Maximum Penalty for Negligently Causing Serious Injury

Report

Sentencing Advisory Council
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1. Introduction

1.1 Terms of Reference

The Attorney-General has sought the advice of the Sentencing Advisory Council on the adequacy of the current maximum penalty of five years' imprisonment for the offence of negligently causing serious injury (NCSI) under section 24 of the Crimes Act 1958 (Vic), particularly in relation to driving matters.¹

Our terms of reference suggest that relevant issues the Council may wish to consider include:

- The maximum penalties for other offences covering similar behaviour, but where the outcome is more or less serious: for example where the victim is killed.
- The maximum penalties for other offences covering the same outcome (i.e. serious injury), but that require a different state of mind: for example where the defendant is reckless.
- The elements of other driving related offences, including relevant penalty levels.²

The maximum penalty for NCSI is substantially lower than that for culpable driving causing death, although negligence can form the requisite fault element for both offences. Therefore the key difference between the two offences would appear to be whether the victim dies or is seriously injured. The Attorney-General points out that ‘injuries sustained by victims of a car accident can be extremely serious and substantially diminish a victim’s quality of life’.³

The Council has been asked to advise on what it considers to be the appropriate maximum penalty for the offence. The Attorney-General notes that it is possible that the Council may conclude in the alternative that there is a gap in the offence framework in relation to driving matters occasioning serious injury. In the event that the Council reaches such a conclusion, the Council’s advice has also been sought on how any perceived gap may be addressed.⁴

1.2 Negligently Causing Serious Injury (NCSI): An Overview

The offence of NCSI arises when it is established that a person:

1. did or omitted to do something;
2. that this act or omission was culpably negligent; and
3. that the act or omission caused serious injury to another person.⁵

NCSI is most likely to be charged in the context of injuries caused by negligent driving. It is also charged in the context of harm caused by other types of behaviour such as assault and more ‘traditional’ negligent behaviour.⁶ The offence of NCSI is explored in more depth in Section 3. Section 4 examines current sentencing practices for NCSI, including judicial criticism of its statutory maximum penalty.

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¹ Letters from the Attorney-General, the Hon Rob Hulls, MP, dated 7 June 2007 and 26 February 2007.
² Letter from the Attorney-General, the Hon Rob Hulls, MP, dated 26 February 2007.
³ Letter from the Attorney-General, the Hon Rob Hulls, MP, dated 7 June 2007.
⁴ Letter from the Attorney-General, the Hon Rob Hulls, MP, dated 7 June 2007.
⁵ Section 24 of the Crimes Act 1958 (Vic) provides that: ‘A person who by negligently doing or omitting to do an act causes serious injury to another person is guilty of an indictable offence’. See also R v Shields [1981] VR 717 (discussion of the degree of negligence necessary to establish the offence).
⁶ See section 2.2 below for discussion of culpable negligence.
⁷ See for example Case Study 3 in Section 3 below.
1.3 Setting a Statutory Maximum Penalty

The considerations relevant to setting or reviewing a statutory maximum penalty include the functions that it should serve and whether it is set at the appropriate level to serve these functions adequately. These include to:

1. Provide sentencers and the broader community with a legislative guide to the seriousness of the offence.
2. Place a legally defined ‘ceiling’ on the lawful action permitted by the State against an offender. This ceiling should be sufficiently low to provide meaningful guidance to sentencers as to the relative seriousness of the offence and yet sufficiently high to provide for the worst examples of the crime that the sentencer may face.
3. Serve as a general deterrent by warning potential offenders about the highest penalty that they will face if they commit such an offence.7

As part of the exercise of setting the maximum penalty, it is useful to consider current sentencing practices and to evaluate where the offence sits along the continuum of relative offence severity. This requires an examination of the intrinsic nature of the offence and a comparison between the elements of the offence and other forms of criminal behaviour.

The following three sections of this Report address these issues in more detail. Section 2 looks at the functions of a maximum penalty. Section 3 places NCSI in context by looking at the elements of the offence and comparing it to related offences. Section 4 looks at sentencing practices for NCSI, including judicial comment about the maximum penalty.

1.4 Criticism of the Maximum Penalty for NCSI

The Council’s reference has arisen out of concern expressed by some members of the judiciary and others that the maximum penalty for NCSI is inadequate, particularly as it applies in the context of criminally negligent driving.8 Section 4 below looks at the judicial criticism of the maximum penalty in detail. Some of these criticisms include that:

- It does not reflect the gravity of the offence, including the severity of the injury to another person that has been caused by the offender.
- It is inadequate to provide for the worst examples of offending.
- It is inconsistent with the maximum penalties for related offences.
- It affects the extent to which cumulation can be ordered; for example in cases in which there are different offences (such as culpable driving and NCSI) committed in relation to different victims but arising out of the same conduct (such as negligent driving).9

As Appendix 2 illustrates, no fewer than nine County Court judges10 and seven Court of Appeal judges11 in Victoria have criticised the maximum penalty for NCSI. This is a significant consideration in assessing the adequacy of the current statutory maximum penalty.

7 See further section 3.1 below.
8 See further Appendix 2 which sets out a number of Victorian County Court and Court of Appeal cases in which the adequacy of the maximum penalty for NCSI has been raised.
9 See further section 4.3 below.
10 Chettle, Dee, Duggan, Gullaci, Nicholson, Nixon, Rizkalla, Smallwood and Wodak JJ.
11 Brooking, Callaway, Charles, Nettle, Phillips, Redlich JJA and Winneke P.
1.5 The Council’s Approach

On 6 July 2007, the Council released an Information Paper which briefly described the context of the reference and provided information about the offence of NCSI and related offences in Victoria and other jurisdictions. It also provided information about sentencing patterns for NCSI and related offences in Victorian courts. The Council invited submissions on four questions raised in the Information Paper. The Council placed advertisements in the Age and the Herald-Sun informing the community of the reference and calling for submissions in response to the Information Paper. Twelve submissions were received by the Council. The Council also held a series of meetings with relevant stakeholders.

The Council compared the maximum penalty for NCSI with related Victorian offences and with comparable offences in other Australian jurisdictions. The Council also analysed sentencing data in relation to the offence of NCSI to determine the actual sentencing practices in both the Magistrates’ Court and County Court.

The Council reviewed the maximum term of imprisonment available for NCSI and has come to the view that the current maximum penalty is inadequate. The Council is of the view, consistent with judges of the County Court, members of the Court of Appeal and the participants in the Council’s consultation process, that the current maximum penalty does not adequately reflect the serious nature of this offence. We also are persuaded that the current maximum penalty does not provide for the worst examples of this offence.

The Council has recommended an increase in the maximum penalty for NCSI from five years to ten years’ imprisonment. Further, in order to maintain a logical consistency between NCSI and dangerous driving causing death, the Council has suggested that there be a differentiation between the maximum penalties for the offences of dangerous driving causing serious injury (five years) and dangerous driving causing death (ten years). This would produce the following scheme which would properly reflect the different levels of culpability and harm:

- Culpable driving causing death: 20 years
- NCSI: 10 years
- Dangerous driving causing death: 10 years
- Dangerous driving causing serious injury: 5 years

In relation to the question of whether a new offence should be created, the Council has considered the benefits and risks of the creation of a new offence of culpable driving causing serious injury. While the Council acknowledged that there are some compelling arguments for the creation of such an offence, ultimately we rejected the introduction of an offence of culpable driving causing serious injury. The Council is of the view that the problem of the inadequate maximum penalty for NCSI can be dealt with without introducing another offence for a specific type of behaviour and further complicating the current offence framework. This is discussed in more detail at sections [6.3]–[6.4] of this report.

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12 The data provided in the original Information Paper were revised and the paper was re-released on 25 July 2007.
13 The submissions received and meetings held are listed in Appendix 4.
14 See further Appendix 1.
1. Introduction
2. ‘Negligently Causing Serious Injury’

2.1 Introduction

As part of the exercise of setting the maximum penalty it is necessary to consider current sentencing practices and to evaluate where the offence sits in the scale of relative offence severity. This requires an examination of the intrinsic nature of the offence and an evaluation of where it sits in relation to other related forms of criminal behaviour. This section looks at the elements of the offence of NCSI in Victoria and compares NCSI to related Victorian offences and to similar offences in other Australian jurisdictions.

2.2 The Offence of NCSI

The offence of NCSI arises when it is established that a person:

1. did or omitted to do something;
2. that this act or omission was culpably negligent; and
3. that the act or omission caused serious injury to another person.15

In order for the prosecution to establish that the accused was culpably negligent, it must establish that the:

act or omission [took] place in circumstances which involved such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that grievous bodily injury would follow, that the act or omission merits punishment under the criminal law.16

This is the same level of negligence that is required to be established for the offence of culpable driving causing death, where the head of culpability alleged is negligence.

This formulation can be contrasted with the civil standard of negligence. In Andrew’s case, it was held that ‘simple lack of care such as will constitute civil liability is not enough’.17 In R v Wright,18 Justice Callaway endorsed the trial judge’s directions to the jury in relation to criminal negligence:

the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the state deserving punishment.19

The prosecution also has to prove that the negligent driving was the ‘operating and substantial cause’20 of the victim’s serious injury.

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15 Section 24 of the Crimes Act 1958 (Vic) provides that: ‘A person who by negligently doing or omitting to do an act causes serious injury to another person is guilty of an indictable offence’.


19 Ibid 358.

‘Injury’ is defined in the Crimes Act 1958 (Vic) as including ‘unconsciousness, hysteria, pain and any substantial impairment of bodily function’. Judge Tadgell in R v Welsh and Flynn suggested whether a particular injury qualifies as a ‘serious injury’ should involve consideration of whether the injury is, in fact, serious or ‘an injury or injuries which would, according to ordinary human experience, be commonly regarded as slight, superficial or trifling’. This wide definition allows for significant scope in what could be considered serious injury by the courts, from ‘two significant black eyes...together with grazes around the head and face’ to quadriplegia and permanent brain injury.

2.3 History of NCSI

The offence of negligently causing serious injury has existed in various forms since the Criminal Law and Practice Statute 1864 (Vic), at which time the maximum penalty was two years’ imprisonment. Despite being created long before the use of the motor vehicle, for some time now it has been recognised that this offence is predominately charged in the context of injuries caused by negligent driving.

The Crimes (Driving Offences) Act 1967 (Vic) increased the maximum penalty for NCSI from two years’ imprisonment to three years’ imprisonment. The penalty was increased on the recommendation of the Chief Justice’s Law Reform Committee that consideration should be given as to whether the maximum penalty for the offence was adequate. While the Committee’s recommendation was to consider increasing the penalty only in relation to driving-related offences, Parliament took the view that it was preferable to adopt one consistent penalty for all offences committed under that section. The increase was to ‘allow the section to play a more effective part than hitherto with respect to injuries caused by negligent driving’.

Since 1967, the maximum penalty for NCSI has increased only once, from three to five years. In 1988, the Victorian Sentencing Committee (‘VSC’) found that there was a need for a review of the maximum penalties for criminal offences in Victoria due to the haphazard organisation of the penalties at the time. The VSC report recommended that the maximum penalty for NCSI should be reduced to one year’s imprisonment on the basis that the current effective sentence for that offence was one year and six months’ imprisonment.

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21 Crimes Act 1958 (Vic) s 15.
22 Crimes Act 1958 (Vic) s 15.
23 (Unreported, Supreme Court of Victoria Court of Appeal, Crockett, King and Tadgell JJ, 16 October 1987).
24 Ibid 18.
26 Section 24 of the Criminal Law and Practice Statute 1864 read as follows: ‘Whosoever by negligently doing or omitting to do any act shall cause grievous bodily injury to any other person shall be guilty of a misdemeanour and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years.’ See R v Shields [1981] VR 717, 719.
28 The Queen v Reid (Unreported, Supreme Court of Victoria Court of Appeal, Brooking, Callaway JJA and Southwell AJA, 9 October 1996).
29 Crimes (Driving Offences) Act 1967 s 2.
31 Victoria, Parliamentary Debates, Legislative Assembly, 26 October 1967, 1364 (G. Reid, Attorney-General).
33 The current effective sentence was calculated by reducing the statutory maximum penalty by a third to take into account the effect of remissions. One of the recommendations of the VSC was the abolition of remissions.
The following year, the Sentencing Taskforce was set up to review the scale of maximum penalties as proposed by the VSC. The Taskforce ultimately came up with its own thirteen level scale which covered all criminal offences in the state of Victoria. As part of its recommendations, the Sentencing Taskforce took the view that the maximum penalty suggested in the VSC report was too low and recommended a maximum penalty of five years’ imprisonment. This was on the basis that the average sentence passed for that offence during the period from 1985–87 was 18 months’ imprisonment. In 1991, this recommendation was given legislative effect as part of the implementation of the new maximum penalty scale pursuant to the Sentencing Act 1991 (Vic).

2.4 Criminal Justice Approaches to Driving-Related Offences

The overwhelming majority of NCSI offences are charged as a result of driving-related injuries. The Transport Accident Commission has recognised injuries caused on the roads as a significant social problem and launched an ongoing campaign to reduce the ‘hidden road toll’. When this campaign began in October 2005, there was an average of 46 people injured on Victorian roads each day (or close to 16,800 people a year). While many of these injuries may not have resulted from criminally negligent behaviour, the significant number of people injured on Victorian roads each year serves to illustrate the scale of the problem.

The problem of offending on the roads is not a new one, but it has presented major challenges to the criminal justice system over the years. The offence of culpable driving was created in 1967 because ‘it had been the common experience...that juries [were] loathe to convict of manslaughter a motorist who might have killed a person by negligent driving’. At that time, the maximum penalty was seven years. This penalty has been increased three times since the inception of the offence, which reflects the growing community concern over fatalities on the road. In 1991, a poll was conducted of 600 voters, which found that despite earlier perceived difficulties for juries in relation to convictions for manslaughter in relation to negligent driving:

The community seem[ed] to take a more punitive view of people who are grossly negligent in the use of motor vehicles than those who are grossly negligent in the use of firearms.

In addition to higher penalties for culpable driving, there also have been recent increases in the maximum penalties for repeat drink driving and failure to stop and render assistance at the scene of an accident as well as the creation of new offences of dangerous driving causing death or serious injury.

34 Victoria, Parliamentary Debates, Legislative Assembly, 19 April 1991, 337 (J. Kennan, Attorney-General).
37 See Figure 8.
39 Victoria, Parliamentary Debates, Legislative Assembly, 26 October 1967, 1362 (G. Reid, Attorney-General).
42 Section 61(3) of the Road Safety Act 1986 (Vic) as amended by the Road Safety (Further Amendment) Act 2005 (Vic).
43 Section 319 of the Crimes Act 1958 (Vic) which was inserted by the Crimes (Dangerous Driving) Act 2004 (Vic).
A range of ancillary orders also has been introduced to complement existing sentencing orders. Under the *Sentencing Act 1991* (Vic), where an offender is convicted of culpable driving, dangerous driving causing death/serious injury, manslaughter or negligently causing serious injury, the court must cancel the offender’s driver’s licence and disqualify him or her from obtaining a licence for 24 months (18 months in the case of dangerous driving causing death/serious injury). The court can also make a finding that the offender was under the influence of alcohol or a drug, which contributed to the offence. If such a finding is made, the offender will be required to be assessed in relation to his or her alcohol/drug use before being able to re-apply for the licence.

