

**REVIEW OF OFFENCES APPLYING TO FATALITIES INVOLVING MOTOR VEHICLES
ON PRIVATE LAND**

Legal Aid NSW Submission

to the NSW Law Reform Commission

FEBRUARY 2015

Introduction

Legal Aid NSW welcomes the opportunity to provide comment in relation to the review of offences applying to fatalities involving motor vehicles on private land ('the Review'), and in particular the question of whether a new offence should be created to cover the case of negligent driving on private property causing death, where the factual elements do not amount to an offence under s 52A of the *Crimes Act* nor under s 117 of the *Road Transport Act*.

Comment

It is our view that criminal sanctions *do* remain available for fatalities caused by genuinely negligent driving on private land. In particular, it remains open to the Crown to pursue a charge of manslaughter by criminal negligence.

In *Nydam v R* [1977] VR 430 at 445 (approved by the High Court in *The Queen v Lavender* (2005) 222 CLR 67 ('*Lavender*') and in *Burns v The Queen* (2012) 246 CLR 334 ('*Burns*'), the Full Court of the Supreme Court of Victoria held that:

In order to establish manslaughter by criminal negligence, it is sufficient if the prosecution shows that the act which caused the death was done by the accused consciously and voluntarily, without any intention of causing death or grievous bodily harm but 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 death or grievous bodily harm would follow that the doing of the act merited criminal punishment [emphasis added].

In contrast with section 117 of the *Road Transport Act*, the offence of manslaughter by criminal negligence applies regardless of whether or not the incident occurred on a public road. Further, although the degree of negligence required in order to substantiate an offence of manslaughter is relatively high, it falls short of the standard contained within section 52A of the *Crimes Act* that the defendant must have been driving "in a manner dangerous". Thus the charge of manslaughter remains open to

the prosecution in circumstances where neither section 117 nor section 52A would apply.

The availability of manslaughter as an available charge in circumstances involving negligent driving causing death on private property, represents a sufficient mechanism by which the criminal law may seek to regulate conduct on private property.

Conclusion

It is the view of Legal Aid NSW that the availability of sections 52A-53 of the *Crimes Act*, section 117 of the *Road Transport Act* and the offence of manslaughter, represent an appropriate balance between the protective mechanism of the criminal law and the private rights of individuals on private property.

Further, the definition of “road related area” should not be expanded beyond its current legislative scope so as to encompass areas under private control. Such an expansion could give rise to an unknown number of adverse consequences, including the substantial regulatory burden placed on rural law enforcement authorities.

However, Legal Aid NSW suggests consideration be given to amending the *Road Transport Act* so as to enable a police officer to breath test the driver of a vehicle involved in a collision on private land. Clause 3 of Schedule 3 to the *Road Transport Act* ostensibly permits a police officer to breath-test a person only if the officer believes that the person was involved in a motor vehicle accident occurring on a public road or on a road related area.

Police officers in other states, like Queensland and Victoria, are not so constrained. In circumstances where police do not have the ability to conduct a breath test on a person suspected of causing a motor vehicle incident on private land, it would be difficult to substantiate any charge(s) laid. Consideration of amendment to the *Road Transport Act* should be given in order to enhance the ability of police to gather evidence in support of a prosecution under section 117 of the *Road Transport Act* for an offence occurring on private land.

Thank you for the opportunity to provide these comments. Legal Aid NSW looks forward to discussing these issues in further detail at the roundtable consultation on 19 February 2015. If you would like further information, please contact Aideen McGarrigle on 9219 5701 or at aideen.mcgarrigle@legalaid.nsw.gov.au.