Inquiry into the Crimes Amendment (Unlicensed Drivers) Bill 2018
Committee functions

The Victorian Law Reform, Road and Community Safety Committee (the Committee) is established under the *Parliamentary Committees Act 2003* (the Act).

The Committee comprises seven members of Parliament: five from the Legislative Assembly and two from the Legislative Council.

Section 13 of the Act sets out the functions of the Committee:

1. The functions of the Law Reform, Road and Community Safety Committee are, if so required or permitted under this Act, to inquire into, consider and report to the Parliament on any proposal, matter or thing concerned with –
   a. legal, constitutional or parliamentary reform;
   b. the administration of justice;
   c. law reform;
   d. the use of drugs, including the manufacture, supply or distribution of drugs;
   e. the level or causes of crime or violent behaviour
   f. road trauma;
   g. safety on roads and related matters

2. It is not a function of the Committee to inquire into, consider or report to the Parliament on any proposal, matter or thing concerned with:
   a. the joint standing orders of the Parliament
   b. the standing orders or rules of practice of the Council or the Assembly
Committee membership

Mr Geoff Howard MP
Chair
Buninyong

Mr Bill Tilley MP
Deputy Chair
Benambra

Dr Rachel Carling-Jenkins MLC
Western Metropolitan

Hon Martin Dixon MP
Nepean

Mr Mark Gepp MLC
Northern Victoria

Ms Natalie Suleyman MP
St Albans

Mr Murray Thompson MP
Sandringham
Committee secretariat

Staff

Yuki Simmonds, Executive Officer
Raylene D’Cruz, Research Officer
Christianne Andonovski, Administrative Officer

Committee contact details

Address  Law Reform, Road and Community Safety Committee
         Parliament of Victoria, Spring Street
         EAST MELBOURNE VIC 3002
Phone    61 3 8682 2846
Email    lrrcsc@parliament.vic.gov.au
This report is available on the Committee’s website.
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Inquiry into the Crimes Amendment (Unlicensed Drivers) Bill 2018

On 20 June 2018, the Legislative Council agreed to the following motion:

That, the Crimes Amendment (Unlicensed Drivers) Bill 2018 be referred to the Law Reform, Road and Community Safety Committee for inquiry, consideration and report by 22 August 2018*.

* The reporting date was later extended to 18 September 2018.
Chair’s foreword

On 20 June 2018, the Legislative Council referred the Crimes Amendment (Unlicensed Drivers) Bill 2018 to the Law Reform, Road and Community Safety Committee for inquiry and report.

The Bill proposes to amend the Crimes Act 1958 to introduce new offences for causing serious injury or death while driving unlicensed in certain circumstances. The Bill was drafted by Dr Rachel Carling-Jenkins MLC in response to the tragic death of 13 year old, Jalal Yassine-Naja, on 14 March 2017 in a collision with an unlicensed driver.

On behalf of the Committee, I wish to convey my deepest sympathies to the family and friends of Jalal, and especially to his mother, Olivia Yassine, for their loss. In giving evidence to the Committee on her experiences and the Justice for Jalal campaign, Olivia demonstrated immense courage and provided the Committee with incredibly important context on the background to the Bill.

It is important to bear in mind that the issues raised about the Bill in this report are separate from the particular circumstances of Jalal’s death. As legislators, it is important that we consider not only the policy intent behind legislative change, but the broader implications of the Bill if implemented and any unintended consequences.

The purpose of the inquiry was to closely examine the contents of the Bill to help inform its consideration by the Legislative Council. Because of the inquiry’s limited scope and the short turnaround time for its completion, the Committee did not advertise a call for submissions but held a day of public hearings focussing on the legal issues related to the Bill. To this end, the Committee thanks all stakeholders who provided evidence during the inquiry. Their contributions in the short time frames available assisted the Committee greatly with forming this report.

I would also like to thank my fellow Committee Members for their contribution during this inquiry, in addition to the secretariat for its hard work and ongoing assistance.

Mr Geoff Howard MP
Chair
September 2018
Findings

FINDING 1: If enacted in its current form, the Bill may conflict with the traditional operation of causation, a fundamental and complex criminal law concept. The lack of clarity would likely lead to implementation problems and require detailed consideration by the courts. 18

FINDING 2: The lack of fault element in the Bill would impose a significantly lower standard of culpability compared to established criminal law approaches, and would likely result in unjust outcomes or be unworkable in practice. 21

FINDING 3: The reverse legal onus of proof in the defence provisions of the Bill would conflict with the right to be presumed innocent, and would likely cause practical difficulties for an accused in attempting to prove the defence. 24

FINDING 4: The principal aim of the Bill, which is to acknowledge the seriousness of unlicensed driving that results in serious injury or death, may be better achieved with alternative legislative reform within the current framework of driving offences. 26
Recommendation

RECOMMENDATION 1: That the Victorian Government refer this report to the Department of Justice and Regulation to ensure the issues raised are considered as part of its investigations into the need for an offence of unlicensed driving that involves the death or serious injury of another person.
Introduction

On 20 June 2018, the Law Reform, Road and Community Safety Committee received a reference from the Legislative Council to inquire into the Crimes Amendment (Unlicensed Drivers) Bill 2018. The Bill was introduced into the Legislative Council on 23 March 2018 by Dr Rachel Carling-Jenkins MLC, the Member for Western Metropolitan. It aims to amend the Crimes Act 1958 to insert two offences under new section 319AAB Unlicensed driving causing serious injury or death. As stated by Dr Carling-Jenkins in her second reading speech:

It inserts an offence into current law, whereby if a person driving a motor vehicle, with the knowledge that they are unlicensed, or reckless whether they are unlicensed, causes serious injury to another person, they are liable up to five years imprisonment. And if they cause the death of another person they are liable to up to 10 years imprisonment.¹

The impetus for the Bill was the death of 13 year old, Jalal Yassine-Naja, who was hit by an unlicensed driver on 14 March 2017. Following an investigation by Victoria Police, the driver was not found to be at fault for his death. The driver was charged with unlicensed driving under the Road Safety Act 1986 and sentenced to 80 hours of community service for this and other unrelated offences. As discussed further in Chapter Two, community concerns arose following this sentencing outcome, which according to Victoria Police’s former Assistant Commissioner of Road Policing, Doug Fryer, highlighted a gap in the law. It was on this basis that Dr Carling-Jenkins introduced the Bill, also known as Jalal’s Law, into the Legislative Council:

Doug Fryer described the tragedy of Jalal’s untimely death as highlighting a gap in the law: ‘I get that the law was applied... community service was all that was available. But it’s highlighted there’s a gap, we’re progressing... some legislative change around unlawful road user causing death and unlawful road user causing injury’.²

Following the Bill’s introduction, it was reviewed by the Victorian Parliament’s Scrutiny of Acts and Regulations Committee which raised concerns about whether the language in the Bill imposes a reverse legal onus on the accused to prove the defence provisions, and its compatibility with the Victorian Charter of Human Rights and Responsibilities Act 2006.³ The Scrutiny of Acts and Regulations Committee’s alert digest reviewing the Bill and the response of Dr Carling-Jenkins to the matters raised are provided in Appendix One.

1.1 Purpose of inquiry

During her contribution to the debate that the Bill be read a second time, Ms Jaclyn Symes MLC, the Member for Northern Victoria, proposed the following reasoned amendment:

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¹ Victoria, Parliamentary Debates, Legislative Council, 23 May 2018, p. 2003 (Rachel Carling-Jenkins MLC, Western Metropolitan).
That all the words after ‘That’ be omitted with the view of inserting in their place ‘this House refuses to read this Bill a second time until the proposals contained in the Bill have been referred to the Law Reform, Road and Community Safety Committee for inquiry, consideration and report by 22 August 2018’.  

In proposing the reasoned amendment, Ms Symes stated that the Victorian Government is committed to the worthiness of the Bill’s intent, but the Government is not in a position to support the Bill in its current form, as the operation of the proposed new offences could create unintended consequences if enacted. She raised the following issues with the Bill:

- Unclear operation of the principle of causation.
- A lack of fault element in the offences (e.g. there is no requirement for dangerous or reckless driving to be involved) and concerns with how this would operate in practice.
- The proposed offences contain a reverse onus of proof in the defence, which could conflict with the Victorian Charter of Human Rights and Responsibilities.
- The proposed defence may have unintended consequences by limiting the scope of convictions.
- A similar offence in the United Kingdom for causing the death of another person while driving unlicensed or while disqualified or uninsured, was re-interpreted by the Supreme Court to require some proof of poor driving behaviour that led to the death.

The purpose of this inquiry was therefore to examine the contents of the Bill in the context of these and any other issues identified by the Committee.

### 1.2 The issue of unlicensed driving and existing offences

While the purpose of this inquiry is not to address the issue of unlicensed driving, it is important to acknowledge that driving without an appropriate licence is common in Australia. Driving without an appropriate licence is also broader than unlicensed driving and can be categorised into the following groups:

- licence never obtained
- licensed in another country or Australian jurisdiction but not exempt from the requirement to hold a licence issued by the jurisdiction in which they are driving (e.g. a driver who obtained their probationary licence at 17 in New South Wales is not eligible to drive independently in Victoria until they are 18)
- driving with a suspended or cancelled licence, or when disqualified from driving
- driving after a disqualification period has ended and not taking the necessary steps to become licensed again
- driving with an expired licence
- driving with a licence inappropriate for the type of vehicle being driven
- driving outside the restrictions of a special licence.

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Driving without an appropriate licence poses a significant problem for road safety agencies, such as police and licensing authorities, as these drivers operate outside of the established licensing system and effectively the law, making it difficult for authorities to monitor their driving behaviour. They also have higher than average crash rates, and are over-represented in crashes involving fatalities or serious injuries.

In his evidence to the Committee, Victoria Police’s Acting Assistant Commissioner for Road Policing, Michael Grainger, advised:

We see unauthorised road use as a huge risk to our community, and just to put that in context, I have managed to source some very basic data that reveals that about 6.6 per cent of trauma collisions over the last five years involved unauthorised road users — not just unlicensed but unauthorised road users. So that was more than 1000 drivers involved in over 16 000 collisions in a five year period. At least 9 per cent of fatal collisions in the same period involved unauthorised road users.\(^7\)

According to the Austroads report, *Developing Measures to Reduce Unlicensed Driving*, unlicensed drivers who drive while disqualified, or with a suspended or cancelled licence; or who have never been licenced, are at greatest risk of crash involvement. The first group’s higher risk factor relates to them typically engaging in other risky driving behaviours, such as drink driving or speeding, which would have resulted in their disqualification, suspension or cancellation in the first place. The second group’s higher risk factor relates to their limited experience and skills to drive safely, as well as a tendency to engage in risky driving behaviours.\(^8\)

In Victoria, offences for unlicensed driving and related offences, such as driving while disqualified or driving in breach of licence conditions, are captured under the *Road Safety Act 1986*. Currently, section 18 of the Act contains both offences for unlicensed driving and driving in breach of licence conditions with a penalty rate not exceeding 25 penalty units or up to three months imprisonment.\(^9\) However, at the time that Ms Symes proposed the reasoned amendment to the Crimes Amendment (Unlicensed Drivers) Bill 2018, she indicated that the *Transport Legislation Amendment (Road Safety, Rail and Other Matters) Act 2017* separated the two offences as they differ in both seriousness and risk. The purpose of this was to provide ‘more effective deterrence, to more appropriately reflect the level of road safety risk and to align with best practice sentencing policy in Victoria’.\(^10\) From 1 November 2018, the offence of unlicensed driving will incur a penalty not exceeding 60 penalty units or up to six months imprisonment.\(^11\)

In Victoria, and elsewhere in Australia, there is currently no specific offence for unlicensed driving that involves the death or serious injury of another person. Following the death of Jalal Yassine-Naja, the Minister for Police, the Hon. Lisa Neville MP, directed the Department of Justice and Regulation (DoJR) to investigate the need for such an offence. The Committee formally requested further information from the Department about these investigations, although a response was not provided.

The Committee also notes that there are a number of existing offences under the *Crimes Act 1958* that relate to driving causing death or serious injury, including:

\(^7\) Acting Assistant Commissioner Michael Grainger, Acting Assistant Commissioner for Road Policing, Victoria Police, *Transcript of evidence*, 3 August 2018, p.41.


\(^9\) *Road Safety Act 1986* (Vic).


\(^11\) *Transport Legislation Amendment (Road Safety, Rail and Other Matters) Act 2017* (Vic).
Chapter 1 Introduction

• culpable driving causing death (up to 20 years imprisonment)\textsuperscript{12}
• dangerous driving causing death (up to 10 years imprisonment)\textsuperscript{13}
• dangerous driving causing serious injury (up to 5 years imprisonment)\textsuperscript{14}
• negligently cause serious injury (up to 10 years imprisonment). This offence is not specific to driving but is largely used for driving offences.\textsuperscript{15}

These offences are discussed in Chapter Three.

1.3 The inquiry process

The purpose of the inquiry was to examine the contents of the Bill, rather than a broader review of relevant policy. The report provides an overview of the key issues raised in the evidence received, to inform consideration of the Bill by the Legislative Council.

With a short turnaround time for the inquiry’s completion, the Committee did not advertise a formal call for submissions. The Committee, however, received correspondence from two interested stakeholders, which were accepted as submissions and published online. These are listed in Appendix Two. The Committee held one day of public hearings where a select number of stakeholders appeared before the Committee to discuss the contents of the Bill. A number of other organisations were invited to appear before the Committee but were unable to attend. This included the DoJR, the Sentencing Advisory Council, the Victorian Equal Opportunity and Human Rights Commission, the Law Institute of Victoria, the Human Rights Law Centre, and the Caston Centre for Human Rights Law. The public hearing witnesses are listed at Appendix Three and their transcripts of evidence are provided at Appendix Four.

The original reporting date for the inquiry was 22 August 2018, although the Committee sought an extension to 18 September 2018.

\textsuperscript{12} \textit{Crimes Act 1958 (Vic)}, section 318(1).
\textsuperscript{13} \textit{Crimes Act 1958 (Vic)}, section 319(1).
\textsuperscript{14} \textit{Crimes Act 1958 (Vic)}, section 319(1A).
\textsuperscript{15} \textit{Crimes Act 1958 (Vic)}, section 24.
2 The Crimes Amendment (Unlicensed Drivers) Bill 2018

2.1 The context of the Bill

2.1.1 The death of Jalal Yassine-Naja

The proposed legislation was introduced in response to the death of 13 year old Jalal Yassine-Naja on 14 March 2017. While the Committee’s role is not to determine the exact circumstances involved with this incident and makes no comment about this, it felt it important to outline some of the evidence received in this regard. This included evidence about the police investigation, court processes and the strong will of Jalal’s mother, Olivia Yassine, to pursue reform in this area following the death of her son.

Ms Jaclyn Symes MLC, the Member for Northern Victoria, advised the Legislative Council during debate on the Bill:

Jalal Yassine-Naja lost his life on 14 March 2017 after being hit by an unlicensed driver... Following a police investigation the driver was found not to be at fault and was charged in relation to driving whilst unlicensed. She was sentenced to 80 hours of community work pursuant to a community correction order.

During the Committee’s public hearings, Victoria Police’s Acting Assistant Commissioner for Road Policing, Michael Grainger, provided further context about the unlicensed driver and the police determination that there was no ‘overt fault’ involved:

It is interesting to note, in the horrible circumstances that led to young Jalal’s passing, that the driver involved was driving on an expired probationary drivers licence — this may be a fact that is known to you, but it was certainly new to me — and in fact had been driving on that licence for about nine months prior to the collision date. That person’s licence had expired on 29 June 2016, some nine months prior to the terrible collision. In this specific case our investigators determined that there was no overt fault that could be attributed to the driver that was driving on the roads. There was no intentional or reckless act that that person committed prior to striking young Jalal, and I think that is a key point.

The Committee was further informed by Acting Inspector Tony Long of Victoria Police that the driver had a significant driving history prior to the date of crash, including at least three court hearings for traffic offences and a number of penalty notices.

16 Crimes Amendment (Unlicensed Drivers) Bill 2018: Explanatory Memorandum (Vic).
The sentence of 80 hours of community work (which the Committee understands also took into account other unrelated offences by the driver) resulted in community concerns that the charge of unlicensed driving and the sentence applied was wholly insufficient compared to the significant and grave harm of the death of Jalal. The Committee particularly acknowledges in this regard the evidence of Olivia Yassine. She told the Committee of the impact of this sentence in failing to acknowledge her son’s life:

It is like, ‘Where is anything about Jalal?’. You have not only hit him; you have run over him. You are unlicensed, and you were caught two weeks earlier driving unlicensed as well. You have got all this history behind you, and my son is a nothing. To me 80 hours community service was not a consequence.

Then you pay attention more to the news. Someone gets a year for running a red light. Someone gets 300 hours for stealing jewellery. Then I am like, ‘Why didn’t this woman get anything?’ Even in the sense of driving lessons — take her car away. Take something else. But to sit there and like, ‘You get your licence back; you only get 80 hours’. I tell my children to pick weeds when they are in trouble — that is community service; that is what she got. But this is for taking a life. She breaks the law, she takes a life — that affects us for the rest of our lives...

Olivia Yassine described the long-term pain and suffering endured in losing Jalal:

Going back I guess to the morning when I did lose him, it is something I relive almost daily. Sleeping is non-existent. His brothers deal with it in their own ways. I have a 12-year-old, a seven-year-old, and even a three-year-old who remembers him. With the way it has affected our lives, I can call it a life sentence, if that is how you want to put it.

Janelle Nicholas, one of the first people on the scene of Jalal’s death, spoke of the impact of this incident on the broader community in her submission to the inquiry:

The effect this has had on everyone involved is immeasurable. Those of us who were there deal with it everyday. Sounds, sights still trigger me and I’m back on that road with Jalal as he died. I can never erase what I saw and heard. Individuals and the community are still in disbelief at the injustice.

Relating to the court processes involved, Olivia Yassine told the Committee of her concerns, including with the reading of her victim impact statement:

Then they came to reading the victim impact statement, and I kid you not. I know it was probably a page and a half. He said, ‘Jalal was her oldest; he was a 13-year-old. He helped her with the younger siblings. Then it goes on to say about how they have been dealing with it. Then there are some things down here about how it has affected their lives. You get what the report means, Your Honour’. They could not even read out how I feel. That is how I feel. I don’t want to read it, because I don’t want to break down.

Olivia Yassine and her supporters also considered there were specific issues with the police investigation. For example, Janelle Nicholas stated that she was told on the day that the police would contact her to obtain a statement, but she never heard back.
In another example, Maria Aylward questioned the return of Jalal’s helmet to Olivia on the day of this death, which she suggested may have formed part of the evidence. 26 There were also some comments regarding a lack of communication with the family during the process. Maria Aylward told the Committee:

There was no verbal communication, very little communication, and when I stepped in and said, ‘Look, I’m trying to help Olivia. She’s in a difficult way emotionally. Is it possible to get some sort of brief of evidence or a meeting or something so that she can have some sort of information fed to her so that she can try and process and understand?’. It came to a situation where he ignored, ignored, ignored and then referred it to his sergeant and said, ‘Don’t contact us again’. So the lack of empathy on the police side and the way that they dealt with it was really unfortunate. 27

The Committee queried these and other issues with Victoria Police during the hearings. In discussing this case, Acting Assistant Commissioner Grainger advised the Committee of his confidence that the investigation was undertaken in a rigorous manner:

I guess I would assert in this case that we have very, very good supervision around any fatal or serious injury collision, so there will be a supervisor routinely reviewing the traffic incident report, for example, particularly if there is a fatal collision. We have our major collision investigation unit overview every fatal collision in Victoria, and if there was in fact determined to be some sort of a gap in our investigation process, then that would become known and communicated very early — very early.

In this case we had highway patrol ... attend the collision, and again a supervisor in place on every shift would be overseeing the fact that we had had a serious injury or fatal collision and assuring himself or herself that an appropriate inquiry was being undertaken. So I am really confident that in our investigation processes of such matters appropriate governance and supervision is in place. Do we routinely then review an inquiry like that? As we proceed to the courts, there is a review process there. If we identify a gap in the preparation of a brief of evidence, for example, there is an opportunity again to intervene and direct different inquiries to be made, but I would suggest that our supervision and governance around things are pretty robust in terms of these sorts of collisions. 28

The Committee notes the disappointment of Olivia Yassine and her supporters with various aspects of justice system processes in this case.

### 2.1.2 The push for reform

In the aftermath of these events, Olivia Yassine told the Committee that while her instinct was to withdraw, she chose instead to fight for acknowledgment of her son’s life:

In that sense, then, I went home and my whole mentality was to crawl into a hole — but I still needed to be a mum. Or you get up and you fight for your son and you get something out of this so that you acknowledge his death and something comes good out of it, because that is what he was — he was such a good boy.

...
Chapter 2 The Crimes Amendment (Unlicensed Drivers) Bill 2018

So I have taken it on myself to try and do something for him. If it is Jalal’s law, which helps another family to never have to deal with what we are dealing with, then maybe I have left something for him.29

The Committee understands that Olivia Yassine’s work through her Justice for Jalal campaign led to the development of the Crimes Amendment (Unlicensed Drivers) Bill 2018 (the Bill) by Dr Rachel Carling-Jenkins MLC, the Member for Western Metropolitan. In introducing the Bill to the Legislative Council, Dr Carling-Jenkins described Jalal’s death as the basis for the legislative reform:

The bill is a response to widespread community concern arising from an unlicensed driver who caused the death of 13 year old Jalal Yassine-Naja merely being sentenced to community service for driving unlicensed. The sentencing took no account of the fact that this unlicensed driver had caused the death of a person, thus revealing a significant gap in the criminal law which the bill seeks to remedy.30

The Committee wishes to express its deepest sympathies to the family and friends of Jalal for their tragic loss. It also wishes to acknowledge and pay respect particularly to Olivia Yassine, who has worked tirelessly on her campaign in the face of an unthinkable tragedy. The Committee was grateful that she and her supporters gave evidence during this inquiry, as it shed light on the human story behind possible reform in this area. The Committee also notes that stakeholders to the inquiry similarly conveyed their condolences for Jalal’s death, and expressed their respect for Olivia Yassine’s formidable efforts in advocating for reform. For example, Dr Steven Tudor, Senior Lecturer in the School of Law at Law Trobe University, stated in his submission:

The death of Jalal Yassine-Naja was a deeply tragic one and every decent person will feel compassion for his family and friends, especially his mother Olivia Yassine, in their understandable grief. Moreover, Ms Yassine’s efforts to bring about change in order to honour her son are very much to be admired.31

In considering the specific contents of the Bill in this inquiry, the Committee is mindful to reiterate that the issues raised regarding the Bill must be seen as separate from the particular circumstances of Jalal’s death.

2.2 The purpose and provisions of the Bill

The Bill aims to amend the Crimes Act 1958 (the Act) to create two new offences for causing serious injury (proposed section 319AAB(1)) or death (proposed section 319AAB(3)) while knowingly or recklessly driving unlicensed.32

The proposed offences are drafted in the same terms but the penalties differ, with unlicensed driving causing serious injury attracting a maximum penalty of five years, and unlicensed driving causing death attracting a maximum penalty of ten years. These penalties are the same as for offences under section 319 of the Act, namely dangerous driving causing death or serious injury. In his evidence, Professor Jeremy Gans of Melbourne Law School highlighted that such a position would make the act of unlicensed driving equivalent to dangerous driving:

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31 Dr Steven Tudor, Submission, no. 2, 4 August 2018, p. 1.
32 Crimes Amendment (Unlicensed Drivers) Bill 2018 (Vic).
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...the effect of this offence is to equate driving without a licence to driving dangerously. In terms of maximum penalty, that does not mean that the courts will necessarily sentence in the same way but is just a recognition that that is effectively what this offence is doing — is treating unlicensed driving as dangerous driving.33

Under the Bill, a person is guilty of an offence where he or she knowingly or recklessly drives while unlicensed and causes serious injury or death by driving the vehicle. The substantive terms of the proposed offences state that the person is guilty if he or she:

(a) drives a motor vehicle knowing that, or being reckless as to whether, they are an unlicensed driver; and

(b) causes serious injury or death to another person by driving the motor vehicle.34

Dr Steven Tudor described the basic structure of both offences as comprising:

1. a conduct element of driving
2. a circumstance element of driving while unlicensed, with an attached fault element of knowing or being reckless as to being unlicensed (being aware that he or she is unlicensed)
3. a result element of death or serious injury to another person.

Dr Tudor further explained that there is no requirement that ‘any connection be proved between the driver being unlicensed and the death or serious injury’. As there is no fault element attached to either the conduct (driving) or the result (death or serious injury), the offences are prima facie strict liability offences.35 Similarly, the Victorian Parliament’s Scrutiny of Acts and Regulations Committee noted in its consideration of the Bill that ‘[t]he offence does not require proof that the driver drove carelessly, dangerously, negligently or recklessly’.36 This issue will be discussed in Chapter Three.

The offences also both contain a defence in proposed sections 319AAB(2) and (4) if the court is satisfied of all three following elements:

1. the person held an appropriate Victorian, interstate or overseas licence at some time before the offence
2. the licence had not been cancelled for a driving offence committed in Victoria, interstate or overseas (e.g.- letting it expire)
3. at the time of causing the death or serious injury, ‘the person was observing the standard of care in relation to the driving of the motor vehicle which a reasonable person would have observed in all the circumstances of the case’.37

It has been identified that these provisions effectively reverse the legal onus of proof, requiring the accused to prove the defence on the balance of probabilities. Again, this issue will be discussed in Chapter Three.

