim was a police officer, emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker, or other</p>	25 years (n/a)	25 years (n/a)	Life imprisonment	Life imprisonment	26 May 2006: Item 1A was amended to also apply to the murder of specified victims where the offence arose because of the victim's voluntary work: <i>Crimes (Sentencing Procedure) Amendment Act 2006</i> (NSW) s 3 (sch 1[3]).	No changes to s 19A (Punishment for murder) of the <i>Crimes Act 1900</i> (NSW).

²¹¹ Technical and purely procedural amendments to the substantive offence provisions are not noted in this table.

Item	Offence		SNPP (as a percentage of the maximum penalty)		Maximum penalty		Change(s) to the SNPP Table between 1/2/2003 and 28/5/2010, and the commencement date(s) of the change(s)	Significant change(s) to the substantive offence provision between 1/2/2003 and 28/5/2010, and commencement date(s) of the change(s) ²¹¹
	1/2/2003	28/5/2010	1/2/2003	28/5/2010	1/2/2003	28/5/2010		
	offence arose because of the victim's occupation	public official, exercising public or community functions and the offence arose because of the victim's occupation or voluntary work					9 June 2009: Council law enforcement officers were specifically included in the list of public officials or workers whose murder carries a SNPP of 25 years, where the offence arose because of the victim's occupation or voluntary work: <i>Crimes (Sentencing Procedure) Amendment (Council Law Enforcement Officers) Act 2009</i> (NSW) s 3(2).	
1B	Murder—where the victim was a child under 18 years of age	Murder—where the victim was a child under 18 years of age	n/a	25 years (n/a)	Life imprisonment	Life imprisonment	1 Jan 2008: Item 1B was added to the SNPP Table and a SNPP of 25 years was prescribed: <i>Crimes</i>	No changes to s 19A (Punishment for murder) of the <i>Crimes Act 1900</i> (NSW).

Item	Offence		SNPP (as a percentage of the maximum penalty)		Maximum penalty		Change(s) to the SNPP Table between 1/2/2003 and 28/5/2010, and the commencement date(s) of the change(s)	Significant change(s) to the substantive offence provision between 1/2/2003 and 28/5/2010, and commencement date(s) of the change(s) ²¹¹
	1/2/2003	28/5/2010	1/2/2003	28/5/2010	1/2/2003	28/5/2010		
							(<i>Sentencing Procedure Amendment Act 2007</i> (NSW) s 3 (sch 1[8])).	
1	Murder—in other cases	Murder—in other cases	20 years (n/a)	20 years (n/a)	Life imprisonment	Life imprisonment	None	No changes to s 19A (Punishment for murder) of the <i>Crimes Act 1900</i> (NSW).
2	Section 26 of the <i>Crimes Act 1900</i> (conspiracy to murder)	Section 26 of the <i>Crimes Act 1900</i> (conspiracy to murder)	10 years (40.0%)	10 years (40.0%)	25 years	25 years	None	None
3	Sections 27, 28, 29 or 30 of the <i>Crimes Act 1900</i> (attempt to murder)	Sections 27, 28, 29 or 30 of the <i>Crimes Act 1900</i> (attempt to murder)	10 years (40.0%)	10 years (40.0%)	25 years	25 years	None	None
4	Section 33 of the <i>Crimes Act 1900</i> (wounding etc with intent to do bodily harm or resist arrest)	Section 33 of the <i>Crimes Act 1900</i> (wounding etc with intent to do bodily harm or resist arrest)	7 years (28.0%)	7 years (28.0%)	25 years	25 years	None	15 Feb 2008: The fault element of 'maliciously' was replaced with 'intentionally'; the offence relating to intention to cause grievous bodily harm and the offence relating to resisting arrest were separated into sub-sections; and offences concerning firearms were

Item	Offence		SNPP (as a percentage of the maximum penalty)	Maximum penalty		Change(s) to the SNPP Table between 1/2/2003 and 28/5/2010, and the commencement date(s) of the change(s)	Significant change(s) to the substantive offence provision between 1/2/2003 and 28/5/2010, and commencement date(s) of the change(s) ²¹¹
	1/2/2003	28/5/2010		1/2/2003	28/5/2010		
4A	Section 35 (2) of the <i>Crimes Act 1900</i> (malicious wounding or infliction of grievous bodily harm in company)	Section 35 (1) of the <i>Crimes Act 1900</i> (reckless causing of grievous bodily harm in company)	n/a	5 years (35.7%)	10 years	14 years	<p>moved to s 33A of the <i>Crimes Act 1900</i> (NSW): <i>Crimes Amendment Act 2007</i> (NSW) sch 1[4].</p> <p>27 Sep 2007: The fault element of 'maliciously' was replaced with 'recklessly'; 'wounding' offences were separated from 'grievous bodily harm' offences; the maximum penalty for the offence was increased from 10 to 14 years; and the offence of reckless causing of grievous bodily harm in company was moved from s 35(2) to s 35(1) of the <i>Crimes Act 1900</i> (NSW): <i>Crimes Amendment Act 2007</i> (NSW) sch 1[7].</p>
4B	Section 35 (1) of the <i>Crimes Act 1900</i> (malicious wounding or infliction of grievous bodily harm)	Section 35 (2) of the <i>Crimes Act 1900</i> (reckless causing of grievous bodily harm)	n/a	4 years (40.0%)	7 years	10 years	<p>1 Jan 2008: Item 4A was added to the SNPP Table and a SNPP of 5 years was prescribed: <i>Crimes Amendment Act 2007</i> (NSW) s 3 (sch 1[9]).</p> <p>1 Jan 2008: Item 4B was added to the SNPP Table and a SNPP of 4 years was prescribed: <i>Crimes Amendment Act 2007</i> (NSW) sch 1[7].</p> <p>27 Sep 2007: The fault element of 'maliciously' was replaced with 'recklessly'; 'wounding' offences were separated from 'grievous bodily harm' offences; the maximum penalty was increased from 7 to 10 years; the offence</p>