Another measure that was introduced by parliament is the alcohol interlock device. The use of such a device is intended to prevent drivers who have exceeded a certain blood alcohol concentration from operating a motor vehicle. In particular circumstances, the court can, where the offender has been convicted of one of the offences as described above, make an order that an alcohol interlock device must be fitted to his or her vehicle.

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44 *Sentencing Act 1991* (Vic) s 89. In relation to manslaughter and negligently causing serious injury, it must be an offence which arises out of the driving of a motor vehicle. The offender cannot have his or her license reinstated except on the order of the Magistrates’ Court at the end of the disqualification period. This section was inserted pursuant to the *Road Safety (Alcohol Interlocks) Act 2002* (Vic).

45 *Sentencing Act 1991* (Vic) s 89 (3B).

46 An ‘alcohol interlock device’ is a device capable of ‘analysing a breath sample for the presence of alcohol; and if it detects more than a certain concentration of alcohol, preventing the motor vehicle from being started’; see section 3 of the *Road Safety Act 1986* (Vic).

47 Under section 89A of the *Sentencing Act 1991* (Vic) where an offender is convicted of culpable driving, dangerous driving causing serious injury/death, manslaughter or negligently causing serious injury (where the offending arises out of the driving of a motor vehicle), the court has made a finding that alcohol was a contributing factor to the commission of the offence and the offender has made an application to the Magistrates’ Court for a license restoration order, an order may be made directing the imposition of an alcohol interlock device. For a first offence in these circumstances or where the order for disqualification was made prior to 13 May 2002, the court has discretion as to whether or not to make an order to impose an alcohol interlock condition of up to six months. For a second or subsequent offence, the imposition of an alcohol interlock condition is mandatory. For a second offence the minimal operation period is six months, for a third or subsequent offence, the minimum is three years.
3. NCSI and the Functions of a Statutory Maximum Penalty

3.1 Introduction

In setting or reviewing a statutory maximum penalty it is necessary to take into account the functions that a statutory maximum penalty should serve.48 These include to:

1. Provide sentencers and the broader community with a legislative guide to the seriousness of the offence. This is generally determined by reference to harm caused or risked by the offender’s act or omission (for example injury, serious injury or death) and the offender’s culpability or blameworthiness (for example whether the harm was caused as a result of the offender’s negligence or recklessness or whether the offender acted intentionally).49

2. Place a legally defined ‘ceiling’ on the lawful action permitted by the State against an individual who commits an offence. This ceiling should be sufficiently low to provide meaningful guidance to sentencers as to the relative gravity of the offence and yet sufficiently high to provide for the worst examples of the crime that the sentencer may face.50

3. Serve as a general deterrent by warning potential offenders about the highest penalty that they will face if they commit such an offence.51

There are a number of reasons for which a particular statutory maximum penalty may be increased, as recently noted by the Victorian Court of Appeal:

On some occasions, when Parliament increases the maximum penalty, that suggests that more severe penalties should be imposed not just for offences falling within the worst class but over a range (not necessarily the whole range) of cases … On other occasions, an increase in the maximum penalty means only that Parliament has thought of a worst class of case for which the previous maximum was inadequate.52

3.2 Deterrence

The statutory maximum penalty is intended to function as a general deterrent by warning potential offenders of the maximum punishment they are liable to receive if they commit an offence.53

It is difficult to quantify whether or not the maximum penalty for an offence actually has any deterrent effect. There is no evidence as to how many potential offenders are aware of the maximum penalties for particular offences or whether or not they are in a position to draw a distinction between those maximum penalties and the level of sentences being imposed by the courts.54

This point was raised in a submission by the Royal Automobile Club of Victoria (RACV) which questions ‘the deterrent effect of any changes to the penalty system’.55 The RACV expressed the view that the effort directed towards assessing the maximum penalty ‘seems disproportionate to its importance in a whole-of-government approach to improving road safety’ and that ‘more effort should be directed toward crash prevention and injury reduction programs’.56

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50 See for example DPP v Aydin & Kirsch [2005] VSCA 86 (Unreported, Callaway, Buchanan and Eames JJA, 3 May 2005) [8]–[12] (Callaway JA).


53 Freiberg (2002), above n 48, 55.


55 Submission 1 (Royal Automobile Club of Victoria).

56 Ibid.
However, where the consequences of particular offences are highly publicised, it can be argued that a higher maximum penalty may have a greater deterrent effect. As the Court of Appeal observed in *DPP v Gany*:\textsuperscript{57}

Serious driving offences frequently involve offenders who are of generally good character and who have excellent prospects for reformation. No-one likes sending such people to gaol but there has been much publicity about the consequences for those who choose to drive their motor vehicles in a criminally negligent or reckless manner causing serious injury or endangering other members of the public. This Court has said on numerous occasions, frequently when dealing with offences of culpable driving and negligently causing serious injury, that those who put lives at risk through grossly negligent driving can expect to receive heavy penalties influenced by the sentencing principle of general deterrence. In such circumstances, sound prospects of rehabilitation will not lead to any significant amelioration of the prominence of general deterrence in the sentencing process. Denunciation and general deterrence must be at the forefront of the sentencing synthesis.\textsuperscript{58}

The deterrent effect of the maximum penalty was also a significant focus of the submissions received by the Council in relation to this reference. The Office of Public Prosecutions, the Working Against Culpable Driving advocacy group and Victoria Police took the view that the current maximum penalty for NCSI is inadequate to act as a deterrent for this offence.\textsuperscript{59} This opinion was also put forward in consultations conducted by the Council.\textsuperscript{60}

The Council’s 2005 review of the maximum penalties of a number of drink driving offences looked at several studies of whether statutory maxima may have a deterrent effect.\textsuperscript{61} One such study examined whether increases to the statutory maximum penalties and maximum licence disqualification periods for drink driving offences in New South Wales in 1998 had any impact on the rates of repeat drink driving.\textsuperscript{62} One of the aims of the penalty increases had been to ‘enhance the deterrent effect of our road penalties and … help to improve road safety’.\textsuperscript{63}

The study compared all drink driving offences prosecuted in the New South Wales Local Courts in 1997 with those in 1999 (after the changes were in force) and found that there was some evidence of a beneficial impact of the sentencing policy on repeat offending, particularly in regional areas:

Non-Sydney drink-drivers sentenced before the statutory penalties were increased, had higher odds of reappearing for a new offence, and reoffended sooner, than non-Sydney drink-drivers sentenced after the penalties were raised. But this effect was not apparent for Sydney drink-drivers.\textsuperscript{64}

The conclusion was reached that although the findings ‘lend support to one of the central tenets of deterrence theory, that is increasing the formal costs associated with an offence will reduce the rate of offending’, the ‘overall effect of the increased penalties on recidivism rates was relatively small, with the probability of a drink-driver reoffending being reduced by just three percentage points in non-Sydney locations’.\textsuperscript{65} For this reason the author concluded that:

\textsuperscript{57} [2006] VSCA 148 (Unreported, Chernov, Vincent and Redlich JJA, 7 July 2007).
\textsuperscript{58} Ibid [35].
\textsuperscript{59} Submissions 5 (Office of Public Prosecutions), 8 (Working Against Culpable Driving) and 11 (Victoria Police).
\textsuperscript{60} Victims’ Issues Roundtable (14 August 2007).
\textsuperscript{61} Sentencing Advisory Council (2005), above n 41, 7–9.
\textsuperscript{63} New South Wales, *Parliamentary Debates* (Second Reading, Traffic Amendment (Penalties and Disqualifications) Bill 1998), Legislative Assembly, 21 May 1998 (C. Scully, Minister for Transport and Minister for Roads).
\textsuperscript{64} Briscoe (2004) above n 62, 7. The study first identified and ruled out five ways in which the intended deterrent effects of the legislation could have potentially been undermined—(1) a reduction in drink driving charges brought before the courts, (2) an increase in court delay, (3) a reduction in guilty pleas, (4) a reduction in proven offences or (5) no subsequent change to the severity of drink driving penalties imposed by the courts.
Given such a small effect size from what was essentially a doubling of the statutory penalties for all drink-driving offences, and keeping in mind the associated costs with administering the new penalty regime, the efficiency of this strategy in controlling crime remains questionable. In comparison, strategies that have increased the perceived risk of apprehension, such as RBT [random breath testing], have had substantial and enduring influences on offending rates … Focusing efforts on maintaining a high level of enforcement of drink-driving offences may therefore be a better use of resources when targeting offending of this nature.66

The study acknowledged that the impact of the legislation might have increased if there had not been a decrease in the proportion of offenders who received licence disqualifications. Twenty per cent of offenders had avoided mandatory licence disqualification as a result of receiving a dismissal under section 10 of the Crimes (Sentencing Procedure) Act 1999 (NSW).67 The author concluded that '[e]nsuring that almost all offenders are recipients of a licence disqualification once found guilty for a drink-driving offence could have increased the potential returns on investment that are reported here'.68

The authors noted that other factors could impact the frequency of drink driving recidivism, such as comparatively lower numbers of random breath testing stations in country and regional locations:

Fewer police are available to target drink-driving in country and regional locations and those that are available have to cover a much larger region than their city counterparts. These factors would reduce the perceived certainty of apprehension as people come to believe that they can elude RBT by avoiding major roads and arterials and thus diminishing the deterrent efficacy of RBT.69

In light of this, the authors concluded that the superior effect of raising statutory penalties found for offenders residing in non-Sydney metropolitan locations is, therefore, an important outcome in terms of addressing drink driving and related issues in country and regional areas.70

Although the New South Wales study had some positive conclusions about the ability of statutory maxima to serve as a deterrent, there is by no means certainty that this purpose will always be served. For this reason an analysis of whether a particular statutory maximum penalty is appropriate is not significantly advanced by attempting to assess whether it is sufficient to serve as a general deterrent. Therefore it is necessary to turn to the other functions served by statutory maxima to assess whether or not the statutory maximum penalty for a particular offence is set at an appropriate level.

### 3.3 Principle of Legality

The statutory maximum penalty provides a finite upper boundary on a sentencer’s power and discretion to punish and/or rehabilitate offenders.71 As well as setting the upper limit of judicial discretion when sentencing offenders, it represents symbolic recognition that the State’s power to deal with offenders must be subject to lawful restraint.

A statutory maximum should provide an indication of the relative gravity of the offence and penalty as compared with other offences and yet be broad enough to allow the sentencer sufficient scope to accommodate the worst examples of the offence that are likely to be encountered.72 This tension was recognised by the Victorian Court of Appeal who observed that:

There is no gainsaying the importance of the maximum penalty prescribed by Parliament for an offence. It provides authoritative guidance by the legislature as to the relative seriousness of the offence, in the abstract, by comparison with other crimes in the calendar … It must always be remembered, however, that a maximum penalty is prescribed for the worst class, or one of a number of worst classes, of the offence in question.73

68 Ibid.
69 Ibid 9.
70 Ibid.
72 Freiberg (2002), above n 48, 56.
When determining an offender's sentence, the statutory maximum penalty is one of the many factors to which the sentencer must have regard including current sentencing practices, the nature and gravity of the offence, the offender's degree of responsibility for the offence, the previous character of the offender and any aggravating or mitigating circumstances.\textsuperscript{74} However, the particular significance of the statutory maximum penalty has been emphasised by the Victorian Court of Appeal:

> It is because the maximum penalty is important that s.5(2)(a) of the Sentencing Act lists it first among the matters to which a court sentencing an offender must have regard and, if the judge mistakes the maximum, that re-opens the discretion unless the Court of Appeal is satisfied that the mistake could not have materially affected the sentence.\textsuperscript{75} It is sometimes said that a judge, in obedience to s.5(2)(a), ‘steers by the maximum’. It is a helpful metaphor, but two things should be said of it. One is that there is a difference between steering by the maximum and aiming at the maximum. The penalty prescribed for the worst class of case is like a lighthouse or a beacon. The ship is not sailed towards it, but rather it is used as a navigational aid. The other is that steering by the maximum may decrease the sentence that might otherwise be imposed as well as increase it.\textsuperscript{75}

Because of the particular significance of the statutory maximum penalty as a sentencing factor, it is essential that it is adequate to reflect the seriousness and provide for the worst examples of the offence. For this reason judicial comment about the adequacy (or otherwise) of a particular maximum penalty is highly relevant to an assessment of whether the maximum penalty provided by the legislature is sufficient.

In relation to the offence of NCSI, there have been numerous comments made by the judiciary that they feel constrained in exercising their sentencing discretion by the low maximum penalty available for NCSI.\textsuperscript{76} For example, Judge Gullaci was highly critical of the maximum penalty for NCSI in \textit{R v Healey}:\textsuperscript{77}

> In my view the maximum penalties available to the court of five years on each of the counts on the presentment is inadequate to enable the court in this state to impose appropriate penalties for the type of offences at the higher range of criminal conduct covered by that section of the Crimes Act.\textsuperscript{78}

In its submission, the Office of Public Prosecutions endorsed the comments made by the judiciary in relation to the inadequacy of the maximum penalty for this offence to provide for the worst examples of this offence, with particular reference to driving offences.\textsuperscript{79} This was reiterated in other submissions and consultations held by the Council.\textsuperscript{80}

\textsuperscript{74} Sentencing Act 1991 (Vic) s 5(2).

\textsuperscript{75} \textit{DPP v Aydin & Kirsch} [2005] VSCA 86 [8]–[12] per Callaway JA (citations omitted).

\textsuperscript{76} See further section 4.3 and Appendix 2 in relation to judicial criticism of the maximum penalty for NCSI.

\textsuperscript{77} [2007] VCC (Unreported, Gullaci J, 21 February 2007).

\textsuperscript{78} Ibid [67]-[68].

\textsuperscript{79} Submission 5 (Office of Public Prosecutions).