In considering the rationale for the proposed offences, Dr Tudor stated:

33 Professor Jeremy Gans, Melbourne Law School, Transcript of evidence, 3 August 2018, p. 6.
34 Crimes Amendment (Unlicensed Drivers) Bill 2018 (Vic), section 319AAB(1) and (3).
35 Dr Steven Tudor, Submission, no. 2, 4 August 2018, pp. 2-3.
37 Crimes Amendment (Unlicensed Drivers) Bill 2018 (Vic), section 319AAB(2)(c) and (4)(c).
The policy rationale for the creation of these offences seems to be that, because the unlicensed driver should not have been driving, then they should be held responsible for the harms to others that result from their driving. Such responsibility arises (on this view) because those harms would not have occurred had the driver obeyed the law and stayed off the road.\textsuperscript{38}

It should be noted that no other Australian jurisdiction has a similar offence to the ones proposed in the Bill. The United Kingdom \textit{Road Traffic Act 1988} contains a similar offence for causing death by driving for unlicensed, disqualified or uninsured drivers. Its experience in implementing the offence is discussed in Chapter Three, along with other issues outlined in evidence received during the inquiry, including on the need for reform in this area and the specific impacts of the Bill in its current form.

\textsuperscript{38} Dr Steven Tudor, \textit{Submission}, no. 2, 4 August 2018, p. 3.
3 Key issues and evidence received

This chapter outlines the evidence received during the inquiry on the policy intent and specific contents of the Crimes Amendment (Unlicensed Drivers) Bill 2018 (the Bill). As is common with inquiries into Bills by Parliamentary Standing Committees, the comprehensive account of evidence is typically drawn from transcripts from the public hearings and written submissions to the Committee.

Given the short time frames involved, the Committee was restricted to one day of public hearings and was not in a position to undertake a formal call for submissions. Even so, the Committee received evidence that was reflective of the key issues to consider regarding the Bill.

3.1 The need for legislative reform

During the inquiry, the Committee heard various views on whether there is a need for legislative reform in this area, particularly where unlicensed drivers cause death or serious injury by driving. Regarding support for such reform, Olivia Yassine and her supporters spoke of the need for greater accountability in cases where the collision is deemed an accident. For example, Janelle Nicholas, one of the first people on the scene of Jalal Yassine-Naja’s death, stated in her submission:

An unlicenced driver needs to be accountable. There are laws in place for culpable driving for licenced drivers but nothing in place for unlicenced drivers when it is deemed an accident. Just the sheer fact that they are driving unlicenced is a criminal act, it shows disregard and therefore should be seen as culpable. No mitigating circumstances, no leeway, no argument around causation, simple fact...you drive unlicenced you ARE responsible and accountable for whatever happens while you are driving.39

At the public hearing, Janelle Nicholas further considered there is a need for greater consequences to act as a deterrent:

That is why I think it is very important that Jalal’s law go ahead to stop this from happening again and so people who are unlicensed do not just think, ‘Oh, well, I’ll just get a slap on the wrist, and I can get back in my car and drive again’. There have to be consequences for people. I know there are queries about, ‘Well, if it’s an accident and if they’re not drinking or they’re not speeding or they’re not anything else, it’s just an accident’. But, like I said, the fact that they knowingly get into that vehicle knowing they should not be on the road, to my mind, makes them accountable and culpable, and they should face the penalty for that.40

Victoria Police also considered that there is currently a legislative gap which requires remedy. In supporting public comments made by former Assistant Commissioner for Road Policing, Doug Fryer, to that effect (outlined in Chapter One), Acting Assistant Commissioner for Road Policing, Michael Grainger advised the Committee:

40 Janelle Nicholas, Transcript of evidence, 3 August 2018, p. 28.
We feel there is evidence to suggest that people on the roads that behave and drive like that — whether they are behaving badly or not, whether they are at fault in a collision or not — their mere presence on the road, we assert, is a problem for the state and community safety.\textsuperscript{41}

Acting Assistant Commissioner Grainger also discussed the specific case of Jalal’s death:

...I assert on behalf of our organisation that people that make those deliberate choices to be on the road and, as a result of that decision, a terrible tragedy occurs, then the community would expect that they be held to account.

In this case I understand that there was a penalty. I understand there was a term of imprisonment available to the judge to make a call on, and for a number of circumstances, which I am not privy to, the decision that was reached was reached. I guess I just bring you back to the fact that we assert — Victoria Police asserts — that if they make that choice to be on the road, they should be held to account. We enforce the law; the judges, I guess, make judgements on such matters.\textsuperscript{42}

In considering whether there is a need for reform in this area, Professor Jeremy Gans of Melbourne Law School told the Committee:

I can well understand the situation where a person who is injured or has a loved one killed by someone who should not have been on the road regards that as a more serious offence than just the offence of unlicensed driving.\textsuperscript{43}

Professor Gans highlighted that the creation of such offences is not only about increasing penalties, but about acknowledging deaths that should not have happened:

Part of the reason I have got some intuitive liking for this offence is that the criminal law is also about acknowledgement. If you just charge someone with unlicensed driving — if you throw the book at them and you give them their three months because they killed someone perhaps, the victims will not see that as acknowledging their situation. The courts sometimes say that they do not like the idea that a death just becomes a meaningless statistic rather than being clearly acknowledged by the courts.\textsuperscript{44}

On the other hand, Emeritus Professor Arie Freiberg AM suggested that current driving offences may be sufficient to ensure that the primary culpability involved in a crash is accounted for:

I think there are really serious questions of whether there are in fact gaps in the law, because in your bill you have created a new level of culpability which is somewhere below or somewhere around careless, but I do not think it uses exactly the same language as careless driving, so there may be the requirement for courts to develop, and prosecutors to develop, some understanding of what this fifth level of culpability is. My gut feeling is that probably it may be unnecessary because between intentional, reckless, negligent, dangerous and careless, we have probably covered the ground in terms of culpability.\textsuperscript{45}

\begin{footnotesize}
\begin{itemize}
\item[41] Acting Assistant Commissioner Michael Grainger, Acting Assistant Commissioner for Road Policing, Victoria Police, \textit{Transcript of evidence}, 3 August 2018, p. 41.
\item[45] Emeritus Professor Arie Freiberg AM, Monash University, \textit{Transcript of evidence}, 3 August 2018, p. 16.
\end{itemize}
\end{footnotesize}
Chapter 3 Key issues and evidence received

He noted that a 2017 review of offences for driving causing serious injury or death by the Tasmanian Sentencing Advisory Council, of which he is the Chair, did not identify a need for major legislative changes. He also stressed the importance of considering the context of existing criminal law and sentencing frameworks through ‘looking at all the facts, the possible gaps in the law, the relationship of this offence to others, sentencing practices and what you might expect out of any change’:

What I suggest is that you have a look at the three reports that we have done, especially the Tasmanian one — even though the law is not identical, all the driving offences are similar — and we do go through the harm and culpability and the offences that fit into each one of them. And we did not recommend major changes in the law in Tasmania, even though the precipitating event was an awful tragedy — of this kid on a motorbike, unlicensed, a 16 year old killing a mother and a child.46

Emeritus Professor Freiberg also informed the Committee more generally of the difference in expectations around criminal justice outcomes once people are fully informed. He suggested it is important to keep this in mind when considering law reform:

... while it may well be that there is a feeling based on what happened here and in Hobart that justice ought to be done, justice involves both the commission of the actus reus — the harm itself — and culpability, and I think it is dangerous to base your law reform on what you think might be the public reaction.

What is in the media is not necessarily what the public, in a considered and informed manner, might think about it. Now, in this sense, I did not bring them with me but I have been involved in a number of studies, both in Tasmania and now in Victoria, where we are looking at juries’ views of sentencing. We have interviewed jurors who have sat in on trials in the County Court; we have given them surveys and we have interviewed them. And the findings again and again are not that the public are necessarily punitive, but that when you provide them with information they are in fact more lenient — except in sex offence cases, and this is the County Court — more lenient than the judges because they have heard all of the facts.47

Whether supportive or not more generally of reform in this area, stakeholders raised a number of specific issues with the contents of the Bill in its current form. For example, while Professor Gans considered there is a case for reform, he noted that ‘[t]he trick, though, is how to define such an offence, and I do think there are a number of drafting problems with this bill’.48 Similarly, Dr Gideon Boas, a Professor at the School of Law at La Trobe University and Barrister-at-Law advised that the issue is ‘where we draw the line between accident, mishap, misadventure and behaviour which should be penalised’:

...in terms of what you as lawmakers want to achieve in terms of where you draw those lines — or the courts in how they interpret what you do in creating the law — I think we need to think carefully about that. This is an offence which I understand the purpose of entirely, but it does concern me, yes.49

The remainder of the chapter outlines concerns raised with the Bill, and also briefly addresses other reform options within existing offence frameworks that were suggested to the Committee.

46 Emeritus Professor Arie Freiberg AM, Monash University, Transcript of evidence, 3 August 2018, p. 20.
47 Emeritus Professor Arie Freiberg AM, Monash University, Transcript of evidence, 3 August 2018, p. 16.
49 Dr Gideon Boas, La Trobe Law School, Transcript of evidence, 3 August 2018, p. 36.
3.2 Contents of the Bill

3.2.1 Causation

Causation is a core element of crime where the criminal conduct involved ‘requires the occurrence of specified results or consequences’. In these cases, it must be proved that the conduct itself caused those results or consequences to occur.\textsuperscript{50}

Under proposed sections 319AAB(1)(b) and (3)(b), an element of the offences is that the person causes serious injury or death by driving the motor vehicle. However, the Committee received evidence on numerous occasions that the way causation is framed in the Bill will significantly impact notions of culpability in existing criminal laws. Dr Steven Tudor, Senior Lecturer in the School of Law at La Trobe University, stated in his submission:

\begin{quote}

The conception of criminal culpability that underlies the Bill seems to be that a person should be blamed for any death or serious injury that results from conduct engaged in which was unlawful, regardless of whether or not the unlawfulness of the conduct has any bearing upon the result. Moreover, the conception of causation that seems to be at work here is that if X would not have happened “but for” Y, then Y is the cause of X. In this context, if the unlicensed driver had not been driving, then the death would not have resulted, and so it is the unlicensed driving which is the cause of the death. Both of these ideas are strongly contestable as bases for criminal responsibility.\textsuperscript{51}

\end{quote}

He gave examples where the ‘but for’ test of causation, as applied in the Bill, is problematic:

- in some cases, even if the unlicensed driver was not on the road, the person may have been killed by another driver, for example where the person runs onto a busy road and is likely to be killed
- if a person intends to commit suicide by running onto a road, it may be inappropriate to place fault on the unlicensed driver involved in a collision.\textsuperscript{52}

He further cautioned that the absence of a direct link between the driving behaviour itself and harm caused would set a dangerous precedent in criminal law, one that is out of step with current approaches to causation and particularly problematic given the seriousness of the proposed offences:

\begin{quote}

To say that the unlicensed driver “takes their chances” when they choose to drive unlicensed and so has to accept responsibility for whatever then happens is far too open-ended as a principle to guide the drafting of criminal offences. It leaves far too open what sort of connection there might be between the unlawful conduct and the harm. The proposed offence makes no provision for contributory negligence or intentional acts on the part of the deceased. Homicide law is too serious to be reduced to such a simple and low threshold. The Bill would also set a dangerous precedent for the drafting of future indictable offences if no fault element needs to be proved in relation to the conduct that causes the harm.\textsuperscript{53}

\end{quote}

\textsuperscript{50} Westlaw AU, \textit{Criminal Law, Investigation and Procedure Victoria} (at 02 May 2016) ‘General Principles of Criminal Law’ [GPOCL.640].

\textsuperscript{51} Dr Steven Tudor, \textit{Submission} no. 2, 4 August 2018, p. 4.

\textsuperscript{52} Dr Steven Tudor, \textit{Submission} no. 2, 4 August 2018, pp. 4-5.

\textsuperscript{53} Dr Steven Tudor, \textit{Submission} no. 2, 4 August 2018, p. 5.
Emeritus Professor Freiberg similarly considered that the causal relationship must remain between the actual driving and the harm caused, rather than being solely concerned with whether the person was licensed or not:

...I think this notion of constructive crime — that is, you are doing one thing and something else happens, and you put those two together with the culpability of one being possibly very minor as we have heard, the unlicensed driving, and the outcome, in this case a death, being very tragic — by putting those together, you increase the culpability. I think my basic argument would be...that you have got to look at the basic culpability of the offender, and this is a very, very complex issue in terms of the current structure of Victorian law.

...my argument would be ultimately the focus should be on the relationship — the causal relationship — between the driving and the harm, not being unlicensed, unless it was a contributing factor.

...Your argument here is, 'But for the fact that you didn’t have a licence, you wouldn’t have been driving'. The law, I think — and I have not taught the criminal law for many years — ‘Was the fact that you were driving unlicensed a substantial cause of the death or injury?’...I think you would have to make the case that it was the unlicensed driving that was the cause. If you cannot do that, I think you rely on the standard law, which is: were you careless; were you dangerous; were you culpable; were you negligent? I think the law is sufficient to cover that.54

In this context, a number of stakeholders raised a United Kingdom (UK) Supreme Court case, R v Hughes, which has direct bearing on how causation as framed in the Bill can be difficult to interpret and may not have its intended effect. These issues are outlined below.

R v Hughes [2013] UKSC 56

The offence of ‘causing death by driving: unlicensed, disqualified or uninsured drivers’ was introduced as section 3ZB of the UK Road Traffic Act 1988, coming into force in 2008. It stated that a person is guilty if he causes the death of another person when driving and, at the time, he was committing an offence of driving other than in accordance with a licence, while disqualified or while uninsured.55 The maximum penalty was two years imprisonment or fines. Prior to its passage, a UK Government consultation paper noted that the standard of driving would be immaterial for the offence, for example by stating:

The mere act of taking a vehicle on to the road when disqualified is, in the Government’s view, as negligent of the safety of others as is any example of driving below the standard expected of a competent driver, even if the disqualified driver at a particular time is driving at an acceptable standard.56

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54 Emeritus Professor Arie Freiberg AM, Monash University, Transcript of evidence, 3 August 2018, pp. 15-16.
55 Road Traffic Act 1988 (UK), section 3ZB.
In 2010, the Court of Appeal of England and Wales in the case of *R v Williams (Jason John)* [2010] EWCA Crim 2552 held that ‘the mere presence of the defendant on the road, without suitable insurance, licence or being subject to disqualification, was sufficient to be held to cause the death of the victim’.

However, the UK Supreme Court in *R v Hughes* in 2013 overturned this view and found that something blameworthy within the accused’s driving must be shown in order for the offence to be made out. Dr Tudor’s submission succinctly outlined the facts of the case and what was held:

In that case, Mr Hughes was driving without a licence and without insurance. Another driver, affected by heroin and lack of sleep, drove erratically, crossed lanes and collided with Mr Hughes. The other driver died. Mr Hughes was charged with unlicensed and uninsured driving causing death. The prosecution accepted that the accident was entirely the deceased’s fault and that Mr Hughes was not at fault and could not have done anything to prevent it. The Supreme Court held that the statutory offence could not be satisfied “unless there is something properly to be criticised in the driving of the defendant, which contributed in some more than minimal way to the death” ([32]).

Specifically in terms of causation, the Court stated that ‘[t]o give effect to the words “causes...death...by driving” there must be something more than “but for” causation.’

Following *R v Hughes*, the Committee understands that a number of guilty pleas to section 3ZB made previously were quashed on appeal. Further, *Guidance for Crown Prosecutors* for charging such offences now state that the standard of driving is relevant, and that causing death ‘involves more than simply placing a car on a road’.

The Committee also notes that the number of people found guilty of the offence appeared to drop following *R v Hughes*. According to the *Criminal Justice System statistics quarterly: December 2017* by the Ministry of Justice, 22 people were found guilty of the offence in both 2010 and 2011. This dropped to 13 in 2012, 10 in 2013, and one in 2014. In 2017, three offenders were found guilty. Noting sentencing practices in both the UK and Victoria, Emeritus Professor Freiberg considered it ‘unlikely’ that such offences in Victoria would produce a ‘huge increase in sentencing outcomes’.

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58 *R v Hughes* [2013] UKSC 56.

59 Dr Steven Tudor, Submission, no. 2, 4 August 2018, p. 6.

60 *R v Hughes* [2013] UKSC 56, p. [32].

61 *R v Uthayakumar; R v Clayton* [2014] EWCA Crim 123; *R v McGuffog* [2015] RTR 34; Stewart, Appeal Against Conviction Following a Reference From The SCCRC By Against Her Majesty’s Advocate [2017] ScotHC HJCAC 90.


64 It should be noted that legislative reform in 2015 changed *Road Traffic Act* to (1) make the offence of causing death while disqualified an indictable offence only under new section 3ZC, and (2) create a new offence of causing serious injury while disqualified under s3ZD. These changes may have impacted the number of offenders charged under s3ZB.

65 Emeritus Professor Arie Freiberg AM, Monash University, *Transcript of evidence*, 3 August 2018, p. 17.
In considering the implications of *R v Hughes* for Victoria, Dr Tudor advised that ‘[i]t could be expected that something similar would be done if the proposed offences came before a Victorian court’. Similarly, Professor Gans told the Committee that the causation aspect in the Bill is unclear and would require consideration by the High Court of Australia:

> It would go to the High Court, quite literally, to work out what this offence means, and you do not want that to happen. People should know in advance. You have a choice on whether to say that there should be some poor quality to the driving that contributed to the accident, or not — that it is irrelevant.

> I should add that as I read the UK judgement, there is a lot unresolved. What counts as poor-quality driving? Is a little bit of speeding poor quality? Is a bald tyre poor-quality driving? An interesting example would be: you are driving along, your passenger does not have a seatbelt and you crash — wholly blamelessly, but your passenger dies because they do not have a seatbelt. Is that your poor-quality driving? I think views could differ on that. It is a driver’s responsibility to ensure that people wear seatbelts, so I do not know how that would be resolved in the UK. And I can see how that could be an issue.

Emeritus Professor Freiberg read out a particular paragraph of the judgement in *R v Hughes* that explained the seriousness of attributing a person as a killer in such circumstances. It stated:

> The offence created is a form of homicide. To label a person a criminal killer of another is of the greatest gravity. The defendant is at risk of imprisonment for a substantial term. Even if, at least in a case of inadvertent lack of insurance or venial lack of licence, a sentence of imprisonment were not to follow, the defendant would be left with a lifelong conviction for homicide which would require disclosure in the multiple situations in which one’s history must be volunteered, such as the obtaining of employment, or of insurance of any kind. Nor should the personal burden or the public obloquy be underestimated; to carry the stigma of criminal conviction for killing someone else, perhaps a close relative, perhaps as in the kind of situation referred to in para 19 an innocent child, is no small thing.

He referred to the unease of the UK Supreme Court in treating these incidents as homicide without any other culpability involved:

> In construing, they said, a penal statute, we have to consider those consequences and consider that in the way that we interpret the legislation. And they will interpret it in the strictest possible way given if you were looking at a 10 year sentence. That is how they approached it. So they basically said, in the absence of carelessness or culpability, they adopted a fairly narrow view, and I think the view is if you are going to call someone a killer, you have got to be careful about how you go about it. I have got no compunction about calling someone culpably driving a killer or dangerously driving or anyone else, but in the circumstances you are looking at I would think twice.

In responding to a question from the Committee about whether Parliament could clearly convey its intention with regard to the Bill’s purpose, Professor Gans advised the Committee:

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66 Dr Steven Tudor, *Submission*, no. 2, 4 August 2018, p. 6.
One would be an amendment, and I tend to prefer this kind of approach to amendments, which said that either there is no requirement to prove that there was anything wrong with the driving, and that would be overturning *Hughes*, or saying that this offence does not apply unless the driving is deficient in some regard and that deficiency contributes to the death or serious injury, and that would be endorsing *Hughes*. So either way, it could be put in the form of express words in the offence provision.

The alternative way would be to amend the explanatory memorandum or otherwise make a clear statement in Parliament that a court would be comfortable...

**FINDING 1:** If enacted in its current form, the Bill may conflict with the traditional operation of causation, a fundamental and complex criminal law concept. The lack of clarity would likely lead to implementation problems and require detailed consideration by the courts.

### 3.2.2 Lack of fault element

Connected to causation is the fact that the Bill does not require a fault element in the conduct (the driving) of the unlicensed driver, which impacts his or her culpability. In his evidence to the Committee, Emeritus Professor Freiberg noted existing driving offences all maintain a link between harm and culpability through the inclusion of the fault elements of driving dangerously, negligently, recklessly, carelessly or intentionally. The following table from a 2007 report by the Victorian Sentencing Advisory Council, of which he is the Chair, on *Maximum Penalty for Negligently Causing Serious Injury* showed how this operates:

**Figure 3.1** Maximum penalties of imprisonment for negligently causing serious injury (NCSI) and related offences

<table>
<thead>
<tr>
<th>Culpability</th>
<th>Damage</th>
<th>Injury</th>
<th>Serious Injury</th>
<th>Death</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Injury not a necessary element of offence</strong></td>
<td>Dangerous Driving</td>
<td>Negligently Cause Injury 5 years (s 24 CA)</td>
<td>Recklessly Cause Injury 5 years (s 16 CA)</td>
<td>Intentionally Cause Injury 10 years (s 18 CA)</td>
</tr>
<tr>
<td><strong>Injury</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Dangerous Driving Causing Serious Injury 5 years (s 319 CA)</td>
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<td><strong>Serious Injury</strong></td>
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<td>Dangerous Driving Causing Serious Injury 5 years (s 319 CA)</td>
<td>Recklessly Cause Serious Injury 15 years (s 17 CA)</td>
<td>Intentionally Cause Serious Injury 20 years (s 16 CA)</td>
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<tr>
<td><strong>Death</strong></td>
<td></td>
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</tr>
<tr>
<td></td>
<td>Dangerous Driving Causing Death 5 years (s 319 CA)</td>
<td>Manslaughter 20 years (s 5 CA)</td>
<td>Murder  Life Imprisonment (s 3 CA)</td>
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</tbody>
</table>


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While maximum penalties may have changed since 2007, the basic structure of offences remains the same. In exploring these concepts in the 2017 *Sentencing of driving offences that result in death or serious injury* report, the Tasmanian Sentencing Advisory Council stated:

...an assessment of the sentencing practices requires an understanding of the seriousness of offence, which is generally viewed as comprising two key factors: (1) the harm caused, and (2) the culpability of the offender. Harm can be defined as ‘the degree of injury done or risked by the act’. Harm focuses on the consequences (actual or potential) of an offender’s conduct. So, in the case of driving offences that relate to motor vehicle crashes where death is caused or motor vehicle crashes where grievous bodily harm is caused, the harm is the same (either death or grievous bodily harm). On the other hand, culpability refers to the fault attributable to the offender. It ‘refers to the factors of intent, motive, and circumstance that bear on the actor’s blameworthiness’. In the case of the driving offences under consideration in this report, there is considerable variability in the culpability of the offender.71

In underscoring these issues, Dr Boas stated:

...it seems that when you are creating a specific law that makes a person responsible for the serious injury or death of a person, just by virtue of the fact that they are unlicensed and they are in a vehicle, no matter what the intersection between conduct and injury is, it differs from traditional criminal law approaches. I am not saying that Parliament cannot do what it wants. If it thinks the community expectation lies there, it lies there, but from a criminal law perspective it is an odd thing to do. We do not see it done.72

Dr Tudor also outlined that the proposed offences would be different from existing driving offences, as well as other indictable homicide offences:

The offence of unlicensed driving causing death would thus differ starkly from all other indictable homicide offences. Murder, for example, requires an intention to kill or cause really serious injury or recklessness as to such a result. Negligent manslaughter requires gross negligence. Unlawful and dangerous act manslaughter requires that the act causing death to be a criminal offence involving a fault element and that a reasonable person in the position of the accused, performing that act, would have realised that he or she was exposing the deceased to an appreciable risk of serious injury. Culpable driving causing death (s 318 of the *Crimes Act 1958* (Vic)) requires that the driving be done recklessly or grossly negligently or while being unable to have proper control of the vehicle due to the influence of alcohol or drugs. Dangerous driving causing death (s 319 of the *Crimes Act*) requires driving at a speed or in a manner dangerous to the public.

In effect, in each of the main homicide offences above there is something culpable about the conduct which causes the death. In the proposed offence of unlicensed driving causing death nothing of this kind needs to be proved. This would make the offence a radical outlier among the homicide offences in Victoria’s statute book.73

It should be noted that in Victoria, the issue of whether causing death while driving drunk is enough to form culpable driving without any blame attributed to the driver was considered in the 1982 Supreme Court decision *R v Feketa*. Professor Gans advised that the Court held ‘there does not have to be a link; it is enough if you are driving drunk when you should not have been driving drunk – that is, you are not in proper

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72 Dr Gideon Boas, La Trobe Law School, *Transcript of evidence*, 3 August 2018, p. 35.
73 Dr Steven Tudor, Submission, no. 2, 4 August 2018, p. 4.
control of your vehicle – and you kill someone. It does not matter if there is a link.\textsuperscript{74} However, Professor Gans also considered the situation of drunk driving to be different from the proposed offence:

The difference between that and unlicensed driving is that unlicensed driving is not at all about your ability to drive; it is about whether you should be on the road or not. I think there are some situations of unlicensed driving. For example, if someone decides to drive something that they know that they have never trained to drive — a motorcycle, for instance, or a truck...

