Submission No 14

DRIVER LICENCE DISQUALIFICATION REFORM

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The Shopfront

YOUTH LEGAL CENTRE

The Committee Manager
Committee on Law and Safety
Parliament House
Macquarie St
Sydney NSW 2000

22 July 2013

Dear Sir/ Madam

Driver Licence Disqualification Reform

Thank you for the opportunity to provide a submission to your current inquiry into driver licence disqualification reform.

We would also welcome the opportunity to give evidence at the inquiry.

About the Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged young people aged 25 and under. Established in 1993, the Shopfront is a joint project of Mission Australia, the Salvation Army and the law firm Herbert Smith Freehills.

We represent and advise young people on a range of legal issues, with a primary focus on criminal law. We are based in the inner city of Sydney but work with young people from all over the Sydney metropolitan area. Our four solicitors appear almost daily for vulnerable young people in the Local, Children's and District Courts.

The Shopfront's clients come from a range of cultural backgrounds, including a sizeable number of indigenous young people. Common to most of our clients is the experience of homelessness; most have been forced to leave home due to abuse, neglect, domestic violence or extreme family dysfunction. Moreover, most of our clients have limited formal education and therefore lack adequate literacy, numeracy and vocational skills. A substantial proportion also have a serious mental health problem or an intellectual disability, often co-existing with a substance abuse problem.

The Shopfront's experience with licence disqualifications

Driver licence disqualifications are, without doubt, one of the most significant systemic issues affecting the Shopfront Youth Legal Centre's clients.

The Shopfront's solicitors frequently appear for children and young adults charged with traffic offences. We also act for clients in licence suspension appeals and applications to quash habitual traffic offender declarations.

Our volume of work in this area is partly due to the fact that Legal Aid is not widely available for traffic matters in Local Courts, and also because our vulnerable young clients face significant barriers when it comes to obtaining and keeping a driver licence.

Problems such as poverty, lack of access to driving tuition, licence sanctions imposed due to inability to pay fines, and ignorance about appeal and review rights all play their part. Even if these barriers can be cleared – which they often are, with the attainment of greater maturity and self-sufficiency as a young person approaches their mid-twenties –

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many young people find themselves ineligible to apply for a licence due to a string of cumulative disqualifications.

When faced with excessively long disqualification periods, it is common for young people to abandon hope of ever getting a licence. In these circumstances they will often drive unlicensed, sometimes out of necessity for employment or family reasons, and sometimes due to the impulsivity that accompanies adolescence. This inevitably leads to further disqualification periods (usually another two years on top of any existing disqualification), heavy fines and even full-time imprisonment.

Although we acknowledge there are legitimate issues with young drivers and road safety, in our view it is counterproductive to make it harder for these young people to obtain or retain a licence. Obtaining a licence is often a big step in the right direction for disadvantaged young people, allowing for better job opportunities and independence.

Lengthy periods of licence disqualification are not having the intended deterrent effect and are not serving the interests of road safety. Rather, they appear to be compromising road safety by creating a large class of drivers who are completely outside the licencing system.

Most of our unlicensed clients do not commit serious traffic offences such as drink-driving or driving in a manner dangerous to the public. The vast majority of their offences are unauthorised driving offences such as unaccompanied learner, driving unlicensed (never licensed), driving while suspended (both fine default and demerit point suspensions), and driving while disqualified.

Previous submissions on this issue

The Shopfront Youth Legal Centre has written numerous submissions on driver licensing, suspension and disqualification.

In the past, much of our focus has been on the impact of fine-default licence sanctions. We welcome the changes that have been made in recent years to the fine default system and to the Road Transport legislation, to provide more options for fine defaulters who lack the capacity to pay (eg Work and Development Orders) and to reduce the mandatory disqualification period for a first offence of driving in breach of a fine default suspension.

However, most of the concerns expressed in our previous submissions, especially the more recent ones on penalty notices and sentencing, remain valid. These include:

- Sentencing: Ancillary Orders - Submission to NSW Law Reform Commission, September 2012 (Part 10.2)

  http://www.theshopfront.org/documents/Sentencing_-_submission_to_NSWLRC_re_Question_Paper_10_-_ancillary_orders.pdf

- Sentencing: Special Categories of Offenders - Submission to NSW Law Reform Commission, September 2012 (Part 11.1. Re: Indigenous offenders)

  http://www.theshopfront.org/documents/Sentencing_-_submission_to_NSWLRC_re_Question_Paper_11_-_special_categories_of_offenders.pdf