\textsuperscript{80} Submissions 1 (RACV), 8 (Working Against Culpable Driving) and 11 (Victoria Police); Victims’ Issues Roundtable (14 August 2007); Meeting with Noel McNamara (14 August 2007).
### 3.4 Offence Seriousness

**Determining the Seriousness of an Offence**

Deciding where to place an offence along the scale of statutory maximum penalties requires an examination of both the intrinsic nature of the offence (including the elements of the offence and current sentencing practices),\(^81\) and the relationship between the offence and other criminal behaviour (such as more and less serious related offences).\(^82\)

The maximum penalty should serve as an expression of the gravity with which the community views the offence and should provide guidance to the judiciary about the seriousness of the offence relative to other offences.\(^83\) The use of a particular statutory maximum penalty as an indicator of the relative seriousness of the offence in question stems from the theory of ‘just deserts’ which emphasises assessing offence seriousness as a more important factor than deterrence to determine the appropriateness of a penalty in a particular case:

> The fundamental principle of desert in punishing convicted persons is that the severity of the punishment should be commensurate with the seriousness of the offender’s criminal conduct. The focus of the commensurate-deserts principle is on the gravity of past conduct, not on the likelihood of future behaviour; this retrospective orientation distinguishes desert from the crime-control goals of deterrence, incapacitation, and rehabilitation. The criterion for judging whether a penalty is deserved is whether it fairly reflects the gravity of the criminal conduct of which the defendant has been convicted, rather than its effectiveness in preventing future crimes by the defendant or other potential offenders.\(^84\)

As the report of the Sentencing Task Force recognised, there are a number of difficulties in ranking the relative seriousness of criminal conduct:

> Social problems do not lend themselves to simple or elegant mathematical solutions. There is ‘no strict denominator of social problems and no scale for comparing different problems’.\(^85\) Despite an individual’s confidence in the merits of his or her intuitive sense of offence seriousness, the concept does convey different things to different people. Offences vary widely in the way they are carried out and in the harm they cause or the interests they infringe. Yet despite the difficulties, ‘the seriousness of criminal acts represents a conceptual dimension of criminality that is indispensable in common everyday discourse, in legal theory and practice, and in sociological work’.\(^86\)

One way to assess the seriousness of criminal conduct is by reference to the degree of harm caused or risked by the offender’s actions and the culpability of the offender.\(^87\)

**Harm Caused**

Harm can be described as the ‘degree of injury done or risked by the act’.\(^88\) Harm inflicted or risked may affect the interests of individuals and the state.\(^89\) The most serious harm is generally considered to be that which affects individual personal integrity, such as murder, sexual offences and other offences involving the causing of injury to the victim. Lower on the scale are offences which have an impact only on economic well-being, such as theft.

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83. Freiberg (2002), above n 48, 55.
In terms of harm caused, the offence of NCSI is placed at the high end of the ‘harm hierarchy’ as a necessary element of the offence is that the offender’s act or omission has caused serious harm to another person.

Culpability
An assessment of culpability, or blameworthiness, involves gauging the extent to which an offender should be held accountable for his or her actions by assessing the offender’s awareness, motivation and state of mind in committing the crime.

In terms of culpability, the offence of NCSI sits lower down on the ‘culpability hierarchy’ than offences in which an offender has intentionally harmed another person.

3.5 Assessing the Seriousness of NCSI

Introduction
As explored in Section 3.4 above, the seriousness of criminal conduct can be assessed by reference to the degree of harm caused or risked by the offender’s act (or omission) and the offender’s culpability. Figure 1 illustrates that, although NCSI sits at the lower end of the ‘culpability hierarchy’ (compared to offences in which an offender has intentionally harmed another person) it is at the higher end of the ‘harm hierarchy’ (compared to offences involving little or no injury). The combination of these levels of harm and culpability is one means of measuring the seriousness with which NCSI should be viewed.

Figure 1: NCSI: Harm and Culpability
Figure 2 briefly explains the different levels of the culpability hierarchy.

**Figure 2: Culpability Hierarchy**

<table>
<thead>
<tr>
<th>Level</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intentional conduct</td>
<td>Intentional conduct requires an intention to cause the consequences of the action, for example, an intention to cause serious injury as opposed to the intention to do the act which caused the serious injury.90</td>
</tr>
<tr>
<td>Reckless conduct</td>
<td>Reckless conduct requires foresight on the part of the accused of the probable consequences of his or her actions and indifference as to whether or not those consequences eventuate.91</td>
</tr>
<tr>
<td>Negligent conduct</td>
<td>Negligent conduct involves such a great falling short of the standard of care which a reasonable person would have exercised and which involved such a high risk that serious bodily injury would follow, that the act or omission merits punishment under the criminal law.92</td>
</tr>
<tr>
<td>Dangerous conduct</td>
<td>Dangerous conduct in relation to driving involves driving 'in a speed or manner dangerous to the public, having regard to all the circumstances of the case.'93</td>
</tr>
</tbody>
</table>

Figure 3 briefly explains the different levels of the harm hierarchy.

**Figure 3: Harm Hierarchy**

<table>
<thead>
<tr>
<th>Level</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Death</td>
<td>Death occurs when there is either irreversible cessation of circulation of blood in the body or irreversible cessation of all function of the brain.94</td>
</tr>
<tr>
<td>Serious Injury</td>
<td>Serious injury includes a combination of injuries such as unconsciousness, hysteria, pain and any substantial impairment of bodily function.95</td>
</tr>
<tr>
<td>Injury</td>
<td>Injury includes unconsciousness, hysteria, pain and any substantial impairment of bodily function.96</td>
</tr>
<tr>
<td>Assault</td>
<td>Assault can be described as ‘a blow or other intentional application of physical force in hostile circumstances.’ 97</td>
</tr>
</tbody>
</table>

---

The relevance of harm and culpability to measuring offence seriousness is illustrated in a comparison of NCSI with related driving and assault offences; as shown in Figure 4 and Figure 5.

Figure 4: Maximum Penalties of Imprisonment for NCSI and Related Offences

As illustrated in Figure 4, culpable driving causing death can encompass more than one type of culpability. The offence can include both subjective (recklessly) and objective (negligently) states of mind. This is in contrast to the injury offences of negligently and recklessly causing serious injury, where there are two separate offences for each applicable level of culpability.

Culpable driving causing death can also cover two further distinct heads of culpability. A person may also be found guilty of culpable driving causing death if the prosecution can establish, in conjunction with the requisite physical element of the offence, that the person was under the influence of alcohol98 or a drug99 to such an extent as to be incapable of having proper control of the motor vehicle. At a trial in relation to the offence of culpable driving, the prosecution is required to identify the head of culpability alleged.100

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98 Crimes Act 1958 (Vic) s 318(2)(c).
99 Crimes Act 1958 (Vic) s 318(2)(d).
100 Crimes Act 1958 (Vic) s 318(3).
Offences with the Same Level of Culpability

In the context of driving offences, it is arguable that one measure of the seriousness of NCSI is to place it relative to culpable driving (by negligence) causing death, as the circumstances and culpability are the same for both offences; the key difference is the level of harm caused (death compared to serious injury). As the overwhelming majority of NCSI cases in the County Court are driving related, it is appropriate to use culpable driving causing death as a higher point along the same axis as NCSI.\(^{101}\)

NCSI can also be compared to the offence of dangerous driving causing death or serious injury, which requires less culpability on the part of the offender, but the same or a greater level of harm.\(^{102}\)

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101 See page 20 below for further discussion on culpable driving causing death. See also Figure 8.
102 Submission 1 (RACV).
Offences with the Same Level of Harm

Another reference point for measuring the seriousness of NCSI are offences with different levels of culpability but the same level of harm (serious injury). Intentionally causing serious injury and recklessly causing serious injury have the same level of harm as NCSI but higher levels of culpability. Dangerous driving causing serious injury has the same level of harm as NCSI but a lower level of culpability; culpably negligent driving being more serious than dangerous driving.103

In terms of harm caused, NCSI is a serious offence which requires that serious harm has been caused to another person. The definition of serious injury can cover a wide range of injuries ranging from anything that cannot ‘be commonly regarded as slight, superficial or trifling’104 to being of the most severe nature, short of death. This point was made by the RACV who submitted that:

- The maximum term for NCSI is the same as for assault and for recklessly causing injury. The fact that NCSI relates to a more severe injury outcome than either of these offences suggests that it should warrant a higher maximum penalty.
- The classification of ‘serious injury’ encompasses a broad spectrum of injury and can extend as far as including extremely serious injuries which significantly diminish a victim’s quality of life. The current maximum penalty of 5 years may not offer a high enough ceiling to provide for the worst examples of NCSI that a sentencer may face.105

This view was reiterated in a number of submissions and consultations, with particular reference to NCSI in the context of driving.106 Among these, the Office of Public Prosecutions submitted that:

- many of the injuries caused...are very serious and often involve permanent and seriously debilitating injuries being sustained by the victim (including severe and permanent brain injury, quadriplegia/paraplegia, loss of limbs etc).107

Other submissions also pointed to the lifelong impact that serious injuries can have on a person’s life.108 One person who was injured by a driver convicted of dangerous overtaking (not of NCSI) said:

- My accident occurred 12 months ago, and I took 3 months to walk again, and 4 months to get home from hospital. I lost my right (dominant) arm, very nearly my right leg as well. … I am no longer able to do a lot of the stuff I used to, and as a result, would be an estimated $8,000 out of pocket for labour to do jobs that I would normally have done myself. My family suffers both financially, and as I am unable to play footy with the boys and etc.109

Despite his permanent injuries, this person did not call for higher maximum penalties, saying ‘I do not hate the person who hit me, he did not do it on purpose’. He suggested instead that offenders be sentenced to community service to help victims in proportion to the harm caused (although not to help the victim in the offender’s case).110

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103 See page 21 for further discussion on dangerous driving causing serious injury.
104 R v Welsh and Flynn (Unreported, Supreme Court of Victoria Court of Appeal, Crockett, King and Tadgell JJ, 16 October 1987) 18.
105 Submission 1 (Royal Automobile Club of Victoria).
106 Submissions 5 (Office of Public Prosecutions) and 8 (Working Against Culpable Driving), Victims’ Issues Roundtable (14 August 2007), Meeting with Noel McNamara, Crimes Victims Support Association (14 August 2007).
107 Submission 5 (Office of Public Prosecutions).
108 Submission 3 (Confidential).
109 Submission 2 (D. Winter).
110 Submission 2 (D. Winter).
3.6 The Circumstances in which NCSI Occurs

Introduction

Figure 4 and Figure 5 above place NCSI in the hierarchy of assault and driving related injury and death offences. They rank NCSI with related offences by reference to harm and culpability, according to the maximum penalty for each offence.

Negligently Causing Serious Injury in the Context of Assaults

Figure 5 above shows that in the context of assault offences, NCSI has the same maximum penalty as the offences of assault and recklessly causing injury.

Compared with other offences which have causing serious injury as an element, the maximum penalty for NCSI is significantly less than the 15 year maximum for recklessly causing serious injury and the 20 year maximum for intentionally causing serious injury. The graduations in these penalty levels reflect the different level of culpability for each offence. The issue is whether the maximum penalties for these three offences are graduated appropriately or whether the five year maximum penalty for NCSI is out of alignment.

Negligently Causing Serious Injury in Breach of a Duty of Care

Another context in which NCSI arises is through circumstances involving ‘traditional’ negligence, such as where the offender has failed in his or her duty towards the victim. In order to be found guilty of NCSI in these circumstances, although they can be referred as ‘traditional’ negligence situations, the departure from the requisite standard of care must still be higher than that which would satisfy the civil standard in order to warrant criminal punishment.

Although all instances of NCSI by definition involve a breach of the duty of care owed by the offender towards the victim or victims, for the purposes of this report the examples of NCSI involving ‘traditional’ negligence will be referred to as ‘breach of duty’ NCSI cases.

For example, in Queensland, in R v Clark,\textsuperscript{111} the offender was charged with unlawfully causing grievous bodily harm after the complainant fell from a flying fox ride where the offender was responsible for securing the complainant’s harness on the ride.

Compared to examples of NCSI that arise in the context of negligent driving or assaults, there are relatively few examples of NCSI arising in the context of a breach of duty.\textsuperscript{112}

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\textsuperscript{112} NCSI could also be charged in relation to injuries caused in the workplace, but these are usually dealt with under the Occupational Health and Safety Act 2004 (Vic). There has been one prosecution of a corporation for NCSI in Victoria, which was unsuccessful. See Karen Wheelwright, ‘Corporate Liability for Workplace Deaths and Injuries – Reflecting on Victoria’s Laws In The Light of The Esso Longford Explosion’, (2002) 16 Deakin Law Review 323.
Introduction

Figure 5 illustrates that the statutory maximum penalty for NCSI is the same as dangerous driving causing death or serious injury.

Culpable Driving Causing Death

The offence of culpable driving causing death was first introduced in Victoria in 1967. At the time it was introduced it had a statutory maximum penalty of seven years’ imprisonment. Since 1967 there have been three increases in the maximum penalty for culpable driving causing death:

- 1991 → 7 to 10 years\(^{114}\)
- 1992 → 10 to 15 years\(^{115}\)
- 1997 → 15 to 20 years\(^{116}\)

These increases have reflected an increasing community awareness and concern about serious road collisions that occur as a result of culpably negligent driving.

For example, at the second reading speech of the Bill that introduced the 1997 amendment, the Minister for Small Business, Louise Asher commented that:

> The community has clearly indicated dissatisfaction with sentencing levels for certain serious offences; this bill will address these concerns so as to restore the faith and confidence of the public in the criminal justice system.

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Ms Asher said that the increase in the maximum penalty for this offence, manslaughter and intentionally causing serious injury ‘reflects the high value that the community places upon life and personal safety’.117

Although such considerations are equally relevant to an analysis of the offence of NCSI, there has only been one increase in the statutory maximum penalty for NCSI during this period.118 This was commented on in *R v Chalkley*,119 in which Judge Nixon said:

> the maximum penalty for culpable driving causing death was originally fixed at seven years’ imprisonment. It was increased over the past two decades, first to ten years’ imprisonment, then to 15 years’ imprisonment, and finally to its present level of 20 years’ imprisonment while the maximum penalty for negligently causing serious injury has remained static.120

### Case Study 3

In a recent example of culpably negligent driving an offender was sentenced for two counts of culpable driving and two counts of negligently causing serious injury. The offender had consumed an excessive amount of alcohol at a party when he decided to leave in his car. Whilst driving over the speed limit, he performed burnouts, fishtailing and continuing acceleration. Finally, he lost control of his car and crashed into the four victims, who were walking along the road. It was estimated that his blood alcohol concentration at the time was between 0.117 and 0.182. The sentencing judge described the offending behaviour as serious and the offender’s driving as ‘grossly culpable’. The offender was sentenced to seven years’ imprisonment for each count of culpable driving, two and a half years for the serious injury caused to one victim, and nine months for the serious injuries caused to the second victim (which were less serious than those caused to the first victim). The effective head sentence was 11 years’ imprisonment with a non-parole period of seven years.

### Dangerous Driving Causing Death or Serious Injury: A Brief History

The offences of dangerous driving causing death and dangerous driving causing serious injury were introduced in 2004 as a response to the community outcry over lenient sentences for dangerous drivers and to bridge the gap between the offences of dangerous driving and culpable driving causing death.121

‘Dangerous driving causing death or serious injury’ was created as an alternative offence to culpable driving causing death and to negligently causing serious injury where the jury is not satisfied that the driving was negligent but is satisfied that the driving was dangerous and resulted in a death or serious injury.122 These aims were highlighted by the Attorney-General in the second reading speech:

> Currently, our courts and prosecutors have two main options when it comes to serious driving offences: culpable driving causing death, which carries a maximum penalty of 20 years’ imprisonment and a minimum licence disqualification period of two years; and dangerous driving, which carries a maximum penalty of two years’ imprisonment and a minimum licence disqualification period of six months.
Many in the community, particularly those whose lives have been affected by fatal road collisions, have expressed concerns that there is a gap in the seriousness between these offences. This bill will fill that gap by creating a new offence which lies between the two existing offences. This amendment creates a new indictable offence of dangerous driving causing death or serious injury. To establish this offence the prosecution will not be required to prove criminal negligence, which is required to prove culpable driving causing death.\textsuperscript{123}

Interestingly both formulations of this offence (death or serious injury) have the same maximum penalty (five years’ imprisonment).