... In that situation, their unlicensed-ness actually contributes to the death, but in many other situations where someone is perfectly able to drive but has lost their licence for whatever reason, it is a little more tenuous to say that their quality of driving contributed to the death. It is just that they should not have been on the road.\textsuperscript{75}

As noted in Chapter Two, the proposed offences are strict liability offences because there is no element of fault required. Dr Boas advised that the use of strict liability in criminal offences is unusual, particularly for serious criminal offences:

The strict liability provisions tend to be attributable to less serious criminality. Certainly I am not aware of offences where there is a period of imprisonment of five or 10 years as a maximum penalty where strict liability is applied, and if it is, it would be rare. It seems to me that you will have difficulty if you leave the legislation in its current form with that wording, because the courts will be uncertain about what it is that they are supposed to be doing with this concept of causation.\textsuperscript{76}

Dr Tudor noted a range of plausible fact scenarios where there would be unintended consequences and uneven outcomes based on whether the driver was unlicensed or not, without a fault element involved:

- Person A, seeking to commit suicide, jumps from a pedestrian overpass onto a busy freeway. Person B is driving on the freeway and hits and kills A. If B is not licensed, they will be guilty of the offence. If B is licensed, they will be guilty of no offence.
- Person A drinks to excess and insists on driving home. They crash into another car, killing themselves. The driver of the other car, B, was driving with proper care and their driving is not at fault. If B is not licensed, they will be guilty of the offence. If B is licensed, they will be guilty of no offence.
- Same scenario as immediately above but the person killed is B’s child, who is in B’s car. If B is not licensed, they will be guilty of the offence. If B is licensed, they will be guilty of no offence.
- Person A is unlicensed but has a younger sibling, B, who needs to get to school by car. No one else in the family can drive. Person A drives B to school. Another driver, C, runs a red light and crashes into A’s car and kills B. A will be guilty of the offence.
- Similar scenario as immediately above, but instead B is A’s sick mother who needs to go to an emergency ward. If C runs a red light and kills B, A will be guilty of the offence.

\textsuperscript{74} Professor Jeremy Gans, Melbourne Law School, Transcript of evidence, 3 August 2018, p. 4.
\textsuperscript{75} Professor Jeremy Gans, Melbourne Law School, Transcript of evidence, 3 August 2018, pp. 7-8.
\textsuperscript{76} Dr Gideon Boas, La Trobe Law School, Transcript of evidence, 3 August 2018, p. 34.
These various scenarios, none of which is fanciful, show that there is a great risk that the proposed offence would cast a very wide net and drag in cases where few people would want to see a person convicted of a homicide offence with a maximum penalty of 10 years imprisonment.\footnote{Dr Steven Tudor, Submission, no. 2, 4 August 2018, pp. 6-7.}

He further considered that, given the seriousness of the proposed offences, it is likely that courts would ultimately read in a fault element, as was the case in \textit{R v Hughes}. Dr Tudor pointed to current High Court authority for this advice:

If the Bill is passed in its current form, then it is highly likely that the courts would interpret the offence by importing a fault element of some kind into it with regard to either the conduct element (the driving) or the result (the death or serious injury). Under the fundamental principles of interpretation of criminal statutes (as articulated by the High Court in \textit{He Kaw Teh v R} (1985) 157 CLR 523) the courts are very unlikely to accept that an indictable homicide offence that is punishable by up to 10 years imprisonment could have no fault element other than knowledge or recklessness as to the circumstance element of being unlicensed.

In \textit{He Kaw Teh}, the High Court was faced with interpreting a federal indictable drug importation offence, in which the legislative provision made no mention of a fault element. The High Court held that the common law presumption that serious criminal offences require proof of a fault element was not displaced and that the provision required proof that the accused knew that the substance being imported was a prohibited import. In light of this well-settled principle of statutory interpretation, the courts are very likely to read a fault element into the Bill’s proposed offences of unlicensed driving causing death or serious injury. It could be expected that at least some form of negligence or dangerousness with regard to the driving would be read into the offences.\footnote{Emeritus Professor Arie Freiberg AM, Monash University, Transcript of evidence, 3 August 2018, p. 17.}

Emeritus Professor Freiberg maintained that ‘it is for the prosecution to prove that there was a degree of fault, whatever it was, and I think we have got five degrees of fault. If that does not cover it, I am surprised.’\footnote{Emeritus Professor Arie Freiberg AM, Monash University, Transcript of evidence, 3 August 2018, p. 20.} He further suggested that, rather than the cause of injury being the unlicensed driving aspect:

\begin{quote}
The cause is the negligent, culpable, dangerous or careless driving. Stick to that and I think you maintain the purity of the law and retain the basic common law, human right, that the prosecution has to prove the case beyond reasonable doubt.
\end{quote}

\textbf{FINDING 2:} The lack of fault element in the Bill would impose a significantly lower standard of culpability compared to established criminal law approaches, and would likely result in unjust outcomes or be unworkable in practice.

\subsection*{3.2.3 Scope of the proposed offences}

Some issues were raised about the scope of the Bill as applying to unlicensed drivers – in some ways, the Bill may be unintentionally broad, or in other ways not broad enough. Professor Gans highlighted that it is not always unlawful to drive without a licence:
You are allowed to drive without a licence on private property. So farmers and their children often drive unlicensed. They drive tractors or whatever else. This legislation, as currently written, would capture someone who perfectly lawfully drove unlicensed on, say, a farm and killed someone, killed a child. They would fall within the legislation. I am not sure that is the intent.\footnote{Professor Jeremy Gans, Melbourne Law School, \textit{Transcript of evidence}, 3 August 2018, p. 3.}

On the other hand, as outlined in Chapter One, driving without an appropriate licence is broader than unlicensed driving. In an example of how the current Bill may have limited scope, Professor Gans stated:

On the other hand, the law on unlicensed driving applies to more than just unlicensed driving. It also applies to people who drive in breach of a condition of their licence, and a really pertinent one there is people who drive a vehicle that they are not licensed to drive. I do wonder whether someone who drove a truck when they had no licence to drive a truck and killed someone ought to be captured by this offence. At the moment, as written, they are not captured by this offence.\footnote{Professor Jeremy Gans, Melbourne Law School, \textit{Transcript of evidence}, 3 August 2018, p. 3.}

Acting Assistant Commissioner Grainger of Victoria Police similarly discussed the concept of an unauthorised road user, which is more than just driving while unlicensed:

...we absolutely should hold drivers on our roads to account when they are not authorised to be there. So it is not just about unlicensed driving, from my perspective; it is about a range of other unauthorised uses of our roads. That might extend to someone driving on an expired licence. That might extend to someone who is suspended, disqualified, unlicensed or cancelled. So there is a range of complicating factors in the review and the implementation of any associated legislation.\footnote{Acting Assistant Commissioner Michael Grainger, Acting Assistant Commissioner for Road Policing, Victoria Police, \textit{Transcript of evidence}, 3 August 2018, p. 40.}

### 3.2.4 The defence provisions

As noted in Chapter Two, the proposed defence contains a reverse legal onus of proof, requiring the accused to satisfy the Court of the defence, including that the driver ‘was observing the standard of care in relation to the driving of the motor vehicle which a reasonable person would have observed in all the circumstances of the case’.\footnote{Crimes Amendment (Unlicensed Drivers) Bill 2018 (Vic), section 319AAB(2)(c) and (4)(c).}

As canvassed by the Victorian Parliament’s Scrutiny of Acts and Regulations Committee (SARC) in its consideration of the Bill, this reverse onus can impact on the right to be presumed innocent under section 25 of the Victorian \textit{Charter of Human Rights and Responsibilities Act 2006}.\footnote{Scrutiny of Acts and Regulations Committee, \textit{Alert Digest No. 8 of 2018}, Parliament of Victoria, Melbourne, 2018, pp. 1-3.} As stated by Dr Tudor:

The Bill effectively requires the accused to prove the defence. This is clearly a reverse onus provision. It conflicts with the standard legal principle that the accused has the obligation to provide or point to evidence indicating the defence is a \textit{reasonable possibility}, and that, if that obligation is met, the obligation is then on the prosecution to \textit{disprove} the defence.

The Bill in this respect is clearly incompatible with the \textit{Charter of Human Rights and Responsibilities (s 25(1))} which recognises that a person does not have to prove their innocence.\footnote{Dr Steven Tudor, \textit{Submission}, no. 2, 4 August 2018, p. 7.}
Chapter 3 Key issues and evidence received

Acknowledging the reversal, Dr Rachel Carling-Jenkins MLC, the sponsor of the Bill, responded to the SARC’s concerns by stating:

It is not desirable that the prosecutor have to prove an accused was driving without due care. The accused should not have been driving. They were unlicensed. While driving they caused serious death or injury. The lack of due care is not an element of the principal offences. It would be perverse to require the prosecution to prove it beyond a reasonable doubt if the limited defence provided is raised.

Rather the accused who seeks the benefit of the limited defence should have the onus of satisfying the court on the balance of probabilities that they were driving with due care.87

In addition to section 25 issues, there were a number of practical concerns raised with this reverse onus of proof. In particular, Professor Gans outlined the difficulty of requiring the defence to prove that the driving conduct was reasonable, as it is typically the prosecution that undertakes the relevant investigations:

...I think there is a practical problem in requiring an accused to prove that they were driving to a proper standard of care. Driving happens in an instant, and proving that you are driving well or not is very hard to do. All you can do is make a claim that you thought you were driving well. It is otherwise hard to prove unless there are very attentive eyewitnesses or a very detailed forensic examination of the traffic accident to show whether you were driving to a proper standard of care or not.

To give a worst-case scenario but not a wholly ridiculous scenario, imagine the police find an overturned car in the middle of the road. There is the driver, who is heavily injured but not dead, and the passenger, who is dead. The driver does not have a licence, because it has expired. That driver eventually recovers in hospital and then gets charged with this offence. They probably will not even remember whatever happened that caused that car to overturn. We will not know. You might think, ‘How else will a car overturn without some sort of bad behaviour on the part of the driver?’, but it is possible. There could have been another vehicle involved. There could have been misbehaviour by the passenger. There could have been a mechanical problem in the car that could not be predicted. There could have been some other distractions. Criminal lawyers always talk about a swarm of bees in the car. But whatever there is, the driver simply will not be able to establish it, and because they will not be able to establish it, they will be guilty of this offence. That is the difficulty of putting the burden of proof on the accused in the situation.

For all other cases where someone is accused of driving badly the burden of proof is on the prosecution. They have, firstly, the ability to do a forensic examination of the scene and to rely on the police’s investigation to work out as best they can what is happening at the scene. Secondly, they have the burden that if they cannot show that this was the fault of the driver in some way, then that is their problem and not the accused’s problem. Again they would be able in that overturned car situation to invite a judge or a jury to say, ‘This must have been that person’s fault’, but it would be a question of proof by the prosecution rather than disproved by the defence.88

Similarly, Dr Tudor considered that ‘[t]he standard of care in driving matters is something routinely proved by the prosecution in driving cases. It is an objective matter relying on an assessment of the external features of the driving’.89

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89 Dr Steven Tudor, *Submission*, no. 2, 4 August 2018, p. 7.
Professor Gans also advised that, by requiring the accused to prove a proper standard of driving, it is likely that existing offences would be a preferable course of action:

I suspect in reality that police faced with an unlicensed driver in this situation would rather just charge them with some other offence, like dangerous driving, rather than having to get a jury or a court to understand this new standard and to then have it resolved on appeal and so on. So one question is why you want to require that someone who is unlicensed in that situation show that they were driving to a proper standard of care rather than just giving them a complete defence and then allowing the police to charge them with careless driving, dangerous driving or culpable driving.90

There was also a concern raised with the unfairness of excluding those who lost their licences due to previous driving offences, as outlined by Dr Tudor in his submission:

It is also unfair to limit the defence to those who had a licence but lost it for reasons other than committing a driving offence. This limit has the effect that if a person was once guilty of a driving offence then they cannot even raise the defence in a future and unrelated case, even though in every other respect they satisfy the defence because their driving was in fact faultless. It is arbitrary and unjust for a person’s past criminal record to have this effect of denying them even the chance of being found not guilty of a later offence where there is no factual connection between their conduct on the two occasions.91

Finally, in terms of drafting language, Professor Gans suggested that the current wording of limiting the defence to those who have not lost their licence due to a driving offence may cause some interpretation issues. He advised that these issues should be settled given the seriousness of the penalties involved with the proposed offences:

...I can imagine there are going to be some arguments about what counts as losing your licence because of an offence as opposed to losing your licence for some other reason. The stakes are low for the offence of unlicensed driving, so I imagine no one has sorted this out. It is a drop from three months to one month. It will not make a real difference to your penalty anyway. The stakes are very high for this offence where you are facing jail and an indictable offence on your record or not. So there might need to be some attention paid to whether this wording does the job and what it exactly does.92

**FINDING 3:** The reverse legal onus of proof in the defence provisions of the Bill would conflict with the right to be presumed innocent, and would likely cause practical difficulties for an accused in attempting to prove the defence.

### 3.2.5 Alternative options

Given the range of identified concerns with the Bill, Dr Tudor considered that ‘[t]hose issues are serious enough, it is argued, to warrant the Bill not being passed in its current form’.93 Instead, Dr Tudor and other stakeholders, such as Professor Gans, put

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90 Professor Jeremy Gans, Melbourne Law School, Transcript of evidence, 3 August 2018, p. 5.
91 Dr Steven Tudor, Submission, no. 2, 4 August 2018, p. 7.
92 Professor Jeremy Gans, Melbourne Law School, Transcript of evidence, 3 August 2018, p. 5.
93 Dr Steven Tudor, Submission, no. 2, 4 August 2018, p. 1.
forth alternative legislative reforms within the current framework of driving offences that could avoid the concerns raised. Maria Aylward, a supporter of Olivia Yassine at the public hearing, acknowledged there were concerns with the Bill but also stated:

> If you are not going to pass the legislation because it is too broad and it might capture people that have truly not done the wrong thing, then we need to still concentrate on some part of the law so that there are consequences. You have killed somebody. Whether it is an accident or not, there need to be consequences.\(^94\)

One suggestion made by Professor Gans is that the current offence for unlicensed driving under section 18 of the *Road Safety Act 1986* could be amended to include an aggravating circumstance where death or serious injury was involved:

> At the moment it says three months if you are an unlicensed driver, maximum, and four months if you were disqualified by a court. You could add in one year, or whatever, if you caused a death. That is one way to deal with this. The caveat there is that you would not want to add in 10 years, because then you are dealing with an offence which is designed as a summary offence to be prosecuted in the Magistrates Court along with 49 other matters that day, and yet if it is carrying a maximum penalty of 10 years it would have to be dealt with in a more serious court. There is a limit to how far you could go with aggravating unlicensed driving to achieve this end, but you could obviously add in a few months to that offence.\(^95\)

An option outlined by Dr Tudor would be to include aggravating circumstances in existing non-homicide driving offences, such as careless driving, where the person was unlicensed and death or serious injury was caused:

> Careless driving is driving without the care and attention a reasonable driver would exercise in the circumstances. These can be made distinct offences with separate penalties, for example a fine of 120 penalty units or 12 months imprisonment for causing death and 60 penalty units or 6 months imprisonment for causing serious injury. Careless driving is already an offence under s 65 of the *Road Safety Act*. The proposal is, in effect, to create a combined offence of careless and unlicensed driving where the driving causes death or serious injury. These would remain as summary offences.\(^96\)

The Committee is aware of recent legislative reform in Queensland to make provision for unlicensed driving as an aggravating factor within its careless driving offence. Section 86 of the Queensland *Transport Operations (Road Use Management) Act 1995* regarding ‘careless driving of motor vehicles’ now provides for the following penalties:

- if the person causes death or serious injury and was an unlicensed driver at the time, a maximum penalty of 160 penalty units or two years imprisonment
- if the person causes death or serious injury, a maximum penalty of 80 penalty units or one year’s imprisonment
- all other circumstances, a maximum penalty of 60 penalty units or six months imprisonment.\(^97\)

\(^{94}\) Maria Aylward, *Transcript of evidence*, 3 August 2018, p. 25.

\(^{95}\) Professor Jeremy Gans, Melbourne Law School, *Transcript of evidence*, 3 August 2018, p. 11.

\(^{96}\) Dr Steven Tudor, *Submission*, no. 2, 4 August 2018, p. 8.

\(^{97}\) *Transport Operations (Road Use Management) Act 1995* (Qld), section 83.
Similarly, the Committee understands that section 45 of the South Australian *Road Traffic Act 1961* regarding ‘careless driving’ provides for aggravating circumstances, including when the person was driving knowing that he or she was disqualified or suspended from driving.98

A further option suggested by Professor Gans would be to amend current definitions of what constitutes ‘dangerous’ or ‘culpable’ driving to include some aspects of unlicensed driving, however he cautioned that the wording would need to be carefully assessed given the penalties involved:

> The second way you could do it is to amend one of the existing offences of vehicular homicide, dangerous driving causing death or culpable driving causing death to include some circumstances of unlicensed driving within the definition of ‘dangerousness’ or ‘culpable’. Culpable is a very serious offence — it is equivalent to manslaughter — so you would want to be cautious about just adding in unlicensed driving there. It carries a maximum penalty of 20 years, but perhaps some aspects of unlicensed driving — for example, a person who drives despite failing the test or knowing that they are completely unable to drive the vehicle but do not care — could be put in there as an alternative to the existing standard of recklessness or extreme dangerousness, extreme negligence.

Alternatively, and this would fit with this current offence, you could have as an instance of dangerousness some aspects of unlicensed driving — knowing unlicensed driving — as an aspect of dangerousness, and then it is just built into the existing offence of dangerous driving causing death. You would just have to deal with all the complexities of knowing that you were without a licence and the exceptions that are currently in this law when you add that to the dangerous driving causing death regime.99

Similarly, Acting Assistant Commissioner Grainger noted that a criminal charge under current offences could be pursued ‘if there were to be legislation that included reference to being an unauthorised road user as an element of culpability’.100

**FINDING 4:** The principal aim of the Bill, which is to acknowledge the seriousness of unlicensed driving that results in serious injury or death, may be better achieved with alternative legislative reform within the current framework of driving offences.

### 3.3 Conclusion

The purpose of this inquiry was to inquire and consider the Crimes Amendment (Unlicensed Drivers) Bill 2018, which aims to create new offences for causing serious injury or death while driving unlicensed. The Committee highlights that the report does not aim to outline every issue raised, but to convey some of the key areas. The transcripts from the public hearings, attached to the report in Appendix Four, and written submissions, found on the Committee’s website, provide more detailed information in this regard.

As noted in this chapter, a number of issues were raised with the Bill during public hearings and in a submission to the Committee. The Committee notes the differing views as to whether legislative reform in this area is even needed. In particular,

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98 *Road Traffic Act 1961* (SA), section 45.
Dr Boas and Emeritus Professor Freiberg both agreed with the proposition that existing legislation is satisfactory and there are no gaps in this area that require legislative change. On the other hand, it was suggested that such reform could potentially be achieved within existing legislative frameworks. As a way forward, the Committee believes this report should be considered as part of the Department of Justice and Regulation’s investigations into the need for an offence of unlicensed driving that involves the death or serious injury of another person.

**RECOMMENDATION 1:** That the Victorian Government refer this report to the Department of Justice and Regulation to ensure the issues raised are considered as part of its investigations into the need for an offence of unlicensed driving that involves the death or serious injury of another person.

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Appendix 1
Scrutiny of Acts and Regulation Committee’s review of the Crimes Amendment (Unlicensed Drivers) Bill 2018
**Alert Digest No. 8 of 2018**

**Crimes Amendment (Unlicensed Drivers) Bill 2018**

<table>
<thead>
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<th>Bill Information</th>
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<tr>
<td><strong>Minister</strong></td>
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<td><strong>Introduction Date</strong></td>
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<td><strong>Private Members Bill</strong></td>
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<td><strong>Second Reading Date</strong></td>
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**Bill Summary**

The Bill would amend the *Crimes Act 1958* to create an offence of causing serious injury or death while driving unlicensed in certain circumstances (new section 319AAB).

**Type of Bill**

- [ ] Government Bill
- [x] Private Members Bill

**CONTENT ISSUES**

- [ ] NONE
- [ ] Inappropriately delegates legislative power
- [x] Trespasses unduly on Rights or Freedoms

**Details**

*Right to be presumed innocent – Reverse legal onus*

As discussed in the *Charter Report* below, it is unclear whether new sub-sections 319AAB(2) and (4) would impose a reverse legal onus on the accused to prove the defences on the balance of probabilities.

The Committee will write to the member seeking further information as to whether or not new sub-sections 319AAB(2) and (4) would impose a reverse legal onus on the accused to prove the defences on the balance of probabilities.

**Recommendation**

- [ ] Refer to Parliament for consideration
- [x] Write to Member for clarification
- [ ] No further action required

**CHARTER ISSUES**

- [ ] NONE
- [ ] Compatibility with Human Rights
- [ ] Operation of the Charter

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**Charter Report**

As discussed in the *Charter Report* below, it is unclear whether new sub-sections 319AAB(2) and (4) would impose a reverse legal onus on the accused to prove the defences on the balance of probabilities.

The Committee will write to the member seeking further information as to whether or not new sub-sections 319AAB(2) and (4) would impose a reverse legal onus on the accused to prove the defences on the balance of probabilities.
**Details**

*Presumption of innocence – Offence of unlicensed driving causing death or serious injury – Defence if court ‘satisfied’ that driver had expired licence and drove carefully – Whether reverse onus*

**Summary:** The Committee will write to the member seeking further information as to whether or not the word ‘satisfied’ in new sub-sections 319AAB(2) and (4) imposes a reverse legal onus on the accused.

**Relevant provision**

The Committee notes that clause 3, inserting new sub-sections 319AAB(1) and (3), creates two new offences of causing either serious injury or death while knowingly or recklessly unlicensed. The offence does not require proof that the driver drove carelessly, dangerously, negligently or recklessly.

The Committee also notes that, for each of the offences, new sub-sections 319AAB(2) and (4) provide:

A person is not guilty of an offence against subsection ([1/3]) if the court is satisfied that—

(a) the person has held an appropriate licence (whether issued in Victoria or in another State, Territory or country) at some time before the commission of an offence against subsection ([1/3]); and

(b) the licence was not cancelled for an offence relating to the driving of a motor vehicle committed by the person in Victoria or in another State, Territory or country; and

(c) at the time the [serious injury/death] was caused, the person was observing the standard of care in relation to the driving of the motor vehicle which a reasonable person would have observed in all the circumstances of the case.

This defence exempts a person who once had a licence, lost it for a non-offence reason (such as letting it expire) and drove carefully.

The Committee observes that the defences in new subsections 319AAB(2) and (4) will only succeed if the Court is ‘satisfied’ of the three matters listed. For example, if, at the end of the trial, the Court is not satisfied as to whether or not an accused with an expired licence drove carefully, then he or she will be convicted of the offence.

**Charter analysis**

The Statement of Compatibility remarks:

Section 25(1) of the charter provides the right to be presumed innocent, and section 25(2) outlines minimum guarantees in criminal proceedings.

An accused’s right under Section 25 (1) to be presumed innocent is not affected by the amendments as it will be necessary to prove each element of the offences.

However, the Committee notes that the Statement of Compatibility does not discuss new subsections 319AAB(2) and (4).

**Relevant comparisons**

The Committee notes that the High Court of Australia has ruled that the word ‘satisfies’, when used in an exception to a deeming provision in Victoria’s drug possession offence, requires that the defendant prove that the matter in the exception on the balance of probabilities.1 The Court rejected an

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1 *Momcilovic v R* [2011] HCA 34.
argument that the Charter permits the word ‘satisfies’ to be interpreted as imposing only an evidential burden on the accused.

Conclusion

The Committee will write to the member seeking further information as to whether or not the word ‘satisfied’ in new sub-sections 319AAB(2) and (4) imposes a reverse legal onus on the accused to prove the defences on the balance of probabilities and, if so, whether those sub-sections are compatible with the Charter’s right to be presumed innocent.

Recommendation

☐ Refer to Parliament for consideration  ☒ Write to Member for clarification  ☐ No further action required
6 June 2018

Hon Richard Dalla-Riva  
Deputy Chairperson  
Scrutiny of Acts and Regulations Committee  
State Member of Parliament for Eastern Metropolitan Region  
Shop 10, 477 Burwood Highway  
Vermont South VIC 3133

Dear Mr Dalla-Riva,

Re: Crimes Amendment (Unlicensed Drivers) Bill

In regards to the matter raised in your correspondence of 5 June I acknowledge that the Bill does impose a reverse onus of proof in relation to the defence provided to each of the offences for driving unlicensed and causing serious injury or death to another person.

However I believe that this is justified and does not unduly derogate from the right of an accused person to be presumed innocent.

