



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 17

**Manslaughter or Dangerous Driving
Causing Death**

REPORT

AUGUST 1970

REPORT ON

MANSLAUGHTER OR DANGEROUS DRIVING CAUSING DEATH

To: THE HON. ARTHUR F. GRIFFITH, M.L.C.
MINISTER FOR JUSTICE

1. As Project No. 17 of its first programme the Committee was asked -

“to examine the law relating to the criminal culpability of the person who by reason of his unreasonable conduct in the driving of a motor vehicle, is responsible for the death of another, and to suggest any changes in the law that may be thought desirable.”

MOVEMENT FOR REFORM

2. On 7 November 1969 you wrote to the Chairman of the Committee pointing out that the Hon. the Chief Justice in the course of a criminal appeal hearing queried the Crown's policy of preferring manslaughter charges in prosecutions over fatal road accidents instead of using the alternative charge of negligent driving causing death (s.291A of the *Criminal Code*).

3. The case which drew these comments from the Chief Justice concerned a conviction by a jury for manslaughter by the criminally negligent use of a motor vehicle. It has for a number of years been the settled policy of the Crown to indict every person for manslaughter whose criminally negligent conduct in the use of a vehicle caused the death of another rather than to prosecute under s.291A. The Chief Crown Prosecutor submitted to the Chief Justice that as the degree of negligence required to establish guilt of either offence was the same, the Crown left it to the jury to decide, having regard to the seriousness of the offence, under which of these sections they would convict.

THE LAW IN WESTERN AUSTRALIA

4. Leaving aside killings that amount to wilful murder or murder, a person who unlawfully kills another in the course of driving a vehicle, may, as explained in paragraph 3 above, be convicted of the crime of manslaughter or of the crime under s.291A of the

Criminal Code (see Appendix A to this report). The maximum sentence for manslaughter is imprisonment with hard labour for life, whereas the maximum for a crime under s.291A is imprisonment with hard labour for five years.

5. Section 291A was introduced in 1945. During the debate the Minister in charge of the Bill drew attention to the reluctance of juries to convict a negligent driver of manslaughter, firstly “because of the high degree of negligence that has to be proved” and secondly because the maximum punishment for that offence is life imprisonment. He explained that the Government’s purpose in introducing s.291A was to create an “intermediate offence . . . which would involve a lesser degree of proof and a shorter term or imprisonment” (Hansard, 1945, Vol. 2, 1707).

6. The attempt to produce an “intermediate offence” was unsuccessful, the High Court holding that the degree of negligence necessary to establish an offence under s.291A is the same as that necessary for manslaughter (*Callaghan v The Queen* (1925) C.L.R. 115). That degree has been defined in a statement, now classic, of Lord Hewart C.J. (in *R. v Bateman* [1925] 19 Cr. App. R. 8; [1925] All E.R. 45): “the negligence or incompetence of the accused went beyond a mere matter of compensation and showed such a disregard for the life and safety of others as to amount to a crime against the State and conduct deserving of punishment”.

INCIDENCE OF INDICTMENTS AND CONVICTIONS

7. From an examination of records kept in the Supreme Court it appears that from 1945 when s.291A was enacted until the end of 1969, there were 214 indictments for manslaughter arising out of the use of a motor vehicle. Of these, 118 proceeded to conviction. Only 3 were convictions for manslaughter, the remainder being convictions under the alternative open to the jury, s.291A. A table showing the number charged each year with the verdicts rendered is appended to this paper (Appendix B).

8. In 1970, to the end of May, there were seven charges of manslaughter, of which one was convicted of manslaughter and five under s.291A. There was also one indictment (on committal by the Coroner) under s.291A (*R. v Haseldine*, 1970 unreported): - The jury disagreed and a new trial was ordered; the case was re-heard and the jury returned a verdict of

guilty upon which a penalty of \$400 was imposed together with a five year suspension of licence.

LAW IN OTHER JURISDICTIONS

9. In the United Kingdom, New Zealand, Queensland and South Australia, apart from the crime of manslaughter, specific offences of “dangerous driving causing death” have been created. See -

U.K. The *Road Traffic Act 1960*, s.1;

N.Z. The *Transport Act 1962*, s.55;

S.A. The *Criminal Law Consolidation Act Amendment Act 1939*, s.14;

Q’ld. The *Criminal Code*, s.328A.

10. In New South Wales, apart from manslaughter, if a vehicle is being driven by a drunken person or in a dangerous manner and the death of another is occasioned through impact with the vehicle, the driver is guilty of culpable driving for which the penalty is five years (*Crimes Act 1900*, s.52A).

11. Victoria has, apart from manslaughter, an offence of “reckless or negligent driving causing death” (*Crimes Act 1958*, s.318).

12. Tasmania has no express provision relating to causing death by the use of a motor vehicle, but when indicting for manslaughter the accused may be convicted of the lesser offence of “reckless, negligent or dangerous driving” (*Traffic Act 1925*, s.14).