\textbf{Case Study 4}

An offender was sentenced to one count of recklessly causing injury and six counts of dangerous driving causing serious injury. He had been showing off in his car with a series of high speed laps around bus stops when he lost control of the car and crashed into a bus shelter, pinning some students under the vehicle and injuring seven students. The seven victims, aged from 13 to 17, suffered multiple injuries including broken legs, a fractured hip, a broken pelvis, broken ribs, a fractured spine and a punctured lung. The offender was sentenced to two years in a youth detention centre. The sentencing judge emphasised the ‘hoon behaviour’ of young men who drove dangerously and considered it as ‘a form of sport’. However, His Honour sentenced the offender to detention in a youth training centre rather than an adult prison because of his youth (20 years of age), genuine remorse and good prospects of rehabilitation.

\textbf{NCSI and other Driving Offences: Are the Statutory Maxima Consistent?}

Figure 4 and Figure 5 include two ‘drink driving’ offences under the \textit{Road Safety Act 1986} (Vic).\textsuperscript{124} These offences may be charged in circumstances where the conduct of the offender (driving while exceeding the prescribed concentration of alcohol) is the same as some examples of NCSI or culpable driving causing death, but the outcome is different because causing harm or injury to another person is not a necessary element of the offence.

To the extent that a statutory maximum penalty reflects the gravity of a particular crime, it is curious that the offence of dangerous driving causing serious injury has the same statutory maximum as NCSI, as NCSI is arguably a more serious offence. Although the former offence incorporates the same level of harm as NCSI (serious injury), the required level of culpability is lower than that required to establish the offence of NCSI. Unlike NCSI, it is not necessary to establish culpable negligence to prove an offence of dangerous driving causing serious injury; it is only necessary to establish that the defendant was driving at a speed or in a manner dangerous in all of the circumstances.\textsuperscript{125}

\begin{footnotes}
\item [124] The offences under ss 49(1)(b) and 49(1)(f) of the \textit{Road Safety Act 1986} (Vic) are combined under the heading ‘drink driving’ for the purposes of this comparison.
\item [125] See Figure 2 for the definition of dangerous driving.
\end{footnotes}
A great deal of the concern about the maximum penalty for NCSI reflects broader concerns about serious road collisions in our community. The overwhelming majority of cases in which the courts have expressed concern about the statutory maximum have occurred in this context. Various initiatives in recent years have attempted to ensure that the offences and penalties for serious road collisions appropriately reflect community expectations. Similar concerns have informed the development of a separate offence of culpable driving causing death (and multiple increases to its maximum penalty) and of dangerous driving causing death or serious injury. Although the higher maximum penalty for culpable driving causing death (twenty years) reflects the fact that a person has been killed by the offender’s actions, in the context of culpably negligent driving cases, it is questionable whether the jump from a maximum penalty of five years where a person has been seriously injured to twenty years where a person has been killed is a proportionate graduation in penalties or whether, as maintained by some members of the judiciary, the five year maximum penalty for NCSI is out of alignment.

A number of participants in the Council’s consultations on this reference were of this view. The Office of Public Prosecutions commented unfavourably on what it perceived as a significant discrepancy between the maximum penalties for culpable driving causing death and NCSI. This was in the context of the gradual increases in penalty by Parliament in relation to culpable driving, but also the number of Director’s appeals against sentence in relation to NCSI, which have resulted in the Court of Appeal increasing the sentence.

Another issue that was raised in consultations concerning the consistency of maximum penalties for driving related offences was the current maximum penalty for dangerous driving causing death. The maximum penalty for this offence is five years’ imprisonment, which is the same as the current maximum penalty for NCSI. While the Council did not consult specifically on this issue, the Office of Public Prosecutions and Victoria Police submitted that the appropriate penalty for this offence would be ten years’ imprisonment, in view of the fact that the offender’s conduct has resulted in the death of a person.

Conclusion
An examination of different examples of NCSI shows the broad range of behaviour which is covered by the current form of the offence. Case studies 1, 2 and 3 all provide examples of NCSI but the circumstances in which the offence or offences were committed in each example are very different. In particular, a distinction emerges between NCSI involving negligent driving and other cases of NCSI. This may support the view that it would be appropriate to separate NCSI (driving) cases from other NCSI cases by creating a separate offence.

A comparison of the statutory maximum penalty for NCSI with those for offences with the same level of harm or culpability, gives some support for the argument that the penalty for NCSI is out of alignment with related offences. In particular it appears inconsistent with the twenty year maximum penalty for culpable driving causing death. This offence like NCSI, can occur in circumstances of culpable negligence; the key difference is therefore whether the victim is killed or seriously injured. The five year maximum penalty for NCSI also appears inconsistent with that for recklessly causing serious injury (fifteen years) and that for intentionally causing serious injury (twenty years). While these offences require a higher level of culpability, they arise when the same level of harm has occurred as for examples of NCSI.


127 Submissions 8 (Working Against Culpable Driving) and 11 (Victoria Police); Victims’ Issues Roundtable (14 August 2007).

128 Submission 5 (Office of Public Prosecutions).

129 Submissions 5 (Office of Public Prosecutions) and 11 (Victoria Police).

130 Although it should be noted that culpable driving causing death also covers recklessness, which is a higher level of culpability.
3.7 Other Australian Jurisdictions

Figure 6 compares the Victorian offence of NCSI with similar or related offences in other Australian jurisdictions. Some of these offences cover a different range of behaviour, harm and/or fault element to that covered by NCSI. The statutory references for these offences are therefore provided in Appendix 3 in order that any comparison of the maximum penalties can be informed by an understanding of the exact terms of each offence.\(^{131}\)

--- ACT --- --- NSW --- NT --- Qld --- ----- SA ----- Vic ----- WA -----  

\(^{131}\) Tasmania is not included in this graph because the maximum penalty for all indictable offences in that jurisdiction is 21 years’ imprisonment and therefore it is not a legislative indication of the relative seriousness of a particular offence. Section 389(3) of the Criminal Code Act 1924 (Tas) provides that ‘subject to the provisions of the Sentencing Act 1997 or of any other statute, and except where otherwise expressly provided, the punishment for any crime shall be by imprisonment for 21 years, or by fine, or by both such punishments, and shall be such as the judge of the court of trial shall think fit in the circumstances of each particular case’.
As Figure 6 illustrates, all Australian jurisdictions have at least one offence which generally corresponds with the Victorian offence of NCSI. Some jurisdictions have specific driving offences which cover the types of behaviour captured by driving related NCSI in Victoria. New South Wales, South Australia and the Australian Capital Territory have separate offences which cover negligent or reckless driving causing serious injury. Some jurisdictions like Queensland and Western Australia also have offences comparable to the Victorian offence of dangerous driving causing serious injury (which covers a lower degree of culpability than NCSI).

Figure 6 shows a wide variation in the maximum penalties applicable to comparable offences in other Australian jurisdictions. For example the New South Wales equivalent of NCSI—unlawfully or negligently causing grievous bodily harm—attracts a statutory maximum penalty of two years’ imprisonment whereas the offence of unlawfully causing grievous bodily harm in Queensland and Western Australia attracts a statutory maximum penalty of up to 14 years’ imprisonment.132 In South Australia the statutory maximum penalty for culpably negligent driving causing serious harm is 15 years or life imprisonment, depending on the circumstances.133

Some of the variation in statutory maxima illustrated in Figure 6 is explained by the different ranges of conduct covered by the interstate offences. A number of the offences cover a different range of harm and/or culpability to the Victorian offence of NCSI. For example, the South Australian offence of ‘causing serious harm by driving in a culpably negligent manner’ includes the reckless driving of a motor vehicle, which covers a higher degree of culpability than negligence under NCSI. This may partly explain the significantly higher penalty for the South Australian offence.

Tasmania is not included in this graph because the maximum penalty for all indictable offences in that jurisdiction is 21 years’ imprisonment.134 Therefore the maximum penalty does not provide a guide to the comparative seriousness of different offences.

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132 Queensland: The maximum penalty for this offence is imprisonment for 14 years: Criminal Code Act 1899 (Qld) s 320. Western Australia: The maximum penalty for this offence is imprisonment for 10 years or, if the offence is committed in circumstances of aggravation, imprisonment for 14 years: Criminal Code Act Compilation Act 1913 (WA) s 297.

133 The statutory maximum penalty is 15 years’ imprisonment (for a first ‘basic’ offence) or life imprisonment (for a first offence that is an aggravated offence or for a subsequent offence): Criminal Law Consolidation Act 1935 (SA) s 19A.

134 Criminal Code 1924 (Tas) s 389(3).
3. NCSI and the Functions of a Statutory Maximum Penalty

4.1 Introduction

An examination of the adequacy of a maximum penalty, including whether it is serving its intended function, necessitates a consideration of current sentencing practices. Any comments about the maximum penalty made by those responsible for the sentencing exercise are also a useful indication of whether the maximum penalty is sufficient to reflect the gravity of the offence and to provide for the worst examples of the offence.

The Council examined sentences for NCSI in the County Court (during the period 2000-01 to 2005-06) and in the Magistrates’ Court (during the period 2004-05 to 2005-06).

In the six years from 2000-01 to 2005-06, 138 people were sentenced for at least one NCSI offence in the County Court of Victoria (an average of 23 people per year). In the Magistrates’ Court, in the two years 2004-05 and 2005-06, 44 people were sentenced for at least one NCSI offence (an average of 22 people per year). No offences of NCSI were dealt with in the Supreme Court during these periods. The Council did not look at sentencing in other courts such as the Children’s Court during these periods.

During the review period which overlapped (2004-05 and 2005-06) roughly the same number of offences of NCSI were dealt with in the County Court as in the Magistrates’ Court.

In addition to analysing sentencing practices, the Council examined judicial comment on the statutory maximum penalty for NCSI in the County Court and the Victorian Court of Appeal over the last six years.

4.2 Jurisdiction for Hearing Charges of NCSI

Hearing NCSI in the Magistrates’ Court

NCSI is an indictable offence with a maximum penalty of level 6 imprisonment (5 years maximum). However an offence of NCSI may be heard and determined summarily in the Magistrates’ Court if the Court is of the opinion that the charge is appropriate to be determined summarily and the defendant consents to a summary hearing.

The jurisdictional limit in the Magistrates’ Court is two years’ imprisonment for a single offence. If a defendant is charged with more than one offence committed at the same time, the court can order cumulation of the sentences imposed in relation to those charges up to a maximum of five years. A magistrate can also impose an aggregate sentence of up to five years’ imprisonment.

135 The statistical information presented here was provided by Court Services, Department of Justice (Vic). While the Sentencing Advisory Council has made every effort to ensure that these data are accurate at the time of publication, the data may be subject to revision.

136 The statistical information presented here was provided by Court Services, Department of Justice (Vic). While the Sentencing Advisory Council has made every effort to ensure that these data are accurate at the time of publication, the data may be subject to revision.

137 Crimes Act 1958 (Vic) s 24.

138 Magistrates’ Court Act 1989 (Vic) s 53(1) and (1A).

139 Sentencing Act 1991 (Vic) s 113-113A.

140 Sentencing Act 1991 (Vic) s 113B.

141 Sentencing Act 1991 (Vic) s 9(2).
The jurisdictional limit is not the same as the maximum penalty imposed by statute. The statutory maximum penalty is reserved for the ‘worst cases of that sort’, while the jurisdictional limit acts as a limitation on the sentencing powers of the court. It follows, therefore, that a magistrate is not constrained to reserve a sentence of two years for the worst example of an offence of NCSI heard in the Magistrates’ Court. The statutory maximum to be considered for NCSI is still five years’ imprisonment.142

Hearing NCSI in the County Court

In some cases it may not be appropriate for a charge of NCSI to be dealt with in the Magistrates’ Court. This may be because the view is taken that the particular example of the offence is too serious to be heard summarily. Another reason might be that the NCSI charge is accompanied by a charge of culpable driving causing death (which cannot be heard by way of summary jurisdiction). These are both likely explanations of the high proportion of the NCSI cases in the County Court which are driving related.143

If a charge of NCSI that is to be dealt with in the County Court is accompanied by summary charges (such as exceeding the prescribed concentration of alcohol) the summary offences can be dealt with in the County Court if the accused indicates a willingness to plead guilty to these offences, in addition to the indictable matter.144

4.3 Judicial Criticism of the Maximum Penalty for NCSI

Introduction

In a number of recent cases, the courts have commented about the inadequacy of the statutory maximum penalty for NCSI. Appendix 2 sets out some of the concerns that have been raised by judges in the County Court and the Victorian Court of Appeal. As Appendix 2 illustrates, no fewer than nine County Court judges145 and seven Court of Appeal judges146 in Victoria have criticised the maximum penalty for NCSI, generally in the context of negligent driving. There are a number of reasons for this criticism.

Offence Seriousness

First, it has been criticised on the basis that it does not reflect the seriousness of the offence, including the severity of the injury to another person that has been caused by the offender.147

In R v Chalkley,148 Judge Nixon noted that:

Simply by way of example, and example only, the maximum penalty for culpable driving causing death was originally fixed at seven years’ imprisonment. It was increased over the past two decades, first to ten years’ imprisonment, then to 15 years’ imprisonment, and finally to its present level of 20 years’ imprisonment while the maximum penalty for negligently causing serious injury has remained static.

The road toll, not only so far as deaths are concerned, but also with regard to injuries, which are not only serious, but often permanent, remains unacceptably high. The maximum penalty for negligently causing serious injury in my judgment remains unacceptably low.149

142  %Hansford v His Honour Judge Neesham [1995] 2 VR 233, 236-7. See also discussion in Fox and Frieberg (2002), above n 48, 239-40.
143  See further Figure 8 in Section 4 below.
144  Crimes Act 1958 (Vic) s 359AA.
145  Chettle, Dee, Duggan, Gullaci, Nicholson, Nixon, Rizkalla, Smallwood and Wodak JJ.
146  Brooking, Callaway, Charles, Nettle, Phillips, Redlich JJA and Winneke P.
149  Ibid [54]–[55].
Some of those who have criticised the current statutory maximum on this basis point to community concern about the devastating consequences of culpably negligent driving. In *R v Wilson*, Judge Wodak said that: ‘It is hard to explain why so many very experienced Judges should not be listened to when the carnage on the roads causes considerable concern in the community’. Similarly, in *R v Ash*, Judge Nicholson commented that:

> It is sad to say that despite all the consternation and concern within our community about the maiming and injury caused on our roads by those who negligently drive motor vehicles, there has been nothing done about increasing the maximum penalty for this offence to which you have pleaded guilty before me.\(^{153}\)

**Worst Examples of the Offence**

The statutory maximum penalty for NCSI has also been criticised by members of the judiciary on the basis that it is inadequate to provide for the worst examples of offending. In *R v Healey*, Judge Gullaci commented that the current statutory maximum ‘is inadequate to enable courts in this state to impose appropriate penalties for the type of offences at the higher range of the type of criminal conduct covered by that section of the *Crimes Act*.\(^{155}\)

**Inconsistency with Related Offences**

Another judicial criticism is that the statutory maximum penalty for NCSI is inconsistent with the maxima of related offences, particularly culpable driving causing death. While culpable negligence can form the requisite fault element for both offences, the key difference between them is whether the victim dies or is seriously injured. As pointed out by the Attorney-General ‘injuries sustained by victims of a car accident can be extremely serious and substantially diminish a victim’s quality of life’.\(^{157}\) This point has been made by a number of judges, for example, in *R v Wickfeldt*, Judge Duggan noted that ‘it seems to me that the maximum penalty for this offence for five years has not remained in proportion to that available for the offence of culpable driving’ and in *R v Blomeley*, Judge Rizkalla said:

> it was your counsel’s submission that this offence just cannot be placed in the same sentencing range as an offence of culpable driving, the circumstances of which could be said to be somewhat equivalent to what occurred on that evening, save to say that in your case the victim has plainly survived, but there is a significant disparity between the two. Culpable driving carries a maximum of 20 years’ imprisonment. … It is perhaps another issue as to whether or not the term in relation to this offence ought to have some greater parity to the term for culpable driving, which Parliament has seen fit to raise significantly in these last years.\(^{159}\)

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151 *R v Wilson* [2007] VCC (Unreported, Wodak J, 26 June 2007) [52].