Item	Offence		SNPP (as a percentage of the maximum penalty)		Maximum penalty		Change(s) to the SNPP Table between 1/2/2003 and 28/5/2010, and the commencement date(s) of the change(s)	Significant change(s) to the substantive offence provision between 1/2/2003 and 28/5/2010, and commencement date(s) of the change(s) ²¹¹
	1/2/2003	28/5/2010	1/2/2003	28/5/2010	1/2/2003	28/5/2010		
4C	Section 35 (2) of the <i>Crimes Act 1900</i> (malicious wounding or infliction of grievous bodily harm in company)	Section 35 (3) of the <i>Crimes Act 1900</i> (reckless wounding in company)	n/a	4 years (40.0%)	10 years	10 years	2007 (NSW) s 3 (sch 1[9]).	of reckless causing of grievous bodily harm was moved from s 35(1) to s 35(2) of the <i>Crimes Act 1900</i> (NSW): <i>Crimes Amendment Act 2007</i> (NSW) sch 1[7].
4D	Section 35 (1) of the <i>Crimes Act 1900</i> (malicious wounding or infliction of grievous bodily harm)	Section 35 (4) of the <i>Crimes Act 1900</i> (reckless wounding)	n/a	3 years (42.9%)	7 years	7 years	1 Jan 2008: Item 4C was added to the SNPP Table and a SNPP of 4 years was prescribed: <i>Crimes (Sentencing Procedure) Amendment Act 2007</i> (NSW) s 3 (sch 1[9]).	27 Sep 2007: The fault element of 'maliciously' was replaced with 'recklessly'; 'wounding' offences were separated from 'grievous bodily harm' offences: <i>Crimes Amendment Act 2007</i> (NSW) sch 1[7].
5	Section 60 (2) of	Section 60 (2)	3 years	3 years	7 years	7 years	None	27 Sep 2007: The fault element of 'maliciously' was replaced with 'recklessly'; 'wounding' offences were separated from 'grievous bodily harm' offences: <i>Crimes Amendment Act 2007</i> (NSW) sch 1[7].

Item	Offence		SNPP (as a percentage of the maximum penalty)		Maximum penalty		Change(s) to the SNPP Table between 1/2/2003 and 28/5/2010, and the commencement date(s) of the change(s)	Significant change(s) to the substantive offence provision between 1/2/2003 and 28/5/2010, and commencement date(s) of the change(s) ²¹¹
	1/2/2003	28/5/2010	1/2/2003	28/5/2010	1/2/2003	28/5/2010		
	the <i>Crimes Act 1900</i> (assault of police officer occasioning bodily harm)	of the <i>Crimes Act 1900</i> (assault of police officer occasioning bodily harm)	(42.9%)	(42.9%)				
6	Section 60 (3) of the <i>Crimes Act 1900</i> (wounding or inflicting grievous bodily harm on police officer)	Section 60 (3) of the <i>Crimes Act 1900</i> (wounding or inflicting grievous bodily harm on police officer)	5 years (41.7%)	5 years (41.7%)	12 years	12 years	None	15 Feb 2008: The fault element of 'maliciously' was replaced with 'recklessly': <i>Crimes Amendment Act 2007</i> (NSW) s 3 (sch 1[13]).
7	Section 61I of the <i>Crimes Act 1900</i> (sexual assault)	Section 61I of the <i>Crimes Act 1900</i> (sexual assault)	7 years (50.0%)	7 years (50.0%)	14 years	14 years	None	None
8	Section 61J of the <i>Crimes Act 1900</i> (aggravated sexual assault)	Section 61J of the <i>Crimes Act 1900</i> (aggravated sexual assault)	10 years (50.0%)	10 years (50.0%)	20 years	20 years	None	15 Feb 2008: The fault element of 'maliciously' was replaced with 'intentionally or recklessly': <i>Crimes Amendment Act 2007</i> (NSW) s 3 (sch 1[3]). 1 Dec 2008: The term 'serious intellectual disability' was replaced with 'cognitive impairment' to cover all impairments of cognitive capacity (whether