Each of the elements of the principal offences - that the accused was driving unlicensed; that the accused knew or was reckless as to whether they were unlicensed; and that the accused by driving caused serious injury to or the death of another person - must first be proved beyond a reasonable doubt.

Only then is the defence - which is intended to be narrow and limited - engaged.

The first two elements of the defence are objective questions on which an accused should not face any difficulty satisfying a court.

The third element only comes into play if the first two elements are established.

It requires that the court be satisfied that the accused who - it has been proved beyond a reasonable doubt - was unlicensed to drive and knowing or reckless as to that fact nonetheless decided to drive a vehicle and while driving caused serious injury or death to another person “was observing the standard of care in relation to the driving of the motor vehicle which a reasonable person would have observed in all the circumstances of the case”.

There are already offences for driving dangerously or culpably. These new offences are designed to fill a gap in the current law.
It is not desirable that the prosecutor have to prove an accused was driving without due care. The accused should not have been driving. They were unlicensed. While driving they caused serious injury or death. The lack of due care is not an element of the principal offences. It would be perverse to require the prosecution to prove it be beyond a reasonable doubt if the limited defence provided is raised.

Rather the accused who seeks the benefit of the limited defence should have the onus of satisfying the court on the balance of probabilities that they were driving with due care.

I believe this is readily distinguishable from Momcilovic in which the impugned provision related to deeming a person to be in possession of drugs found on premises they occupied even as a shared tenant.

In that case the possession of the drugs was a key element of the principal offence.

In this bill the question of, for example, driving with due care, is an element of a defence intended to be narrow and limited.

In conclusion I note that it seems that if the bill did not provide any defence at all it would not have engaged this concern. Nonetheless I intend to retain the defence as I think it contributes to the bill being a balanced and appropriate measure to fill the gap in the law made evident following the tragic death of Jalal Yassine-Naja.

Kind Regards,

Dr Rachel Carling-Jenkins
## Appendix 2

### Submissions

<table>
<thead>
<tr>
<th>Submission no.</th>
<th>Name of individual or organisation</th>
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<tbody>
<tr>
<td>1</td>
<td>Janelle Nicholas</td>
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<tr>
<td>2</td>
<td>Dr Steven Tudor</td>
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</tbody>
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## Appendix 3
### Public hearings

**Friday 3 August 2018 — Legislative Council Committee Room, Parliament House, Melbourne**

<table>
<thead>
<tr>
<th>Name</th>
<th>Title</th>
<th>Organisation</th>
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<tbody>
<tr>
<td>Professor Jeremy Gans</td>
<td></td>
<td>Melbourne Law School</td>
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<tr>
<td>Emeritus Professor</td>
<td>Arie Freiberg AM</td>
<td></td>
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<td>Olivia Yassine</td>
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<td>Maria Aylward</td>
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<td>Cameron Vella</td>
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<td>Dr Gideon Boas</td>
<td>Professor</td>
<td>La Trobe University Law School and Barrister-at-Law</td>
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<tr>
<td>Michael Grainger</td>
<td>Acting Assistant Commissioner, Road Policing</td>
<td>Victoria Police</td>
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<tr>
<td>Tony Long</td>
<td>Acting Inspector</td>
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Appendix 4

Transcripts of evidence
TRANSCRIPT

LAW REFORM, ROAD AND COMMUNITY SAFETY COMMITTEE

Inquiry into the Crimes Amendment (Unlicensed Drivers) Bill 2018

Melbourne — 3 August 2018

Members

Mr Geoff Howard — Chair
Mr Bill Tilley — Deputy Chair
Dr Rachel Carling-Jenkins
Mr Martin Dixon

Mr Mark Gepp
Ms Natalie Suleyman
Mr Murray Thompson

Witness

Professor Jeremy Gans, Melbourne Law School.
The CHAIR — I would like to welcome everyone here to the Law Reform, Road and Community Safety Committee’s hearing this morning. We have been given a new reference recently to look at the Crimes Amendment (Unlicensed Drivers) Bill 2018, which is before the Parliament. That is the aim of today: to look through aspects of the bill and to be able to provide advice back to the Parliament in regard to that.

Our first witness this morning is Jeremy Gans, who is a professor at the Melbourne Law School. Thank you very much for coming along. You, I note amongst other things, do act as an adviser to SARC; you are obviously used to working with parliamentary committees, then. We welcome your comments, firstly, in regard to the bill. I think we have got 45 minutes, so if you want to make some general comments on your viewing of the bill, and then we will enter into some further discussions, but at this stage it is over to you, Jeremy, to provide your overview on the proposed legislation.

Prof. GANS — I will just make the obvious point that I am not speaking on behalf of Melbourne Law School or of SARC — my two employers — just as an academic, and that SARC reviewed this bill under its usual scrutiny remit. I am one of its two advisers on human rights, so I had a look at the bill in that context. I am happy to discuss what SARC said, but otherwise I will not discuss the human rights aspects of the bill.

I do have a few things to say as an opening statement. Firstly, just on the general question of whether there should be an offence like this to cover a situation where someone kills someone while driving without a licence, I think there is a case for an offence of this sort. I can well understand the situation where a person who is injured or has a loved one killed by someone who should not have been on the road regards that as a more serious offence than just the offence of unlicensed driving. There are precedents for creating a more serious offence or adding a significantly different punishment to someone who does something which just happens to kill someone — something they should not do, which happens to kill someone. For example, your regular breaches of occupational health and safety become much more serious if you happen to kill someone, even though that is a ‘There but for the grace of God go I’ situation.

In New South Wales if you are a commercial drug trafficker and you happen to kill someone in the course of commercial drug trafficking — for example, a lab explodes — even if there is no negligence on your part, you are a murderer in New South Wales just because of that; and in Victoria drink drivers who happen to kill someone are guilty of culpable driving causing death, regardless of whether their drunkenness had anything to do with the accident. So there is a precedent for saying. ‘You shouldn’t have been doing this, and if someone gets killed, we should label you in a special way’. I think there is a case for this, and as the committee would probably be aware, the UK has an offence of this sort, presumably for the same reason.

The trick, though, is how to define such an offence, and I do think there are a number of drafting problems with this bill. It is not surprising: it is a private member’s bill, and even when Justice is involved in drafting, things are not perfect. I will just go through a few concerns I have about drafting. I will just summarise them; I am happy to elaborate if needed. There are three elements to the new offence. The first one is paragraph (1)(a), which is about being unlicensed. The broad problem with this paragraph is it is not closely connected to the law on when it is legal or illegal to be unlicensed. It covers a person who knows or is reckless as to whether they are unlicensed or not. The current law on being unlicensed does not have a knowledge or recklessness requirement. Of course it makes sense to have one here — you would not want to have this serious consequence on someone who was inadvertently unlicensed — but it does not otherwise deal with the question of whether or not you are unlicensed and the significance of that. You could be reckless about being an unlicensed driver even though you are licensed. So for instance, someone who comes over from New Zealand, has not checked the rules and thinks, ‘I have no idea whether I’m allowed to drive or not’ — they are therefore reckless as to whether they are an unlicensed driver under the definition of ‘unlicensed driver’ — and then drives and kills someone. They would fall within the terms of this bill even though they are actually perfectly licensed. You are allowed to drive in Australia.
That is just the knowledge and recklessness part. A second problem is that it is not always illegal in Victoria to drive without a licence. The offence of driving without a licence is driving without a licence on a highway. It is bad terminology; it means a road. You are allowed to drive without a licence on private property. So farmers and their children often drive unlicensed. They drive tractors or whatever else. This legislation, as currently written, would capture someone who perfectly lawfully drove unlicensed on, say, a farm and killed someone, killed a child. They would fall within the legislation. I am not sure that is the intent.

On the other hand, the law on unlicensed driving applies to more than just unlicensed driving. It also applies to people who drive in breach of a condition of their licence, and a really pertinent one there is people who drive a vehicle that they are not licensed to drive. I do wonder whether someone who drove a truck when they had no licence to drive a truck and killed someone ought to be captured by this offence. At the moment, as written, they are not captured by this offence.

In the UK the solution is to, instead of talking about unlicensed drivers, talk about circumstances which would count as the offence of ‘unlicensed driving’ under their version of the Road Safety Act. I think that is a better formulation. It captures the complexities that might arise from —

The CHAIR — Can you just say that again?

Prof. GANS — Sorry. In the UK it is driving in circumstances which would amount to an offence under the offence of unlicensed driving, and that captures all of the nuances that can be captured by that offence. Just one other thing to mention in that regard is that there is a concept of being a ‘disqualified driver’, and it seems possible under the legislation — I do not know if this is the practical reality — that you could be a licensed but disqualified driver. Again, there is a question of whether you would want to capture that sort of person in this bill or not. At the moment, you do not.

That is paragraph (a), and the broad idea is just to link it more closely to the offence, although the complication there is to retain the knowledge or recklessness requirement. The UK does not have that. The second bit is paragraph (b), which is ‘causes serious injury’ — or death — ‘by driving the motor vehicle’. Those words — ‘causes’, ‘by’ and ‘driving’ — are always difficult words. They are the stuff of criminal law exams. You can ask lots of interesting questions about when someone is and is not driving. It is far less straightforward than you would think. And ‘causes’ is also a very difficult philosophical concept, as you try and wonder when you have caused something or not. If you are driving along in your car and it blows up or something and takes out a nearby shop, have you caused their death? Those are difficult questions but are unlikely to arise in practice for this bill.

What is likely to arise, and what has arisen in the UK, is the question of whether someone who is driving wholly properly, without any criticism of their driving whatsoever — it is possible for that person to still kill someone. The standard example is that you are driving wholly properly and a child just sprints onto the road. You properly brake but you are unable to stop in time to save the child. Have you caused their death by your driving? Well, if your thinking is, ‘Would the child still be alive if you were not driving?’, then the answer is yes, you have caused the death. And if the thinking is that you should not have been driving because you did not have a licence, then there is an argument that it is appropriate to catch you.

But people will baulk at that, and the UK Supreme Court baulked at that. In 2013 they said — they have very similar language in their legislation — ‘No, there has to be something wrong with your driving that contributed to the death or the serious injury you cause’. That is not in there in the words of their legislation. They read it in because they were uncomfortable with the result and they were unsure what Parliament intended.

The CHAIR — So alternative wording might be ‘driving carelessly’ or something?

Prof. GANS — Well, you could put in a carelessness requirement, or you could make it clear that you do not want such a requirement. You could do either, and I do think that it is best for Parliament to say
either way, because otherwise the situation is so unclear because of this 2013 UK Supreme Court precedent and the fact that Victoria would be assumed to be aware of that precedent. It would go to the High Court, quite literally, to work out what this offence means, and you do not want that to happen. People should know in advance. You have a choice on whether to say that there should be some poor quality to the driving that contributed to the accident, or not — that it is irrelevant.

I should add that as I read the UK judgement, there is a lot unresolved. What counts as poor-quality driving? Is a little bit of speeding poor quality? Is a bald tyre poor-quality driving? An interesting example would be: you are driving along, your passenger does not have a seatbelt and you crash — wholly blamelessly, but your passenger dies because they do not have a seatbelt. Is that your poor-quality driving? I think views could differ on that. It is a driver’s responsibility to ensure that people wear seatbelts, so I do not know how that would be resolved in the UK. And I can see how that could be an issue.

The CHAIR — Just while you are on that, Jeremy, if we were not talking about unlicensed drivers in this case, and there was a case where a driver hit somebody, the courts would look at the issue of reckless or careless driving, I presume. So how does that get resolved in the normal case of events?

Prof. GANS — Right now?

The CHAIR — Yes.

Prof. GANS — There are a series of offences that punish you for the quality of your driving. It is a matter for the prosecution whether they charge, but there are offences of culpable driving, dangerous driving and careless driving, and then various breaches of the road rules. So, for example, if you are driving over the speed limit or change lanes, follow too closely or the like, they could charge you with any of those things. Breaches of the road rules do not carry an extra penalty if you kill someone, but the other offences generally do. Dangerous driving and culpable driving do. There is a standard defined — whether it is a perfect standard is another matter — and the jury or the judge would have to resolve whether your driving met that standard. Here, though, there is no standard. And of course we would just have to deal with the words ‘causes by driving’, but it is a matter of interpretation when you count as causing by driving someone’s death. If you drive wholly blamelessly and the child runs into the street, I would think views could differ on whether that is a death caused by your driving.

Just to give you the other bit of authority — that is the UK authority — in Victoria we have an offence of culpable driving causing death, so if you cause death by your culpable driving. ‘Culpable’ is defined in a number of ways. It includes indifference to life and it includes serious negligence, but it also, as an alternative, includes intoxication by drugs or alcohol to a level that means you are not in proper control of your car. That sounds like you are very, very drunk, but you do not have to be. It would not take much drinking for me to not be in proper control of a car.

In 1982 the Victorian Supreme Court had to consider what to do in a situation where someone is drunk and is driving but they cause a death without any blame on their part — the child runs onto the road or whatever. Even if they were sober, that person still would have driven, though of course if they were not on the road, that person would have been alive. In 1982 the Victorian Supreme Court said there does not have to be a link; it is enough if you are driving drunk when you should not have been driving drunk — that is, you are not in proper control of your vehicle — and you kill someone. It does not matter if there is a link.

Thirty-four years later, in 2006, five judges of the Court of Appeal had another look at that case, and they said, ‘We think it’s probably wrongly decided, but because 34 years have passed since then and Parliament has done nothing in response, it is not our job to fix that problem; it is Parliament’s’. Now we are 12 years later, and Parliament is passing more legislation, the mystery is: is Parliament intending to pick up the 1982 decision, which was tough, or is it intending to pick up the 2013 English decision, which was a little bit nicer? I do not see any way to tell that answer. I reckon that will just be something the courts will decide down the track. But my personal view is that Parliament should decide either way for itself rather
than leaving that to a court decision. Buried within there are some issues of degree: just how bad does your driving have to be to trigger this provision?

The third element of the offence is the defence, which is covering a situation where someone loses their licence for a less-bad reason — the licence has expired, they have not paid their fee or whatever — rather than they have lost their licence because they got a lot of demerit points or because a court stripped their licence from them for terrible behaviour. It covers that situation, and it picks up wording which is already in the Road Safety Act to cover that situation, which is in the unlicensed driving offence. That usually carries a three-month penalty. It drops down to one month if you lost your licence because it expired rather than because it was taken away from you.

I do not know if that wording is very clear — I have not looked into it — but I can imagine there are going to be some arguments about what counts as losing your licence because of an offence as opposed to losing your licence for some other reason. The stakes are low for the offence of unlicensed driving, so I imagine no-one has sorted this out. It is a drop from three months to one month. It will not make a real difference to your penalty anyway. The stakes are very high for this offence where you are facing jail and an indictable offence on your record or not. So there might need to be some attention paid to whether this wording does the job and what it exactly does.

But the bit that has me a little more concerned is the final element of that defence. It is not enough that you lost your licence for a not-so-bad reason — because your licence expired. If you are in that situation, you are still guilty unless you can show that at the time of your driving you were observing the standard of care in relation to the driving of a motor vehicle which a reasonable person would have observed in all the circumstances of the case. There are a couple of things to say about that. One is that as near as I can tell — and I might have missed something — I do not believe that particular standard otherwise appears in the criminal law of driving. It is not the standard that is used for culpable driving or for dangerous driving. It might have some link to the standard for careless driving, but I am not sure of that. It has created a new standard, and that is always going to cause some difficulty for lawyers and courts who now have to work out where this standard fits into the picture.

I suspect in reality that police faced with an unlicensed driver in this situation would rather just charge them with some other offence, like dangerous driving, rather than having to get a jury or a court to understand this new standard and to then have it resolved on appeal and so on. So one question is why you want to require that someone who is unlicensed in that situation show that they were driving to a proper standard of care rather than just giving them a complete defence and then allowing the police to charge them with careless driving, dangerous driving or culpable driving.

The only other thing to point out about this — and this goes to something SARC commented on in its report — is that this puts the burden of proof on the accused. They have to show they were driving at the proper standard of care. SARC raised the issue, which Dr Carling-Jenkins responded to, of whether that is compatible with the charter’s right to be presumed innocent. But putting that aside I think there is a practical problem in requiring an accused to prove that they were driving to a proper standard of care. Driving happens in an instant, and proving that you are driving well or not is very hard to do. All you can do is make a claim that you thought you were driving well. It is otherwise hard to prove unless there are very attentive eyewitnesses or a very detailed forensic examination of the traffic accident to show whether you were driving to a proper standard of care or not.

To give a worst-case scenario but not a wholly ridiculous scenario, imagine the police find an overturned car in the middle of the road. There is the driver, who is heavily injured but not dead, and the passenger, who is dead. The driver does not have a licence, because it has expired. That driver eventually recovers in hospital and then gets charged with this offence. They probably will not even remember whatever happened that caused that car to overturn. We will not know. You might think, ‘How else will a car overturn without some sort of bad behaviour on the part of the driver?’, but it is possible. There could have been another vehicle involved. There could have been misbehaviour by the passenger. There could have been a mechanical problem in the car that could not be predicted. There could have been some other
distractions. Criminal lawyers always talk about a swarm of bees in the car. But whatever there is, the driver simply will not be able to establish it, and because they will not be able to establish it, they will be guilty of this offence. That is the difficulty of putting the burden of proof on the accused in the situation.

For all other cases where someone is accused of driving badly the burden of proof is on the prosecution. They have, firstly, the ability to do a forensic examination of the scene and to rely on the police’s investigation to work out as best they can what is happening at the scene. Secondly, they have the burden that if they cannot show that this was the fault of the driver in some way, then that is their problem and not the accused’s problem. Again they would be able in that overturned car situation to invite a judge or a jury to say, ‘This must have been that person’s fault’, but it would be a question of proof by the prosecution rather than disproved by the defence.

One final other thing to cover in my opening statement is just the penalty, which at the moment I observe is linked to in the same penalty as the offence of dangerous driving causing death and serious injury — five years for serious injury, 10 years for death. That just makes the obvious point that the effect of this offence is to equate driving without a licence to driving dangerously. In terms of maximum penalty, that does not mean that the courts will necessarily sentence in the same way but is just a recognition that that is effectively what this offence is doing — is treating unlicensed driving as dangerous driving.

The CHAIR — Just for my benefit first, before we go off to other members of the panel. The existing laws — could I just check in terms of driving unlicensed, do you know what the maximum penalty would be for somebody who is driving unlicensed?

Prof. GANS — It varies. I have got it here. It is three months for an unlicensed driver —

The CHAIR — Three months what?

Prof. GANS — Sorry, prison — maximum, or a fine. It drops down to one month, though, if the person is in the position that is covered by the defence — that is, they lost their licence not because of a previous offence but because they simply let it expire or a less blameworthy reason for losing their licence. It rises as well to, I think, four months if they lost their licence because a court made an order requiring them to lose their licence or because they had been drink-driving and were subject to an alcohol condition, and they evaded their alcohol condition. So there is a sliding scale. This switch between one and three and four months I think in practice does not necessarily amount to a big difference. Part of this law, the wording of this law, is a legacy of a time when there used to be a one-month mandatory minimum sentence for a repeat offence of unlicensed driving. That is how we used to deal with the problem of unlicensed driving, but that got removed in Victoria when suspended sentences were abolished because of the recognition that generally those were dealt with by suspended sentence and there now would no longer be that option.

The CHAIR — I will go to other questions from other people and then come back.

Dr CARLING-JENKINS — Thank you very much for coming in today, Professor Gans. I just wanted to say, no-one is ever just an academic. As a former academic, I am quite aware of the work that goes into achieving the status that you have. I appreciate your analysis of intent, and I take that on board, particularly your analysis of R v. Hughes, was it, in the UK Supreme Court? Very briefly, I wonder if — and I believe you have got the intent of this bill right, but you are saying it is not reflected yet in the wording of that — the committee-of-the-whole process, should this bill come back to the house, could provide that intent without redrafting. Do you think that is —

Prof. GANS — It would be possible to introduce an amendment that would specify either way —

Dr CARLING-JENKINS — Do you think an amendment would be a better way to go so it is very, very clear —

Prof. GANS — There are two possibilities. One would be an amendment, and I tend to prefer this kind of approach to amendments, which said that either there is no requirement to prove that there was anything
wrong with the driving, and that would be overturning Hughes, or saying that this offence does not apply unless the driving is deficient in some regard and that deficiency contributes to the death or serious injury, and that would be endorsing Hughes. So either way, it could be put in the form of express words in the offence provision.

The alternative way would be to amend the explanatory memorandum or otherwise make a clear statement in Parliament that a court would be comfortable as —

Dr CARLING-JENKINS — That is where the committee-of-the-whole process comes in, but you are thinking of something even clearer?

Prof. GANS — Yes. So could you put the wording in the explanatory memorandum. I should point out a court is not bound by that.

Dr CARLING-JENKINS — Sure.

Prof. GANS — A court might decide that, despite the appearance of those words, Parliament has not been clear enough in its language, but —

Dr CARLING-JENKINS — They are certainly guided by it.

Prof. GANS — It obviously puts a thumb on the scales to do that sort of thing. I must say, personally I prefer this sort of thing to be in the legislation itself, both because unless it is in the legislation itself, a court might decide otherwise, so that will involve everyone having to litigate, but secondly, just so that it is — outside of Parliament and in some academic circles, no-one reads explanatory memoranda.

Dr CARLING-JENKINS — Fair enough.

Prof. GANS — So in fairness to the punter out there and their lawyer, putting it in the legislation just means everyone knows what the deal is and avoids a situation where someone belatedly realises what the law actually is.

Dr CARLING-JENKINS — Fair enough. Thank you for that recommendation. I will probably agree to disagree a little bit on the onus of proof, because in my opinion unlicensed driving is dangerous driving. I guess that is comparable, isn’t it, to if you are driving drunk, it is dangerous driving or culpable driving.

Prof. GANS — It is culpable driving if you are so drunk that you do not have proper control of the vehicle. So while that sounds like you must be extremely drunk, proper control is actually an interesting term —

Dr CARLING-JENKINS — That is quite vague as well, isn’t it?

Prof. GANS — Sorry?

Dr CARLING-JENKINS — That is a little bit vague as well.

Prof. GANS — Yes, that is very vague. It is the subject of expert evidence, and the courts have worked hard on that issue. But it is not, I think there is a popular belief that it is just a matter of .05 or .08, but that is not how it is worked out. Perhaps rightly so, but perhaps it would be better just to say that if you are breaching the rule, you should not be on the road, and if you kill someone, you are guilty. The interesting thing is that there is a reference to proper control of the vehicle there, which is why the Court of Appeal was actually unsure that that ruling from 1982 was correct because the test is whether you are in proper control; surely that should have something to do with the death you cause.

The difference between that and unlicensed driving is that unlicensed driving is not at all about your ability to drive; it is about whether you should be on the road or not. I think there are some situations of
unlicensed driving. For example, if someone decides to drive something that they know that they have never trained to drive — a motorcycle, for instance, or a truck —

Dr CARLING-JENKINS — I thought that was a very good point.

Prof. GANS — In that situation, their unlicensed-ness actually contributes to the death, but in many other situations where someone is perfectly able to drive but has lost their licence for whatever reason, it is a little more tenuous to say that their quality of driving contributed to the death. It is just that they should not have been on the road.

Dr CARLING-JENKINS — Okay. I have a slight disagreement with that one, but I do definitely agree with the truck example and the motorcycle example if you have got a car licence. I think that something that this bill does not yet capture and that is something that should —

Prof. GANS — So if the legislation was like the UK and referred to the offence of unlicensed driving, that also covers driving in breach of a condition of your licence, which would include a condition that said, ‘You are not allowed to drive a truck’, or for that matter a condition that said, ‘You must drive with glasses’.

Dr CARLING-JENKINS — Right. That sounds like a good amendment to make.

Prof. GANS — Although with your knowledge or recklessness, mens rea requirement, that would then cover a situation where a person thought they were allowed to drive a truck — sorry, it would exclude a situation where a person thought they were permitted to drive, say, a smaller truck, and were wrong.

Dr CARLING-JENKINS — Right. Thank you.

The CHAIR — So just to clarify that, you are effectively saying — and this relates to 1(a), doesn’t it, again —

Prof. GANS — Yes.

The CHAIR — that you would change the wording to be more in line with what the UK have done, or —

Prof. GANS — Yes. The UK just says, ‘In circumstances where this would amount to the offence of unlicensed driving’ under their legislation but with the caveat that the UK does not require that you knew that or were reckless as to it. If you want to retain that, and I think there is a good case for doing so, you would have to add that wording in somewhere. One way to add in that wording, which would be perhaps a little more straightforward in terms of drafting, is to copy the UK approach but have an exception which says, ‘This offence does not apply to someone who did not know and was not reckless as to whether they were in breach of that’, whether they are an unlicensed driver or whatever the other requirement is.

Mr TILLEY — Without getting too much off the track of what we are talking about here, it is fair enough to say our nation is getting smaller for those that are car reliant and driving or in charge of a motor vehicle. By way of background, I live on the border of New South Wales and Victoria. This committee undertook an inquiry on lowering the driving age to 17. It was a recommendation to the government. The government did not accept that. So in the case of being on the border you have got a number of young or inexperienced new drivers. If you normally reside in Victoria, you could skip over the border and obtain a probationary drivers licence but you do normally reside in Victoria. So the best opportunity — if a young driver driving in Victoria is involved in a crash involving a fatality, probably the current status quo would be that that young driver would possibly be charged with making a false declaration.