153 Ibid [28].


155 *R v Healey* [2007] VCC (Unreported, Gullaci J, 21 February 2007) [67].


157 Letter from the Attorney-General, the Hon Rob Hulls, MP, dated 7 June 2007.


159 Ibid [11]–[12].
Cumulation

The law requires that a separate sentence be imposed for each offence and section 16(1) of the Sentencing Act 1991 (Vic) creates a presumption of concurrency of sentences. However, a sentencer has a discretion, in cases where there is more than one offence, to order that the sentences imposed be partially or wholly cumulative on each other. Though the presumption of concurrency will usually apply when more than one offence arises from the same facts, acts or circumstances, this is not a fixed rule and in the case of motor vehicle accidents where there have been multiple fatalities, or fatalities and injuries, the courts have upheld sentences which are partially consecutive in order to provide proper recognition of the amount of harm done. Subject to the principle of totality and the requirement that a sentence should not be ‘crushing’, the total effective sentence may exceed the sentence imposed for the most serious offence or the maximum penalty which may be imposed for the most serious class of offence charged.

Despite this general principle, the Court of Appeal has commented that the relatively low statutory maximum penalty for NCSI adversely affects the extent to which cumulation can be ordered; for example in cases in which different victims are killed or seriously injured out of the same conduct (such as negligent driving).

Whilst I would agree with counsel that the judge must be careful to ensure that orders for cumulation do not produce a total sentence which infringes principles of totality, I am unable to agree that the judge’s discretion is otherwise inhibited in the case of culpable driving causing multiple deaths or injury. In many cases which have come before this Court … the same driving has caused death to one victim and injury to another, leading to sentences imposed for culpable driving causing death on the one hand and negligently causing serious injury on the other. Cumulation has been ordered of a portion of the sentence for the latter offence upon the sentence for the former, for the purpose of recognising that the two offences have been committed against two different victims. In such cases, as this Court has noted previously, cumulation has been constrained merely because of the inappropriately low maximum penalty prescribed by the legislature for the offence of negligently causing serious injury, a penalty which itself, I think, needs to be revised.

The number of judges who have criticised the NCSI statutory maximum penalty, and the extent of their criticisms are significant to the assessment of the adequacy of the current statutory maximum penalty. This section will now place these comments in context by looking at how NCSI is currently being sentenced in the County and Magistrates’ Courts.

4.4 NCSI Offences in the County Court

Introduction

In the six years from 2000-01 to 2005-06, 138 people were sentenced for at least one NCSI offence in the County Court of Victoria (an average of 23 people per year). Figure 7 shows the number of these people by their age group and gender. As shown, the majority of those sentenced were men (117 men or 85% compared to 21 women or 15%). The most common age group for men sentenced was 20-24 years (50 males) while for women it was 20-24 and 25-29 years (6 females in each). The average age of all people sentenced was 27 years and 3 months. Women had a higher average age than men (30 years and 5 months compared to 26 years and 8 months.)

160 Fox and Freiberg (1999), above n 48, 714.
161 Ibid 721.
164 DPP v Gany [2006] VSCA 148 (Unreported, 7 July 2006, Chernov, Vincent and Redlich JJA) [30].
165 The statistical information presented here was provided by Court Services, Department of Justice (Vic). While the Sentencing Advisory Council has made every effort to ensure that these data are accurate at the time of publication, the data may be subject to revision.
Figure 7: The number of people sentenced for NCSI by age and gender, County Court, 2000-01 to 2005-06

Offences Charged Alongside NCSI

Many of the offences of NCSI which were dealt with in the County Court during the period 2000-01 to 2005-06 were determined at the same time as the more serious offence of culpable driving or other driving related offences.

Table 1 ranks the nine most common offences that were sentenced alongside NCSI from 2000-01 to 2005-06. This table shows the number and percentage of the 138 people sentenced for NCSI over the period 2000-01 to 2005-06 who were also sentenced for these nine other offences. The last column sets out the average number of charges per person for each offence.

Each of the 138 people was sentenced for an average of 3.47 offences, including 1.56 charges of NCSI. The most common offence finalised in conjunction with NCSI was culpable driving causing death, with 65 people also sentenced for this offence (47.1% of all cases). The next most common offences sentenced in conjunction with NCSI were ‘drink driving’ under section 49(1)(b) of the Road Safety Act 1986 (Vic) (30 people) and drive with authorisation suspended (14 people).
Table 1: Number and percentage of people sentenced for NCSI by the most common offences that were sentenced alongside the offence of NCSI, County Court, 2000-01 to 2005-06

<table>
<thead>
<tr>
<th>Offence</th>
<th>Number of people</th>
<th>Percentage</th>
<th>Average number of charges/person</th>
</tr>
</thead>
<tbody>
<tr>
<td>Negligently causing serious injury</td>
<td>138</td>
<td>100</td>
<td>1.56</td>
</tr>
<tr>
<td>1 Culpable driving causing death</td>
<td>65</td>
<td>47.1</td>
<td>1.18</td>
</tr>
<tr>
<td>2 Drink Driving—s 49(1)(b) RSA</td>
<td>30</td>
<td>21.6</td>
<td>1.00</td>
</tr>
<tr>
<td>3 Drive with authorisation suspended</td>
<td>14</td>
<td>10.1</td>
<td>1.00</td>
</tr>
<tr>
<td>4 Theft</td>
<td>12</td>
<td>8.6</td>
<td>1.17</td>
</tr>
<tr>
<td>5 Possess drug of dependence</td>
<td>11</td>
<td>7.9</td>
<td>1.09</td>
</tr>
<tr>
<td>6 Conduct endangering persons</td>
<td>10</td>
<td>7.2</td>
<td>1.00</td>
</tr>
<tr>
<td>7 Conduct endangering life</td>
<td>9</td>
<td>6.5</td>
<td>1.44</td>
</tr>
<tr>
<td>8 Unlicensed driving</td>
<td>9</td>
<td>6.5</td>
<td>1.22</td>
</tr>
<tr>
<td>9 Drink driving—s 49(1)(f) RSA</td>
<td>8</td>
<td>5.8</td>
<td>1.00</td>
</tr>
</tbody>
</table>

**Persons Sentenced**

|                             | 138 | 100 | 3.47 |

Source: Court Services, Department of Justice (Vic)

RSA = Road Safety Act 1986 (Vic)

The sentencing remarks of all cases heard in the County Court in the six-year period from 2000-01 to 2005-06 were analysed to determine the proportion of NCSI offences which were driving related. The results of this study are presented in Figure 8 which shows that in the County Court, NCSI overwhelmingly occurs in the context of driving related behaviour. This is not surprising given that offences of NCSI heard in the County Court are most likely to be accompanied by other driving offences (as shown in Table 1). As shown in Figure 8, 95.8% of offences were driving related, while 4.2% were categorised as non-driving related offences.

**Figure 8:** The proportion of NCSI offences that were driving related, County Court, 2000-01 to 2005-06

![Figure 8: The proportion of NCSI offences that were driving related, County Court, 2000-01 to 2005-06](image)
Figure 9 shows the number of charges by the age group of the people sentenced for both driving related and non-driving related NCSI. As shown, the most common age group for driving related offences was 20-24 years, while the most common age group for non-driving related offences was 30-34 years.

Figure 9: The number of offences of NCSI by age and offence type, County Court, 2000-01 to 2005-06
Distribution of Sentence Types

Figure 10 compares the percentage of charges resulting in a custodial sentence for NCSI with related offences for the period 2000-01 to 2005-06. The percentage of charges resulting in a custodial sentence for NCSI (84%) was second highest to culpable driving (96%) and was higher than that for other offences such as intentionally causing serious injury (74%) and recklessly causing serious injury (52%). This is significant given that intentionally causing serious injury and recklessly causing serious injury are more serious offences than NCSI, with maximum penalties of 20 years’ imprisonment and 15 years’ imprisonment respectively.

Source: Court Services, Department of Justice (Vic)

* Custodial sentences include imprisonment, partially suspended sentences, youth training centre orders, combined custody and treatment orders, hospital security orders and custodial supervision orders.
Table 2 presents a detailed breakdown of the frequency of different sentencing outcomes for NCSI and related offences.

Table 2: Distribution of sentence types for proven charges of NCSI and related offences, County Court, 2000-01 to 2005-06

<table>
<thead>
<tr>
<th>Sentencing Outcome</th>
<th>Recklessly causing injury</th>
<th>Intentionally causing injury</th>
<th>Negligently causing serious injury</th>
<th>Recklessly causing serious injury</th>
<th>Intentionally causing serious injury</th>
<th>Dangerous driving causing death or serious injury</th>
<th>Culpable driving</th>
</tr>
</thead>
<tbody>
<tr>
<td>Imprisonment</td>
<td>249 (40%)</td>
<td>412 (42%)</td>
<td>138 (64%)</td>
<td>312 (40%)</td>
<td>456 (58%)</td>
<td>0 (0%)</td>
<td>156 (82%)</td>
</tr>
<tr>
<td>Partially suspended sentences</td>
<td>25 (4%)</td>
<td>51 (5%)</td>
<td>23 (11%)</td>
<td>47 (6%)</td>
<td>45 (6%)</td>
<td>0 (0%)</td>
<td>5 (3%)</td>
</tr>
<tr>
<td>Youth training centre</td>
<td>19 (3%)</td>
<td>34 (3%)</td>
<td>19 (9%)</td>
<td>44 (6%)</td>
<td>60 (8%)</td>
<td>0 (0%)</td>
<td>21 (11%)</td>
</tr>
<tr>
<td>Other custodial*</td>
<td>8 (1%)</td>
<td>10 (1%)</td>
<td>0 (0%)</td>
<td>8 (1%)</td>
<td>25 (3%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>Wholly suspended sentences</td>
<td>143 (23%)</td>
<td>190 (20%)</td>
<td>24 (11%)</td>
<td>199 (25%)</td>
<td>118 (15%)</td>
<td>0 (0%)</td>
<td>7 (4%)</td>
</tr>
<tr>
<td>Intensive correction order</td>
<td>16 (3%)</td>
<td>31 (3%)</td>
<td>4 (2%)</td>
<td>31 (4%)</td>
<td>27 (3%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>Community-based order</td>
<td>96 (15%)</td>
<td>174 (18%)</td>
<td>4 (2%)</td>
<td>113 (14%)</td>
<td>39 (5%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>Fine</td>
<td>40 (6%)</td>
<td>30 (3%)</td>
<td>3 (1%)</td>
<td>11 (1%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>Other non-custodial</td>
<td>34 (5%)</td>
<td>40 (4%)</td>
<td>0 (0%)</td>
<td>24 (3%)</td>
<td>20 (3%)</td>
<td>0 (0%)</td>
<td>1 (1%)</td>
</tr>
<tr>
<td>Total</td>
<td>630 (100%)</td>
<td>972 (100%)</td>
<td>215 (100%)</td>
<td>789 (100%)</td>
<td>790 (100%)</td>
<td>0 (100%)</td>
<td>190 (100%)</td>
</tr>
</tbody>
</table>

* Other custodial includes combined custody and treatment order, custodial supervision order and hospital security order.
Figure 11 graphs the central tendency and range of imprisonment sentences for NCSI and related offences. The median\(^{166}\) imprisonment sentence length for NCSI was 1 year and 10 months. This was well below the median for culpable driving causing death (5 years) and intentionally causing serious injury (3 years), both of which have 20 year statutory maximum penalties. It was marginally below the median sentence for recklessly causing serious injury (2 years), for which the statutory maximum penalty is 15 years. However, the median for NCSI was more than double that for recklessly causing injury (9 months), which has the same statutory maximum penalty as NCSI.

The highest imprisonment sentence imposed for NCSI was 4 years. This was below the longest sentence for intentionally causing serious injury (16 years), culpable driving (12 years and 4 months), recklessly causing serious injury (10 years) and intentionally causing injury (5 years), all of which have higher statutory maximum penalties than NCSI. However, it was also greater than the most severe sentence for recklessly causing injury (3 years and 6 months) which has the same statutory maximum penalty as NCSI. As a percentage of the statutory maximum, NCSI (80%) exceeded all the other offences examined except for intentionally causing serious injury (81%). In comparison, recklessly causing injury was 70 percent, recklessly causing serious injury was 67 percent and culpable driving causing death was 61 percent.

Figure 11: Imprisonment sentence length for NCSI and related offences, County Court, 2000-01 to 2005-06

Source: Court Services, Department of Justice (Vic)

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\(^{166}\) The median is the middle number of a sequential group of numbers, such that half of the numbers in the group have values below it and half have values above it.
Figure 12 shows a steady increase in the average length of imprisonment sentences handed down for NCSI since 2001-02. In that financial year, the average sentence length was 1 year and six months. By 2005-06, it had increased 40 percent to 2 years and 1 month.

**Figure 12: Imprisonment sentence lengths for NCSI in the County Court (average years) 2000-01 to 2005-06**

Source: Court Services, Department of Justice (Vic)

**Conclusion**

An examination of the sentencing practices in the County Court for the offence of NCSI reveals that a greater percentage of offenders who are convicted of this offence receive sentences of imprisonment than offenders who are convicted of intentionally causing serious injury or recklessly causing serious injury, despite the much higher maximum penalties for these offences.

Furthermore, the sentences of imprisonment imposed in relation to the offences other than NCSI in Figure 11 are generally significantly lower than the maximum penalties available for those offences. In contrast, the highest sentence of imprisonment for NCSI reached 80 percent of the maximum penalty and sentences of imprisonment for that offence generally were approaching the ceiling of the maximum penalty. This provides support for the view of some members of the judiciary that the maximum penalty is insufficient to accommodate the worst examples of the offence.

The number of sentences of imprisonment imposed in relation to NCSI and the length of such sentences suggests that the current maximum penalty for NCSI is insufficient to deal with the offences of NCSI currently coming before the County Court.

Considering that the vast majority of offences of NCSI that are determined in the County Court are driving related offences, it also suggests that the maximum penalty for this type of NCSI may need to be considered separately.
4.5 NCSI Offences in the Magistrates’ Court

Introduction

In the two years 2004-05 and 2005-06, 44 people were sentenced for at least one NCSI offence in the Magistrates’ Court (an average of 22 people per year). Figure 13 shows the number of people who were sentenced for NCSI by age and gender. As shown, the majority of those sentenced were men (38 men or 86% compared to 6 women or 14%). The most common age group was 20-24 years (13 people). In 2004-05 and 2005-06, the average age of people sentenced for NCSI in the Magistrates’ Court was 26 years and 11 months.