Item	Offence		SNPP (as a percentage of the maximum penalty)		Maximum penalty		Change(s) to the SNPP Table between 1/2/2003 and 28/5/2010, and the commencement date(s) of the change(s)	Significant change(s) to the substantive offence provision between 1/2/2003 and 28/5/2010, and commencement date(s) of the change(s) ²¹¹
	1/2/2003	28/5/2010	1/2/2003	28/5/2010	1/2/2003	28/5/2010		
9	Section 61JA of the <i>Crimes Act 1900</i> (aggravated sexual assault in company)	Section 61JA of the <i>Crimes Act 1900</i> (aggravated sexual assault in company)	15 years (n/a)	15 years (n/a)	Life imprisonment	Life imprisonment	None	a disability, disorder, illness or injury): <i>Crimes Amendment (Cognitive Impairment—Sexual Offences) Act 2008</i> (NSW) s 3 (sch 1[2]). 1 Jan 2009: Further circumstances of aggravation were added, namely, where the offender—breaks and enters into any building with intent to commit the offence or another serious indictable offence; or deprives the victim of his or her liberty before or after the offence. The term 'building' was defined: <i>Crimes Amendment (Sexual Offences) Act 2008</i> (NSW) s 3 (sch 1[1]–[2]). 15 Feb 2008: The fault element of 'maliciously' was replaced with 'intentionally or recklessly': <i>Crimes Amendment Act 2007</i> (NSW) s 3 (sch 1[3]).
9A	Section 61M (1) of the <i>Crimes Act</i>	Section 61M (1) of the <i>Crimes Act</i>	5 years (71.4%)	5 years (71.4%)	7 years	7 years	None	1 Dec 2008: The term 'serious intellectual

Item	Offence		SNPP (as a percentage of the maximum penalty)		Maximum penalty		Change(s) to the SNPP Table between 1/2/2003 and 28/5/2010, and the commencement date(s) of the change(s)	Significant change(s) to the substantive offence provision between 1/2/2003 and 28/5/2010, and commencement date(s) of the change(s) ²¹¹
	1/2/2003	28/5/2010	1/2/2003	28/5/2010	1/2/2003	28/5/2010		
	1900 (aggravated indecent assault)	Act 1900 (aggravated indecent assault)						disability' was replaced with 'cognitive impairment': <i>Crimes Amendment (Cognitive Impairment—Sexual Offences) Act 2008</i> (NSW) s 3 (sch 1[2]). 1 Jan 2009: 'Victim under the age of 16 years' was removed as a circumstance of aggravation, and a separate offence of indecent assault against a victim under 16 was created under s 61M(2) of the <i>Crimes Act 1900</i> (NSW)—effectively increasing the maximum penalty for indecent assault against victim aged between 10 and 16 from 7 to 10 years [see Item 9B below]: <i>Crimes Amendment (Sexual Offences) Act 2008</i> (NSW) s 3 (sch 1[3]–[4]).
9B	Section 61M (2) of the <i>Crimes Act 1900</i> (aggravated indecent	Section 61M (2) of the <i>Crimes Act 1900</i> (aggravated indecent	5 years (50.0%)	8 years (80.0%)	10 years	10 years	1 Jan 2008: The SNPP for this offence was increased from 5 to 8 years: <i>Crimes</i>	1 Jan 2009: Section 61M(2) of the <i>Crimes Act 1900</i> (NSW) was changed from indecent assault of a child under 10

Item	Offence		SNPP (as a percentage of the maximum penalty)		Maximum penalty	Change(s) to the SNPP Table between 1/2/2003 and 28/5/2010, and the commencement date(s) of the change(s)	Significant change(s) to the substantive offence provision between 1/2/2003 and 28/5/2010, and commencement date(s) of the change(s) ²¹¹
	1/2/2003	28/5/2010	1/2/2003	28/5/2010			
	1/2/2003	28/5/2010	1/2/2003	28/5/2010	1/2/2003	28/5/2010	to indecent assault of a child under 16—effectively increasing the maximum penalty for an indecent assault against a child between the age of 10 and 16 from 7 to 10 years: <i>Crimes Amendment (Sexual Offences) Act 2008</i> (NSW) s 3 (sch 1[3]–[4]).
	assault—child under 10)	assault)					(<i>Sentencing Procedure Amendment Act 2007</i> (NSW) s 3 (sch 1[10])). 19 May 2009: The reference to 'child under 10' in item 9B was removed: <i>Criminal Legislation Amendment Act 2009</i> (NSW) sch 1.5[1].
10	Section 66A of the <i>Crimes Act 1900</i> (sexual intercourse—child under 10)	Section 66A (1) or (2) of the <i>Crimes Act 1900</i> (sexual intercourse—child under 10)	15 years (60.0%)	15 years (s 66A(1)—60.0%; s 66A(2)—n/a)	25 years	s 66A(1)—25 years s 66A(2)—Life imprisonment	1 Feb 2003: The maximum penalty for this offence was increased from 20 to 25 years: <i>Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002</i> (NSW) s 3 (sch 2[1]). 1 Jan 2009: A new aggravated offence of having sexual intercourse with a child under 10, with a maximum penalty of life imprisonment, was created under s 66A(2) of the <i>Crimes Act 1900</i> (NSW).