- Penalty Notices - Submission to NSW Law Reform Commission, December 2010 (Part 6.9 and 6.10)

  http://www.theshopfront.org/documents/Penalty_notices__submission_to_NSWLRC_December_2010.pdf

- The effectiveness of fines as a sentencing option - Submission to the NSW Sentencing Council, September 2007 (pages 2- 3)

  http://www.theshopfront.org/documents/Fines_-_Supplementary_Submission_to_Sentencing_Council_September_2007.pdf

- Youth Homelessness - Submission to the National Youth Commission Inquiry, June 2007. (Parts 2.8 and 3.8).

  http://www.theshopfront.org/documents/Youth_homelessness_submission.pdf

- Fines - Submission to the Office of State Revenue, Fines Act Review, June 2002. (Parts 3.2 and 3.3)

  http://www.theshopfront.org/documents/Fines.pdf

Comments on specific terms of reference

a) Removal of any outstanding disqualification periods for people who complete a minimum offence-free period

Our primary submission is that cumulative disqualifications and Habitual Traffic Offender (HTO) declarations should both be abolished, and that magistrates should be given greater discretion over disqualification periods for unauthorised driving offences.

However, if these reforms are not adopted in full, we strongly support a scheme that would allow disqualified drivers to apply for removal of outstanding disqualifications after an offence-free period. We note that this was recommended by the Sentencing Council in 2006[1].

We would suggest that, in most cases, the appropriate offence-free period should be two years, or 12 months in the case of drivers whose outstanding disqualifications arose from offences committed when under 18.

Such a scheme would be of assistance to offenders such as Marco, Vicky, Daniel and Ryan, whose case studies are included in this submission. All of these young people have incurred lengthy cumulative disqualification periods as a result of offences committed when they were young and immature. Some of them, such as Marco, Daniel and Vicky, have now attained some maturity and have managed to desist from driving while disqualified. We are of the view that they should be rewarded for their continued good behaviour and be given the opportunity to apply for a licence in order to improve their employment prospects and their ability to fulfil their family responsibilities.

Daniel

Daniel, now aged 24, had a tumultuous upbringing. His adolescence and early adulthood were characterised by instability, dysfunctional familial relationships and homelessness.

For two years from the age of 11, Daniel was involved with the Department of Community Services. At the age of 13 he left home, and was exposed to drug-using and offending peers. He was expelled from various schools for behavioural problems. He spent much of this time homeless because of his unstable relationship with his family. Between the ages of 15 and 18, he was in and out of juvenile detention centres and was not in regular contact with his family.

The majority of Daniel's traffic offences were committed when he was only 17 years of age, and mainly involved driving whilst suspended or disqualified. These offences led to cumulative disqualifications that ran until April 2013, as well as habitual traffic offender declarations.

He committed two further "drive while disqualified" offences when he was 18 and 19 years of age respectively, at a time when he was struggling to maintain employment. These offences led to further periods of disqualification and additional habitual traffic offender declarations.

[1] NSW Sentencing Council, Interim Report on *The effectiveness of fines as a sentencing option,* 2006, http://www.sentencingcouncil.lawlink.nsw.gov.au/agdbasev7wr/sentencing/documents/pdf/interim_report_on_fines.pdf, paras 5.124 to 5.129

Within the last five years, Daniel has made significant changes in many areas of his life. He is married, is expecting his first child and is completing a trade certificate at TAFE NSW. However, an integral part of being a tradesman involves being able to drive to and from various work sites. As a result, Daniel has struggled to obtain regular employment due to the restriction on his driving. Without stable employment, he will not be able to support his family.

Although he has demonstrated good behaviour and rehabilitation over the last five years, his rehabilitation - and his ability to assist and support his family at this crucial time when expecting his first child - has been hampered by his inability to obtain a driver licence.

The Shopfront Youth Legal Centre assisted Daniel to have his habitual traffic offender declarations quashed. However, he still had some disqualification left to serve, and we have assisted him with an application for remission of the remaining period of disqualification.

Other offenders such as Ryan have not been able to desist from driving. However, had the option of applying to remove outstanding disqualifications been available at an earlier stage, they would likely have availed themselves of it. The prospect of getting their licence back after two years (as opposed to 5 or 20 or 40 years) would act as a reason not to abandon all hope of getting a licence, and an incentive to maintain good behaviour.

Ryan

Ryan grew up in a dysfunctional family where he was exposed to domestic violence. When he was in his teens he lived in a refuge and incurred several thousands of dollars in railway and traffic fines.