Prof. GANS — Or with unlicensed driving if that was applicable in that situation.

Mr TILLEY — That is the test. I had a significant look myself. If you look at this proposed piece of legislation, it says if they are a licensed driver in another state.
Prof. GANS — Yes. I would have to just — I could not speak to the question of whether a licensed driver in another state who has a licence and who is under age would be picked up by Victorian law or not; they might be. If they are picked up by Victorian law, then the only issue is would there be any legality about them obtaining the licence in New South Wales. That could be an offence under New South Wales law — maybe. I do not know.

Mr TILLEY — I am certainly not aware of any existing legislation.

Prof. GANS — And then otherwise the issue of the death would be dealt with via careless driving, dangerous driving or culpable driving, and that would require the prosecution to prove something about the quality of the driving.

Mr TILLEY — On the other side of it, our existing statutes for driver offences is that we are dealing with those drivers who are disqualified or cancelled. Say, for example, once again living closer to the border, police may intercept a driver and find evidence of bad character — that he has got one conviction in Victoria. He might have 10 convictions in New South Wales. You have got him here for the 11th time and he has been disqualified or cancelled, and a long list of prior offences for exceeding the prescribed concentration of alcohol, possibly drugs, but you cannot introduce any evidence of bad character because you have got him for that one offence. It is because there has to be a finding of guilt, which has to be dealt with in the Victorian jurisdiction.

Prof. GANS — You can in some situations introduce that other evidence of bad character if it has significant probative value in the case in Victoria and would not prejudice the court. It would be a rare driving case where it would be useful to have that extra information at the guilt or innocence phase, and it would be introduced at the sentencing phase. So it would come in in some ways; it is not always out.

Just another comment in response to what you have said, though — and I should have said this in my opening statement — is that relying on the concept of unlicensed driving as a hook to punish someone who kills someone brings with it everything that comes with the licensing regime, and the licensing regime is not perfect. Some people have licences who should not have licences, but by the same token, I think there are occasional cases where some people lose licences in pretty tough situations, or just not having a licence, tough or not, is a very tough situation for them, because they are isolated people or whatever. You pick up all of that when you pick that up in this offence provision. But I do not think that goes to whether you should have this offence provision or not. It goes to the question of whether the licensing regime needs to be a better one than it currently is. The licensing regime, for all of its good or bad, mostly makes it clear to someone whether or not they should be on the road, and I think that is what is at the heart of this offence.

The CHAIR — Can I just follow up on that. In practice when that comes before a court, does that normally get picked up in court in terms of the penalty that is brought down in the end?

Prof. GANS — The fact that you are unlicensed or the fact that the licensing situation was tough?

The CHAIR — Well, the issues that relate to why you are unlicensed or the background.

Prof. GANS — None of these are mandatory sentences, so they are all relevant to sentencing. In this offence, but also in the much less serious unlicensed driving offence, a court would take into account those matters. What they do with them is another matter. They might well say, ‘It’s all very sad for you. We know you needed to have this job. We know you have sick kids, but rules are rules’. They could take that line, or they could say, ‘You’re not as bad as someone who is just flouting the law’.

The CHAIR — Which is always the case when the courts —

Prof. GANS — I think there is actually a provision in the Road Safety Act that says, ‘What’s the purpose of the licensing regime?’. It has got several purposes. One is to ensure that people have the skills to drive, and that is not always engaged in these situations. Another one is to let people know when they
are allowed to drive or not — just what the rules are. The third is an ID issue, so they can identify people in all sorts of situations on the road. Those are all quite distinct issues, and the offence bundles it all together. Sentencing takes it all apart again and says, ‘What’s the problem here?’.

The CHAIR — In regard to the UK example, how long has it been in place now, do you know?

Prof. GANS — I think the offence was put in in 2008 in the UK and then it got to the UK Supreme Court in 2013.

The CHAIR — And have you got any sense as to how it has operated there?

Prof. GANS — No. Beyond that case I do not know anything about it. I have seen a bit of commentary since the case just wondering what that case means in terms of who gets caught now that they have introduced some sort of standard of driving requirement into the offence, but no-one quite knows what it is.

One other thing I should say about the UK case is that part of their analysis was the idea that, for instance, if you are driving along the road and a child runs in front of you, that would count in the UK as causing that person’s death by your driving. I am not sure that analysis would be true here. I think there is an argument here that the death was caused by whatever caused that child to run onto the road — not the child necessarily but whatever circumstances caused it — then at least in some situations your driving would not be a cause of that death. The UK is a little tougher on the test of causation than Australian courts tend to be. Their analysis might not entirely hold here. Likewise, Australia has its own test for what counts as driving. There is an argument that if certain things are happening to you — you are being attacked by a swarm of bees, you have fallen asleep, your car has stopped working — you are no longer driving. Those argument would have more trouble in the UK than they would here.

The third thing to mention that I should mention also is that as a matter of sentencing law in Victoria your sentence will go down if the negligence of your victim contributed to the accident — not by much, mind you, but it will be taken into account. It was the subject of dispute in the courts, but the current standard is that negligence by the other person will reduce your sentence, not just because you are not as bad but because it seems fair to factor their negligence into the punishment society gives to you. So if someone else runs onto the road and it is really their fault that it is an accident, whether or not you are convicted you will get a lower sentence than if they walked onto the road and you were not keeping a lookout.

The CHAIR — You are using the example of a child crossing the road, but it could be, I guess, an adult who has been drinking and wanders onto the road or an adult who simply wanders out without taking normal care.

Prof. GANS — Absolutely. A child is actually a very complex situation because no-one is going to accuse the child of being negligent unless they are a much older child, but there might be a negligent adult who let the child run onto the road. I do not know how the courts would deal with that in terms of sentencing. I just do not know the answer. The other example I gave of your passenger not wearing a seatbelt, in some ways that is the driver’s fault, they are meant to ensure everyone should wear the seatbelt, but it is obviously also the passenger’s fault so long as they are not a child.

The CHAIR — All right. Any other questions?

Mr TILLEY — Yes. I was not finished before you took over, Chair.

The CHAIR — Sorry. I did not suggest you had, but you have got your chance now.

Mr TILLEY — Anyway, our colleague Dr Rachel Carling-Jenkins brought on this private members bill with, I have got no doubt, very good intent. What I want to get from you is your view. We have a young deceased male. The full circumstances probably are not in the documents you have probably read here today. In saying that, are there existing statutes in the state of Victoria that could be possibly amended, in the absence of this particular legislation, for these types of incidents? Though they are in the
minority in this state, thank God, certainly the final outcome is that we have a young driver who through no fault of his own was sentenced to what the court of appropriate jurisdiction saw as an appropriate penalty. Is there something in the statutes that probably needs to be addressed, that you might have observed, that might make these types of circumstances meet probably what you would often hear is the community — 

Prof. GANS — Sorry, just — 

Mr TILLEY — Without confusing you. Yes? 

Prof. GANS — I am just wanting to understand — this is the situation that has prompted this bill; is that what you are referring to? 

Mr TILLEY — Yes. 

Prof. GANS — So someone is killed and the driver was not shown to have been driving badly but was driving without a licence. 

Mr TILLEY — Nice and simple; plain English. 

Prof. GANS — So one way to deal with it is this kind of bill, but there are other ways. Another way is to aggravate the offence of unlicensed driving. At the moment it says three months if you are an unlicensed driver, maximum, and four months if you were disqualified by a court. You could add in one year, or whatever, if you caused a death. That is one way to deal with this. The caveat there is that you would not want to add in 10 years, because then you are dealing with an offence which is designed as a summary offence to be prosecuted in the Magistrates Court along with 49 other matters that day, and yet if it is carrying a maximum penalty of 10 years it would have to be dealt with in a more serious court. There is a limit to how far you could go with aggravating unlicensed driving to achieve this end, but you could obviously add in a few months to that offence. 

The second way you could do it is to amend one of the existing offences of vehicular homicide, dangerous driving causing death or culpable driving causing death to include some circumstances of unlicensed driving within the definition of ‘dangerousness’ or ‘culpable’. Culpable is a very serious offence — it is equivalent to manslaughter — so you would want to be cautious about just adding in unlicensed driving there. It carries a maximum penalty of 20 years, but perhaps some aspects of unlicensed driving — for example, a person who drives despite failing the test or knowing that they are completely unable to drive the vehicle but do not care — could be put in there as an alternative to the existing standard of recklessness or extreme dangerousness, extreme negligence. 

Alternatively, and this would fit with this current offence, you could have as an instance of dangerousness some aspects of unlicensed driving — knowing unlicensed driving — as an aspect of dangerousness, and then it is just built into the existing offence of dangerous driving causing death. You would just have to deal with all the complexities of knowing that you were without a licence and the exceptions that are currently in this law when you add that to the dangerous driving causing death regime. 

There is a number of ways you could go. I do not have any strong views on which of those is the better way. Others might have views on that, but it is not obvious to me which of those is the better way. 

Mr TILLEY — When the prosecution puts up their evidence, would it be better to test — with that type of amendment in the legislation in a court of appropriate jurisdiction, would that assist? 

Prof. GANS — These things are always going to be a little complex regardless. I know you have some police talking to you today. I do wonder what prosecutors would think of this, because for them — and for the courts as well, I guess; judges, maybe even defence lawyers — there is always complexity when you layer on different approaches. They can all turn up in the same trial, because often you will have a situation where someone is unlicensed and might have been driving badly or very badly, so then you charge them with culpable driving if it is very bad, but then also as an alternative, dangerous driving, and then also as an
alternative, unlicensed driving. Now that sounds in some ways great — you are going to catch them one way or the other. But the trial itself, if there is a jury, which there would be for a culpable driving charge, this just means more directions for the jury, more questions, more things that can go wrong.

This might seem counterintuitive, but the High Court has said that if you offer the jury three options — a more serious one, a medium option and a lesser one — and if you get any of those directions wrong, the verdict gets overturned because the idea is that even if the jury goes for the most serious one, the fact that they have misunderstood the least serious one might have an effect on their reasoning about the most serious one. It is a bit out there, that reasoning, but the High Court has said it several times, so prosecutors and judges might respond to this provision with, ‘We don’t need this. Nine times out of 10, tragedies aside, we will deal with these people under dangerous or culpable driving, and unlicensed driving is an added complication that we would rather not have’. They might say that; on the other hand they might say, ‘No, this is terrific. We would love to have the alternative so we can catch the people we think should be caught’. I just do not know what their view would be; it is not clear to me which way they would go. They do not always want more options, is the simple version of that.

Mr TILLEY — No, I get what you are saying. Thank you.

The CHAIR — Just to follow through, my understanding then of where the current laws are is that if somebody is driving carelessly, whether or not they have their licence, they could be charged if they caused harm.

Prof. GANS — Yes.

The CHAIR — So this legislation is only necessary if you want to change the concept that — they might not have been picked up for driving carelessly, but they were driving unlicensed, so we want to lift the penalty above the potential three months to a higher level of penalty?

Prof. GANS — Yes. It is not just about lifting the penalty. Part of the reason I have got some intuitive liking for this offence is that the criminal law is also about acknowledgement. If you just charge someone with unlicensed driving — if you throw the book at them and you give them their three months because they killed someone perhaps, the victims will not see that as acknowledging their situation. The courts sometimes say that they do not like the idea that a death just becomes a meaningless statistic rather than being clearly acknowledged by the courts. The circumstance where they talk about that is actually where one person kills multiple people, and defence lawyers sometimes say, ‘Well, it’s the same act. You shouldn’t punish them just because they happened to kill three people rather than one. The driving was just as bad; it is just that all that happened was that there were more people in that other car’. The response of the courts is, ‘No, actually, that would turn the other two deaths into a meaningless statistic. We want that acknowledged’. I think it is more than just, how long can we put this person away? In fact I do not really think it is mostly about that; I think it is mostly about acknowledging deaths and that they should not have happened on the roads, which is really the essence of the argument here.

Ms SULEYMAN — Thank you for presenting today. You noted a year. Would that be sufficient or could it be reviewed?

Prof. GANS — I do not really know, to be honest. I think we are all going to have different views on what counts as an appropriate level of punishment. There are two ways of thinking about punishment, which is: how long do you want this person to be in a prison? If they are 30 years old, do you want them to be in a prison until they are 31 or until they are 36 or until they are 40? Likewise if they are 18, do you want them to be there until they are 19? That is one way of thinking about it. It is often the way I think, to be honest. But I think that a lot of people in the public think of it in a different way, as these are numbers that are putting a value on wrongdoing, and that one year compared to a death can seem a bit shocking to some people. On that way of thinking, you need to have more time to acknowledge a death.

Some people’s reasoning is it is a life for a life — that if you have taken away someone’s life, your life should be taken away, not by the death penalty of course, but by life imprisonment. But no-one would
enact such a law, much less follow through with it, but then the question is: what is the right number? There is not much point adding a month, say, to the penalty, because that would actually be worse than a meaningless statistic. It would be saying that a death is worth a month. I do not know where a year fits into that. There is a certain logic, I do think, in equating unlicensed driving or at least some unlicensed driving with dangerous driving, which is what this bill does.

The CHAIR — All right. Are there any other questions at the moment? We have certainly got other witnesses to hear from too, Jeremy.

Prof. GANS — You have got Arie Freiberg, and he is the best person to ask about all those matters.

The CHAIR — That is right. Here is Arie about to come to speak to us now. Thank you very much for your time, Jeremy. It is much appreciated.

Witness withdrew.
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The CHAIR — All right. Are there any other questions at the moment? We have certainly got other witnesses to hear from too, Jeremy.

Prof. GANS — You have got Arie Freiberg, and he is the best person to ask about all those matters.

The CHAIR — That is right. Here is Arie about to come to speak to us now.

Thank you very much for your time, Jeremy. It is much appreciated.

Witness withdrew.
The CHAIR — Welcome, Arie. Thank you for coming along today. As you know, we are undertaking this inquiry into some legislation that has come before the Parliament, the Crimes Amendment (Unlicensed Drivers) Bill. I do not think I need to go through the bit about explaining that you are on Hansard. You should be aware of that and that you are covered by parliamentary privilege in what you say to us. What I would welcome is similar to what we heard from Jeremy. We welcome you making some general comments about your appraisal of the proposed legislation, and then we will enter into some discussion with you in regard to that.

Prof. FREIBERG — Sure. Thank you very much for the invitation. I am very pleased to do so. I am chair of the Victorian Sentencing Advisory Council, but I want to make it clear I am not speaking on behalf of the council because the council has no views on this matter. We have not been consulted. But I will be drawing on material that the council has produced in relation to a number of reports relating to driving-related offences, which might be of use, and I am happy to provide some of that material to the staff of the committee because I do not have the facility to. Anyway, they are all online, but I will draw your attention to them.

So if I do take a few minutes to just give you an overview of my own personal views of the bill. Clearly as we have just heard — and as you have mentioned, it is a great tragedy if someone dies because of someone else’s actions. The basic question is the appropriate attribution of blame or culpability. There is a very complex relationship, as you have just heard from Jeremy and as you would know from your own work, between culpability on the one hand and harm on the other. You can have those situations with high culpability and no harm; someone could be driving extremely dangerously or culpably and nothing happens. They just do not kill anyone or harm anyone. On the other hand you have got a situation where somebody has died and there may be no culpability at all. So I will work my way through some of those issues because they are crucial in understanding where this bill might fit into the current framework, as I was listening to the previous discussion.

Can I say generally, if the bill is just about the reverse onus of proof, then I would not be supportive of reversing the onus of proof. As you have just heard, it is more than just about a reverse onus, but I put on the record that I do not think it is appropriate to have a reverse onus. Secondly, I put on the record that I think this notion of constructive crime — that is, you are doing one thing and something else happens, and you put those two together with the culpability of one being possibly very minor as we have heard, the unlicensed driving, and the outcome, in this case a death, being very tragic — by putting those together, you increase the culpability. I think my basic argument would be, and probably different from Professor Gans, that you have got to look at the basic culpability of the offender, and this is a very, very complex issue in terms of the current structure of Victorian law.

We have done a couple of reports in Victoria. In 2007 we published a report on Maximum Penalty for Negligently Causing Serious Injury. Of course that is an offence that can be committed by vehicles as well. In that case we produced a matrix which compared harm on the one hand and culpability on the other, and there are a large number of offences. As you can see, it is death or it might be injury, serious injury or no injury at all. So for careless driving there is no injury; it is just about the driving. And you have got the culpability, which is intention, recklessness, negligence and then dangerousness, which was added a few years ago. In fact we recommended that the maximum penalty for negligently causing serious injury be raised from five years to 10 to fit in with the culpable driving — so in fact the Parliament did that, and we thought that there was a gap there in the legislation. You were asking about gaps before.

The question of the range of culpability — we also looked at that. In my spare time I am also chair of the Tasmanian Sentencing Advisory Council. Because of concerns about the kinds of death — there was a young man who was driving through Hobart, a young 16-year-old with no licence, who killed someone, extremely tragic, right in town, and that of course created huge public concern, as they always do. We were given a reference by the Attorney-General and wrote a report on the Sentencing of Driving Offences that Result in Death or Injury. It could not be more spot-on as an essay topic.

Dr CARLING-JENKINS — That is fantastic.
Prof. FREIBERG — And we released that report in April 2017. Once again — simply because I happen to be chair of both committees — we produced a table of harm on the one hand and culpability, and the offences that fall within them. That is an important context, I think. When you are looking at this legislation, look at what is existing. You asked about gaps. I think there are really serious questions of whether there are in fact gaps in the law, because in your bill you have created a new level of culpability which is somewhere below or somewhere around careless, but I do not think it uses exactly the same language as careless driving, so there may be the requirement for courts to develop, and prosecutors to develop, some understanding of what this fifth level of culpability is. My gut feeling is that probably it may be unnecessary because between intentional, reckless, negligent, dangerous and careless, we have probably covered the ground in terms of culpability.

Again I repeat my comment that I think the essence of this is the culpability of the person in relation to the outcome, and while it may well be that there is a feeling based on what happened here and in Hobart that justice ought to be done, justice involves both the commission of the actus reus — the harm itself — and culpability, and I think it is dangerous to base your law reform on what you think might be the public reaction.

What is in the media is not necessarily what the public, in a considered and informed manner, might think about it. Now, in this sense, I did not bring them with me but I have been involved in a number of studies, both in Tasmania and now in Victoria, where we are looking at juries’ views of sentencing. We have interviewed jurors who have sat in on trials in the County Court; we have given them surveys and we have interviewed them. And the findings again and again are not that the public are necessarily punitive, but that when you provide them with information they are in fact more lenient — except in sex offence cases, and this is the County Court — more lenient than the judges because they have heard all of the facts.

Now, I would then challenge any law reform or any process to say, ‘Here are the facts of this case, not what was reported in any newspaper or on 3AW. Here is a situation. Somebody is driving a car unlicensed, from what I understand about this case, and without any fault have killed or injured somebody. What would you believe about that?’ And then you would have to unpack that particular understanding of culpability and the relationship between the primary culpability, the driving whilst unlicensed, and the harm that is caused.

Dr CARLING-JENKINS — Can I just add that is contested in this case — that it was without. I just want to put that on the record that it is contested.

Prof. FREIBERG — I am not in a position to — I am just saying assume. You have put a culpability requirement in here. I think that is appropriate. Whether it is needed is another question, and my argument would be ultimately the focus should be on the relationship — the causal relationship — between the driving and the harm, not being unlicensed, unless it was a contributing factor.

In the English case — I will not go into it because you are clearly aware of it. There it was that if you just used an intuitive but wrong standard, which is ‘but for’, rather than the law about substantial causation. Of course, ‘But for the fact that my mother gave birth to me, I wouldn’t have been driving, and therefore I wouldn’t have killed a person’. Your argument here is, ‘But for the fact that you didn’t have a licence, you wouldn’t have been driving’. The law, I think — and I have not taught the criminal law for many years — ‘Was the fact that you were driving unlicensed a substantial cause of the death or injury?’ And then you got to the question of the kids running across the road, contributory negligence. But I think you would have to make the case that it was the unlicensed driving that was the cause. If you cannot do that, I think you rely on the standard law, which is: were you careless; were you dangerous; were you culpable; were you negligent? I think the law is sufficient to cover that. Now, I would then add, if you want to understand — because you asked the question —

Mr HOWARD — Sorry. Just on that point then, Arie — and taking what Rachel just said — if there was culpability but the courts did not pick that up, that is not the fault of them being unlicensed; it is an issue within the current legal system that perhaps did not address some of the concerns that may have been raised.
Prof. FREIBERG — In terms of the culpability?

Mr HOWARD — Yes.

Prof. FREIBERG — Well, I think it is for the prosecution to prove that there was a degree of fault, whatever it was, and I think we have got five degrees of fault. If that does not cover it, I am surprised. I think the new standard may or may not be necessary. There may or may not be a gap. I do not practise in the courts, but I think that I would still go for the fact that you go for the primary liability — what was the cause of the death — not the incidental factor.

As Jeremy pointed out, you may have lost your licence because you got demerit points. You may have got them and then not received the notice. I think the bill covers you have got to know that you are doing it — I do not think that is the problem. It is the question of linking what I think are possibly two unrelated matters. It may well be that your lack of a licence is a contributing factor, because you are not capable of driving, but I will come back to that, if I may, in a moment. Let me keep going. I am conscious of the time.

In 2015, because the Sentencing Advisory Council in Victoria is concerned about deaths and injury on the roads, this is the third report that I have been involved in. This is an analysis of current sentencing practices. It is called *Major Driving Offences: Current Sentencing Practices*. We did that in 2015, because we know how many cases come before the courts because of death and injury on the road. It comes to the question of maximum penalties, and Jeremy raised the issue that this is quite a dramatic increase in that. I think, again, you have got to see that in relation to the matrix, which we will provide to you. I am sorry I have not prepared all of this, but you will have it as background.

If you can see, this is the average or median sentences for the offences of culpable driving causing death, dangerous driving causing death, negligently causing serious injury, dangerous driving causing serious injury. They range from a maximum of six years and one month for culpable driving causing death — probably around seven now — with a non-parole period of four. So about six with the four, seven with the five, going down to two and a half years to one year, three months, for dangerous driving causing serious injury, and for dangerous driving causing death, three years, three months. Now, that is the median. Of course you have got higher and lower. But if you are going to create a maximum penalty that is quite serious for very low, in my view, culpability, you have got to understand that the judges are going to find it very difficult to give you a five or 10-year sentence when the average for culpable driving — a maximum of 20 years — is about seven years. So you have got to understand judicial behaviour. This comes back to the question of how we guide sentencing. We have recently recommended the creation of a sentencing guidelines council, which would provide guidance for judges. That may or may not come before you as a Parliament before the election — I do not know.

Can I point out also that in this report, in terms of the features, we did a statistical factor analysis of what was involved in dangerous driving. Dr Carling-Jenkins might be interested that 37 per cent of those convicted and sentenced for culpable driving were unlicensed and/or either had a suspended licence or were disqualified at the time of offending. So Jeremy was talking about the issue of the relationship with unlicensed driving as an aggravating factor or some other factor. Now, that is not the major factor, but it was enlightening and interesting to realise that nearly 40 per cent of those who were driving were not charged with driving without a licence or being disqualified; they were charged with culpable driving, and that would have been a factor.

In terms of dangerous driving and careless driving, we did not have the figures. But again, if you want to know what the current sentencing practices are, on our website we have current sentencing practices for all the offences. It is a live website. I have printed it out. For dangerous driving causing death, in the higher courts basically about three to four years is the average sentence. You can look those up. If you are thinking that it is going to create a huge increase in sentencing outcomes, I think that is unlikely, because it does not fit within the other areas.

I will just finish by saying that in relation to the UK offence, you have had a look at that. The sentencing council — they do have one in the UK — which does provide guidance for the courts, which they have to...
follow. They do have a sentencing guideline for causing death by driving unlicensed, disqualified or uninsured, and they provide, as we do not do in Victoria, a range of sentences. Their guidance is, if the offender was unlicensed or uninsured and no aggravating factors, it would be a medium-level community order; it may be low or high. If they were unlicensed plus one aggravating factor, 26 weeks custody, or a high-level community order. If the offender was disqualified from driving or unlicensed or uninsured, plus two or more aggravating factors, then it would be sent up to the higher court. They do then set out what the aggravating factors are. It might be culpability or the number of people injured, and I would draw your attention to the fact that this is the kind of thing that the courts will take into account and that the English and Welsh courts have to look at — remorse, admissions, cooperation, all those other things — and there are guidelines there.

My final comment, and I am sorry for taking so long, but I would draw your attention to paragraph 26 of the Hughes case, because you are going to be looking at that. I mean that is the only similar provision. I think, whatever one says, and I come to this as trying to provide some balance and understanding of both sides, but I do understand the concern, the harm, that somebody has been killed. They say, and I quote:

To label a person a criminal killer of another is of the greatest gravity. The defendant is at risk of imprisonment for a substantial term. Even if, at least in a case of inadvertent lack of insurance or venial lack of licence, a sentence of imprisonment were not to follow, the defendant would be left with a lifelong conviction for homicide which would require disclosure in the multiple situations in which one’s history must be volunteered, such as the obtaining of employment, or of insurance of any kind. Nor should the personal burden or the public obloquy be underestimated; to carry the stigma of criminal conviction for killing someone else, perhaps a close relative, perhaps as in the kind of situation referred to … an innocent child, is no small thing.