Item	Offence		SNPP (as a percentage of the maximum penalty)		Maximum penalty		Change(s) to the SNPP Table between 1/2/2003 and 28/5/2010, and the commencement date(s) of the change(s)	Significant change(s) to the substantive offence provision between 1/2/2003 and 28/5/2010, and commencement date(s) of the change(s) ²¹¹
	1/2/2003	28/5/2010	1/2/2003	28/5/2010	1/2/2003	28/5/2010		
								Circumstances of aggravation were specified under s 66A(3) of that Act: <i>Crimes Amendment (Sexual Offences) Act 2008</i> (NSW) s 3 (sch 1[9]). 1 Jan 2009: The term 'serious intellectual disability' was replaced with 'cognitive impairment': <i>Crimes Amendment (Sexual Offences) Act 2008</i> (NSW) s 3 (sch 1[10]). 19 May 2009: Further circumstance of aggravation added—namely, that the offender breaks and enters into any building with intent to commit the offence or another serious indictable offence: <i>Criminal Legislation Amendment Act 2009</i> (NSW) sch 1.3[1]. None
11	Section 98 of the <i>Crimes Act 1900</i> (robbery with arms etc and wounding)	Section 98 of the <i>Crimes Act 1900</i> (robbery with arms etc and wounding)	7 years (28.0%)	7 years (28.0%)	25 years	25 years	None	None
12	Section 112 (2)	Section 112 (2)	5 years	5 years	20 years	20 years	None	15 Feb 2008: House

Item	Offence		SNPP (as a percentage of the maximum penalty)		Maximum penalty		Change(s) to the SNPP Table between 1/2/2003 and 28/5/2010, and the commencement date(s) of the change(s)	Significant change(s) to the substantive offence provision between 1/2/2003 and 28/5/2010, and commencement date(s) of the change(s) ²¹¹
	1/2/2003	28/5/2010	1/2/2003	28/5/2010	1/2/2003	28/5/2010		
	of the <i>Crimes Act 1900</i> (breaking etc into any house etc and committing serious indictable offence in circumstances of aggravation)	of the <i>Crimes Act 1900</i> (breaking etc into any house etc and committing serious indictable offence in circumstances of aggravation)	(25.0%)	(25.0%)				breaking offences were modernised by removing the reference to a lengthy list of specified buildings and premises, and replacing it with a simple reference to 'any ... other building': <i>Crimes Amendment Act 2007</i> (NSW) s 3 (sch 1[19]).
13	Section 112 (3) of the <i>Crimes Act 1900</i> (breaking etc into any house etc and committing serious indictable offence in circumstances of special aggravation)	Section 112 (3) of the <i>Crimes Act 1900</i> (breaking etc into any house etc and committing serious indictable offence in circumstances of special aggravation)	7 years (28.0%)	7 years (28.0%)	25 years	25 years	None	15 Feb 2008: House breaking offences were modernised by removing the reference to a lengthy list of specified buildings and premises, and replacing it with a simple reference to 'any ... other building': <i>Crimes Amendment Act 2007</i> (NSW) s 3 (sch 1[19]).
14	Section 154C (1) of the <i>Crimes Act 1900</i> (car-jacking)	Section 154C (1) of the <i>Crimes Act 1900</i> (taking motor vehicle or vessel with	3 years (30.0%)	3 years (30.0%)	10 years	10 years	1 Jan 2008: Reference to 'car-jacking' replaced with 'taking motor vehicle or vessel with assault or with	1 Sep 2006: Car-jacking offences were extended to include the taking of vessels: <i>Crimes Amendment (Organised Car and Boat Theft) Act</i>

Item	Offence	SNPP (as a percentage of the maximum penalty)		Maximum penalty		Change(s) to the SNPP Table between 1/2/2003 and 28/5/2010, and the commencement date(s) of the change(s)	Significant change(s) to the substantive offence provision between 1/2/2003 and 28/5/2010, and commencement date(s) of the change(s) ²¹¹
		1/2/2003	28/5/2010	1/2/2003	28/5/2010		
						occupant on board'—to accommodate the extension of car-jacking offences to include vessels: <i>Crimes (Sentencing Procedure) Amendment Act 2007 (NSW) s 3 (sch 1[11])</i> .	2006 (NSW) s 3 (sch 1[5]–[6]).
15	Section 154C (2) of the <i>Crimes Act 1900</i> (car-jacking in circumstances of aggravation)	5 years (35.7%)	5 years (35.7%)	14 years	14 years	1 Jan 2008: Reference to 'car-jacking' replaced with 'taking motor vehicle or vessel with assault or with occupant on board'—to accommodate the extension of car-jacking offences to include the taking of vessels: <i>Crimes (Sentencing Procedure) Amendment Act 2007 (NSW) s 3 (sch 1[11])</i> .	1 Sep 2006: Car-jacking offences were extended to include the taking of vessels: <i>Crimes Amendment (Organised Car and Boat Theft) Act 2006 (NSW) s 3 (sch 1[5]–[6])</i> . 15 Feb 2008: The fault element of 'maliciously' was replaced with 'intentionally or recklessly': <i>Crimes Amendment Act 2007 (NSW) sch 1[3]</i> .