He had his provisional licence at one stage, but this was suspended and later cancelled due to his fines. He entered a time-to-pay arrangement and slowly began to pay off his fines. However, the policy at the time was that he could not get his licence until the fines were paid in full.

At the rate Ryan was paying his fines, he would not have been able to pay them off until he was in his 30s. Not surprisingly, he gave up hope of getting a licence and started driving without one. It did not take long for him to accumulate several years of court-imposed disqualifications and habitual traffic offender declarations.

As a juvenile, Ryan committed other offences including petty theft and property damage. At 18, he committed an assault and was placed on a good behaviour bond which he successfully completed. Since then, his only offences have been traffic-related, mostly driving while disqualified.

At one stage Ryan bought a "pocket rocket" scooter, thinking he could lawfully drive it without a licence and without having to register it. He was one of the many young people who fell for the promotional material put out by the promoters of such products. His misunderstanding was short-lived, as he was soon charged with driving while disqualified, as well as using an unregistered vehicle.

Ryan is now 28 and is the father of five children. He works very hard to financially support them and also plays an active role in their care. He has done his best to cope without a licence but has found it incredibly difficult. On occasions he has driven out of perceived necessity in order to maintain his employment or to get his kids to school.

On his last driving while disqualified charge, although he was driving to work and there were no aggravating features such as speeding or intoxication, the magistrate sentenced him to full-time imprisonment. Ryan appealed and, fortunately for him and his children, the sentence was converted to an Intensive Correction Order.

Ryan is still subject to a mandatory disqualification period and to one habitual traffic offender declaration. If he can get this quashed he will be eligible to re-apply for his licence in 2015, when he is 30 years of age.

b) Abolition of the Habitual Traffic Offenders scheme

We strongly support the abolition of the Habitual Traffic Offenders (HTO) scheme. HTO declarations serve no useful purpose and are at odds with the evidence which suggests that, beyond a certain point, disqualifications have little or no deterrent value.

Criminological research suggests that, while disqualification can be an effective deterrent and can bring about positive changes in behaviour, at least when applied to people convicted of drink-driving, beyond a certain period disqualification ceases to be a deterrent and becomes counterproductive.

We refer to the Sentencing Council's interim report on *The Effectiveness of Fines as a Sentencing Option*[2] (October 2006), and in particular the Section on "Licence Sanctions and Secondary Offending". As noted in that report, lengthy disqualifications have limited deterrent value[3] and in many cases lead to secondary offending[4]. The Sentencing Council criticised the HTO scheme and recommended that it be abolished or significantly modified[5].

The questionable deterrent value of lengthy disqualification periods has also been discussed by the NSW Law Reform Commission[6] and by the NSW Court of Criminal Appeal[7].

In our experience, our clients' applications for quashing of Habitual Offender Declarations are usually successful. Particularly where young people are concerned, and the offences relate largely to unauthorised driving, most magistrates are of the view that the additional 5 years' disqualification is "a disproportionate and unjust consequence" of the offending.

Given the relative ease of having them quashed, it could be said that HTO declarations are the least of our clients' problems. However, we do have clients whose HTO declarations are not quashed and who experience significant hardship as a result.

If HTO declarations are to be retained, we submit that they should not be automatically imposed, but that the police or the RMS should be required to make an application to the court for a declaration to be made.

c) Courts' discretion when imposing disqualification periods for unauthorised driving offences

We are strongly of the view that courts should be given greater discretion over disqualification periods for unauthorised driving offences.

A first offence of driving while cancelled, suspended or disqualified currently incurs a mandatory 12-month disqualification, cumulative on any existing disqualification or suspension period. The exception is driving while subject to a fine-default suspension, where the mandatory disqualification period is 3 months. For a second or subsequent offence, the mandatory period increases to 2 years[8].

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[2] http://www.sentencingcouncil.lawlink.nsw.gov.au/agdbasev7wr/sentencing/documents/pdf/interim_report_on_fines.pdf

[3] As above, paras 5.39-5.44

[4] As above, paras 5.51-5.57

[5] As above, paras 5.101 to 5.118, 5.144

[6] *Sentencing Question Paper 10: Ancillary Orders*, July 2012, http://www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/cref130qp10.pdf, para 10.29

[7] The NSWCCA, in a guideline judgment about high-range drink-driving, referred to research suggesting that, at least where drink-driving is concerned, the optimal disqualification period is 18 months and beyond that period the offender will simply ignore the fact of disqualification: *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No. 3 of 2002) [2004] NSWCCA 303*, http://www.austlii.edu.au//cgi-bin/disp.pl/au/cases/nsw/NSWCCA/2004/303.html?query=PCA%20guideline, citing Homel, *Penalties and the Drink Driver: A study of One Thousand Offenders*, ANZJ Crim (1981) 14 (225-241).