WORKING PAPER AND COMMENTS THEREON

13. The Committee published a working paper in June 1970. Copies were sent to the Chief Justice and Judges of the Supreme Court, the Chief Judge and Judges of the District Court, the Law Society, the Magistrates, the Justices Association of Western Australia, the Law School, the Commissioner of Police, the Under Secretary for Law, and other Law Reform Commissions and Committees with which this Committee is in correspondence. (A copy of the working paper is attached at Appendix C).

14. In the working paper the dissatisfactions with the present law were summarised (in paragraph 16) as follows -

- “(a) it is understood that some judges feel it is confusing to juries to tell them - as now must be done - that though the elements of the two offences are precisely the same, the maximum penalty for one is significantly more than for the other;
- (b) the policy of the Crown in indicting all alleged offenders for manslaughter has led to judicial suggestions that the Crown may be abdicating its responsibility; that it should be exercising its discretion to differentiate between the worse and the less bad cases and indicting accordingly;
- (c) juries have shown a pronounced reluctance to convict for manslaughter where the unlawful killing is due to the negligent use of a motor vehicle;

though an alternative verdict is available, there are some who feel that the more use of the term ‘manslaughter’ leads juries to acquitting when they might otherwise convict; to quote Lord Goddard, ‘Juries hate the word ‘manslaughter’. They see in front of them fifteen years, or something of that sort. They associate manslaughter with murder trials . . .’ (Hansard H.L. Vol. 191, Col. 86).

15. Considerable interest has been shown in the working paper. The Committee received comments on it from the Chief Justice and four of the puisne judges of the Supreme Court, one of the judges of the District Court, the Chief Crown Prosecutor, the Commissioner of Police and the Law Reform Committee of the Law Society.

16. The overwhelming weight of opinion and comment favoured the Committee’s main thesis, namely, that the principles of the law in this State are now well settled and generally understood and that no drastic change is warranted.

17. From the comments received, however, it would seem that some marginal points of difference still exist. The main point arises from the Crown’s policy of charging manslaughter as a general rule. It has been strongly contended that the Crown should exercise its discretion and only charge with the more serious offence in the appropriate case. On the other hand, it is

argued that since the standard of negligence to be established for both offences is the same, the only difference between the offences being one of penalty, the Crown has no alternative other than to prosecute for the offence carrying the heavier penalty, leaving the matter in the particular case to the court and jury.

18. The tentative reformulation of s.291A put forward by the Committee in paragraph 25 of the working paper was in part an attempt to reconcile this difference of opinion.

19. Disapproval of the Committee's tentative reformulation of s.291A was however expressed in a substantial number of the comments received. In the main the criticism was directed at the express division of the offence into two degrees and the use of the word 'serious' to distinguish between these degrees.

20. There appear to be four ways in which the problem could be dealt with.

21. First - section 291A could be left unaltered (except for minor drafting amendments - see paragraph 31 below).

22. The course suggested in the above paragraph would appear to be the most generally acceptable. It would, the Committee believes, meet with the least disapproval.

23. Second - sub-section (1) of s.291A could be left unaltered, sub-section (2) being altered to prohibit an indictment charging manslaughter when death is caused by the use of a motor vehicle.

24. This course would solve the difference of opinion referred to in paragraph 3 above but it would deprive the jury of the opportunity to bring in a verdict of guilty of a lesser offence, and there is some evidence suggesting that juries may have become accustomed to being given a choice of verdicts in motor manslaughter cases. Moreover it is generally believed that if a lesser verdict is not open to the jury the chances of an acquittal are greater.

25. Third - the Committee's tentative reformulation of section 291A could be redrafted to avoid the use of the word 'serious'. The following draft has been suggested as an alternative to the Committee's reformulation and, in the Committee's view, would be preferable.

Subject to section 595, when a person who unlawfully kills another under circumstances which but for the provisions of this section would constitute manslaughter causes the death by failing to use reasonable care *or* to take reasonable precautions in the use *or* management of a vehicle, he is guilty only of negligent killing by the use of vehicle and shall not be indicted for manslaughter.

Upon an indictment charging a person with the crime of negligent killing by the use of a vehicle he shall, if found guilty, be convicted of negligent killing by the use of a vehicle in the first or second degree as the jury by its verdict having had regard to the culpability of the convicted person as they find it to have been and to all the circumstances of the case, shall decide.

Penalty - Negligent killing by the use of a vehicle in the first degree: 7 years.
 Negligent killing by the use of a vehicle in the second degree: 3 years.

26. The Committee is of the view however that there would still be substantial opposition to a provision which expressly divides the offence of motor manslaughter into degrees.

27. Fourth - section 291A could be repealed and a completely new provision introduced along the lines suggested by the Chief Justice's Law Reform Committee of Victoria. This would involve the introduction of an offence of causing death by culpable driving, which would include driving recklessly, driving negligently, driving under the influence of alcohol or driving under the influence of drugs, the Crown being required to specify in the indictment which particular form of culpability is being charged.

28. While such a course may seem attractive and would be preferred by the Committee to the introduction of the concept of 'dangerous driving' used in some jurisdictions, there would still be some difficulties involved in introducing such provisions into the Code. These have been adverted to in the working paper. Moreover the Committee did not suggest this course as a possibility in its working paper. The Committee for reasons stated in its working paper would not recommend a change along these lines and before any action is taken to introduce any such change the matter should at least be investigated further.