Item	Offence		SNPP (as a percentage of the maximum penalty)		Maximum penalty		Change(s) to the SNPP Table between 1/2/2003 and 28/5/2010, and the commencement date(s) of the change(s)	Significant change(s) to the substantive offence provision between 1/2/2003 and 28/5/2010, and commencement date(s) of the change(s) ²¹¹
	1/2/2003	28/5/2010	1/2/2003	28/5/2010	1/2/2003	28/5/2010		
15A	n/a	Section 154G of the <i>Crimes Act 1900</i> (organised car or boat rebirthing activities)	n/a	4 years (28.6%)	n/a	14 years	1 Jan 2008: The offence of knowingly facilitating a car or boat rebirthing activity was added to the SNPP Table, with a SNPP of 4 years: <i>Crimes (Sentencing Procedure) Amendment Act 2007 (NSW) s 3 (sch 1[12])</i> . 1 Jan 2008: The original item 15A (Section 203E of the <i>Crimes Act 1900</i> (bushfires)) was renumbered as item 15B in the SNPP Table: <i>Crimes (Sentencing Procedure) Amendment Act 2007 (NSW) s 3 (sch 1[12])</i> .	1 Sep 2006: The new offence of knowingly facilitating a car or boat rebirthing activity that is carried out on an organised basis, with a maximum penalty of 14 years imprisonment, was created: <i>Crimes Amendment (Organised Car and Boat Theft) Act 2006 (NSW) s 3 (sch 1[7])</i> .
15B	Section 203E of the <i>Crimes Act</i>	Section 203E of the <i>Crimes Act</i>	5 years (35.7%)	5 years (35.7%)	14 years	14 years	1 Jan 2008: This offence was	None

Item	Offence		SNPP (as a percentage of the maximum penalty)		Maximum penalty		Change(s) to the SNPP Table between 1/2/2003 and 28/5/2010, and the commencement date(s) of the change(s)	Significant change(s) to the substantive offence provision between 1/2/2003 and 28/5/2010, and commencement date(s) of the change(s) ²¹¹
	1/2/2003	28/5/2010	1/2/2003	28/5/2010	1/2/2003	28/5/2010		
	1900 (bushfires)	1900 (bushfires)					originally item 15A in the SNPP Table; it was renumbered as item 15B: <i>Crimes (Sentencing Procedure) Amendment Act 2007 (NSW) s 3 (sch 1[12])</i> .	
15C	Section 23 (2) of the <i>Drug Misuse and Trafficking Act 1985</i> (cultivation, supply or possession of prohibited plants), being an offence that involves not less than the large commercial quantity (if any) specified for the prohibited plant concerned under that Act	Section 23 (2) of the <i>Drug Misuse and Trafficking Act 1985</i> (cultivation, supply or possession of prohibited plants), being an offence that involves not less than the large commercial quantity (if any) specified for the prohibited plant concerned under that Act	n/a	10 years (n/a; or in case of cannabis plant or cannabis leaf—50.0%)	Life imprisonment and/or 5000 penalty units Where the offence relates to cannabis plant or cannabis leaf, imprisonment and/or 5000 penalty units	Life imprisonment and/or 5000 penalty units Where the offence relates to cannabis plant or cannabis leaf, imprisonment and/or 5000 penalty units	1 Jan 2008: Item 15C was added to the SNPP table and a SNPP of 10 years was prescribed: <i>Crimes (Sentencing Procedure) Amendment Act 2007 (NSW) s 3 (sch 1[13])</i> .	None

Item	Offence	SNPP (as a percentage of the maximum penalty)		Maximum penalty		Change(s) to the SNPP Table between 1/2/2003 and 28/5/2010, and the commencement date(s) of the change(s)	Significant change(s) to the substantive offence provision between 1/2/2003 and 28/5/2010, and commencement date(s) of the change(s) ²¹¹
		1/2/2003	28/5/2010	1/2/2003	28/5/2010		
16	<p>Section 24 (2) of the <i>Drug Misuse and Trafficking Act 1985</i> (manufacture or production of commercial quantity of prohibited drug), being an offence that:</p> <p>(a) does not relate to cannabis leaf, and</p> <p>(b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug</p>	<p>Section 24 (2) of the <i>Drug Misuse and Trafficking Act 1985</i> (manufacture or production of commercial quantity of prohibited drug), being an offence that:</p> <p>(a) does not relate to cannabis leaf, and</p> <p>(b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug</p>	<p>10 years (50.0%; or in case of cannabis plant—66.7%)</p>	<p>10 years (50.0%; or in case of cannabis plant—66.7%)</p>	<p>20 years imprisonment and/or 3500 penalty units Where the offence relates to cannabis plant, 15 years imprisonment and/or 3500 penalty units</p>	None	None
17	Section 24 (2) of	Section 24 (2)	15 years	15 years	Life	None	None