Figure 13: The number of people sentenced for NCSI by age and gender, Magistrates’ Court, 2004-05 and 2005-06

Offences Charged Alongside NCSI

Table 3 ranks the nine most common offences that were sentenced alongside NCSI in 2004-05 and 2005-06. This table shows the number and percentage of the 44 people sentenced for NCSI over the period 2004-05 and 2005-06 who were also sentenced for these nine other offences. The last column sets out the average number of charges per person for each offence.

Each of the 44 people was sentenced for an average of 4.27 offences, including 1.27 charges of NCSI. The most common offence finalised in conjunction with NCSI was ‘drink driving’ under section 49(1)(a) of the Road Safety Act 1986 (Vic) with 8 people also sentenced for this offence (18.2% of all cases). The next most common offences sentenced in conjunction with NCSI were conduct endangering persons (6 people) and using an unregistered motor vehicle on a highway (6 people).

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Table 3: The nine most common offences sentenced alongside NCSI in 2004-05 and 2005-06.

<table>
<thead>
<tr>
<th>Offence Description</th>
<th>Number of People</th>
<th>Percentage of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conduct endangering persons</td>
<td>6</td>
<td>13.6%</td>
</tr>
<tr>
<td>Using an unregistered motor vehicle on a highway</td>
<td>6</td>
<td>13.6%</td>
</tr>
<tr>
<td>Drink driving under section 49(1)(a) of the Road Safety Act 1986 (Vic)</td>
<td>8</td>
<td>18.2%</td>
</tr>
<tr>
<td>Other</td>
<td>24</td>
<td>54.5%</td>
</tr>
</tbody>
</table>

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167 The statistical information presented here was provided by Court Services, Department of Justice (Vic). While the Sentencing Advisory Council has made every effort to ensure that these data are accurate at the time of publication, the data may be subject to revision.
Table 3: Number and percentage of people sentenced for NCSI by the most common offences that were sentenced alongside the offence of NCSI, Magistrates’ Court, 2004-05 to 2005-06

<table>
<thead>
<tr>
<th>Offence</th>
<th>Number of people</th>
<th>Percentage</th>
<th>Average number of charges/person</th>
</tr>
</thead>
<tbody>
<tr>
<td>Negligently causing serious injury</td>
<td>44</td>
<td>100</td>
<td>1.27</td>
</tr>
<tr>
<td>1 Drink driving—s 49(1)(a) RSA</td>
<td>8</td>
<td>18.2</td>
<td>1.00</td>
</tr>
<tr>
<td>2 Conduct endangering persons</td>
<td>6</td>
<td>13.6</td>
<td>1.00</td>
</tr>
<tr>
<td>3 Use unregistered motor vehicle - highway</td>
<td>6</td>
<td>13.6</td>
<td>1.00</td>
</tr>
<tr>
<td>4 Recklessly cause injury</td>
<td>5</td>
<td>11.4</td>
<td>2.20</td>
</tr>
<tr>
<td>5 Unlawful assault</td>
<td>5</td>
<td>11.4</td>
<td>1.40</td>
</tr>
<tr>
<td>6 Drink driving—s 49(1)(f) RSA</td>
<td>5</td>
<td>11.4</td>
<td>1.00</td>
</tr>
<tr>
<td>7 Drink driving—s 49(1)(a) RSA</td>
<td>4</td>
<td>9.1</td>
<td>1.00</td>
</tr>
<tr>
<td>8 Fail to stop vehicle after an accident</td>
<td>4</td>
<td>9.1</td>
<td>1.00</td>
</tr>
<tr>
<td>9 Drive in a manner dangerous</td>
<td>4</td>
<td>9.1</td>
<td>1.00</td>
</tr>
<tr>
<td><strong>Persons Sentenced</strong></td>
<td><strong>44</strong></td>
<td><strong>100</strong></td>
<td><strong>4.27</strong></td>
</tr>
</tbody>
</table>

Source: Court Services, Department of Justice (Vic)

RSA = Road Safety Act 1986 (Vic)

Distribution of Sentence Types

The Council examined sentences for NCSI in the Magistrates’ Court for the two-year period 2004-05 and 2005-06. Over this period, 44 people were sentenced for a total of 56 charges of NCSI (some offenders were sentenced for more than one charge of NCSI). This is an average of 22 people per year. Table 4 shows the distribution of sentence types imposed for each of these 56 charges.

The most common sentence type imposed was a wholly suspended sentence (15 charges) followed by a community based order (10 charges). A sentence of immediate imprisonment was imposed in relation to four of the charges of NCSI.

The lengths of the four imprisonment terms were 2 months, 3 months, 14 months and 18 months. All imprisonment terms except the 18 month term were aggregate sentences.

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168 The statistical information presented here was provided by CourtLink. While the Sentencing Advisory Council has made every effort to ensure that these data are accurate at the time of publication, the data may be subject to revision.

169 The jurisdictional limit in the Magistrates’ Court is two years’ imprisonment in relation to a single offence: Sentencing Act 1991 (Vic) s 113-113A. If a defendant is charged with more than one offence committed at the same time, the court can order cumulation of the sentences imposed in relation to those charges up to a maximum of five years: Sentencing Act 1991 (Vic) s 113B. A magistrate can also impose an aggregate sentence of up to five years’ imprisonment: Sentencing Act 1991 (Vic) s 9(2). If an offender is convicted by a court of two or more offences which are founded on the same facts or are part of a series of offences, the court may impose an aggregate sentence of imprisonment in respect of those offences in place of a separate sentence of imprisonment in respect of each of them. The term of an aggregate sentence of imprisonment imposed must not exceed the total effective period of imprisonment that could have been imposed in respect of these offences if the Magistrates’ Court had imposed a separate sentence of imprisonment on each of them.
Table 4: Distribution of sentence types for proven charges of NCSI, Magistrates’ Court, 2004-05 to 2005-06

<table>
<thead>
<tr>
<th>Sentence</th>
<th>2004-05</th>
<th>2005-06</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Imprisonment</td>
<td>3</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Partially suspended sentence of imprisonment</td>
<td>0</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>Youth training centre order</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Intensive correction order</td>
<td>4</td>
<td>5</td>
<td>9</td>
</tr>
<tr>
<td>Wholly suspended sentence of imprisonment</td>
<td>14</td>
<td>1</td>
<td>15</td>
</tr>
<tr>
<td>Community based order</td>
<td>3</td>
<td>7</td>
<td>10</td>
</tr>
<tr>
<td>Fine</td>
<td>4</td>
<td>3</td>
<td>7</td>
</tr>
<tr>
<td>Adjourned undertaking</td>
<td>2</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Dismissal</td>
<td>1</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>32</strong></td>
<td><strong>24</strong></td>
<td><strong>56</strong></td>
</tr>
</tbody>
</table>

Source: CourtLink, Unpublished data (Vic)

Conclusion
The number of sentences of imprisonment imposed in relation to NCSI and the length of imprisonment sentences where it is imposed (which are significantly less than the maximum penalty available for this offence) would suggest that the current statutory maximum penalty is sufficient to deal with the offences of NCSI currently coming before the Magistrates’ Court.

4.6 Profile of an NCSI Offender
The above data allow a profile of a ‘typical’ NCSI offender to be constructed. Of the offences of NCSI for which sentences were handed down in the County Court and Magistrates’ Court:

- More people sentenced for NCSI in the County Court are likely also to be charged with culpable driving than with any other offence. The most common types of offences charged in conjunction with NCSI in the County Court are all driving related offences. In the Magistrates’ Court, more people sentenced for NCSI are likely also to be charged with drink driving than with any other offence. The most common types of offences charged in conjunction with NCSI in the Magistrates’ Court are assault related or driving related offences.

- In the County Court, the offence or offences of NCSI are highly likely to have occurred in circumstances involving negligent driving by the offender. During the period 2000-01 to 2005-6, 95.8 percent of the offences of NCSI occurred in circumstances of negligent driving (206 of the total 215 offences). Although it is not possible to perform a similar analysis on the Magistrates’ Court data, an examination of the offences charged alongside NCSI suggests that NCSI occurs in the context of assaults as well as in the context of negligent driving. This is a different pattern to that which was demonstrated in the County Court.

- The overwhelming majority of NCSI offences are committed by men—85 percent in the County Court and 86 percent in the Magistrates’ Court.

- The average age of people sentenced for NCSI in the County Court was 27 years and 3 months at the time of sentence. This is very similar to the peak age for culpable drivers sentenced in the higher courts (27 years and eleven months). In 2004-05 and 2005-06, the average age of people sentenced for NCSI in the Magistrates’ Court was 26 years and 11 months.
5. Is the Maximum Penalty Adequate?

5.1 The Council’s View

Consistent with views expressed over a number of years by members of the County Court and the Court of Appeal, the Council believes that the current maximum penalty for NCSI does not adequately serve its intended functions and should be increased.

While the Council accepts that the combination of a high level of risk and a lower level of culpability makes NCSI a difficult offence to place relative to like offences, we are concerned that, particularly in light of increases to the maximum penalty for culpable driving causing death, the current maximum penalty does not provide an accurate guide as to where NCSI falls in the hierarchy of offending.

In our view the disparity between the maximum penalty for culpable driving causing death (20 years’ imprisonment) and NCSI (5 years’ imprisonment) cannot be justified. As a number of submissions recognised, the injuries to a victim resulting from this offence can be extremely serious and debilitating, including severe and permanent brain injury, quadriplegia/paraplegia and loss of limbs. The ongoing and substantial impact these types of injuries are likely to have on a victim should not be underestimated.

Further, the Council believes that the current gap between the maximum penalties for NCSI and culpable driving causing death was never intended when culpable driving was first established as a separate offence in 1967. The maximum penalty for culpable driving was initially set at seven years, while the maximum penalty for NCSI was raised from two to three years. Since that time, the maximum penalty for NCSI has increased only once, from three to five years, while the maximum penalty for culpable driving has increased three times, from seven years to the current maximum penalty of 20 years. The Council considers the failure to lift the maximum penalty for the lesser offences of NCSI may well have been the product of legislative oversight, rather than a conscious decision based on changed views concerning the relative severity of these offences.

The Council has considered two possible approaches to resolving the current inadequacy of the maximum penalty for NCSI:

1. To increase the maximum penalty for the existing offence of NCSI (which would continue to encompass both driving-related and assault-related offending); or
2. To create a new driving-related offence in order to reflect more appropriately the specific context in which these offences occur and the seriousness with which they are viewed, which would carry a new higher maximum penalty.

The second approach would leave open the question of whether the maximum penalty for NCSI, which would now cover only non-driving related offending, should also be increased.

We consider these issues below.
5. Is the Maximum Penalty Adequate?
6. Should a Separate Offence be Introduced?

6.1 Introduction

Much of the dissatisfaction with the maximum penalty for NCSI has arisen in the context of negligent
driving cases. As is the case with culpable driving causing death, negligent driving causing serious injury
is viewed as part of a broader social problem deserving of special recognition.

Judge Nixon, one of many County Court judges who over the years have criticised the maximum penalty
for NCSI as inadequate, has observed that:

The road toll, not only so far as deaths are concerned, but also with regard to injuries, which are not
only serious, but often permanent, remains unacceptably high. The maximum penalty for negligently
causing serious injury in my judgment remains unacceptably low.170

Driving-related offences of NCSI are often charged alongside culpable driving and other driving offences.
On this basis it could be argued that a strong justification exists for treating these forms of offences
differently, given they often arise in circumstances similar to culpable driving causing death.

6.2 The Relationship Between NCSI and Culpable Driving

The similarity between this class of NCSI and culpable driving was reflected when culpable driving
was introduced into the Crimes Act 1958 (Vic). At that time, the Chief Justice’s Law Reform Committee
specifically noted that it had confined its recommendation for a new offence to culpable driving causing
death because there was already an offence of negligently causing bodily injury.171

Part of the justification for the increases in the maximum penalty for culpable driving is that it reflects a
particular attitude or community concern about the circumstances in which it occurs. The same justification
exists in relation to offences of NCSI where it arises out of the use of a motor car. A number of judges
who have criticised the maximum penalty for NCSI have referred to the similarity in circumstances
between culpable driving causing death and that particular class of offences of NCSI. A person’s culpably
negligent driving may cause the death of one person and the serious injury of another. In a case where
the serious injury is at the top end of the range, it is inconsistent that the offender should be liable to a
maximum penalty of 20 years in relation to the offending against the deceased victim and only five years
in relation to the seriously injured victim.

In light of the special relationship between culpable driving and NCSI, it could be argued that a new
offence of culpable driving causing serious injury is warranted.

171 Chief Justice’s Law Reform Committee, above n 30, 10.
6.3 A New Offence of Culpable Driving Causing Serious Injury?

A number of submissions, including from the Office of Public Prosecutions,\textsuperscript{172} the Law Institute of Victoria,\textsuperscript{173} Victoria Legal Aid,\textsuperscript{174} RACV,\textsuperscript{175} the Melbourne Magistrates’ Court\textsuperscript{176} and Working Against Culpable Driving,\textsuperscript{177} identified a gap in the current offence framework in relation to serious injury arising out of the driving of a motor vehicle and supported the creation of a new offence of culpable driving causing serious injury to fill this gap. This approach was also supported in discussions with victims of crime.

Creating a new separate offence would have a number of potential benefits. First, it would enable the serious and particular social harm caused by those who drive a motor vehicle, in circumstances where the victim is seriously injured but not killed to be recognised. Secondly, it would create a legal framework for driving-related serious injury offences that would be consistent with that which currently exists for the offence of culpable driving causing death. Under this approach, the heads of culpability would be extended from criminal negligence alone, to include recklessness and driving under the influence of alcohol or drugs. In support of this, the Melbourne Magistrates’ Court submitted that ‘although the offence of negligently causing serious injury is available, the other heads of culpable driving causing serious injury do not seem to have an offence readily available. In the circumstances, it would appear appropriate to create a new offence to cover this apparent gap.’\textsuperscript{178}

It might also encourage the development of a separate jurisprudence in relation to driving offences including culpable driving causing death, culpable driving causing serious injury and dangerous driving causing death or serious injury.