[8] *Road Transport Act* 2013 section 54

Driving when never licensed (which is deemed to include not licensed in the preceding 5 years) does not incur a mandatory disqualification for a first offence, but for a second offence there is a mandatory 3-year disqualification[9].

Magistrates of course have a discretion to deal with the matter under section 10 of the *Crimes (Sentencing Procedure) Act*, which means that no conviction is recorded and no disqualification is imposed. However, there are limits on this discretion. Further, such a discretion is usually exercised only when the defendant is legally represented or is articulate enough to address the court about their relevant circumstances. Also, the court is faced with an "all-or-nothing" choice, rather than being able to adopt some sensible middle ground and impose a modest disqualification and penalty.

Nathan

Nathan had a difficult childhood and adolescence. His mum was in and out of prison, and his relationship with his dad was not always good. He spent most of his late teens either homeless or living in supported youth accommodation. To his credit, Nathan managed to get his driving licence and purchase a cheap car when he was only 17.

Soon after, he incurred a parking fine which he did not pay. It is unclear whether Nathan was even aware that he had been fined, but just after he turned 18 his licence was suspended. Nathan never received the suspension letter. He had been forced to leave his accommodation, and unable to find a permanent home he could not update the RTA with a new address.

About three months later, Nathan was pulled over by the police. He was told that his licence had been suspended, and charged with driving while suspended. He was told not to drive again. Because Nathan was basically living in his car, he felt he could not simply abandon his car by the side of the road and so continued to drive. He was pulled over by police again later that day and charged with a second count of driving while suspended.

Largely because of his homelessness, Nathan missed his court date. He was convicted of both offences in his absence, and disqualified from driving for a total of 3 years. He had already been off the road for over a year when he came to the Shopfront Youth Legal Centre for advice.

We assisted him in having both convictions annulled. This was a long and complicated process because of Nathan's circumstances. The first charge was eventually dismissed because Nathan had been unaware of the suspension of his licence. Nathan pleaded guilty to the second charge of driving while suspended, but recognising that he had already spent such a long period off the road, the Magistrate dismissed the charge under section 10 of the *Crimes (Sentencing Procedure) Act*.

This means that Nathan, at 22 years of age, was no longer disqualified and was able to apply for his licence again. Nathan was fortunate that he had the self-restraint not to drive during his disqualification, and that he was able to access appropriate legal advice and advocacy. It is worth noting that Legal Aid is generally not available for traffic offences and, had he not been referred to the Shopfront, he probably would not have received the assistance he needed.

Ben

Ben is a young man from a migrant background who grew up in Western Sydney. Like many young people (especially young men in suburban areas) his ability to drive is central to his identity, and more importantly to his ability to obtain employment. Ben got his learner's licence at 16, and provisional licence at 17. Unfortunately, he incurred some minor traffic fines which he was unable to pay. The fines were referred to the SDRO, and his licence was suspended.

[9] *Road Transport Act* 2013 section 53(4)

Shortly after, Ben was caught driving while suspended. He admitted knowing his licence had been suspended, but needed to drive for work and could not pay the fines. He did not know what to do. Before going to court he managed to deal with his fines and to get his licence back. Due to Ben's age and circumstances, a section 10 bond would appear to have been an appropriate outcome. However, the Local Court magistrate recorded a conviction and imposed the mandatory disqualification, which at that time was 12 months. Unfortunately, Ben did not have any legal advice about his right to appeal, and so did not appeal this conviction.

Several months later, after turning 18, Ben was again caught driving while disqualified. In this instance, largely due to the harsh way in which he had been treated by the magistrate on the earlier matter, the presiding magistrate showed him some leniency and released Ben on a section 10 bond.

Regrettably, Ben was caught driving while disqualified again, only one day from the end of his disqualification period. He was a passenger in a car being driven by a friend. The friend double-parked the car for a few minutes, leaving Ben alone. When another driver returned to one of the cars blocked by his friend's car, Ben got into the driver's seat and reversed a few metres in order to let them out. He was spotted immediately, because police officers in the vicinity were familiar with him and his disqualification.

The magistrate dealing with this matter took the view that Ben had already "used up his section 10" and refused to extend any further leniency. Ben had to serve a further 2-year disqualification period, which severely undermined his ability to maintain employment.