Item	Offence		SNPP (as a percentage of the maximum penalty)	Maximum penalty		Change(s) to the SNPP Table between 1/2/2003 and 28/5/2010, and the commencement date(s) of the change(s)	Significant change(s) to the substantive offence provision between 1/2/2003 and 28/5/2010, and commencement date(s) of the change(s) ²¹¹
	1/2/2003	28/5/2010		1/2/2003	28/5/2010		
	the <i>Drug Misuse and Trafficking Act 1985</i> (manufacture or production of commercial quantity of prohibited drug), being an offence that:	of the <i>Drug Misuse and Trafficking Act 1985</i> (manufacture or production of commercial quantity of prohibited drug), being an offence that:	(n/a; or in case of cannabis plant— 75.0%)	(n/a; or in case of cannabis plant— 75.0%)	imprisonment and/or 5000 penalty units Where the offence relates to cannabis plant, 20 years imprisonment and/or 5000 penalty units		
18	Section 25 (2) of the <i>Drug Misuse</i>	Section 25 (2) of the <i>Drug</i>	10 years (50.0%); or	10 years (50.0%); or	20 years imprisonment	None	None

Item	Offence		SNPP (as a percentage of the maximum penalty)	Maximum penalty		Change(s) to the SNPP Table between 1/2/2003 and 28/5/2010, and the commencement date(s) of the change(s)	Significant change(s) to the substantive offence provision between 1/2/2003 and 28/5/2010, and commencement date(s) of the change(s) ²¹¹
	1/2/2003	28/5/2010		1/2/2003	28/5/2010		
	<i>and Trafficking Act 1985</i> (supplying commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug	<i>Misuse and Trafficking Act 1985</i> (supplying commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug	in case of cannabis plant— 66.7%	in case of cannabis plant— 66.7%	and/or 3500 penalty units Where the offence relates to cannabis plant, 15 years imprisonment an/or 3500 penalty units	and/or 3500 penalty units Where the offence relates to cannabis plant, 15 years imprisonment an/or 3500 penalty units	
19	Section 25 (2) of the <i>Drug Misuse and Trafficking Act 1985</i> (supplying commercial	Section 25 (2) of the <i>Drug Misuse and Trafficking Act 1985</i> (supplying commercial	15 years (n/a; or in case of cannabis plant— 75.0%)	15 years (n/a; or in case of cannabis plant— 75.0%)	Life imprisonment and/or 5000 penalty units Where the offence relates	Life imprisonment and/or 5000 penalty units Where the offence relates	None

Item	Offence		SNPP (as a percentage of the maximum penalty)		Maximum penalty		Change(s) to the SNPP Table between 1/2/2003 and 28/5/2010, and the commencement date(s) of the change(s)	Significant change(s) to the substantive offence provision between 1/2/2003 and 28/5/2010, and commencement date(s) of the change(s) ²¹¹
	1/2/2003	28/5/2010	1/2/2003	28/5/2010	1/2/2003	28/5/2010		
	quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that prohibited drug	quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that prohibited drug			to cannabis plant or leaf, 20 years imprisonment and/or 5,000 penalty units	to cannabis plant or leaf, 20 years imprisonment and/or 5000 penalty units		
20	Section 7 of the <i>Firearms Act 1996</i> (unauthorised possession or use of firearms)	Section 7 of the <i>Firearms Act 1996</i> (unauthorised possession or use of firearms)	3 years (60.0%; or in the case of prohibited firearm or pistol—21.4%)	3 years (21.4%)	5 years imprisonment Where offence relates to a prohibited firearm or pistol, 14 years imprisonment	14 years	None	14 Feb 2004: The offence of unauthorised possession or use of a prohibited firearm or pistol was separated from the less serious offence of unauthorised possession or use of other firearms (now s 7A of the <i>Firearms Act</i>)

Item	Offence		SNPP (as a percentage of the maximum penalty)		Maximum penalty		Change(s) to the SNPP Table between 1/2/2003 and 28/5/2010, and the commencement date(s) of the change(s)	Significant change(s) to the substantive offence provision between 1/2/2003 and 28/5/2010, and commencement date(s) of the change(s) ²¹¹
	1/2/2003	28/5/2010	1/2/2003	28/5/2010	1/2/2003	28/5/2010		
21	Section 51 (1A) or (2A) of the <i>Firearms Act 1996</i> (unauthorised sale of prohibited firearm or pistol)	Section 51 (1A) or (2A) of the <i>Firearms Act 1996</i> (unauthorised sale of prohibited firearm or pistol)	n/a	10 years (50.0%)	20 years	20 years	1 Jan 2008: Item 21 was added to the SNPP Table and a SNPP of 10 years was prescribed: <i>Crimes (Sentencing Procedure) Amendment Act 2007</i> (NSW) s 3 (sch. 1[14]).	1966 (NSW), and the latter offence was effectively removed from the SNPP Table. A jury can now find the accused guilty of an alternative offence under s 7A of that Act: <i>Crimes Legislation Further Amendment Act 2003</i> (NSW) s 3 (sch 5[2]-[5]). None
22	Section 51B of the <i>Firearms Act 1996</i> (unauthorised sale of firearms on an ongoing basis)	Section 51B of the <i>Firearms Act 1996</i> (unauthorised sale of firearms on an ongoing basis)	n/a	10 years (50.0%)	20 years	20 years	1 Jan 2008: Item 22 was added to the SNPP Table and a SNPP of 10 years was prescribed: <i>Crimes (Sentencing Procedure) Amendment Act</i>	15 Dec 2003: The offence of selling firearms illegally on an ongoing basis was modified so that the 3 or more occasions of sale that constitute the offence may occur over any consecutive period of 12 months, instead of any period of 30