RECOMMENDATIONS

29. The Committee recommends -

- (1) As its first preference - the course suggested in paragraph 21.
- (2) As its second preference - the amendment suggested in paragraph 23.

30. The Committee also recommends that in either event consideration should be given to conferring jurisdiction to deal with the offence of manslaughter to the District Court. Courts of Sessions, even presided over by magistrates, used to have such jurisdiction. The jurisdiction could be given either expressly by amendment to the *District Courts Act*, or in a limited form by reducing the maximum penalty for manslaughter, when the death has been caused by the use of a vehicle, to fourteen years. The Committee recommends that the jurisdiction should be given *not* by reducing the penalty but by the amendment of the *District Courts Act*.

31. In the interests of accuracy, the following minor amendments to the Code seem desirable. The Committee therefore also recommends that -

- (a) subsection (1) of s.291A be amended by substituting the word “or” for the word “and” in line four;
- (b) the marginal note to s.291A be amended to read “causing death by the negligent use or management of a vehicle”; and
- (c) section 277 be amended to read -

“Any person who unlawfully kills another is guilty of a crime which according to the circumstances of the case may be wilful murder, murder, manslaughter, or causing death by the negligent use or management of a vehicle”.

CHAIRMAN

MEMBER

MEMBER

11 August 1970

APPENDIX A

THE CRIMINAL CODE OF WESTERN AUSTRALIA

Duty of persons in charge of dangerous things.
Code, s.266.

Section 266: It is the duty of every person who has in his charge or under his control anything, whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger; and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty

Definition of killing.
Code, s.270.

Section 270: Except as hereinafter set forth, any person who causes the death of another, directly or indirectly, by any means whatever, is deemed to have killed that other person.

Definition of manslaughter.
Code, s.280.

Section 280: A person who unlawfully kills another under such circumstances as not to constitute wilful murder or murder is guilty of manslaughter.

Punishment of manslaughter.
Code, s.287.

Section 287: Any person who commits the crime of manslaughter is liable to imprisonment with hard labour for life.

Reckless or dangerous driving.
Inserted by, No. 40 of 1945, s.2.

Section 291A: (1) Any person who has in his charge or under his control any vehicle and fails to use reasonable care and take reasonable precautions in the use and management of such vehicle whereby death is caused to another person is guilty of a

crime and liable to imprisonment with hard labour for five years.

(2) This section shall not relieve a person of criminal responsibility for the unlawful killing of another person.

Conviction for offence other than that charged Code, s.594.

Repealed and new section inserted by No. 32 of 1918, s.18.

Section 594: Except as hereinafter stated, upon an indictment charging a person with an offence he may be convicted of any offence which is established by the evidence, and which is an element or would be involved in the commission of the offence charged in the indictment.

Charge of murder or manslaughter. Code, s.595. Amended by No. 40 of 1945, s.3.

Section 595: Upon an indictment charging a person with the crime of wilful murder, he may be convicted of the crime of murder or of the crime of manslaughter, if either of those crimes is established by the evidence, but not except as herein expressly provided, of any other offence than that with which he is charged.

Upon an indictment charging a person with the crime of murder, he may be convicted of the crime of manslaughter, if that crime is established by the evidence, but not, except as herein expressly provided, of any other offence than that with which he is charged.

Proviso:
Charge of homicide of child.

Upon an indictment charging a person with the crime of manslaughter he cannot, except as herein expressly provided, be convicted of any other offence. Provided that upon an indictment charging a person with the wilful murder or murder of any person, or with unlawfully killing any person, if upon the evidence it appears that the person alleged to have been killed was a child of which a woman had recently been delivered, the accused person may be convicted of the offence of preventing the child from

being born alive by an act or omission of such a nature that, if the child had been born alive and had then died, he would be deemed to have unlawfully killed the child, or of the offence of endeavouring by a secret disposition of the dead body of the child to conceal the birth, if either of those offences is established by the evidence.

Provided also that upon an indictment charging a person with the crime of manslaughter he may be convicted of a crime under section two hundred and ninety-one A hereof, if that crime is established by the evidence.

APPENDIX B

Year	No. Charged Manslaughter	No. Charged with s.291A	Guilty of Manslaughter	Guilty of s.291A	Not Guilty
1946	4	-	-	1	3
1947	4	-	-	2	2
1948	2	-	-	1	1
1949	3	-	-	3	-
1950	1	7	-	1	7
1951	7	2	-	3	6
1952	8	-	-	5	3
1953	4	-	-	2	3
1954	4	-	-	1	3
1955	7	-	-	3	4
1956	16	-	-	13	3
1957	6	-	-	-	6
1958	7	-	-	5	2
1959	13	-	-	5	8
1960	15	-	-	6	9
1961	11	-	-	5	6
1962	16	-	-	6	10
1963	11	-	-	7	4
1964	15	-	2	7	6
1965	12	-	-	10	2
1966	14	-	-	10	4
1967	10	-	-	8	2
1968	10	-	-	6	4
1969	14	-	1	5	8
1970	7	1	1	6	3
	221	10	4	121	109