Instead of the mandatory periods that currently apply, we suggest that these offences should carry automatic and minimum disqualifications similar to those applicable to drink-driving and other offences. The disqualification periods should recognise the difference in severity between driving while unlicensed, suspended, cancelled and disqualified respectively.

The automatic and minimum disqualification periods proposed by the Law Society of NSW in its submission to this inquiry could provide a useful starting point (although we suggest that the minimum disqualification periods for driving while disqualified should be lower than those proposed by the Law Society).

The legislature has already acknowledged that driving in breach of a fine-default suspension is of a lower order than driving while suspended in other circumstances, or driving while cancelled or disqualified. Accordingly, the mandatory disqualification for a first offence was reduced from 12 months to 3 months. This is a welcome development which was recommended by the Sentencing Council in 2006[10]. It is disappointing to note that the other recommendations of the Sentencing Council for the review of mandatory disqualifications and the abolition of HTO declarations[11] have not yet been adopted.

It is generally acknowledged that driving while disqualified is generally more serious than driving while simply unlicensed or in breach of an administrative suspension, because it involves the breach of a court order.

Driving whilst cancelled may be a serious or a trivial offence, depending on the circumstances of the cancellation. In this regard, we draw the Committee's attention to the unfair anomaly highlighted by the case study of "Carlos".

Carlos

Carlos was raised by migrant parents in suburban Sydney. Both of his parents have now returned to live overseas. Since his late teens, Carlos has led a chaotic life characterised

[10] NSW Sentencing Council, Interim Report on *The effectiveness of fines as a sentencing option,* 2006, http://www.sentencingcouncil.lawlink.nsw.gov.au/agdbasev7wr/sentencing/documents/pdf/interim_report_on_fines.pdf, paras 5.87 to 5.99, 5.144

[11] See footnote above.

by unstable accommodation, mental illness, cannabis and alcohol abuse and low-level offending.

When he was referred to the Shopfront, Carlos was 19 and had had several admissions to psychiatric wards, often while acutely psychotic. Although he was diagnosed with a serious and chronic mental illness (schizoaffective disorder) he was discharged from hospital without appropriate follow-up. His local mental health service appeared to have put him in the "too-hard basket".

The Shopfront Youth Legal Centre has assisted Carlos with a range of issues including housing, income support, mental health, criminal matters, fines and debts. Carlos' health and well-being have improved, and he has resumed some activities (for example, surfing) in which he had lost interest while he was unwell.

Despite his difficulties, Carlos managed to get a licence when he was 21 years old. After he had his licence for a few months he was convicted of low-range drink driving, and disqualified for the automatic period of 6 months.

He did not drive during this disqualification, but started driving again after six months, thinking that his licence had been automatically reinstated. This is a common misconception held by people who do not understand the difference between suspension and disqualification, and are not aware that disqualification has the effect of permanently cancelling their licence.

Had his licence expired during the disqualification period, he would have been dealt with simply as an unlicensed driver and would not have faced a mandatory disqualification. However, because the expiry date on his licence was after the end of the disqualification period, he was charged with driving while cancelled. As this was a second or subsequent offence (the first offence being the low-range PCA) he faced a mandatory 2-year disqualification period if convicted.

When appearing for Carlos in court, we pointed out the anomaly between "unlicensed" and "cancelled" depending on the licence expiry date. We submitted that this operated unfairly on people in Carlos' situation. We successfully advocated for a section 10 bond, which meant that Carlos was not disqualified. This was a good outcome but would not have been possible without strong advocacy and a sympathetic bench.

We also call for the abolition of *cumulative* disqualifications for unauthorised driving offences. Cumulative disqualifications have a devastating effect on disadvantaged people, including most of the young people whose case studies appear in this submission. Some young people have several years of disqualification in front of them by the time they turn 18 (see, for example, Daniel and Marco). Clients such as Vicky also incurred lengthy cumulative disqualifications at a very young age, albeit not as juveniles.

We understand that the threat of a cumulative disqualification is intended to operate as a deterrent. However, it is clearly not having this effect on the large numbers of people who continue to drive while they are disqualified.

Vicky

Vicky is now in her mid-20s and is a single mum with a 3-year-old daughter.

She grew up in a dysfunctional family environment and was in the care of the Department of Community Services during her teens. Vicky was homeless for some years but with the help of an after-care service, was able to obtain Department of Housing accommodation.

As a young adolescent Vicky was diagnosed with various mental and developmental disorders, which continued into her early adulthood and made her prone to impulsive behaviour.