Item	Offence		SNPP (as a percentage of the maximum penalty)		Maximum penalty		Change(s) to the SNPP Table between 1/2/2003 and 28/5/2010, and the commencement date(s) of the change(s)	Significant change(s) to the substantive offence provision between 1/2/2003 and 28/5/2010, and commencement date(s) of the change(s) ²¹¹
	1/2/2003	28/5/2010	1/2/2003	28/5/2010	1/2/2003	28/5/2010		
							2007 (NSW) s 3 (sch 1[14]).	consecutive days: <i>Firearms and Crimes Legislation Amendment (Public Safety) Act 2003</i> (NSW) s 4 (sch 2[2]).
23	Section 51D (2) of the <i>Firearms Act 1996</i> (unauthorised possession of more than 3 firearms any one of which is a prohibited firearm or pistol)	Section 51D (2) of the <i>Firearms Act 1996</i> (unauthorised possession of more than 3 firearms any one of which is a prohibited firearm or pistol)	n/a	10 years (50.0%)	20 years	20 years	1 Jan 2008: Item 23 was added to the SNPP Table and a SNPP of 10 years was prescribed: <i>Crimes (Sentencing Procedure) Amendment Act 2007</i> (NSW) s 3 (sch 1[14]).	None
24	Section 7 of the <i>Weapons Prohibition Act 1998</i> (unauthorised possession or use of prohibited weapon)—where the offence is prosecuted on indictment	Section 7 of the <i>Weapons Prohibition Act 1998</i> (unauthorised possession or use of prohibited weapon)—where the offence is prosecuted on indictment	n/a	3 years (21.4%)	14 years on conviction on indictment	14 years on conviction on indictment	1 Jan 2008: Item 24 was added to the SNPP Table and a SNPP of 3 years was prescribed: <i>Crimes (Sentencing Procedure) Amendment Act 2007</i> (NSW) s 3 (sch 1[14]).	None

ANNEXURE B

JRIS STATISTICS – DANGEROUS DRIVING AND AGGRAVATED DANGEROUS DRIVING OFFENCES

Section of the Crimes Act 1900 (NSW)	Maximum penalty for the offence	Maximum penalty in the Local Court	Courts	Period	Number of cases	Number and percentage of cases where non-custodial sentence, [‡] home detention or periodic detention was imposed*	Number and percentage of cases where suspended sentence was imposed*	Number and percentage of cases where full-time custodial sentence was imposed*	Mid-point of full-time custodial sentence [#]	Mid-point of non-parole period or fixed term for full-time custodial sentence [#]
s 52A(1)(a) - dangerous driving occasioning death—drive under influence (strictly indictable)	10 years	n/a	Higher courts	Jan 2002– Dec 2008	48	3 (6.3%)	3 (6.3%)	42 (87.5%)	3 years	2 years

[‡] Non-custodial sentences include: community service orders, good behaviour bonds (with or without supervision), dismissal of charges, conditional discharge of offender, conviction with no other penalty, sentenced to the rise of the court, and fines.

* Percentages are of the total number of cases.

All data (except years) were rounded upwards in JRIS, eg, 7 months would be rounded up to 12 months.

Section of the Crimes Act 1900 (NSW)	Maximum penalty for the offence	Maximum penalty in the Local Court	Courts	Period	Number of cases	Number and percentage of cases where non-custodial sentence, ^a home detention or periodic detention was imposed*	Number and percentage of cases where suspended sentence was imposed*	Number and percentage of cases where full-time custodial sentence was imposed*	Mid-point of full-time custodial sentence [#]	Mid-point of non-parole period or fixed term for full-time custodial sentence [#]
s 52A(1)(b) - dangerous driving occasioning death—drive speed dangerous (strictly indictable)	10 years	n/a	Higher courts	Jan 2002– Dec 2008	2	1 (50.0%)	Nil	1 (50.0%)	3.5 years	2 years
s 52A(1)(c) - dangerous driving occasioning death —drive manner dangerous (strictly indictable)	10 years	n/a	Higher courts	Jan 2002– Dec 2008	198	55 (27.8%)	49 (24.7%)	94 (47.5%)	3 years	18 months