In construing, they said, a penal statute, we have to consider those consequences and consider that in the way that we interpret the legislation. And they will interpret it in the strictest possible way given if you were looking at a 10-year sentence. That is how they approached it. So they basically said, in the absence of carelessness or culpability, they adopted a fairly narrow view, and I think the view is if you are going to call someone a killer, you have got to be careful about how you go about it. I have got no compunction about calling someone culpably driving a killer or dangerously driving or anyone else, but in the circumstances you are looking at I would think twice.

Sorry for taking so much time, but that is the context and the background with which I come to this legislation or this proposed legislation.

**The CHAIR** — Thank you. My question, to lead with, just relates to what you had to say about the UK legislation and the sentencing advisory committee’s advice following on from that.

**Prof. FREIBERG** — The sentencing council.

**The CHAIR** — Would it effectively mean that the legislation has no effect?

**Prof. FREIBERG** — No, it creates an offence.

**The CHAIR** — But in terms of the sentencing outcome it is still going to be judged according to the culpability as opposed to the licence.

**Prof. FREIBERG** — Exactly right. That is right, and the great advantage of having a sentencing council, as they do, and which we do not have but which is proposed, is that they are able to look at it in the context of every other offence. They have got dozens of guidelines all the way from murder, manslaughter, rape, burglary. They have to fit this one in to that great matrix of harm and culpability, and you will see from the guidance that it would only be where there were many aggravating circumstances you would actually end up with a six-month jail sentence.

**The CHAIR** — To just clarify, your general view, in your knowledge of the law, is that this legislation is not necessary and not appropriate?

**Prof. FREIBERG** — Yes.
Mr TILLEY — I have just got a very quick one.

Prof. FREIBERG — Sure. I will give you a long answer.

Mr TILLEY — That’s fine. Just when you were talking about those categories of different driving offences, no doubt you are aware that in the state of Victoria a finding of guilt for careless driving is now dispensed with quite conveniently by a traffic infringement notice.

Prof. FREIBERG — I was not aware of that, no.

Mr TILLEY — Some years ago, and I do struggle with it because the proofs of a careless — although it is lower on the scale — is all care and attention of a prudent driver, and I think this was brought in to expedite those cases where a motor vehicle loses traction on one wheel or more, or a motorcyclist decides to do a mono, which is a careless driver. I think that is the low fruit and why that was brought on, but on the higher end of the scale of careless driving I was just wondering if you had a view, and as you just said to me, you were not aware. The data and the statistics in relation to careless driving, where that might have changed significantly since it has been processed by way of a traffic infringement notice.

Prof. FREIBERG — I do not know how many of those are dealt with in that way, but we do have on our website. By the way, I missed one. On the negligently causing serious injury driving-related, we also found 34 per cent of those were unlicensed. The dangerous driving causing serious injury, 60 per cent had a record of prior offending in terms of driving. So, to be fair, it is not unrelated, but it is one step to go to saying that there are a lot of unlicensed people; it is another step to say it was the unlicensed aspect of it which produced the harm.

For unlicensed driving our current sentencing practice shows that 54 per cent get a fine, 16 per cent get imprisonment and the average imprisonment is about three to six months. I have not got the careless driving, but on our website, which is the Magistrates Court, you can see what the careless driving is. But it would be fairly low.

Mr TILLEY — Like in today’s society police will intercept a young fellow, and we are seeing more and more instances of young people that are driving below the legal age of being able to attain or get a drivers licence, and we are seeing that through the media daily.

Prof. FREIBERG — And we do not want to encourage that, but of course given the volume, and you want the Magistrates Court to be dealing with serious cases —

Mr TILLEY — That is the point in leaving it in the hands of Victoria Police alone, where you will get a young driver and you will probably hit him with a careless driving or an unlicensed. I mean a member of the police force can issue three tickets before they have to go to a brief. Just deal with it on the side of the road. They are not going to pay the penalty. It is going to go to the parent court; they are going to get warrants.

Prof. FREIBERG — There are 6 million infringement notices issued every year — parking and all the rest of it — but the reality is that the Magistrates Court is groaning under the strain, especially now with family violence offences and the like. Again, you do not want to downplay careless driving, but it is sometimes a precursor to more serious offending, sometimes not. What we have found here is that unlicensed driving is a component — 34 per cent of culpable — but on whether it was the lack of the licence, it clearly was not in many cases. It was the fact that they were drunk out of their minds or on ice or drugs and all the rest of it. That was the substantial cause. I come back to my argument: I think you need to find the appropriate culpability, whether it is intention to kill someone, reckless, negligence, dangerous or careless. I think it is probably well covered.

Ms SULEYMAN — I just have one question. If you are an unlicensed driver — you are not a dangerous driver — in your opinion are the current laws sufficient?

Prof. FREIBERG — To deal with what, the unlicensed or the causing of harm?
Ms SULEYMAN — Causing of harm.

Prof. FREIBERG — In the absence of this particular case, which I was not aware of until I saw the background material, I would have thought it would have covered it, because dangerous driving causing death was something newly created to meet a gap. Whether you want to create an offence of careless driving causing death or serious injury or even injury, I would not oppose that if you can convince me that that was a gap in the law. It is the link within what I believe is unassociated culpability of driving without a licence. If you could prove to me that driving without a licence was the cause of the causing of harm, then I think that offence should cover it. Causing death or serious injury due to the unlicensed driving might be a different offence.

I am not going to draft on the spot. I do not want a ‘but for’ test. The dangerous thing the Hughes case pointed out, and the criminal law came to this conclusion years ago, is if you use a ‘but for’ test, then you end up blaming my mum and dad for giving birth to me, because everything along the way was her fault. Because had I not been alive, I would not have stolen, I would not have thieved, I would not have committed it. That is not the case. The cause is the negligent, culpable, dangerous or careless driving. Stick to that and I think you maintain the purity of the law and retain the basic common law, human right, that the prosecution has to prove the case beyond reasonable doubt. As I said, that is a separate issue. I think you will have submissions on that. I think that is a fundamental right of every citizen, to have their case proved beyond reasonable doubt. I know again and again what we are doing is reversing the onus of proof because it is easier for the state. I still believe in some basic human rights and civil liberties. I know that is old-fashioned, but you know, that is the kind of guy I am.

Dr CARLING-JENKINS — Can I interrupt just as a follow-up there. So you are not sure if there is a gap in the law is what you are essentially saying?

Prof. FREIBERG — In terms of the very lowest level of culpability?

Dr CARLING-JENKINS — Like the police, for example, are saying there is a gap in the law. So you are disagreeing with that point of view. And it is fine to disagree.

Prof. FREIBERG — Look, I am not going to go on the record because I really do not know. I am not an expert in driving offences. What I suggest is that you have a look at the three reports that we have done, especially the Tasmanian one — even though the law is not identical, all the driving offences are similar — and we do go through the harm and culpability and the offences that fit into each one of them. And we did not recommend major changes in the law in Tasmania, even though the precipitating event was an awful tragedy — of this kid on a motorbike, unlicensed, a 16-year-old killing a mother and a child.

Dr CARLING-JENKINS — It sounds awful.

Prof. FREIBERG — It was all over the newspapers. But I am really glad that you have got this committee — and, again, in Tasmania calm reflection of the situation, looking at all the facts, the possible gaps in the law, the relationship of this offence to others, sentencing practices and what you might expect out of any change. I think, as the Chair just pointed out, even where they have got the law in the UK, the sentencing guidelines council made up of judges, prosecutors, police — a whole range of people — say, ‘This is what we think the appropriate sentence should be’. You may think it is a bit moderate, but they say, ‘The aggravating factors aren’t the causing of death; that is something else’. I would urge you, given your time lines — and I know it is a terrible thing to say for your staff — but take the time to look at what has been done in Tasmania and Victoria. You know the Hughes case, but have a look at their guidance, and you will hear evidence from the police. I do not practise in the courts; I do not do traffic. I try to drive, licensed, carefully. That is my contribution to the safety of Victoria.

Dr CARLING-JENKINS — Fair enough. Thank you.

The CHAIR — Thank you very much, Arie.

Prof. FREIBERG — A pleasure. Thank you.
Witness withdrew.
LAW REFORM, ROAD AND COMMUNITY SAFETY COMMITTEE

Inquiry into the Crimes Amendment (Unlicensed Drivers) Bill 2018

Melbourne — 3 August 2018

Members
Mr Geoff Howard — Chair
Mr Bill Tilley — Deputy Chair
Dr Rachel Carling-Jenkins
Mr Martin Dixon

Mr Mark Gepp
Ms Natalie Suleyman
Mr Murray Thompson

Witnesses
Ms Olivia Yassine,
Ms Maria Aylward,
Mr Cameron Vella and
Ms Janelle Nicholas.
The CHAIR — Welcome, Olivia and friends. As you know, this is a parliamentary committee. We are trying to be relaxed in our approach to the issue, so I hope you do not feel intimidated. I understand you feel a bit anxious in talking to us today. We are here as parliamentarians to look at the legislation that Rachel has brought before the Parliament and to make some judgement about it. While your particular personal circumstance is not under consideration here, clearly you are welcome to speak to us and share your experience that has led to, I guess, the legislation coming forward.

Take your time. You are welcome to share your experience, and we might have some questions to ask. If your friends have anything to add, then they can do so. For the benefit of Hansard, who are recording the discussion, speak into your microphones. Over to you when you are ready, Olivia. This is your opportunity to tell us what you think we should know to help us form our judgements.

Ms YASSINE — Clearly I am here because I lost my 13-year-old son nearly 17 months ago to a road trauma accident — they called it an accident. The loss of Jalal has created a massive void for me and his three brothers. He was my oldest; he was a beautiful young boy — giving, loving, respectful, manners. He was my everything — the first child.

Going back I guess to the morning when I did lose him, it is something I relive almost daily. Sleeping is non-existent. His brothers deal with it in their own ways. I have a 12-year-old, a seven-year-old, and even a three-year-old who remembers him. With the way it has affected our lives, I can call it a life sentence, if that is how you want to put it. What my mind cannot get around is how all of it has been dealt with. The lady who did it — the lack of remorse, not even a sorry. And also in the sense where we are scarred — I mean, it happened in front of us. We are scarred with all of that — his lifeless body, watching him. The whole day, we relive it constantly.

Then we come back to the lady who has done this to us. How she feels about it is one thing, but then also her breaking the law, being unlicensed. The way we have been treated and dealt with I feel is also unfair — the communication, or lack of communication, that we received in dealing with my son’s death. Then to get to the end result, it was almost as if it was dealt with as just her being unlicensed and my son was just non-existent. To us he was very existent. I mean, it is your child. I know that for everyone you cannot really put a personal touch on it, but for us we lost a family member. She has got seven children of her own, and to be sitting in there and knowing that — the day it was dealt with I could not even be looked at to be given condolences. It just feels like we received kicks in the gut, one after the other. There was no sorry. Charging at me to record me while I cried because I saw the dent on her car, which she drove to court unregistered.

She constantly gets these slaps on the wrist, and I am sitting back thinking — it is almost like, ‘What is going on? Why?’ She drives an unregistered car, she drives unlicensed, she runs over and kills my son, and I am sitting in this courtroom waiting for some sort of justice, not so much where it is going to be closure but something that makes it feel like, ‘You’ll be remembered in some sense where they acknowledge your death’. But to be treated like he was just — you know, she ran over a speed hump, so to speak —

I am sitting there, they have given her back her licence, they have given her only 80 hours community service — ‘Because you’re a mum and you have seven children. You need to go after them’, and I am left in awe. It is like, ‘Where is anything about Jalal?’ You have not only hit him; you have run over him. You are unlicensed, and you were caught two weeks earlier driving unlicensed as well. You have got all this history behind you, and my son is a nothing. To me 80 hours community service was not a consequence.

Then you pay attention more to the news. Someone gets a year for running a red light. Someone gets 300 hours for stealing jewellery. Then I am like, ‘Why didn’t this woman get anything?’ Even in the sense of driving lessons — take her car away. Take something else. But to sit there and like, ‘You get your licence back; you only get 80 hours’. I tell my children to pick weeds when they are in trouble — that is community service; that is what she got. But this is for taking a life. She breaks the law, she takes a life — that affects us for the rest of our lives — no remorse, no nothing. Her behaviour on the news — I look at her not just as a woman who has children. I waited for the sorry and I thought that is all I would have
needed. I look at her like a monster. I mean, I am sorry to say it, but she is like a monster, and she took my boy away with no consequence whatsoever.

In that sense, then, I went home and my whole mentality was to crawl into a hole — but I still needed to be a mum. Or you get up and you fight for your son and you get something out of this so that you acknowledge his death and something comes good out of it, because that is what he was — he was such a good boy. It is funny because the irony here is that his life was taken away by a family who always gave children grief when they went to the park. We would come home because they were the children that kicked and spat and did other stuff. They had no parents around. Here are my four boys. They have got manners, apologies; they are so respectful. I do the best I can in raising my four kids by myself.

It is a blow where almost you feel mistreated by the law, by the report of everything. I had to ask for my own copies of things because no-one gave me anything. Even when I received that, it was so inconsistent to call it an accident — all the information does not weigh up. Even reading that stuff, it was so disrespectful to my son’s death. He is 10 years old, he is going to work, he is going left when he is going right — nothing adds up. So I have taken it on myself to try and do something for him. If it is Jalal’s law, which helps another family to never have to deal with what we are dealing with, then maybe I have left something for him.

**The CHAIR** — Thanks, Olivia. One of the questions I have, in terms of talking about it — you understand that we are looking just at the law, which cannot change your personal situation, but as you point out, it might change the situation of others in your situation in the future — you also were raising the issue about the lack of support you got. Was that in regard to the way the police followed up at the time? Just talk through some of those other issues of why it came to be that outcome that has been so very bad for you.

**Ms YASSINE** — The communication with the police officers that were in charge of the case, I felt it was not there unless I kept contacting them, or kept asking them, ‘Please tell me something’. Then at times when they would contact me, it almost felt like they were doing me a favour. When he first contacted me it was a week after my son’s death. I thought, ‘I don’t know how these things work’, because you do not expect yourself to be in this situation. So after a week he contacted us and said, ‘I’m actually doing you a favour calling you after my work hours’. I thought, ‘Yeah, cool. All right’. We were just wanting an update on what was happening. Something would be nice. It was a week later, literally a week, when they had already ruled it to be an accident — no foul play, no nothing.

I still remember on the day of the accident sitting by my son’s lifeless body, and they asked whoever was at the scene with us at the time, ‘Is she sure that she wants all of his stuff?’. Nothing was taken in for them to investigate — like his helmet, which I have got at home. One side is crushed and one side is not. How did she run over him? Which side did she run over? What did she do? So I have got his bloody helmet sitting in my cupboard at home that they have given me from his head.

**Ms AYLWARD** — Sorry, can I just add something?

**The CHAIR** — Certainly.

**Ms AYLWARD** — My name is Maria Aylward. I did not have the pleasure of meeting Jalal, but I met Olivia at the point where she had probably already begun the journey. I have come on board to try and help her. I actually got involved with the communication with the police. He was only a senior constable, I think. I swiftly got an email back — there was no report, there was no brief of evidence, there was nothing official or any kind of documentation to state what happened on the day et cetera. There was no verbal communication, very little communication, and when I stepped in and said, ‘Look, I’m trying to help Olivia. She’s in a difficult way emotionally. Is it possible to get some sort of brief of evidence or a meeting or something so that she can have some sort of information fed to her so that she can try and process and understand?’ . It came to a situation where he ignored, ignored, ignored and then referred it to his sergeant and said, ‘Don’t contact us again’. So the lack of empathy on the police side and the way that they dealt with it was really unfortunate.
What I found as well is that even though Olivia was demanding that she had Jalal’s belongings that day, as police process they should have, I believe, taken those things. They gave her Jalal’s helmet with parts of his skull still in that helmet. So to me, as hard as it would have been to say no, I believe that they should have taken those into evidence for some period of time and then given them back at another reasonable time. There seems to be a real sloppiness in the police work, and when you read the report, which I helped Olivia lodge the FOI for, the information detailed in here is literally incorrect. It states that he is 10, when he is 13, and that he was on his way to work and that he was turning right when he was turning left. I fail to see how the police have come to the conclusion that it is an accident. Yes, do you want to take the documents?

Mr TILLEY — Yes, maybe we can get a copy of it. You said it was a report. Is it from the inquest?

Ms AYLWARD — It is a notes request form from VicPol that we wrote through —

The CHAIR — Okay. If you can pass that on, we will give it back to you later on.

Ms AYLWARD — Yes, it is okay if you take copies. But I fail to see, when the report is so inconsistent, how they were able to come to the conclusion that it was an accident. I know you are here only to study the legislation, but maybe we need to look at, apart from that, how they are handling these situations.

The CHAIR — I think it is useful that we hear that, and that we can.

Ms AYLWARD — We talk about road trauma — there are massive Victorian police ads, VicRoads, about getting road trauma to zero. I think it is quite contradictory that we deal with somebody who has broken the law, unlicensed, that has been caught before, by giving them 80 hours. She is not even given any driving lessons; she has not been suspended. I think it is totally inadequate. If you are not going to pass the legislation because it is too broad and it might capture people that have truly not done the wrong thing, then we need to still concentrate on some part of the law so that there are consequences. You have killed somebody. Whether it is an accident or not, there need to be consequences. She has not even been remorseful. When I was brought up, if there was an accident, you apologised. It is not reaching any level of anything for this family that have gone through this horrendous time — and someone cannot turn around and say sorry? Then she is asked to leave the courtroom, because she is looking at the lady. She has been told that it is intimidating the woman that ran over her child.

Ms YASSINE — It just feels like a constant kick in the —

Mr TILLEY — Who requested that?

Ms YASSINE — She did; the lady.

Ms AYLWARD — She did. requested that Olivia be removed from the courtroom because Olivia was looking at her because she killed her kid.

Ms YASSINE — It was the first day that I had seen her, come face-to-face with her after she killed my son, so obviously I am looking at this lady thinking, ‘This is the person’. She had the — what are they called? The PSOs?

Mr VELLA — Protective security.

Ms AYLWARD — Yes, the PSO security, the people at the courts.

Ms YASSINE — Whoever they are at the courts, she had them approach me, take down my details. What have I done? ‘She feels threatened by you looking at her’, and then she went and sat in the little security section. I thought, ‘I’m looking at her because it’s the first time I’ve seen her since she killed my son’. That was the same day that it got adjourned and when I had actually come face-to-face with her. Because every time I walked past the Kluger, I always measured where he was standing, how she hit him, how he got run over. Then I saw the actual dint in the car and the car was right in front of me —
Mr VELLA — Unregistered.

Ms YASSINE — unregistered. That was when I saw it there. My sister was with me on that day, and I broke down seeing this. She barged at me, recording me and was calling the police over. I thought, ‘Oh, my God. What have I done now? I’m looking at the dint from where you hit my son. There’s even a little mark of his blue bag right next to it and you’re coming to record me’.

Mr TILLEY — This matter was dealt with summarily, in which court?

Ms YASSINE — Sunshine.

Mr TILLEY — Sunshine Magistrates Court? Okay.

Ms AYLWARD — Basically as a traffic incident.

Mr TILLEY — Okay.

Dr CARLING-JENKINS — Do you want to clarify for us the 80 hours of community service? That was not all —

Ms YASSINE — That is not for Jalal.

Dr CARLING-JENKINS — That’s right. I just wanted you to clarify that for the committee.

Ms YASSINE — That is the worst part. That was for two weeks earlier being caught unlicensed. It was the day of my son — but there was nothing about a killing or a running over or anything; just being unlicensed. And also for three or four weeks after that, breaching a family violence order causing injury. Eighty hours community service.

Dr CARLING-JENKINS — Yes. Thank you for clarifying that. I appreciate it. I just think it is really important for us to understand that the 80 hours was not just for one offence so to speak. Did you get an opportunity to draft and read out a victim impact statement at all?

Ms YASSINE — I was told to do a victim impact statement through the officer that was in charge of my case.

Ms AYLWARD — That was done before though, wasn’t it?

Ms YASSINE — No. What happened was that in November or December I had a call from Paul from Channel 7. I still remember sitting outside with my kids. It was a beautiful day. He said, ‘Why weren’t you there today?’ I said, ‘Where? Where was I meant to be?’ He said, ‘She was at court, but it got adjourned’. I said, ‘Nobody has even told me anything’. I should have maybe taken a breather and then emailed, but I emailed the police officer because I could not get in touch with him. I said to him, ‘This isn’t on. I’m meant to be informed of all this stuff. I’m meant to be told what’s happening. Keep me updated’. He said to me it had been adjourned to 2 December, I think — or 4 December it was. Then all he could reply to me a week later was, ‘You know you can do a victim impact statement and that will be read out in court for you’. I thought, ‘Whatever I can do, I’ll do that now. Now that I know that this is happening, I’m in there’.

I did a victim impact statement with the help of someone from — oh, my God, I can’t even remember. She helped me at the police station — the OPP. She was one of the people that know what they are meant to put in there, and her help was amazing. We did this report. The day that everything was read out, including her 80 hours and everything else, it began first with the magistrate. She could not even look straight at me to give me condolences; she looked the opposite way in the room. I thought, ‘That’s all right. That’s cool’. Then they came to reading the victim impact statement, and I kid you not. I know it was probably a page and a half. He said, ‘Jalal was her oldest; he was a 13-year-old. He helped her with the younger siblings. Then it goes on to say about how they have been dealing with it. Then there are some things down here about how it has affected their lives. You get what the report means, Your Honour’. They could not even read out how I feel. That is how I feel. I don’t want to read it, because I don’t want to break down.
The CHAIR — Yes, of course.

Ms YASSINE — And that is how you have read it? Okay. Then they give her her licence back — this is all in one courtroom, one day. Then they say to her, ‘Because it’s important for you to be around your seven kids and you need to drive. Here’s your 80 hours for all these three things’. Jalal was not even mentioned. It was just more condolences to begin with, this is the crappy victim report and off you go. Her lawyers said she has not been dealing with it — she has not been eating or sleeping, and I thought, ‘Yeah, but her actions have been saying something else’ — no sorry; her behaviour has been abrupt and rude, like I have done something to her. That is how it made me feel. Then she walks out and she was fine. I walk out even more broken.

Ms AYLWARD — That is indicative of the courts now, though, that an offender seems to have more rights than a victim. In this kind of case when you lose a child, it is not exactly the environment you need to be subjected to. It is pretty insensitive. And to find out from a Channel 7 reporter that you are able to do a victim impact statement is pretty pathetic.

The CHAIR — Yes. So my follow-on question relates to that, Olivia. Were you offered counselling through that process at all?

Ms YASSINE — No. I have been offered more help here.

Mr VELLA — I am her next-door neighbour, Cameron Vella. I met her and I knocked on her door as a new neighbour, seeing her come in, and she was frightened. I thought, ‘I don’t know her. I don’t know her story yet’, and slowly learned there was no backup for her or any help. I have been with her every day since that day — anytime I can — whether with a car, whether with the kids, whether with her having a bit of time just so she can be alone and me looking after the kids, because I have two kids of my own, so they get along.

It is terrible — terrible to see. I do not know how she does it, but I would not handle it as good, but I know is in her corner, and that corner is somewhere where I would not see her the way she would be, I would imagine. But that is why I have stuck by her, because there is just no justice, I feel, that has given her any help or counselling. And just seeing how someone can throw dirt in front of a live camera, pushing away Paul — that is, the Channel 7 TV crew — and the police in front of the Sunshine courts numerous times —

Ms YASSINE — Her reaction, her sticking the finger up.

Mr VELLA — I see where she just really wanted to have some remorse from her and sympathy, and I do not think she would have even come this far if she had got some of that. It has come to this because it has just gone to her that basically —

Ms YASSINE — No-one cares about your son, so —

Mr VELLA — she is digging her own hole here because there is nothing getting done in her favour.

The CHAIR — No sense of justice in the whole process.

Mr VELLA — So it hurts her, and I can see why because, you know, you are grieving and you need some sort of support or even someone saying, ‘Sorry, it was an accident. I apologise’ — like anyone should — ‘Is there anything I can do? I didn’t mean it’. You would get that from somebody; you think you should get that.

Ms YASSINE — I was told on the day when it happened — I do not know if you can get police notepads or whatever, but the officer said to me — ‘Her daughter said to her, “Mum, you have to stop. You just ran over something”‘. Why is your daughter telling you that? Why is your daughter telling you, ‘Mum, stop. You just ran over something’? So not only have you hit him and run over him, you have not seen him. And she did not get out of the car until — well, she stopped two houses down.

Mr VELLA — If you hit something, you do not stop two houses down.
Ms YASSINE — Janelle was one of the first two or three people on the scene, give or take 30 seconds of each other, and the first couple that came out were house-sitting. They thought their letterbox had been smashed, and they ran outside. There they see my son lying on the road, and he tries to put him on his side because he is choked up with blood. And that is when she got out of her car, collapsing on him, saying, ‘I’m going to jail’ — nothing about Jalal, nothing about anything else. Then she saw Janelle, and what did she say to you?