While homeless during her teens, Vicky incurred a large number of fines, mainly for travelling on trains without a valid ticket. These fines were referred to the SDRO, and then to the RTA, which imposed a "customer business restriction". She was told that she would not be able to apply for a licence until her fines were paid in full.

Like many young people in her situation (with or without mental health problems) Vicky felt that she would never be able to pay off her fines, and would never be able to get her licence. She took the risk of driving without a licence, and not surprisingly was soon picked up by police and charged with driving unlicensed.

On her first conviction for driving when never licensed, Vicky received a fine and no disqualification. When charged for the second time, at the age of 19, the magistrate adjourned the case in order to give Vicky the opportunity to sort out her fines and apply for a licence.

The Shopfront Youth Legal Centre assisted Vicky in making annulment applications for some of her fines, and to make a time-to-pay arrangement for the others. Unfortunately, due to her poverty, mental health problems, and chaotic lifestyle, Vicky missed a couple of payments. The fine default licence sanctions, which had been lifted, were re-imposed. She also committed another unlicensed driving offence during the adjournment period, which disentitled her to any leniency the magistrate might have contemplated.

When the matter came back to court, Vicky received a conviction and, with it, the mandatory 3-year disqualification. Since then, Vicky has been charged several times with driving while disqualified.

Just before she turned 21, Vicky was charged with another instance of driving while disqualified. She had driven off to try to avoid the police, and so was also charged with dangerous driving. It is worth noting that this is the only time Vicky has ever been charged with an offence involving dangerous driving; to date, she has never been charged with a drink-driving offence, and has incurred only minor speeding infringements.

Vicky was refused bail and spent almost 2 months in custody before being sentenced. She was sentenced to a 9-month prison term with immediate release on parole. This immediate release was granted only because Vicky was lucky enough to strike a very compassionate magistrate, who recognised that keeping Vicky in prison would cause her to lose her housing and jeopardise any potential for rehabilitation.

Vicky spent the next 7 months on parole, and managed to do so without reoffending. However, she has since been charged with further offences of driving while disqualified. The most recent of these occurred in April 2010, while fleeing a violent domestic situation. She was placed on a suspended sentence and has not committed any further traffic offences.

Even without taking into account habitual traffic offender declarations, Vicky has now been disqualified from driving until she is well into her forties. Her inability to drive is affecting her employment prospects and her ability to take her daughter to child-care, appointments and outings. Unless Vicky's disqualifications can be remitted, or a re-licencing scheme is introduced, it is likely that her 3-year-old daughter will be able to get a driving licence before Vicky can.

If there is to be any place for cumulative disqualifications, we submit that this should be at the discretion of the court. Cumulative disqualifications should only be imposed in limited cases, for example where the offender has repeatedly shown contempt for court orders and has placed other road users at real risk.

We also suggest that there should be some upper limit on the period of disqualification that can be accumulated. We would suggest that a court should not be permitted to impose disqualifications that would result in the offender having more than 5 years left to serve at the time of their disqualification. This is similar to the limit on the Local Court's power to impose cumulative sentences of imprisonment.

If the RMS is of the view that the person should be off the road for a longer period, it has the discretion to refuse any future licence application on the grounds that the person is not a fit and proper person to hold a licence. Alternatively, if the Habitual Traffic Offender scheme is to be retained on the limited basis that we have suggested above, the RMS or the police could apply for a HTO declaration.

d) Revision of maximum penalties prescribed for unauthorised driving offences

We do not see the maximum penalties as the most important issue facing our clients. The courts have (and to a significant extent are prepared to exercise) discretion in relation to the penalty imposed. The most serious problem lies with disqualifications, over which the court has little or no discretion.

Nevertheless, we support a review of the maximum penalties for unauthorised driving offences. We refer to our earlier comments to the effect that there should be some distinction between offences with differing degrees of severity.

Ideally, we would prefer unauthorised driving offences not to be imprisonable offences. The number of people (especially Aboriginal people) sentenced to imprisonment for driving while disqualified is alarming.

NSW BOCSAR, in its report *Why are indigenous imprisonment rates rising?*[12], in August 2009, noted that between 2001 and 2008 the adult indigenous imprisonment rate rose by 37% in Australia and 48% in New South Wales.

It was noted that there were increases in the number of indigenous prisoners in custody, both on remand and sentenced, for traffic and motor vehicle regulatory offences. 15% of the total increase in the number of sentenced indigenous prisoners was due to traffic offences. There was also a substantial rise in the proportion of indigenous prisoners serving sentences for "offences against justice procedures" (which includes resisting and hindering police).