Section of the Crimes Act 1900 (NSW)	Maximum penalty for the offence	Maximum penalty in the Local Court	Courts	Period	Number of cases	Number and percentage of cases where non-custodial sentence, ^a home detention or periodic detention was imposed*	Number and percentage of cases where suspended sentence was imposed*	Number and percentage of cases where full-time custodial sentence was imposed*	Mid-point of full-time custodial sentence [#]	Mid-point of non-parole period or fixed term for full-time custodial sentence [#]
s 52A(1)(e) - culpable driving causing grievous bodily harm—drive under influence ^x <repealed>	3 years	18 months	Higher courts	Jan 2002– Dec 2008	1	Nil	1 (100.0%)	Nil	n/a	n/a
s 52A(2) - aggravated dangerous driving occasioning death (strictly indictable)	14 years	n/a	Higher courts	Jan 2002– Dec 2008	57	Nil	2 (3.5%)	55 (96.5%)	5 years	2.5 years
s 52A(2) - aid and abet aggravated dangerous driving occasioning death (strictly indictable)	14 years	n/a	Higher courts	Jan 2002– Dec 2008	1	Nil	Nil	1 (100.0%)	3 years	n/a

^a The offence of culpable driving was replaced by the offence of dangerous driving, with effect from 23 December 1994: *Crimes (Dangerous Driving Offences) Amendment Act 1994* (NSW) s 3 (sch 1).

Section of the Crimes Act 1900 (NSW)	Maximum penalty for the offence	Maximum penalty in the Local Court	Courts	Period	Number of cases	Number and percentage of cases where non-custodial sentence, a home detention or periodic detention was imposed*	Number and percentage of cases where suspended sentence was imposed*	Number and percentage of cases where full-time custodial sentence was imposed*	Mid-point of full-time custodial sentence*	Mid-point of non-parole period or fixed term for full-time custodial sentence*
s 52A(3)(a) dangerous driving occasioning grievous bodily harm—drive under influence (Table 1)	7 years	18 months	Higher courts	Jan 2002– Dec 2008	78	26 (33.3%)	13 (16.7%)	39 (50.0%)	2 years	12 months
			Local Courts	Jul 2005– Jun 2009	57	32 (56.1%)	16 (28.1%)	9 (15.8%)	12 months	6 months
s 52A(3)(b) - dangerous driving occasioning grievous bodily harm—drive speed dangerous (Table 1)	7 years	18 months	Higher courts	Jan 2002– Dec 2008	2	Nil	Nil	2 (100.0%)	18 months	18 months
			Local Courts	Jul 2005– Jun 2009	4	2 (50.0%)	1 (25.0%)	1 (50.0%)	12 months	6 months
s 52A(3)(c) - dangerous driving occasioning grievous bodily harm—drive manner dangerous (Table 1)	7 years	18 months	Higher courts	Jan 2002– Dec 2008	124	43 (34.7%)	23 (18.5%)	58 (46.8%)	2 years	18 months
			Local Courts	Jul 2005– Jun 2009	163	125 (76.7%)	18 (11.0%)	20 (12.3%)	15 months	9 months

Section of the Crimes Act 1900 (NSW)	Maximum penalty for the offence	Maximum penalty in the Local Court	Courts	Period	Number of cases	Number and percentage of cases where non-custodial sentence, ^a home detention or periodic detention was imposed*	Number and percentage of cases where suspended sentence was imposed*	Number and percentage of cases where full-time custodial sentence was imposed*	Mid-point of full-time custodial sentence [#]	Mid-point of non-parole period or fixed term for full-time custodial sentence [#]
s 52A(4) - aggravated dangerous driving occasioning grievous bodily harm (Table 1)	11 years	18 months	Higher courts	Jan 2002– Dec 2008	87	9 (10.3%)	7 (8.0%)	71 (81.6%)	2.5 years	18 months
s 52A(4) - aggravated dangerous driving causing grievous bodily harm—prescribed concentration of alcohol (Table 1)	11 years	18 months	Local Courts	Jul 2005– Jun 2009	16	9 (56.3%)	2 (12.5%)	5 (31.3%)	18 months	12 months
s 52A(4) - aggravated dangerous driving causing grievous bodily harm—exceed speed (Table 1)	11 years	18 months	Local Courts	Jul 2005– Jun 2009	1	1 (100.0%)	Nil	Nil	n/a	n/a

Section of the Crimes Act 1900 (NSW)	Maximum penalty for the offence	Maximum penalty in the Local Court	Courts	Period	Number of cases	Number and percentage of cases where non-custodial sentence, ^a home detention or periodic detention was imposed*	Number and percentage of cases where suspended sentence was imposed*	Number and percentage of cases where full-time custodial sentence was imposed*	Mid-point of full-time custodial sentence [#]	Mid-point of non-parole period or fixed term for full-time custodial sentence [#]
s 52A(4) - aggravated dangerous driving causing grievous bodily harm—police pursuit (Table 1)	11 years	18 months	Local Courts	Jul 2005– Jun 2009	4	1 (25.0%)	1 (25.0%)	2 (50.0%)	12 months	6 months
s 52A(4) - aggravated dangerous driving causing grievous bodily harm—drug (not alcohol) (Table 1)	11 years	18 months	Local Courts	Jul 2005– Jun 2009	1	Nil	Nil	1 (100.0%)	20 months	15 months