Ms NICHOLAS — I am Janelle Nicholas. I was one of the first on the scene. When I pulled up in my car there was this young boy lying on the road. At first I did not understand what had happened because there was no car near him, and I thought, ‘That’s odd. What’s going on?’. Then as I got closer and saw what had happened to him, it was obvious that he had been struck severely. Then I saw a lady standing on the footpath. We had rushed over to Jalal to render what assistance we could, and this lady was just standing on the side of the road, just staring, and I am thinking, ‘Is that her child?’. I did not quite understand what had happened. While the others were attempting CPR, I was on the phone to 000. I said to her, ‘What’s happened? Is that your boy?’, and she just said, ‘It’s over. It’s over. I’m a single mother. It’s over’. And she just walked away. I thought, ‘That’s a very, very odd reaction’. And I thought, ‘Well, I can’t deal with you at the moment. We’ve got to deal with this’.

It was not until later that I discovered that she was the driver of the car, and her vehicle was parked way away from the accident scene. That is why I did not realise that that car had been involved. And when the police got there — going back to your question about the police and their process — the police spoke to me that morning, and I told them her reaction, that she did not render assistance, that she just stood there worrying about herself and what was going to happen to her. I told them. They took my name and address, and they said, ‘We will be in touch. We will need a statement because you were first on the scene’. I never heard another word from them ever again. I thought the fact that I had spoken to the offender would mean that my recollections and her words that day would be relevant to any investigation into the case, and I heard nothing. I kept waiting, and I heard nothing. Next thing we know, it is going to court and it has just been deemed an accident.

To my way of thinking, okay, I have no doubt that she did not deliberately run over him. Yes, it was an accident, but the fact that she chose to get into that vehicle when she was unlicensed and had been caught unlicensed previously — it was a conscious choice on her part to start that vehicle and drive it — makes her culpable whether it is an accident or not. She should not have been in it. It was an illegal act on her part, and a child lost his life because of her actions. That is why I think it is very important that Jalal’s law go ahead to stop this from happening again and so people who are unlicensed do not just think, ‘Oh, well, I’ll just get a slap on the wrist, and I can get back in my car and drive again’. There have to be consequences for people. I know there are queries about, ‘Well, if it’s an accident and if they’re not drinking or they’re not speeding or they’re not anything else, it’s just an accident’. But, like I said, the fact that they knowingly get into that vehicle knowing they should not be on the road, to my mind, makes them accountable and culpable, and they should face the penalty for that. I have submitted a written submission as well.

Ms AYLWARD — May I say I know that there are already driving offence acts that cover parts of culpability — drink-driving et cetera — but even if the legislation is a little bit broad, as it is now, perhaps when it is deemed an accident some point of culpability could be that if someone is a recidivist, has been caught and has several traffic offences or driving offences, that that is taken into account when they are sentenced so that it holds some sort of culpability. There does not seem to be a deterrent to stop people from getting back in their car if they are just getting a slap or a fine and then you just get back in and you get your licence.

We are very hard on drink-driving now, and we penalise people. They lose their jobs, they pay for a blow machine — whatever they call it — et cetera. In this current legislation, even if it is an accident, she has been caught, she has continued to do it, she has continued to make a choice, as does someone when they get into a car when they drink-drive. So, maybe the culpability could be broadened to recidivism or traffic offences being taken into account as well, just from the law side of things. I know it is separation of powers with the courts et cetera, but the Parliament does set the boundaries.
Mr TILLEY — Sure. I would like to continue this conversation a little bit before we get to that. Rachel has brought this bill before the Parliament — and bloody good on you for having a dip at it — but as the Chair did say at the start of this conversation, we are looking at this particular drafting of the bill and its effects. I do not know how far we will get or whether we will resolve the issue, but we will certainly come out and make some recommendations together. But, firstly, my deepest and sincerest condolences for your loss of Jalal to you, Olivia, and to Jalal’s siblings.

By way of background, I am a former member of Victoria Police. I have prepared coroners briefs, inquest briefs and I have seen a number of children die on our roads. Only in part can I even vaguely understand what you are going through, apart from being an investigator on these things. That is so you understand where I am coming from. I am very interested that if, for example, the Parliament does not come out with a specific piece of legislation or amends a particular bill, there might be some things that we might discover to change and block these loopholes. That is the Parliament working at its best together so that we can stop this from ever happening again.

But in saying that, I am very interested in the conversation that we have been having. We will have Victoria Police here this afternoon. I, and no doubt my colleagues, will have a number of questions for Victoria Police, let me assure you. Can you recall, Olivia, who the informant — when I say the ‘informant’, who the investigating police officer was?

Ms YASSINE — Yes. It was

Mr TILLEY — Was he from —

Ms YASSINE —

Mr TILLEY — so he was not a specialist in highway patrol. He was in a divisional van?

Ms YASSINE — I do not know.

Mr TILLEY — That is all right.

Ms AYLWARD — I think I have it on email.

Mr TILLEY — We can get that sort of information from Victoria Police. But what I am astonished with is the way customer service of Victoria Police often fails our community and in fact reflects politicians in the Parliament — that those at the front line that are charged with the responsibilities for delivering the services —

Ms YASSINE — Just speaking to him was almost like it would never get me anywhere. I remember with one phone call after I had moved — so September or October, maybe — he had said to me, ‘Sorry. I’ve been meaning to be in touch, but I haven’t’, and so on and so forth’. I just wanted updates of what was happening. ‘What is happening as we go forward? When is she going to be in court? I just want to know’. My whole thing before she got her 80 hours was not so much what was her punishment but what are her circumstances or what are the consequences going to be out of this.

I was saying to him, ‘I know how my son gets on his skateboard. I know how he goes to school. I know where he crosses. I know how he holds it. I know his actions’. I had just seen him literally 5 minutes beforehand. Then when I would say things to him, he would say to me, ‘Well, Olivia, look they’re just assumptions’. I said, ‘Okay, but I’m telling you my son’s routine. I know my son’s routine and what he does’. And then he said to me, ‘The way that it’s looking or what we can’t rule out is that he didn’t just fly out in front of her’. I said, ‘Hold up! The dent on her car is him already crossing the road. How did he fly out in front of her?’ It was in a manner where, ‘I’d better not keep going in this conversation’, because I felt almost stupid. And then I said to him, ‘That’s you making an assumption based on not even knowing my son and forgetting that where she hit him he is already halfway across the road, so she didn’t see him. And my son crosses the road on foot, then he gets back on his skateboard near where it changes colour, on
the side of the road, basically. He’s never in the middle of the road’. And he said, ‘Well, we just need to see what the outcome is’.

Then on the day when we were at court, he and — there was another sergeant; he is in now. I know his last name is . They were both there on the day. They kept talking to me about, ‘You need to remember whatever the outcome is, we have no say in it. We have no say in it’. And I said, ‘Look, that’s fair enough, but you guys also have a say in what the report is, so whatever you guys have given, that is what the magistrate reads’. And then when she was told about all this 80 hours and, ‘Here’s your licence back’ — basically, ‘Here’s a gold platter for you and —

Mr TILLEY — I have got to just cut you off. You have mentioned that on the hearing date, the trial date, the magistrate gave her licence back?

Ms YASSINE — I heard him say — yes — that her licence had been given back. ‘VicRoads have sorted everything and your licence is back’.

Mr TILLEY — So at the time when she ran over your son was she disqualified, cancelled?

Ms YASSINE — I think it was suspended.

Mr TILLEY — Suspended at the time, so there were no charges of driving while suspended on this day?

Ms YASSINE — No, I heard nothing about fines. I heard nothing about —

Mr TILLEY — We will get this from the police.

Ms AYLWARD —

Dr CARLING-JENKINS — She had been picked up two weeks before also driving —

Ms YASSINE — Two weeks beforehand, but that was in her 80 hours. So she was caught driving unlicensed as well.

Mr VELLA — The first time she got caught two weeks prior to this. I thought there would have been an impound on her vehicle of some sort. I thought maybe — I don’t know.

Ms YASSINE — But even on the day when I left the room in shock — I was crying. I do not even know how I did not pass out, thinking, ‘How did that just happen?’. And I remember detective or sergeant Murley saying to me, ‘You can appeal this’. I thought, ‘Oh my God, okay. I can appeal this. I can appeal this’. He said, ‘You just need to get your head around it. You can appeal this’. Then when I got home and got my head around what just happened — ‘They need to appeal it, not me’.

So even standing there in shock, ready to pass out because they have given her a golden platter, and you are still lying to me. Why are you lying to me? It’s like, ‘I know this isn’t what you wanted. It’s not the outcome we told you. We can only do what we can’. But yet, you are standing right in front of me telling me I can appeal this. Why?

Mr TILLEY — So, Janelle, just after the immediate incident, you were one of the first on the scene?

Ms NICHOLAS — Yes.

Mr TILLEY — Did the police ever sit down with you and record a statement?

Ms NICHOLAS — No.

Mr TILLEY — To this day they have never recorded a statement of your observations?
Ms NICHOLAS — No. They spoke to me that morning because I was with Jalal. I was right there when they arrived, and of course when they arrived and the ambulances arrived we all stepped back. You know, ‘Out of the way; we’ll step back now’, and they went down the street and did a little bit of a doorknock, and I said, ‘Yes, I was the first on the scene, I spoke to the offender and I said this is what she said’. He was in plain clothes, this gentleman, so I am assuming he was from the detective branch — or somebody — and he said, ‘Very interesting. Right. We’ll be in contact in the next couple of days, and we’ll take a statement’. I said, ‘That’s fine, no problem. I’m available’. And I never heard another word from them. So to this day they have never recorded my observations on what she said or anything.

Mr TILLEY — Thanks for that. In the absence, Olivia — I have not seen the brief or any of those documents going back to before we have come to this place where the Parliament is looking at introducing a new law. Have you been the recipient of an inquest brief?

Ms YASSINE — I have received nothing.

Mr TILLEY — A copy of a brief of evidence?

Ms YASSINE — I have received nothing, only whatever I have tried —

Mr TILLEY — Sketch maps?

Ms YASSINE — No.

Ms AYLWARD — Nothing.

Mr TILLEY — Nothing, okay.

Ms YASSINE — Nothing. I have requested for the freedom — and that is only because of Maria. She has helped. If I had not had people that know — because I do not know what to do. You are not meant to know this stuff. I never imagined myself sitting in a room in Parliament talking about a law that I want for my son as acknowledgement of his death. But she mentioned the freedom of information, and then they sent me something back saying something about, ‘What you’re requesting is a bit too much’. And what I requested was normal stuff, like, can I get any sort of scientific evidence, what was measured, what was done, statements, things that were spoken about — just normal things of what happened on the day? And they said I was requesting special stuff so it is going to take a bit longer. Then they said to me, ‘You need to go and apply for a coroner’s inquest brief’, and I am still waiting on that. And we applied for that two or three months ago now?

Ms AYLWARD — Yes, about three months ago — more actually; it is about four months ago. The only reason that I know about these types of things is because I have had a positive dealing with Victoria Police — thank God! — in our specific incident, but I just find it — the first thing I said when I met Olivia was, ‘Do you have a brief of evidence? Do you have any information about the case?’, and there was nothing. And when I specifically went and said, ‘Look, I’m trying to help Olivia. What can you pass on?’ And I know that police are obliged to give information in certain cases.

Mr TILLEY — In certain cases, yes.

Ms AYLWARD — Well, certain information. Information is power, and it is certainly power to victims as well, and the non-communication at all — as you will speak to VicPol. I was prepared to put in a report to police — to IBAC. I am actually on a committee with the CAA as well, and that was their recommendation, to forward it to IBAC as well. So the lack of sympathy — and I know that they go to certain schools where they hear from victims and are taught how to deal with victims, and in every part of this incident there has been not one shred of decent action towards Olivia and her family. And she has been so strong and so amazing. And her kids are beautiful — beautiful kids.
Mr TILLEY — Can I ask, I need a favour from you all. If you intend to stay for the rest of the public hearings today, I have just got to plead with you, when we do get Victoria Police giving their evidence, you have just got to keep it in check for us.

Ms YASSINE — Yes.

Mr TILLEY — I know there is a hell of a lot of emotion.

Ms YASSINE — I have kept it in check for a really long time, I really have. So I can do that. I really have.

Mr TILLEY — No doubt this committee will make a number of recommendations in pursuing a number of avenues for Jalal. All right?

Ms YASSINE — Thank you.

The CHAIR — I will sum up in a second. I just want to say too, as a parent of a 13-year-old and a 15-year-old, how challenging this has obviously been for you, and I hate to ever imagine that sort of thing. It is any parent’s nightmare, so it is a dreadful experience you have had, impacted, as we can hear, by concerns that we are hearing about the way the follow-up went with police and the courts. Clearly within this inquiry we are looking at the legislation, but it does not mean, as Bill says, that we will not make some other recommendations based on what we have heard you share today.

One of the other things that clearly is going through our mind is whether the existing legislation still might have brought about a different outcome if procedures had been followed differently, because clearly there is the dangerous driving legislation that could have been brought forward. Even people who are driving unlicensed can be jailed for up to three months. So it is a matter of whether under the existing legislation that simply procedures were not followed through appropriately or whether there is a need to change the legislation, and that is obviously something that we will need to make some comments on, but thank you so much for your contribution today. It is obviously a huge challenge for you to go through the experience you have had and then have follow-up negative experience, and we hope in some way, while we cannot change what has happened to you, we can address some of those issues for other people.

Ms YASSINE — That is the whole purpose, yes, definitely. Thank you.

Dr CARLING-JENKINS — Thank you very much.

The CHAIR — All right, if you have got nothing more to say at the moment, we might have a break, and as Bill says, you are welcome to stay for the afternoon hearings. You aware we are hearing from a lawyer and the police at the end of our hearings today, so you are welcome to stay on, or you are welcome not to stay on if you think it is going to be too challenging. It is up to you.

Ms AYLWARD — Thank you.

Witnesses withdrew.
TRANSCRIPT

LAW REFORM, ROAD AND COMMUNITY SAFETY COMMITTEE

Inquiry into the Crimes Amendment (Unlicensed Drivers) Bill 2018

Melbourne — 3 August 2018

Members
Mr Geoff Howard — Chair
Mr Bill Tilley — Deputy Chair
Dr Rachel Carling-Jenkins
Mr Martin Dixon

Mr Mark Gepp
Ms Natalie Suleyman
Mr Murray Thompson

Witness
Dr Gideon Boas, Professor, La Trobe Law School and Barrister-at-Law.
The CHAIR — We will reconvene today’s session of the Law Reform, Road and Community Safety Committee and welcome Dr Gideon Boas, who is from the La Trobe Law School, among other things. We might get straight into it. Gideon, you are aware that we have a bill before us that we are looking at that has been presented by Rachel Carling-Jenkins to the upper house of the Parliament. We welcome your general comments about the legislation — I presume you have had a chance to look over what is proposed — and then we will follow up with some questions perhaps after that.

Dr BOAS — Sure. Given the time frame, I will be brief and perhaps answer any questions that you might have. I am not sure whether what I say will be particularly surprising — I am sure it will not. I have some concerns that I would like to express about the framing and wording of the provision and perhaps the purpose of the provision, I suppose. I do not think there is so much a problem with the wording itself; it is more what happens if it enters into force as law.

The main point is this: the concept of causation is one that gives me cause for concern. I have seen from reading Hansard that there have been some concerns about that expressed also. I obviously, like everybody else who has dealt with this, feel dreadful about the circumstances in which this bill has come to pass. Nothing I say should be taken as being anything other than having great sympathy for the family involved and those who are touched by these issues, which unfortunately are too many. But there is an issue from a criminal law perspective that I am concerned about, and that is that where you have a law that talks about a person being responsible for the serious injury or death of another person and you talk about them as causing that death or serious injury, then you have to somehow define and deal with the concept of causation. In the criminal law, as you probably will have heard from others and probably know yourselves, the idea of causation is traditionally one that is defined by certain states of mind or behaviours that intersect with states of mind. Where that occurs, the criminal law accepts the responsibility of the person because they take an inherent risk in certain behaviour that they undertake which eventuates in harm to others, and that is criminalised. That is well understood.

The way that this provision is currently drafted — I will just go to it — 319AAB says:

(1) Subject to subsection (2), a person who—

(a) drives a motor vehicle knowing that, or being reckless as to whether, they are an unlicensed driver; and

(b) causes serious injury to another person by driving the motor vehicle—

is guilty of an offence …

And that is repeated, of course, in respect of the death provision. It seems to me that you do one of two things with the concept of causation there. You either attribute the meaning of causation — the meaning given in traditional criminal law discourse — and it usually comes out of murder and serious injury cases, because that is just the nature of where this comes from, and sometimes culpable and dangerous driving causing death. You attribute the conduct of the person to their behaviour in a meaningful sense — they intended to do something; they were reckless as what they were doing — or you do not, in which case you attribute strict liability to that person. That might be, for example, pollution offences or some parking offences and these sorts of things.

The strict liability provisions tend to be attributable to less serious criminality. Certainly I am not aware of offences where there is a period of imprisonment of five or 10 years as a maximum penalty where strict liability is applied, and if it is, it would be rare. It seems to me that you will have difficulty if you leave the legislation in its current form with that wording, because the courts will be uncertain about what it is that they are supposed to be doing with this concept of causation. I saw reference to a UK case — I was not aware of it myself — where the legislation invited a sort of strict approach to liability in terms of the fact that a person was driving unlicensed and the causing of injury to another person or death, I think, in that case. The court took the view that it would not impose a strict liability upon the individual. Courts will do this. Generally speaking, that is what judges will do when confronted with this sort of problem, because as lawyers, as criminal lawyers, we understand the concept of causation in a specific way.
It has been said, and I will say it, that there are specific offences for culpable driving and for negligent driving. The concepts of intentional, reckless and negligent behaviour of a person when they are in a vehicle is already dealt with — very harshly in my view; not wrongly, but harshly. The penalties have increased dramatically in the past few years. There has been not just Parliament increasing the maximum penalty attributable to cases like this but also guideline judgements from the Court of Appeal where they have indicated an increase in sentence for this sort of behaviour. In negligent driving, although it was not a guideline judgement, there has also been Court of Appeal commentary about the application of sentences — so dangerous driving; careless, culpable driving causing death, and instructing the lower courts to use the sentencing regime and give higher sentences for that conduct.

All of that is represented, in my view, in the expression of Parliament and in the expression of the courts in their sentencing ranges. This is a very different concept. It is interesting because when I first looked at this I actually thought it was designed to fill a strange lacuna that exists in some cases. I have been involved in cases that have both of these problems, if it is a problem. One is where you have got a jury and the fact that a person was unlicensed when they drove causing an accident is excluded from the jury. It is considered to be prejudicial in a way that makes it unfair to the accused, and it is excluded. I have had a case where that was done.

There are cases, of course, then when the proposition that a person is unlicensed in the context of causing an accident and injury to other people is to be used as a sentencing factor. I think you heard from Arie Freiberg this morning. He would have talked about that. This is something that you can use as an aggravating feature in sentencing, and judges do do that. And I have seen that done.

But it seems that when you are creating a specific law that makes a person responsible for the serious injury or death of a person, just by virtue of the fact that they are unlicensed and they are in a vehicle, no matter what the intersection between conduct and injury is, it differs from traditional criminal law approaches. I am not saying that Parliament cannot do what it wants. If it thinks the community expectation lies there, it lies there, but from a criminal law perspective it is an odd thing to do. We do not see it done. I will say no more in general terms.

The CHAIR — And having said that, that does not occur with people who have consumed alcohol?

Dr BOAS — What does not occur?

The CHAIR — That does not then become a feature that would add to the weight of the causation, if you like.

Dr BOAS — It can, definitely, and this is the thing. The courts have available to them the ability to take a person’s behaviour and the context of their behaviour into account in determining guilt or innocence, and indeed sentence if they are found to be guilty. If you have consumed alcohol and you have driven and an accident has occurred, it is more likely that the courts or a jury, depending on the circumstances, will interpret that as being a dangerous act, a reckless act. So therefore you have caused by virtue of that conduct the accident. It is a factor that can be taken into account, and as I said, in the case I referred to, having excluded the fact that a person was unlicensed when they were driving removed from the jury the opportunity to consider that as a causative factor.

But we are talking about cases where there is evidence that there is a cause in a material sense between the conduct of the person and the accident that occurs causing the injury, not just the fact that a person is unlicensed regardless of their behaviour. I have had a client who was unlicensed when they had an accident and two people died, who had driven for about 400 hours but had never been licensed, which raises an interesting problem. They had never been licensed so would fall into the context of this provision. He pleaded guilty and was sentenced accordingly and appropriately, and the fact that he was unlicensed was taken into account by the judge, so that was appropriate. Here we are talking about another level of remoteness, if you like. Again, as I said, I am not expressing a particular view about that; it is just an unusual feature. It is an unusual offence for the criminal law to entertain.
Dr CARLING-JENKINS — Just very briefly, I want to clarify: I think you were saying in your opening statement around the judiciary that they are taking dangerous driving more seriously now and that has been an upward trend over the last few years?

Dr BOAS — In my experience, and I have not studied it academically, yes it has. As I said, the Court of Appeal has issued a guideline judgement with respect to negligent driving causing, I think it was serious injury or death — I cannot remember which — where they said, ‘You need to sentence more harshly’, over to where they said, ‘You need to do that with dangerous and culpable driving causing death as well’. You can probably see it from the sentencing council guidelines that the periods of imprisonment have in my anecdotal experience increased, and quite significantly so, over the last few years.

Dr CARLING-JENKINS — Thank you. Also, just to clarify then, you do not think there is a gap in the law? You think that the event that precipitated this piece of legislation should have been able to be dealt with under existing law. Would that be your interpretation?

Dr BOAS — Yes. It is a difficult question, because I understand what —

Dr CARLING-JENKINS — Maybe take the precipitating event out then, and just talk to that you do not think there is a gap, because the police were telling us that they thought there was, and that is why they were unable to get a conviction.

Dr BOAS — It is in the nature of the police to want to be able to criminalise and deal with behaviour that ends up in mishap, and that is understandable. That is their role, and good on them.

Dr CARLING-JENKINS — Sure. But your opinion is?

Dr BOAS — It is a philosophical opinion, really, or view. I think we have to think about what we want to criminalise and where we draw the line between accident, mishap, misadventure and behaviour which should be penalised, and how it should be penalised. I saw in Hansard debates that I think the government representative was saying — and I apologise if they are here; I just cannot remember who it was — that the government has passed a bill to increase the penalty for unlicensed driving to a six-month period of imprisonment as a maximum penalty. For somebody whose child has been killed in an accident where the driver was not at fault but was unlicensed, six months in jail is hardly going to satisfy them. I doubt anything would satisfy them.

Dr CARLING-JENKINS — Understandably.

Dr BOAS — Yes, understandably. But in terms of what you as lawmakers want to achieve in terms of where you draw those lines — or the courts in how they interpret what you do in creating the law — I think we need to think carefully about that. This is an offence which I understand the purpose of entirely, but it does concern me, yes.

The CHAIR — Just to follow up, the case that has brought this about, if it had come to the courts with a charge of dangerous driving, may well have been dealt with differently, but in this case the fact that it did not come to the courts in that form meant that it was dealt with separately as an unlicensed driving case.

Dr BOAS — Yes, it is a great point. I think you were alluding to this before; the police can interpret the fact of a person being unlicensed and being in an accident as being a dangerous act, and the courts can determine that. The courts can rule on that, but the police can look at that and say, ‘Look, in all the circumstances this looks like dangerous behaviour to me or reckless behaviour to me which occasioned death’, and charge it. I have no idea what happened in this case — they may have sought advice from the OPP; I just do not know — but it is conceivable, yes, that a person in this situation could have been charged and convicted, potentially, depending on how the courts determined their acts, for dangerous driving causing death, and then of course a whole different regime would apply to them.

The CHAIR — Any other questions?
Dr CARLING-JENKINS — No. It was kind of summarising what we had earlier this morning, to be honest.

The CHAIR — Yes, that is right — after we have heard from Arie Freiberg too. You have added onto comments he has made too, in which case we do not need to go through the specifics of the legislation that is being proposed. It is more the issue that you are sharing that you believe that the existing legislation should be satisfactory and does not have any gaps, as you have identified.

Dr BOAS — That would be my conclusion, yes.

The CHAIR — Okay.

Ms SULEYMAN — And I think the important point, just to add, is that the police do have the ability in that circumstance to review whether or not a person was reckless and dangerous and come to that point, and therefore that is a different path altogether, so a lot of responsibility falls on the police at the time of an incident.

Dr BOAS — I agree with that, and the answer is yes, subject of course to a reasonable interpretation of what the higher courts have said about concepts of causation, about concepts of dangerousness and recklessness. The police — as I said, I have no idea — you might ask them, ‘Did you get advice from the OPP about how the courts will view this?’ They might have formed for themselves a very clear picture that this was just a horrible accident where the person who is unlicensed but was driving had done nothing wrong and in all the surrounding circumstances they could not see a basis for attributing fault to them — apart from the fact that they were unlicensed. Only they can answer that. But I agree that, and I think I said it, it is open to the police to charge for dangerous driving or something like that in those circumstances, again of course depending on the facts.