BOCSAR said:

> "These results suggest that the substantial increase in the number of indigenous people in prison is due mainly to changes in the criminal justice system's response to offending rather than changes in offending itself."

Although the *Crimes (Sentencing Procedure) Act* already contains a provision[13] to the effect that imprisonment must be a last resort, far too many people continue to be imprisoned for unauthorised driving offences.

We submit that penalties of imprisonment should still be available for substantive driving offences (such as mid- and high-range drink driving, driving in a manner dangerous to the public, or driving dangerously while avoiding a police pursuit). However, we are of the view that imprisonment is generally unwarranted for offences relating to licence status.

Nick

Nick is a young man with an intellectual disability and an extremely disadvantaged background.

Nick never met his father, as he died from a drug overdose before Nick was born. Nick's mother and his uncle (who had been a father figure for him) both passed away from alcohol-related illnesses when Nick was in his early teens.

Nick spent most of his adolescent years with his grandparents, and has now assumed the task of caring for his elderly grandmother since his grandfather passed away late last year. This is an overwhelming responsibility for him, made particularly difficult by the fact that his grandmother does not drive and Nick is unable to get a driving licence.

Like many other young people we have worked with, Nick's intellectual disability was masked by other factors and was not diagnosed while he was at school. As a consequence, he has missed out on the support that he might otherwise have received from Ageing, Disability and Home Care (ADHC).

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[12] http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/BB41.pdf/$file/BB41.pdf

[13] Section 5

According to the psychologist who assessed Nick in early adulthood, his low verbal intelligence places him in the range of a moderate intellectual disability, which "would compromise his capacity to cope with many of the demands of basic mature community living", including formal education and employment.

Nick's impoverished verbal skills are also associated with "a limited insight and reflective capacity, which would lead to impulsive and poorly reasoned behaviour." This makes it difficult for Nick to cope with "competing demands, including the experience of stress or distress, or to manage the risks associated with temptation."

Nick has learnt to drive informally but has never had a driving licence. A combination of poverty, lack of family support, low literacy and outstanding fines (mostly for railway infringements) made him feel that getting his licence was impossible. From time to time he would be tempted to get behind the wheel of a friend's car, or on a small scooter or motorbike, without a licence.

It did not take long for Nick to accumulate several years' worth of disqualifications, largely as a result of being charged with driving while unlicensed and driving while disqualified. He has also been sentenced to serious penalties. We attempted to have some of his charges dealt with under section 32 of the *Mental Health (Forensic Provisions) Act* due to his intellectual disability, but the magistrate was of the view that this was not an appropriate way to deal with regulatory traffic offences.

Even after the quashing of all his habitual traffic offender declarations, Nick is disqualified until at least 2016. Although Nick has not yet been sentenced to full-time imprisonment for traffic offences, he has come close. He has spent time on remand for traffic offences and, for his most recent offences, he is on a suspended sentence. He will almost inevitably face full-time imprisonment if he commits *any* sort of offence.

Some might say that Nick's disability and his impaired functioning make him unfit to hold a licence. We disagree. We know young people with intellectual disabilities and other disadvantages who, with adequate opportunities and support, are capable of being safe and law-abiding drivers.

e) Vehicle sanctions for offenders who repeatedly drive while disqualified

We have had the benefit of reading the draft submissions of both the Law Society and the NSW Legal Assistance Forum.

We share the concerns of both of these organisations in relation to vehicle sanctions, firstly as to whether they will have the intended impact in terms of deterrence or incapacitation, and secondly as to unjustifiable hardship to third parties.

Faced with a choice between vehicle sanctions and the existing disqualification regime, we see vehicle sanctions as the lesser of the two evils. However, this is not a sufficient reason to introduce vehicle sanctions.

Like the Law Society, we concede that there may be a role for vehicle sanctions in the case of serious and repeat offending. The introduction of such a measure should not be adopted without a strong evidence base as to its effectiveness.

Comments on other relevant issues

The following issues are not specifically within the Committee's Terms of Reference. However, we submit that they are highly relevant to this Inquiry and we would ask the Committee to consider our comments.

a) Jurisdiction of Local and Children's Court in relation to traffic offences allegedly committed by children

For young people old enough to obtain a learner licence (16 for cars, 16 and 9 months for motorcycles[14]), proceedings for traffic offences are dealt with in the Local Court, unless the young person has a related criminal charge before the Children's Court[15].