If a new offence of culpable driving causing serious injury were to be introduced in similar terms as the existing offence of culpable driving causing death, it would include recklessness as a head of culpability, thereby creating a similar offence to recklessly causing serious injury, but confined to driving-related offending. There would be a strong argument in such circumstances for setting the maximum penalty for the new offence at the same level as the maximum penalty for recklessly causing serious injury (15 years’ imprisonment), to avoid any potential anomalies in the treatment of driving-related and non-driving related offences. This position is supported by the Office of Public Prosecutions, Victoria Legal Aid and the Law Institute of Victoria.\textsuperscript{179} In consultations it was suggested that the maximum penalty for this offence should allow for a wide discretion on behalf of the courts depending on the level of serious injury.\textsuperscript{180}

The question also would remain as to whether the maximum penalty for the existing offence of NCSI was appropriate, or should be increased. As the offence would no longer deal with driving-related injuries, but instead apply to a more limited range of assault and ‘breach of duty’ cases, it may be that the current maximum penalty is adequate to deal with these cases. It is arguable that if the concern about the maximum penalty in relation to this offence was limited to cases arising in the context of driving that the five year penalty is sufficient. This view was taken by the Office of Public Prosecutions, Victoria Legal Aid and the Law Institute of Victoria.\textsuperscript{181}

\textsuperscript{172} Submission 5 (Office of Public Prosecutions).
\textsuperscript{173} Submission 9 (Law Institute of Victoria).
\textsuperscript{174} Submission 12 (Victoria Legal Aid).
\textsuperscript{175} Submission 1 (RACV).
\textsuperscript{176} Submission 10 (Melbourne Magistrates’ Court).
\textsuperscript{177} Submission 8 (Working Against Culpable Driving).
\textsuperscript{178} Submission 10 (Melbourne Magistrates’ Court).
\textsuperscript{179} Submissions 5 (Office Against Culpable Driving), 9 (Law Institute of Victoria) and 12 (Victoria Legal Aid).
\textsuperscript{180} Victims’ Issues Roundtable (14 August 2007).
\textsuperscript{181} Submissions 5 (Office of Public Prosecutions), 9 (Law Institute of Victoria) and 12 (Victoria Legal Aid).
Conversely, it could be argued that it would be incongruous to have a disparity of ten years between the maximum penalty for the offence of NCSI and the proposed new offence of culpable driving causing serious injury where the only difference was the use of a motor vehicle. While this is a particular subset of offending, it cannot be said to be so much more serious as to warrant such a difference.

There are, however, some potential risks to creating a new offence of culpable driving causing serious injury. One of the concerns raised in consultations was that the creation of a new offence with a significantly higher penalty may dissuade defendants from pleading guilty and lead to more trials in the County Court.\(^{182}\)

It could also be argued that the creation of a new offence would create too great a disparity with the offence of dangerous driving causing serious injury, which has a five year maximum penalty. If a new offence of culpable driving causing serious injury were created with a maximum penalty of fifteen years, some cases might be resolved by the offender entering a plea of guilty to the lesser offence, thereby avoiding the higher penalty. Arguably, it would be the responsibility of the prosecuting authority not to accept a plea of guilty for dangerous driving causing serious injury where there are reasonable prospects for conviction on the more serious offence of culpable driving causing serious injury.

There is a question as to whether there is still a need for discrete driving-related offences. The community may now be ready to consider offences committed on the roads to be equally as serious as those which occur in other circumstances. As we have noted, the offence of culpable driving was first created because there was a perception that juries would not convict a person of manslaughter where the death occurred in the context of driving. However, in its review of offences relating to death caused by dangerous driving, the Victorian Law Reform Commission found that community views had changed significantly since culpable driving was introduced. As a result of this shift, the Commission was of the view that juries would convict an accused of manslaughter, where the death arose from the driving of a motor vehicle, in appropriate cases. It concluded, therefore, that the offence of culpable driving was no longer required.\(^{183}\)

While it is not suggested that the offence of culpable driving should be abolished, it may be that the arguments in favour of developing separate offences for driving related conduct are no longer as persuasive as they once were. As was evident in the Council’s consultation on this reference, the offence of NCSI, whether or not it arises in the context of driving, is considered to be a serious one. There is no suggestion that a jury would not convict a person of NCSI where the offence arose in the context of driving.

There is also a danger that creating new offences to cover particular circumstances of offending could result in the perceived need to create further new offences to cover every circumstance in which an offence could be committed. Such a proliferation of offences would serve to confuse rather than clarify the offence hierarchy.

\(^{182}\) Victims’ Issues Meeting (14 August 2007).

\(^{183}\) Law Reform Commission of Victoria (1992), above n 40, 10–11.
6.4 The Council’s View

The seriousness of the harm caused to our community by negligent drivers is significant and should not be underestimated. However, the Council considers that issues of the adequacy of the maximum penalty are best addressed within the current offence framework rather than through the creation of a new offence of culpable driving causing serious injury.

While we note the strong support for introducing a new offence, we believe the original rationale for creating separate driving-related offences for conduct covered by other broader offences no longer applies. The offence of culpable driving causing death was introduced at a time when driving-related harm and the level of culpability involved on the part of drivers was less widely recognised, and juries were reluctant to categorise this conduct as manslaughter. Some 40 years later, we believe there is widespread community acceptance of the seriousness of driving-related offending and, on this basis, no need to separate this behaviour from other contexts in which serious injury may result.

The Council is particularly concerned that creating such an offence would risk producing a false dichotomy between driving and non-driving related instances of NCSI. It may also act as a precedent for the creation of further offences to address specific circumstances of offending and contexts in which offending behaviour occurs, leading to an unnecessary proliferation in the number of offences.

The Council believes that the serious nature of the injuries that can potentially fall within the scope of NCSI, regardless of the circumstances in which they are committed, justifies an increase in the maximum penalty in order to provide for the worst examples of that offence. We recommend, therefore, that the maximum penalty for NCSI be increased to ten years.

The Council notes that such an increase will create an anomalous position in the maximum penalty offence framework when the offence of NCSI, which will carry a 10 year maximum penalty, is compared with the offence of dangerous driving causing death, which carries a maximum penalty of five years’ imprisonment. While the level of culpability required for dangerous driving causing death is lower than that necessary to establish NCSI, the level of harm resulting is higher. Accordingly, the Council suggests that consideration may need to be given to increasing the maximum penalty for dangerous driving causing death to ten years.184

Recommendation

The current statutory maximum penalty for the offence of negligently causing serious injury under section 24 of the Crimes Act 1958 (Vic), should be increased from 5 years’ imprisonment (Level 6 imprisonment) to 10 years’ imprisonment (Level 5 imprisonment).

184 See Appendix 1.
Appendix 1: Suggested Sentencing Framework

Figure 14 illustrates a new sentencing framework incorporating the higher maximum penalty as recommended for the offence of NCSI and the suggested increased maximum penalty for the offence of dangerous driving causing death, if such an increase is considered necessary.

**Figure 14: New Sentencing Framework**

<table>
<thead>
<tr>
<th>Gravity (Harm Caused)</th>
<th>Culpability</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dangerous etc</td>
<td>Negligently</td>
</tr>
<tr>
<td>Injury not a necessary element of offence</td>
<td>Drink Driving 6 / 12 / 18 months (s 49(1)(b) &amp; (f) RSA)</td>
</tr>
<tr>
<td>Dangerous Driving 2 years (s 64 RSA)</td>
<td></td>
</tr>
<tr>
<td>Injury</td>
<td>Recklessly Cause Injury 5 years (s 18 CA)</td>
</tr>
<tr>
<td>Serious Injury</td>
<td>Negligently Cause Serious Injury 10 years (s 24 CA)</td>
</tr>
<tr>
<td>Serious Injury</td>
<td>Dangerous Driving Causing Serious Injury 5 years (s 319 CA)</td>
</tr>
<tr>
<td>Death</td>
<td>Dangerous Driving Causing Death 10 years (s 319 CA)</td>
</tr>
<tr>
<td>Death</td>
<td>Culpable Driving Causing Death 20 years (s 318(2)(a) CA (recklessly)) (s 318(2)(b) CA (negligently))</td>
</tr>
<tr>
<td>Death</td>
<td>Manslaughter 20 years (s 5 CA)</td>
</tr>
<tr>
<td>Death</td>
<td>Murder Life Imprisonment (s 3 CA)</td>
</tr>
</tbody>
</table>
Appendix 2: Criticism of the NCSI Maximum Penalty

<table>
<thead>
<tr>
<th>Victorian County Court</th>
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</thead>
<tbody>
<tr>
<td><strong>Case</strong></td>
</tr>
<tr>
<td><strong>R v Wilson</strong> [2007] VCC (Unreported, Wodak J, 26 June 2007) [49], [52]. See also [50]–[51].</td>
</tr>
<tr>
<td><strong>R v Franklin</strong> [2007] VCC (Unreported, Smallwood J, 27 February 2007) [1].</td>
</tr>
<tr>
<td><strong>R v Healey</strong> [2007] VCC (Unreported, Gullaci J, 21 February 2007) [67]–[68].</td>
</tr>
<tr>
<td><strong>R v Pavlidis</strong> [2007] VCC (Unreported, Smallwood J, 23 January 2007) [2].</td>
</tr>
<tr>
<td><strong>R v Svorinich</strong> [2006] VCC (Unreported, Nixon J, 9 March 2006) [65].</td>
</tr>
<tr>
<td><strong>R v Gany</strong> [2006] VCC (Unreported, Gebhardt J, 10 February 2006) [20].</td>
</tr>
<tr>
<td><strong>R v Huynh</strong> [2006] VCC (Unreported, Coish J, 2 February 2006) [2].</td>
</tr>
<tr>
<td><strong>Case</strong></td>
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<tr>
<td><em>R v Van Rooyen</em> [2005] VCC (Unreported, Nixon J, 12 December 2005) [39].</td>
</tr>
<tr>
<td><em>R v Chalkley</em> [2005] VCC (Unreported, Nixon J, 18 August 2005) [52], [54]–[55].</td>
</tr>
<tr>
<td><em>R v Blomeley</em> [2005] VCC (Unreported, Rizkalla J, 4 March 2005) [11]–[12].</td>
</tr>
<tr>
<td><em>R v Kennedy</em> [2005] VCC (Unreported, Kennedy J, 18 August 2004) [13].</td>
</tr>
<tr>
<td><em>R v McKenzie</em> [2005] (Unreported, Punshon J, 15 July 2005) [45].</td>
</tr>
<tr>
<td><em>R v Kolevas</em> [2005] VCC (Unreported, Chettle J, 6 June 2005) [13].</td>
</tr>
</tbody>
</table>
| **R v Ash** [2005] VCC  
(Unreported, Nicholson J,  
27 May 2005) [28], [31].  
See also [36]–[39]. | It is sad to say that despite all the consternation and concern within our community about the maiming and injury caused on our roads by those who negligently drive motor vehicles, there has been nothing done about increasing the maximum penalty for this offence to which you have pleaded guilty before me. …  
As I have said, unfortunately Parliament at this stage has not seen fit to increase the maximum penalty for this serious offence of negligently causing serious injury. It has not kept pace with the increases in penalty for the associated offence of culpable driving, although I am told and do understand that discussions and moves are afoot to increase the penalty for negligently causing serious injury. For the purposes of determining the appropriate sentence in your case… I am bound by the maximum penalty of 5 years’ imprisonment. |
| --- | --- |
| **R v Smith** [2005] VCC  
(Unreported, Chettle J, 8  
April 2005) [10]. | The offence to which you have pleaded guilty is a serious offence, and carried a maximum penalty of five years’ imprisonment. You heard in discussion comments made by a Supreme Court judge in the past to the effect that five years for an offence of negligently causing injury is too light a maximum penalty, and that may well be the case for some examples of negligently causing serious injury. |
| **R v Rizza** [2005] VCC  
(Unreported, Wood J, 23  
February 2005) [32]. | [P]arliament’s attention has on five occasions been brought to the opinion on [sic] members of the Court of Appeal, that the term of five years’ imprisonment for this offence is inadequate. |
| **R v Johnston** [2004] VCC  
(Unreported, Smallwood J,  
23 March 2004) [1]. | Whilst it may be viewed by some that the maximum penalty involved in a charge such as this is not high enough, I must be at all times aware that that is the sentencing regime in which I must pass sentence. |
| **R v Wickfeldt** [2002] VCC  
(Unreported, Duggan J, 23  
October 2002) 9. | It seems to me that the maximum penalty for this offence of five years has not remained in proportion to that available for the offence of culpable driving. I regard this case as being a bad example of this particular offence. |
| **R v Ramsey** [2002] VCC  
(Unreported, Rendit J, 10  
July 2002) 5. | The maximum sentence for negligently causing injury is five years and, although there are judicial statements by some judges of superior courts that this maximum is inadequate, I am compelled to sentence you on the basis that five years is the maximum and is reserved for the worst case of negligently causing serious injury. |
| **R v Menzies** [2000] VCC  
(Unreported, Dee J, 28  
July 2000) 33. | The maximum penalty for negligently causing serious injury is five years, which is grossly inadequate. |
## Appendix 2: Criticism of the NCSI Maximum Penalty

<table>
<thead>
<tr>
<th>Case</th>
<th>Comment (quoted)</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>R v Fackovec</em> [2007] VSCA 93 (Unreported, Vincent, Eames and Nettle JJA, 10 May 2007) [37] (Nettle JA).</td>
<td>I turn to the question of re-sentencing. As to the count of negligently causing serious injury … it is to be noted that the maximum penalty is only five years’ imprisonment. But, as this Court has said on several occasions, it is a penalty which needs to be revised.</td>
</tr>
<tr>
<td><em>R v Yusuf</em> [2006] VSCA 178 (Unreported, Callaway and Redlich JJA, Coldrey AJA, 31 August 2006) [1] (Callaway JA).</td>
<td>It has often been observed that the … maximum [for NCSI] is too low. It is out of kilter with the maximum penalties for related offences and, in some cases, inhibits the courts from doing justice.</td>
</tr>
<tr>
<td><em>DPP v Gany</em> [2006] VSCA 148 (Unreported, 7 July 2006, Chernov, Vincent and Redlich JJA) [30] (Redlich JA).</td>
<td>These considerations led to the submission by the Director that even if the sentence of two years and six months on count 2 was appropriate, orders of partial cumulation of those counts should have produced a sentence well in excess of three years even if the extent of the orders for cumulation were constrained because of the inappropriately low maximum penalty prescribed by the legislature for the offence of negligently causing serious injury.</td>
</tr>
<tr>
<td><em>R v Roach</em> [2005] VSCA 162 (Unreported, Ormiston, Charles and Callaway JJA, 8 June 2005) [11] (Callaway JA).</td>
<td>The judge … said that he hoped that the sentence passed would demonstrate how seriously the courts and the community view such offending. Unfortunately, as has often been observed, the maximum penalty for negligently causing serious injury is out of kilter with the maximum penalties for related offences. The only response open to the courts, in cases of such gravity as the present, is to impose a term of imprisonment as close to the maximum as other principles of sentencing will allow. Those principles include, but are not limited to, any entitlement to a discount for pleading guilty.</td>
</tr>
<tr>
<td><em>R v Johnston</em> (Unreported, Supreme Court of Victoria, Court of Appeal, Charles JA, 15 October 2004) [5].</td>
<td>This Court has on no less than five occasions attempted to draw to the attention of Parliament that the maximum penalty of five years’ imprisonment for negligently causing serious injury is inadequate and needs to be revised … The attention of Parliament should again be drawn to the fact that the maximum penalty for this offence is too low.</td>
</tr>
<tr>
<td><em>R v Brown</em> (2003) 39 MVR 293, [2003] VSCA 153, Winneke P, Callaway and Vincent JJA, 17 September 2003) [9] (Callaway JA).</td>
<td>It is notorious that the maximum penalty for negligently causing serious injury is too low and is out of kilter with the maximum penalties for related offences. That does not mean that the maximum penalty can be ignored, but it does not prevent the courts from ‘firming up’ in appropriate cases in the sentences imposed for that offence.</td>
</tr>
<tr>
<td><em>R v Scott</em> [2003] VSCA 55 (Unreported, Winneke P, Phillips and Buchanan JJA, 15 May 2003) [25] (Winneke P).</td>
<td>Nor, in my view, is the penalty of two years which his Honour imposed for negligently causing serious injury manifestly excessive. The maximum penalty of five years has been the subject of criticism for some years, insofar as it applies to injuries inflicted by criminally negligent driving.</td>
</tr>
<tr>
<td><strong>R v Truelove [2001] VSCA 78</strong> (Unreported, Phillips, Batt and Chernov JJA, 10 May 2001) [20] (Phillips JA).</td>
<td>The sentencing judge was, however, referred by prosecuting counsel to <em>Taylor</em>, in which … Brooking, J.A. expressed the view that the maximum for this very offence was inadequate. In <em>Taylor</em>, for the same offence as was charged here, his Honour said he would have expected a longer term than one year. Of course each case depends upon its own facts, but the argument of proportion by reference to the maximum that was put … does, I think, over-simplify matters. It cannot be determinative.</td>
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<tr>
<td><strong>R v Guariglia [2001] VSCA 27</strong> (Unreported, Winneke P, Brooking and Charles JJA, 21 March 2001) [20] (Winneke P).</td>
<td>Whilst I would agree with counsel that the judge must be careful to ensure that orders for cumulation do not produce a total sentence which infringes principles of totality, I am unable to agree that the judge’s discretion is otherwise inhibited in the case of culpable driving causing multiple deaths or injury. In many cases which have come before this Court … the same driving has caused death to one victim and injury to another, leading to sentences imposed for culpable driving causing death on the one hand and negligently causing serious injury on the other. Cumulation has been ordered of a portion of the sentence for the latter offence upon the sentence for the former, for the purpose of recognising that the two offences have been committed against two different victims. In such cases, as this Court has noted previously, cumulation has been constrained merely because of the inappropriately low maximum penalty prescribed by the legislature for the offence of negligently causing serious injury, a penalty which itself, I think, needs to be revised.</td>
</tr>
<tr>
<td><strong>R v Taylor [1999] VSCA 206</strong> (Unreported, Brooking, Philips and Buchanan JJA, 30 November 1999) [3] (Brooking JA).</td>
<td>The maximum penalty for culpable driving was 20 years’ imprisonment and that for negligently causing serious injury five years’ imprisonment. The judge remarked that the maximum of five years was surprisingly low, echoing, we were told by the Crown what had been said by other members of his court. I agree that the maximum of five years is too low.</td>
</tr>
</tbody>
</table>
Appendix 2: Criticism of the NCSI Maximum Penalty
## Appendix 3: Inter-jurisdictional Comparison