Mr TILLEY — I suppose in general terms, and you probably would not be able to answer this, in your experience at the bar in dealing with these more serious culpable and dangerous driving matters and of the quality of the evidence that has been put up by the police, have you personally experienced the quality, not so much of the witnesses — it is for the police to go and get them — but of the hand-up brief and the quality of the evidence they are providing? For example, if you have got a number of charges as a result of a fatality on a Victorian road that have been put up by the police investigative body, as being the major collision unit, in stark contrast to, say, a member of the police force as the informant with lesser experience, have you ever experienced personally the quality of the evidence that has gone up?

Dr BOAS — Definitely. There are more and less experienced officers and highway patrol officers out there. The experienced ones know what to look for, they know what evidence to collect, they know who to talk to, and that makes a big difference. The evidence collected at the time of the accident is critical, obviously. The more experienced the officer — you know. But you get these guys — I had one informant I cross-examined at a committal who had been on the road for 36 hours, with two fatalities. You wonder about his capacity to do what he needs to do. I thought he did a good job in that case — in fact that case fell over because the crash reconstructionist, the engineer, was pretty poor and did a poor job.

That is another problem — the police can do a good job and then the expert who assesses the mechanical capacity of the car and its functioning and so forth, usually that is all right; it is usually more the reconstruction based upon the physical evidence that is available of what might or might not have occurred. Not when you have got five witnesses who say, ‘I saw this and it was clear’; it is where there were not any witnesses or the only witnesses were in the cars that it becomes difficult. So the short answer to the question is yes, definitely.

Mr TILLEY — So a failure to see is a failure to find on behalf of the investigator?

Dr BOAS — Absolutely, and I am not being critical of the police.

Mr TILLEY — No, of course you are not.
Dr BOAS — It is a dirty, difficult job, and mostly they do it really well and they bring the appropriate evidence to court, but it is true that it does vary.

The CHAIR — All right, look, I do not think we need to hold you any longer, Gideon. Thank you very much for your contribution. It clarifies a number of issues for us. We are expecting to hear from the police any moment now. At half past one we are due to be hearing from the police, so we will certainly have some issues that we will —

Dr BOAS — I will get out quickly, then, shall I?

The CHAIR — No, you are welcome to stay!

Dr BOAS — Thanks very much for your time.

The CHAIR — Thank you for your time.

Witness withdrew.
TRANSCRIPT

LAW REFORM, ROAD AND COMMUNITY SAFETY COMMITTEE

Inquiry into the Crimes Amendment (Unlicensed Drivers) Bill 2018

Melbourne — 3 August 2018

Members
Mr Geoff Howard — Chair
Mr Bill Tilley — Deputy Chair
Dr Rachel Carling-Jenkins
Mr Martin Dixon

Mr Mark Gepp
Ms Natalie Suleyman
Mr Murray Thompson

Witnesses
Acting Assistant Commissioner Michael Grainger, road policing, and
Acting Inspector Tony Long, Victoria Police.
The CHAIR — We have Acting Assistant Commissioner Michael Grainger and Inspector Tony Long with us this afternoon to comment on the proposed legislation that this committee is inquiring into, the Crimes Amendment (Unlicensed Drivers) Bill. In opening, while we will seek some general comment from you in regard to the legislation, we will probably want to follow up. We do have here listening this afternoon the mother of a child who was killed, and in lots of ways brought about this legislation coming forward. There are issues that have been raised before the inquiry today that we might raise with you for further comment. In particular, you have had a chance to look at the legislation before us. I guess we are looking at whether you see any gaps in the existing legislation, whether this proposal helps to address that, and any other comments in that matter. Are you leading off, Michael?

Acting Asst Comm. GRAINGER — I guess I will.

Mr TILLEY — For the record, I just want to correct that Tony is the rank of superintendent. You might be acting; I do not know.

Acting Insp. LONG — Yes, only acting, sir. Thank you.

The CHAIR — All right. I am just going on the notes that are before me. Sorry, Tony.

Acting Insp. LONG — No, no, that is fine.

Acting Asst Comm. GRAINGER — Thank you for inviting us along and providing us an opportunity to share our thoughts. If it is okay, I would not mind just setting a little bit of context as to why we are here. You all know — it will come as no surprise to everyone in the room — that every 2 hours in Victoria we have someone die or seriously injured on our roads as the result of a collision, most of which I think are highly preventable. You will know the government’s plan, in terms of the Towards Zero strategy, that seeks over the next five years to drive deaths on our roads down — under 200 per annum. We have lost 120 lives on our roads this year, which is just a tragedy that continues to play out on a daily basis. I do extend my sincere condolences to the family members present that bring us here before you. We also know that about 5000 people are seriously injured every year, and that is a toll, if you like, that we do not talk about very often. So we were really pleased to see some sort of a commitment to addressing what we see as a gap, with the unlicensed driving legislation.

As you will know, the road safety partners and government are committed to developing a safe system for our community, and that involves committing to developing safe speeds on our roads, safe road users importantly, and that is important for this inquiry — safe roads and safe vehicles. In preparing for today’s discussion, I actually looked at the Road Safety Act. Part 3, section 17(c) talks to the reason we license people on our roads, and it is very much about ensuring that people who are or who become unfit to drive or are not permitted to be on our roads are not on our roads. As his parting gift to me, when Doug Fryer left Victoria Police, he very clearly identified in some public commentary that he saw a gap, and I absolutely support his public assertions in that regard.

It is interesting to note, in the horrible circumstances that led to young Jalal’s passing, that the driver involved was driving on an expired probationary drivers licence — this may be a fact that is known to you, but it was certainly new to me — and in fact had been driving on that licence for about nine months prior to the collision date. That person’s licence had expired on 29 June 2016, some nine months prior to the terrible collision. In this specific case our investigators determined that there was no overt fault that could be attributed to the driver that was driving on the roads. There was no intentional or reckless act that that person committed prior to striking young Jalal, and I think that is a key point. From my perspective I assert that making a deliberate decision to actually drive on our roads was in fact an overt act; it was an intentional act. There is no evidence to suggest that it was anything other than that. I think in terms of that, both Doug Fryer and myself and everyone in our command and our organisation do see a gap in the current law.

I have read the draft bill, and the key issues for Victoria Police are that we absolutely should hold drivers on our roads to account when they are not authorised to be there. So it is not just about unlicensed driving, from my perspective; it is about a range of other unauthorised uses of our roads. That might extend to someone driving on an expired licence. That might extend to someone who is suspended, disqualified, unlicensed or cancelled. So there is a range of complicating factors in the review and the implementation of any associated legislation.
I assert that the wording of any bill is not a matter for Victoria Police. We are not legislators. What we are really good at is actually upholding the right, delivering on our mission statement and enforcing the law. I do understand that the practical application of any associated law that results from these inquiries we will absolutely commit to enforcing, because that is what we do and we do it really well. I do understand and applaud the fact that the bill is trying to achieve community expectations in this regard, and the overwhelming feedback from our people is, and I reassert, that there is a gap here.

In terms of strict liability offences, I understand that that is complicated for the legislators. I understand there is a range of unintended consequences that people wiser than I will work their way through as we draft legislation. I have had advice from some of my people that the proposed legislation may sit better in a Road Safety Act than in the Crimes Act, but again I am not a legislator. I support the intention of the draft bill.

We see unauthorised road use as a huge risk to our community, and just to put that in context, I have managed to source some very basic data that reveals that about 6.6 per cent of trauma collisions over the last five years involved unauthorised road users — not just unlicensed but unauthorised road users. So that was more than 1000 drivers involved in over 16 000 collisions in a five-year period. At least 9 per cent of fatal collisions in the same period involved unauthorised road users. I guess that provides you with some sort of context.

On average we know through our automated numberplate recognition program — which focuses on unauthorised road users, unlicensed, unregistered vehicles, uninsured, stolen vehicles — that the ANPR technology annually detects about 15 000 unauthorised road users. We are detecting that with a limited number of ANPR units out there at the moment, so we have 10 vans and six vehicles equipped with that technology. In the next two and a half years we will be expanding our technology for the use of ANPR to 220 highway patrol vehicles, so I expect there will be an exponential growth in the number of detections that we have of unauthorised road users.

That is pretty well it from my perspective. I absolutely support the intention. I am not really in a position to talk to the ins and outs of the legislation as proposed, and I do not think that would be appropriate, but our absolute commitment is to remove those unauthorised road users from the roads. We feel there is evidence to suggest that people on the roads that behave and drive like that — whether they are behaving badly or not, whether they are at fault in a collision or not — their mere presence on the road, we assert, is a problem for the state and community safety.

The CHAIR — Thanks, Michael. Can I ask: when somebody is identified, pulled over and found to not be a licensed driver, what is the process that then would happen?

Acting Asst Comm. GRAINGER — So generally we would interview that person at the roadside. There is no ability to restrict them from doing too much. We can seize their car. Depending on the circumstances, if they are breaking the law, we may well seize a vehicle, but in most circumstances an unlicensed driver would be proceeded with by way of a summons to appear before a Magistrates Court or via a penalty notice. That is where our data gets a little bit clunky. So I can pull out in time the number of police-issued infringements, but to then marry that up with additional prosecutions through the Magistrates Court is really clunky, so I could not bring you that information today.

The CHAIR — And just following up, we know that this legislation has been brought about by the incident that saw the death of Jalal Yassine. The driver in that case, you said, had an expired probationary licence, so she had not been disqualified from driving —

Acting Asst Comm. GRAINGER — No, she just had not extended —

The CHAIR — And so the step for her would have been then, once her licence was about to expire, to apply for the full licence?

Acting Asst Comm. GRAINGER — She would just simply pay, and her licence would be confirmed as a Victorian drivers licence.

The CHAIR — And we have been advised that the driver in this case had been identified as driving without a licence before. Do you know whether there was a summons issued in that case?
Acting Asst Comm. GRAINGER — Tony might be able to talk you through that. I know there was a significant driving history. Tony?

The CHAIR — It would sort of help us in this particular case to understand the gaps in the legislation or how the process works.

Acting Asst Comm. GRAINGER — Sure.

Acting Insp. LONG — According to some documentation, there are a number of traffic offences prior to the date of the crash going back as far as 2013. The lady had been convicted on a few occasions of driving whilst her authorisation was suspended for various reasons, and she has probably got two or three or four different occasions where that has occurred.

The CHAIR — So there have been some court procedures that have proceeded?

Acting Insp. LONG — Yes, there are at least three court hearings with traffic offences, and there are also a number of penalty notices that have been issued over a period as well.

Acting Asst Comm. GRAINGER — It is certainly not unheard of in my experience that we may have a driver who is unlicensed who just chooses to continuously drive unlicensed and, despite intervention by police at the roadside, will continue to drive unlicensed. There are provisions, I guess, in the Crimes Act if someone continues to repeat offences to seek their formal remand into custody, but in my experience that would rarely happen in relation to a charge purely of unlicensed driving.

The CHAIR — So then in proceeding forward after there has been a serious incident, how do the police determine whether somebody has been driving dangerously and to take that path in court, or to simply pursue the fact that they may have been unlicensed and not pursue with dangerous driving charges?

Acting Asst Comm. GRAINGER — Sure. I guess any investigation starts at the crime scene, and our people would then work their way back from what they have found at a particular crime scene, so there would be local inquiries. You will generally hear about police calling for information via Crime Stoppers of any observed unusual or abhorrent behaviour that precedes a crime, and we would do that in a range of manners in such an inquiry. So we would be immediately doorknocking, for example, in the immediate vicinity — knocking on residents’ doors, going to businesses looking for CCTV and calling on other witnesses to come forward, to determine if there had been any overt criminal offending or any overt negligent driving, for example.

The CHAIR — Do you think this happens on all occasions? And my follow-on question is: do you review cases periodically, like this one, where they have attracted some public attention, to see whether the police did in fact operate in the best way on that occasion, whether you might have wanted police to do things differently if you had your time over again or whether perhaps there are some processes you did not follow as you would have liked?

Acting Asst Comm. GRAINGER — I guess I would assert in this case that we have very, very good supervision around any fatal or serious injury collision, so there will be a supervisor routinely reviewing the traffic incident report, for example, particularly if there is a fatal collision. We have our major collision investigation unit overview every fatal collision in Victoria, and if there was in fact determined to be some sort of a gap in our investigation process, then that would become known and communicated very early — very early.

In this case we had highway patrol from out Melton way, I believe, attend the collision, and again a supervisor in place on every shift would be overseeing the fact that we had had a serious injury or fatal collision and assuring himself or herself that an appropriate inquiry was being undertaken. So I am really confident that in our investigation processes of such matters appropriate governance and supervision is in place. Do we routinely then review an inquiry like that? As we proceed to the courts, there is a review process there. If we identify a gap in the preparation of a brief of evidence, for example, there is an opportunity again to intervene and direct different inquiries to be made, but I would suggest that our supervision and governance around things are pretty robust in terms of these sorts of collisions.
The CHAIR — Okay. The last question I have before I go to other panel members is: in regard to when there has been a death and police are the lead agencies more or less on the scene after the event, do they have capacity to refer counselling assistance to bereaved parents?

Acting Asst Comm. GRAINGER — Absolutely, and I understand that happens regularly.

The CHAIR — Okay.

Acting Insp. LONG — Our major collision investigation unit actually has embedded counselling staff at the moment. Both work to look after the staff that work there, but they are also able to provide support and assistance to bereaved family members and grieving family members.

The CHAIR — Okay.

Acting Asst Comm. GRAINGER — And across Victoria Police across a range of crime themes, we now have a really advanced commitment to referring and support for victims.

The CHAIR — Good. I would have expected that, but that is not what we heard in this particular case.

Acting Asst Comm. GRAINGER — I cannot argue that — I am not in a position to argue that — but it is our absolute commitment right here, right now that that would occur if the collision occurred today.

The CHAIR — Yes. I was surprised when I heard that was not the case. Rachel or Bill?

Dr CARLING-JENKINS — I would just like to briefly comment and say thank you very much for coming in. I know your time is very precious, and I appreciate you coming to the committee today. I think we share the same philosophical view around deliberately driving without a licence is simply negligent.

Acting Asst Comm. GRAINGER — Yes.

Dr CARLING-JENKINS — I sense a little bit of a frustration from you and also from your members that people will continue to do this. The figures that you quoted are frustrating to hear as well.

Just one very quick question. You talked about unauthorised road users, and this legislation only really deals with unlicensed. You also mentioned expired. What other, I guess, gaps do you find that are frustrating in this way? So who else is unauthorised to use the road that you are picking up in this 6.6 per cent of users?

Acting Asst Comm. GRAINGER — It is mainly the suspended drivers, so we can talk about those.

Dr CARLING-JENKINS — Okay.

Acting Asst Comm. GRAINGER — They have had a licence, but they have been suspended for whatever reason. We have also got the expired, which I referenced — so they have simply let their licence expire and have not renewed it but continue to drive.

Dr CARLING-JENKINS — And they know.

Acting Asst Comm. GRAINGER — And they know, so they are making a deliberate decision around that in most cases.

Dr CARLING-JENKINS — Sure.

Acting Asst Comm. GRAINGER — There would be some argument, I guess, and we see it from time to time — the same happens with unregistered vehicles, for example — that the communication with that person, for whatever reason, has not alerted them to the fact that they have just expired, so we hear some evidence of that from time to time. Again I would argue and I would assert that if you are a licensed road user in Victoria, you have got the responsibility to keep an eye on when your licence expires and when your registration expires. That may be a hard or simplified view, but that is the view of Victoria Police — not my personal view, but the view of Victoria Police. Unlicensed.
And of course there are those that surrender their licence for whatever reason. For example, a 90-year-old driver for whatever reason decides to surrender their licence because they feel that they are incapable of exercising effective control, then for whatever reason they choose to drive. That would be an example of that. Those are the broad categories that I refer to when I talk to unauthorised road users.

Unregistered is also an unauthorised road user. Again I see some complications in all of this, but what we do is not easy, is it?

**Dr CARLING-JENKINS** — No, not at all. Thank you.

**Mr TILLEY** — Firstly, I suppose, be careful what you wish for, but congratulations on being the new AC, road safety. No doubt you have been one of the Queen’s men for a long time, with a lot of experience, and you have made a lot of contribution to upholding the right in Victoria.

**Acting Asst Comm. GRAINGER** — Thank you.

**Mr TILLEY** — Thank you for that ongoing thing. I just want to continue a robust conversation. Going back to the evidence of the priors that you were mentioning earlier and some of the loopholes from the gaps that we have got, and we were talking about the possibility of impounding motor vehicles on the road, correct me if I am wrong, but were they alleging in this case findings of guilt or were they just penalty notices from the past? Those convictions, were they as a result of findings of the Magistrates Court or were they just —

**Acting Insp. LONG** — There were traffic offences that were determined at the Magistrates Court.

**Mr TILLEY** — Okay. So then it was findings of guilt.

**Acting Insp. LONG** — So there were three appearances before a Magistrates Court, and then there were, I think, about 12 or 14 penalty notices that were separate again.

**Mr TILLEY** — Yes. Right. Okay. So there is a significant history there that the court would have heard in any case?

**Acting Insp. LONG** — Yes. Correct.

**Mr TILLEY** — And that evidence would have been passed on conviction. So that people understand in the community — the police do not allege that until after there is a conviction.

**Acting Insp. LONG** — That is correct, yes.

**Mr TILLEY** — On that, are there any existing gaps? For example, police experience — and I declare, yes, I was in the job for quite a while, and a lot of those experiences in trying to make the legislation better every which way we can. We are continually changing legislation in the state of Victoria, and there is a gap in the Road Safety Act for impoundment in particular. You might intercept a driver on a highway, try to process it. There are no convictions in Victoria. You might have 10 convictions for what is PCA in New South Wales or Western Australia and everywhere else, but you cannot do anything with the impounding in that instance unless those convictions are findings of guilt in Victoria. Some of those amendments, filling those gaps are things that these parliaments need to change.

**Acting Asst Comm. GRAINGER** — Absolutely.

**The CHAIR** — And following on from that, clearly we have heard that under this government the penalty for driving unlicensed has been increased — up to a six-month potential jail term now. Although the government may put the law in place, when it gets before the court the magistrate — or whoever is dealing with the case — of course may not choose to go to the maximum penalty, and in fact in cases such as this they have not gone for jail terms at all, and perhaps it is rare that a jail term is put in place. I guess my point is that even though the government may bring in legislation it of course goes before the courts, who are independent and are guided perhaps by the legislation, but the outcome may be quite different from what the public may expect.

**Acting Asst Comm. GRAINGER** — I guess the public would expect a judge appropriately briefed to make decisions based on a case-by-case basis, so they would need to consider circumstances; however, I assert on
behalf of our organisation that people that make those deliberate choices to be on the road and, as a result of that decision, a terrible tragedy occurs, then the community would expect that they be held to account.

In this case I understand that there was a penalty. I understand there was a term of imprisonment available to the judge to make a call on, and for a number of circumstances, which I am not privy to, the decision that was reached was reached. I guess I just bring you back to the fact that we assert — Victoria Police asserts — that if they make that choice to be on the road, they should be held to account. We enforce the law; the judges, I guess, make judgements on such matters.

Ms SULEYMAN — Thank you very much for being here and thank you for the great work that Victoria Police do in challenging circumstances. I have got two questions. One is: I heard from a previous speaker, and it is the intent of the police officer after a fatality, which we have been discussing, where there is the availability for the police to charge someone for dangerous or reckless driving because it is actually an unauthorised road user. And you have spoken about that, so it really does come down to — and I am seeking your response to this — the police officer who appears at that incident on that day. So in the case that we are talking about, if the police officer had taken another approach and put forward the dangerous and reckless driving of an unauthorised driver, then it could have been an absolutely different path.

Acting Asst Comm. GRAINGER — I guess if the evidence was there to suggest culpability, then absolutely the investigation would have progressed down that path and criminal charges would have been considered. So I would assert that in any fatal collision and serious injury collision we would be considering criminal offences, but then we need to be satisfied beyond reasonable doubt that there is a chance of a successful prosecution. We need to be satisfied on the evidence that the culpability has been demonstrated. Now, if there were to be legislation that included reference to being an unauthorised road user as an element of culpability, then absolutely that criminal charge could be pursued. But on the circumstances, as I understand things, there was no overt evidence to suggest a deliberate or a negligent or culpable act — certainly a deliberate act to be on the road unlicensed, but not in terms of the driving that preceded the collision, on my advice.

Acting Insp. LONG — If someone has indicated to you that simply by driving unlicensed that would satisfy the elements of recklessness or dangerousness, I would say that is incorrect. The position of Victoria Police would be that is incorrect, that unlicensed driving does not cover recklessness or dangerousness on its own. It has to be some form of driving that does that, some actual driving input to cover that point.

Ms SULEYMAN — And just with your evidence: onsite in normal practice is it verbal evidence or written evidence by witnesses?

Acting Asst Comm. GRAINGER — It can be both.

Ms SULEYMAN — It could be both?

Acting Asst Comm. GRAINGER — Yes. In nirvana it will be electronically recorded as well, but that is a way off. But at the roadside we can take evidence in the written form and generally it is as a result of a discussion roadside or back at the police station that is then recorded.

Ms SULEYMAN — Just one more final question if I may. In quite tragic circumstances we have heard that Victoria Police do provide support services to victims and their families — support services and counselling. Is there a process — just for me, because I am not quite clear, maybe you can explain to me the process that happens after an incident. If you could just briefly explain how Victoria Police or the responsible officer would have communication and dialogue with, let us say, the family in this circumstance, in normal procedural practice.

Acting Asst Comm. GRAINGER — Yes. It would be our commitment not to actually directly offer the ongoing support but refer to an agency that could provide that, just to be clear on that. My understanding of how it works, and Tony may have a different view, is that at a fatal collision our priorities are absolutely the families and extended families of those that have passed and the investigation. Those are our priorities. The support for the families generally, as it occurs now, as I understand, would be continuing and ongoing, particularly if there is a prosecution involved. But I know of cases, both in terms of road trauma inquiry and homicide particularly — and I have done both — where that ongoing support has been offered. I hear you saying that it seems not to have been offered in this case, and I am disappointed to hear that. I would suggest that that is an
aberration. Our normal practice would be to refer. We have a very close relationship with road trauma support services. We have publications from that particular team in every highway patrol office, I would think, in Victoria. There is a very, very acute focus on victim support and management through any prosecution. The process would be — absolutely — investigate, support the family and prosecute if a prosecution is appropriate and extend that ongoing support where we can.

Having said that, we refer off. We investigate many, many fatal collisions, as I alluded to today already, but that commitment to our victims is strong today. If it was not in 2016, then I simply offer my sincere apologies around that.

The CHAIR — It certainly surprises us that a single mother of a 13-year-old young boy that was killed would not have been linked in with appropriate counselling.

Acting Asst Comm. GRAINGER — Yes. That would be our general practice.

Mr TILLEY — I just want to continue our conversation. As hard as it is, often we have to take the emotion out of this. Certainly throughout your lengthy careers you have been exposed to death of all kinds throughout the state of Victoria, but you would say that with this particular case, and as my colleague Natalie has been discussing, there are a couple of concerns with that. Probably one of the things I would like to see is to obtain from Victoria Police some sort of an undertaking to reach out to the family of the young deceased in this matter. I know it has been through the court, but it would be helpful if Victoria Police was able to reach out and do something in that space.

Acting Asst Comm. GRAINGER — Absolutely.

Mr TILLEY — Obviously with a death, then there is a whole lot of policy. The Victoria Police Manual gives guidelines for investigating officials to go about their business, dot their i’s and cross their t’s. Can I get some sort of assurance in this particular incident, because this bill from my colleague Dr Carling-Jenkins —

Dr CARLING-JENKINS — Just Rachel.

Mr TILLEY — Rachel. Sorry about that.

Dr CARLING-JENKINS — It is just easier.

Mr TILLEY — This particular bill has arisen from this particular incident. There would have been a report to the coroner on this occasion as well. There would have been a significant brief of evidence. It just would have been mentioned. As I understand it, on this occasion there was only the single charge of unlicensed. The review process, just for some comfort, I suppose — and certainly we will take this part in camera — is that sometimes we do not always get the best result. We try and perform as best we can, but sometimes things do fall through the cracks, and we understand that.

Acting Asst Comm. GRAINGER — Absolutely.

Mr TILLEY — So you are absolutely confident with reviewing this particular matter that it absolutely complies, and Victoria Police is satisfied that Victoria Police was able to do the absolute best it could in these circumstances?

Acting Asst Comm. GRAINGER — I am satisfied based upon the legislative framework that we were working with, based upon the evidence that our people saw, that they did the best they could, but I do concede that if that support has not been offered to the families, as is suggested here, then we clearly need to correct that.

Mr TILLEY — Thank you.

The CHAIR — Anything else, Rachel?

Dr CARLING-JENKINS — No. It has been very, very helpful. Thank you very much for your time.

Acting Asst Comm. GRAINGER — Thank you. Good luck.

The CHAIR — Thank you very much for your time.
Mr TILLEY — Good luck.

The CHAIR — That concludes our hearing for today. The committee will be meeting this Thursday to discuss the hearing today and deliberating further later on. I would like to thank everybody who has presented today. I thank my colleagues. I thank Murray Thompson for his arrival — noted. I thank everybody. Our thoughts clearly go out to Olivia too. We hope that you and your family can move forward. Certainly we appreciated hearing from you today.

Committee adjourned.