



LEGISLATIVE ASSEMBLY

FOR THE AUSTRALIAN CAPITAL TERRITORY

COMMITTEE SUPPORT

QToN No. JACS 001

Standing Committee on Justice and Community Safety

Inquiry into Dangerous Driving ANSWER TO QUESTION TAKEN ON NOTICE

Asked by Mr Braddock on 26 October: Dr John Boersig, Legal Aid ACT took on notice the following question(s):

Reference: Hansard [uncorrected] proof transcript [26/10/22] [PAGE 40]]

In relation to:

MR BRADDOCK: Just a supplementary on that. Dr Boersig, you put a caveat on your answer saying theoretically you could do such a weighting scheme. Why did you use that caveat and what are you thinking about with that?

Dr Boersig: Because I only just thought about it when the question came.

MR BRADDOCK: Okay.

Dr Boersig: And I do not think that it is beyond the remit that a government could legislate a percentage or a weight that had to be done, because—but I would have to think through how that would happen practically, in the light of what the fuller discussion that came from Ms Lee about. Mandatory sentencing brings with it a whole range of problematic issues and I suppose I would just need to—I want to be very considered in my response to that question, because it might sound straightforward, but I think it could actually be quite complex and problematic and so that is why. I do not mean to hedge, but I would need to think about that.

MR BRADDOCK: Thank you.

THE CHAIR: Are you happy to take that as a question taken on notice?

Dr Boersig: Yes, we will take it. Yes.

Legal Aid ACT: The answer to the Member's question is as follows:—

1. The question on notice raises the issue of whether it is appropriate in dealing with offences of dangerous driving for some sentencing considerations to be given particular weight. While theoretically this could be done, the sentencing law of the ACT already equips courts to deal

with any and all aspects of dangerous driving offences and their harm on the community. This expressly includes victims and their families, even where there is loss of life.

2. There are two themes of importance to this discussion: the principle of individualised justice, and the extent to which the sentencing considerations cover the field for offences the subject of this Inquiry. Both are such that legislative intervention would serve little to no purpose in more closely including or centralising the impact of offending on victims, particularly where dangerous driving has resulted in death.

The current scheme

3. The general purposes of sentencing are contained in s 7 of the Crimes (Sentencing) Act 2005. Subsection (2) places the weight of each of those purposes on equal footing:

7 Purposes of sentencing

(1) A court may impose a sentence on an offender for 1 or more of the following purposes:

- (a) to ensure that the offender is adequately punished for the offence in a way that is just and appropriate;
- (b) to prevent crime by deterring the offender and other people from committing the same or similar offences;
- (c) to protect the community from the offender;
- (d) to promote the rehabilitation of the offender;
- (e) to make the offender accountable for his or her actions;
- (f) to denounce the conduct of the offender;
- (g) to recognise the harm done to the victim of the crime and the community.

(2) To remove any doubt, nothing about the order in which the purposes appear in subsection (1) implies that any purpose must be given greater weight than any other purpose.

4. In the case of young offenders, these general purposes need to be read alongside s 133C:

133C Young offenders—purposes of sentencing

(1) Despite section 7 (2), in sentencing a young offender, a court must consider the purpose of promoting the rehabilitation of the young offender and may give more weight to that purpose than it gives to any of the other purposes stated in section 7 (1).

(2) Also, in sentencing a young offender, a court must have particular regard to the common law principle of individualised justice.

5. In exercising its sentencing jurisdiction, the Court must consider the factors in s 33, disregarding those in s 34. Section 33 sets out an extensive array of matters which the court “must consider”. These factors include the nature and circumstances of the offence, the effect of the offence on victims, matters subjective to the offender and many other factors. I will not set them out at length, but they have been carefully thought out, and reflect a similarity of approach in other Australian jurisdictions including the federal jurisdiction

6. Importantly, sub-ss (3) and (4) are careful to preserve sentencing courts' discretion in light of these considerations, despite their being mandatory:

(3) Subsections (1) and (2) do not limit the matters a court may consider in deciding how an offender should be sentenced (if at all) for an offence.

(4) The fact that any relevant factor is known to the court does not require the court to increase or reduce the severity of the sentence for the offence.

7. Overall, the sentencing regime requires a **spectrum** of matters to be considered, while preserving **judicial discretion** and embodying the principle of **individualised justice**

Individualised Justice

8. Individualised justice is the application of sentencing principles, as rules, in response to the circumstances of the individual case. It is the principle that sentencing ought produce individualised and just outcomes. Individualised justice is often ascribed meaning with reference to the following passage of Mahoney ACJ in *R v Lattouf*:

There is a public interest in the adoption and articulation of sentencing principles which will deter the commission of serious crime and punish those who commit it. ... But there are other interests to which the sentencing process must have regard; there are other objectives which the sentencing process must seek to achieve. Paramount amongst these is the achievement of justice in the individual case. To see the sentencing process as involving no more than stern punishment for each offender is not merely simplistic; it damages the public interest. A sentencing process which is seen by the public merely as draconian and not just will lose the support of those whom it is designed to protect. If a sentencing process does not achieve justice, it should be (sic) put aside. As I have elsewhere said, if justice is not individual, it is nothing[.]

9. The last sentence is a reference to his Honour's judgment in *Kable v Deputy Director of Public Prosecutions*:

What may and should be done is not to be determined by the articulation of generalities. The law must be effective to do what needs to be done in the individual case. If justice is not individual, it is nothing.