<table>
<thead>
<tr>
<th>Jur</th>
<th>Legislation</th>
<th>Section</th>
<th>Offence</th>
<th>Statutory Maximum</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACT</td>
<td>Crimes Act 1900 (ACT)</td>
<td>25</td>
<td>‘A person who, by any unlawful or negligent act or omission, causes grievous bodily harm to another person is guilty of an offence punishable, on conviction, by imprisonment for 2 years’.</td>
<td>2 years</td>
</tr>
<tr>
<td></td>
<td>Road Transport (Safety and Traffic Management) Act 1999 (ACT)</td>
<td>6(1)</td>
<td>‘A person must not drive a motor vehicle negligently on a road or road related area. Maximum penalty...if the driving occasions grievous bodily harm—100 penalty units, imprisonment for 1 year or both’.</td>
<td>1 year</td>
</tr>
<tr>
<td>NSW</td>
<td>Crimes Act 1900 (NSW)</td>
<td>54</td>
<td>‘Whosoever by any unlawful or negligent act, or omission, causes grievous bodily harm to any person, shall be liable to imprisonment for two years’.</td>
<td>2 years</td>
</tr>
<tr>
<td></td>
<td>Road Transport (Safety and Traffic Management) Act 1999 (NSW)</td>
<td>42(1)</td>
<td>‘A person must not drive a motor vehicle negligently on a road or road related area. Maximum penalty:...if the driving occasions grievous bodily harm—20 penalty units or imprisonment for 9 months or both (in the case of a first offence) or 30 units or imprisonment for 12 months or both (in the case of a second or subsequent offence)’.</td>
<td>9 months (1st offence) 12 months (2nd or subsequent offence)</td>
</tr>
<tr>
<td>NT</td>
<td>Criminal Code Act (NT)</td>
<td>174E</td>
<td>‘A person is guilty of a crime if (a) the person engages in conduct; and (b) that conduct causes serious harm to another person; and (c) the person is negligent as to causing serious harm to the other person or any other person by the conduct’.</td>
<td>10 years</td>
</tr>
<tr>
<td>Jur</td>
<td>Legislation</td>
<td>Section</td>
<td>Offence</td>
<td>Statutory Maximum</td>
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<tr>
<td>Qld</td>
<td><em>Criminal Code Act 1899 (Qld)</em></td>
<td>320</td>
<td>Unlawfully does grievous bodily harm</td>
<td>14 years</td>
</tr>
<tr>
<td></td>
<td></td>
<td>328A(4)</td>
<td>Dangerous operation of a vehicle</td>
<td>10 / 14 years</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>‘Any person who unlawfully does grievous bodily harm to another is guilty of a crime, and is liable to imprisonment for 14 years’.</td>
<td>14 years</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>‘A person who operates, or in any way interferes with the operation of, a vehicle dangerously in any place and causes the death of or grievous bodily harm to another person commits a crime’.</td>
<td>10 / 14 years</td>
</tr>
<tr>
<td>SA</td>
<td><em>Criminal Law Consolidation Act 1935 (SA)</em></td>
<td>268(5)</td>
<td>Causing serious harm by criminal negligence</td>
<td>4 years</td>
</tr>
<tr>
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<td>In circumstances including where a defendant’s consciousness was/may have been impaired by self-induced intoxication to the point of criminal irresponsibility at the time of the alleged offence; and the defendant’s conduct: ▪ resulted in serious harm and ▪ if judged by the standard appropriate to a reasonable and sober person in the defendant’s position, falls so short of that standard that it amounts to criminal negligence, the defendant may be convicted of causing serious harm by criminal negligence.</td>
<td>4 years</td>
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<td></td>
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<td>19A(3)</td>
<td>Causing serious harm by driving vehicle in a culpably negligent manner</td>
<td>15 years / life</td>
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<td>‘A person who (a) drives a vehicle or operates a vessel in a culpably negligent manner, recklessly, or at a speed or in a manner dangerous to the public; and (b) by that culpable negligence, recklessness or other conduct, causes harm to another, is guilty of an indictable offence’.</td>
<td>15 years / life</td>
</tr>
<tr>
<td>Jur</td>
<td>Legislation</td>
<td>Section</td>
<td>Offence</td>
<td>Statutory Maximum</td>
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<tr>
<td>Tas</td>
<td><em>Criminal Code Act 1924 (Tas)</em></td>
<td>172</td>
<td>‘Any person who unlawfully wounds or causes grievous bodily harm to any person by any means whatever is guilty of a crime’.</td>
<td>21 years</td>
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<td>167B</td>
<td>‘Any person who causes grievous bodily harm to another person by the driving of a motor vehicle at a speed or in a manner that is dangerous to the public, having regard to all the circumstances of the case, including, in the case of the driving of a motor vehicle on a public street, the nature, condition and use of the street and the amount of traffic that is actually at that time, or that might reasonably be expected to be, on the street, is guilty of a crime’.</td>
<td>21 years</td>
</tr>
<tr>
<td>Vic</td>
<td><em>Crimes Act 1958 (Vic)</em></td>
<td>24</td>
<td>‘A person who by negligently doing or omitting to do an act causes serious injury to another person is guilty of an indictable offence’.</td>
<td>5 years</td>
</tr>
<tr>
<td>WA</td>
<td><em>Criminal Code Act Compilation Act 1913 (WA)</em></td>
<td>297</td>
<td>‘Any person who unlawfully does grievous bodily harm to another is guilty of a crime’.</td>
<td>10 / 14 years</td>
</tr>
<tr>
<td></td>
<td><em>Road Traffic Act 1974 (WA)</em></td>
<td>59(1)</td>
<td>‘If a motor vehicle driven by a person (the “driver”) is involved in an incident occasioning the death of, or grievous bodily harm to, another person and the driver was, at the time of the incident, driving the motor vehicle (a) while under the influence of alcohol, drugs, or alcohol and drugs to such an extent as to be incapable of having proper control of the vehicle; or (b) in a manner (which expression includes speed) that is, having regard to all the circumstances of the case, dangerous to the public or to any person, the driver commits a crime’.</td>
<td>20 or 14 or 4 years (on indictment). 18 months (summary conviction).</td>
</tr>
</tbody>
</table>
While the degree of harm (grievous bodily harm) covered by this offence is generally comparable to ‘serious injury’ in NCSI, the culpability of the offender is expressed differently. It is an offence to **unlawfully** do grievous bodily harm. It would appear that this offence is constructed to cover criminal negligence: see for example *R v Clark [2007] QCA 168* (Unreported, Jerrard, Keane JJA and Lyons J, 25 May 2007) [40] (Keane JA).

328A(4) of the *Criminal Code Act 1899* (Qld) provides that the offender is liable on conviction on indictment:

(a) to imprisonment for 10 years, if neither paragraph (b) nor (c) applies; or

(b) to imprisonment for 14 years if, at the time of committing the offence, the offender is: (i) adversely affected by an intoxicating substance; or (ii) excessively speeding; or (iii) taking part in an unlawful race or unlawful speed trial; or

(c) to imprisonment for 14 years, if the offender knows, or ought reasonably know, the other person has been killed or injured, and the offender leaves the scene of the incident, other than to obtain medical or other help for the other person, before a police officer arrives.

Section 268(5) of the *Criminal Law Consolidation Act 1935* (SA) provides that: ‘If—

(a) the objective elements of an alleged offence are established against a defendant but the defendant’s consciousness was (or may have been) impaired by self-induced intoxication to the point of criminal irresponsibility at the time of the alleged offence; and

(b) the defendant’s conduct resulted in serious harm (but not death); and

(c) the defendant is not liable to be convicted of the offence under subsection (1) or (2); and

(d) the defendant’s conduct, if judged by the standard appropriate to a reasonable and sober person in the defendant’s position, falls so short of that standard that it amounts to criminal negligence, the defendant may be convicted of causing serious harm by criminal negligence.

Maximum penalty: Imprisonment for 4 years.

The statutory maximum penalty is 15 years’ imprisonment (for a first ‘basic’ offence) or life imprisonment (for a first offence that is an aggravated offence or for a subsequent offence): *Criminal Law Consolidation Act 1935* (SA) s 19A.

This would appear to cover negligently causing serious injury: *Quarrell v White [2004] TASSC 45* (Unreported, Crawford J, 20 May 2004) [8].

In Tasmania, the maximum penalty for any crime is 21 years’ imprisonment (*Criminal Code Act 1924* (Tas) s 389(3)). See further n 132 above.

In Tasmania, the maximum penalty for any crime is 21 years’ imprisonment: (*Criminal Code Act 1924* (Tas) s 389(3)). See further n 132 above.

The maximum penalty for this offence is imprisonment for 10 years or, if the offence is committed in circumstances of aggravation, imprisonment for 14 years: *Criminal Code Act Compilation Act 1913* (WA) s 297.

Section 59(3) of the *Road Traffic Act 1974* (WA) provides that a person convicted on indictment of an offence against section 59 is liable—

(a) if the offence is against subsection (1)(a), or the offence is against subsection (1)(b) and is committed in circumstances of aggravation, to a fine of any amount and to imprisonment for—(i) 20 years, if the person has caused the death of another person; or (ii) 14 years, if the person has caused grievous bodily harm to another person; or

(b) in any other circumstances, to imprisonment for 4 years.

Note: the 20 year statutory maximum penalty was not included in Figure 6 as it relates to offences in which the person has caused the death of (rather than grievous bodily harm to) another person.
Appendix 4: Consultation

The Council released an Information Paper on 6 July 2007, which briefly described the context of the reference and provided information about the offence of NCSI and related offences in Victoria and other jurisdictions. It also provided information about sentencing patterns for NCSI and related offences in Victorian courts. The Council invited submissions on four questions raised in the Information Paper.

The Council placed advertisements in the Age (Saturday 7 July 2007) and the Herald-Sun (Monday 9 July 2007) alerting the community about the reference and calling for submissions in response to the Information Paper.

12 submissions were received by the Council.

The Council also held a series of meetings with relevant experts and stakeholders, including:

- Meeting with Chief Judge Rozenes, Judge Punshon and Judge Smallwood of the County Court of Victoria (1 August 2007).
- Meeting with Noel McNamara, Crime Victims Support Association (14 August 2007).
- Victims’ Roundtable discussion (14 August 2007).

Advertisement

CALL FOR SUBMISSIONS

Negligently Causing Serious Injury

The Council has been asked by the Attorney-General, the Honourable Rob Hulls MP, for advice on the appropriate maximum penalty for the offence of negligently causing serious injury (NCSI). The current maximum penalty for NCSI is five years’ imprisonment.

NCSI commonly arises in the context of assaults as well as driving offences in circumstances where the victim is seriously injured, but is not killed.

The Council has prepared a brief Information Paper and is inviting submissions on four questions raised in this paper. The Information Paper is available on our website.

Submissions should be addressed to the Council at:

Sentencing Advisory Council
Level 4, 436 Lonsdale St
Melbourne VIC 3000
Fax: (03) 9603 9030
E-mail: contact@sentencingcouncil.vic.gov.au

Closing Date: Friday 3 August 2007

To order a copy of the Information Paper or for assistance in preparing a submission (including access to an interpreter), please phone the Council on (03) 9603 9047 or 1300 363 196 or visit our website at:

www.sentencingcouncil.vic.gov.au

Sentencing Advisory Council
Level 4, 436 Lonsdale Street
Melbourne Victoria 3000
Telephone 1300 363 196
www.sentencingcouncil.vic.gov.au
### Submissions

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<td>1</td>
<td>10/07/2007</td>
<td>Royal Automobile Club of Victoria</td>
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<td>2</td>
<td>31/07/2007</td>
<td>D. Winter</td>
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<td>01/08/2007</td>
<td>K. Davies</td>
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<td>5</td>
<td>03/08/2007</td>
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<td>12</td>
<td>16/08/2007</td>
<td>Victoria Legal Aid</td>
</tr>
</tbody>
</table>
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R v Johnston (Unreported, Supreme Court Court of Appeal, Charles JA, 15 October 2004)


R v Roach [2005] VSCA 162 (Unreported, Ormiston, Charles and Callaway JJA, 8 June 2005)
R v Truelove [2001] VSCA 78

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Criminal Code 1913 (WA)
Criminal Code 1924 (Tas)
Criminal Code 1983 (NT)
Criminal Code 2002 (ACT)
Criminal Code Act 1899 (Qld)
Criminal Law Consolidation Act 1935 (SA)
Magistrates’ Court Act 1989 (Vic)
Sentencing Act 1991 (Vic)