10. Section 133C of the Act makes express mention of 'individualised justice'. Strikingly, it is the only reference in any mainland Australian statute. It is important to recognise that the Assembly saw fit to entrench the principle in all instances of sentencing for young offenders. But of further importance is its equal application in adult sentencing.
11. The Explanatory Statement to the Children and Young People Bill 2008, which inserted s 133C, was careful to describe the reference as being emphatic of its application to sentencing of young offenders; not as intending to apply exclusively to it:

New section 133C(2) invokes the sentencing principle of individualised justice. The new section does not intend to codify the sentencing principle, but intends to emphasise a sentencing court's regard for the principle of individualised justice when sentencing

young offenders. This emphasis is consistent with the Australian jurisprudence, such as *R v Voss* [2003] NSWCCA 182 and *R v Mills* [1998] 4 VR 235.

12. Any endeavour by the legislature to constrict sentencing discretion, or to give more weight to factors favouring the tariff approach, is at the expense of sentencing courts to dispense individualised outcomes. This causes particular difficulty in cases involving young offenders, in light of its express mention in s 133C. That is not to say that it is not also undesirable to extinguish it with respect to adult offenders, either.

Sentencing Factors Cover the Field for Dangerous Driving

13. So comprehensive is s 33 that it is difficult to conceive of cases involving circumstances outside the scope of s 33 of the Act.
14. The Terms of Reference for the Inquiry do not refer directly to what is hoped to be achieved or examined in sentencing courts. However, the tenor of submissions and discussion in the Hansard suggest there may be public dissatisfaction with sentencing outcomes, either because they are perceived to be too lenient or place insufficient weight on the effect of offending on victims and their families, particularly where there has been loss of a loved one.
15. While this is understandable, in reality harm to the community, both in the sense of the general public and those individuals affected by the offending, is fully captured in existing mandatory sentencing considerations. For instance:
 - (a) The circumstances and seriousness of the individual offending. These circumstances might include being subject to one or both of conditional liberty or licence disqualification.⁷ • The nature and circumstances of the offence (sub-s (1)(a)).
 - (b) Damage to property, injury or even death of persons. • Injury, loss or damage resulting from the offence (para (e)). • The effect of the offence on victims of the offence, the victims' families and anyone else who may make a victim impact statement (para (f)).
 - (c) Loss or harm to unborn children, where the person harmed is a pregnant woman. • The considerations of para (g), as they are applicable.
 - (d) Loss or harm to vulnerable persons.⁸ • The considerations of para (gb), as they are applicable.
 - (e) Intoxication of the offender. • Whether the offender was affected by alcohol or drugs, and the circumstances in which the offender was so affected (para (p)).
16. And of course, the Court is empowered to consider matters outside of sub-ss (1) and (2) of s 33 if it is appropriate to do so.

Mandatory sentencing considerations

17. In referring to a "weighting scheme, the QON invokes the possibility of some form of mandatory sentencing considerations. The legislature could introduce provisions requiring sentencing courts to have regard to certain circumstances. It has done so through s 34B for domestic violence offences:

34B Sentencing—family violence offences

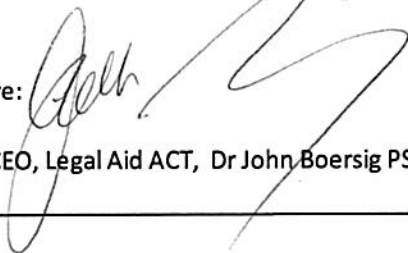
(1) In deciding how an offender should be sentenced for a family violence offence, a court must consider the nature of family violence and the context of the offending, including the following:

- (a) the matters mentioned in the preamble to the Family Violence Act 2016;
- (b) whether the offending occurred at the home of the victim, offender or another person;
- (c) whether the offending occurred when a child was present;
- (d) if the offence is a serious family violence offence—whether the offender has 1 or more other convictions for serious family violence offences.

18. The chapeau of s 34B requires a sentencing court to consider broader matters of context to the offending. It might ordinarily consider the circumstances of the offending, but perhaps not the background and relationship in which it occurs. Offences of dangerous driving, however, would not seem to encompass the same complexity or nuance which might be missed in a strict application of the mandatory considerations (and others as may be relevant). It is clear that all circumstances, including those of concern to the Committee and members of the public making submissions, are already required to be considered. A provision like s 34B would serve no real purpose, other than repeating the relevant s 33 considerations.
19. Whilst a provision, to the extent it would purport to affect weighting of sentencing considerations, might extinguish the application of individualised justice to adults, it would create a clear difficulty with sentencing young offenders. As set out above, it would contradict and the application and purpose of s 133C of the Act.
20. An alternative approach would be a mandatory sentencing provision which would require the Court to impose a certain sentence, usually unless some circumstance or circumstances applied, or otherwise in the discretion of the sentencing court. There are no existing mandatory sentencing provisions in the Territory. To impose one for dangerous driving offences, but not for more serious offences, might be seen to be heavy-handed, grossly inconsistent and unfit for purpose. There are some limited mandatory sentencing provisions in some other Australian jurisdictions, but only in relation to very serious crimes and not in relation to driving offences. It would be hard to justify mandatory minimums for such offences in the ACT.

Approved for circulation to the Standing Committee on [Choose an item.](#)

Signature:



Date: 21 November 2022

By the CEO, Legal Aid ACT, Dr John Boersig PSM