We are of the view that the Children's Court should have jurisdiction over *all* traffic offences allegedly committed by young people under the age of 18.

The justification for hearing juvenile traffic offences in adult courts is usually along the lines of *"Since the ability to obtain a licence is a privilege extended to adults, all traffic offenders should be dealt with as adults"* and *"The focus of traffic offences is deterrence and public safety. Since the risk of harm to the public caused by driving offences is the same, if not higher, when a child rather than an adult is driving, on this view, children should not be treated in any special manner in the court system".*[16].

However, we submit that such justifications are misconceived. It is adults who extend this "privilege" to young people with full knowledge of developmental difference between adults and children. We note that there are already a number of restrictions placed on learner and provisional drivers, recognising that young drivers generally pose a higher risk to road safety than more mature drivers. Many of these restrictions (such as limits on number of passengers, prohibitions on driving high-performance vehicles) are appropriate and evidence-based. Dealing with children in court as if they were adults is, we submit, neither appropriate nor evidence-based.

In fact, the acknowledged over-representation of young drivers in traffic offences and accidents suggests that young people who commit traffic offences should be treated differently to adults. Rather than the punitive and deterrent measures which are applied to adult traffic offenders, young people require a rehabilitative approach to assist them to become safer drivers.

The history of a separate criminal jurisdiction for children has traditionally reflected the acceptance that different principles and practices should apply to children and adults. The current state of scientific knowledge on adolescent brain development adds support to this approach. It is now well-recognised that young people do not offend, nor do they respond to criminal sanctions, in the same manner as adults[17].

Children are less mature and more vulnerable than adults; they also respond less effectively to punitive and deterrent sanctions. They deserve the special protection, and the rehabilitative approach, afforded by the Children's Court. We are of the firm view that this applies equally to traffic matters as it does to any other matter.

The current process by which children are taken before adult courts (often unrepresented) is inappropriate, disproportionately punitive and arguably in breach of our obligations under the United Nations Convention on the rights of the Child.

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[14] Road Transport (Driver Licensing) Regulation 2008 clause 12

[15] *Children (Criminal Proceedings) Act* section 28(2)

[16] See Department of Attorney General and Justice consultation paper on the review of the *Children (Criminal Proceedings) Act* and the *Young Offenders Act*, http://www.lpclrd.lawlink.nsw.gov.au/lpclrd/lpclrd_consultation/lpclrd_discussion.html#Review_of_the_Young_, Part 4.11.3

[17] As above, Parts 2.1 and 2.2.

Although there is provision for the Local Court to exercise the sentencing options under the *Children (Criminal Proceedings) Act*[18], it is our experience that many Local Court magistrates are unaware of, or fail to consider, this. The tendency in the Local Court is to apply the sentencing principles and options relevant to adults. Children can suffer harsh penalties and lengthy disqualifications which are often inappropriate to their age and circumstances.

This situation is not assisted by the fact that children are not always legally represented in the Local Court, even though they should be entitled to Legal Aid. When children are represented in Local Court traffic matters, duty solicitors are not always well-versed in the special legislative provisions and legal principles applying to children.

Marco

Marco, now in his mid-20s, grew up in a household where he witnessed and was subject to serious domestic violence from his stepfather. As a result, he missed significant periods of his schooling, and at age 17 or 18 he moved out of the family home to live with his foster grandmother.

Marco was initially unable to obtain a licence because he had insufficient documentary identification to satisfy the Roads and Traffic Authority. His birth certificate bears one surname but his other documentary identification, including school records from 1992 onwards, bore another. By the time he had managed to gather the necessary identification documents, he was already disqualified from driving.

Marco's first two offences of driving while unlicensed were committed while he was under 18, and dealt with by the Local Court. Most of Marco's traffic offences were committed near the family home or near his foster grandmother's place. Driving was an escape for him during a turbulent period in his life.

By the time he turned 18, Marco was already disqualified from driving until the age of 23. He committed further offences of driving while disqualified at age 18. As a result, Marco ended up being disqualified from driving for a total of 9 years from 2002 to 2011.

Court records show that Marco was unrepresented on every court sentence date, except his last one in 2003. Being unrepresented, Marco did not have anyone to assist him to place before the court any submissions about mitigating circumstances or (when he was still a juvenile) about the use of sentencing options under the *Children (Criminal Proceedings) Act*. Nor did Marco have access to any legal advice about his appeal rights (unfortunately he did not become aware of the service provided by the Shopfront Youth Legal Centre until some years later).

Marco's most recent traffic offence was committed in December of 2002, and he has demonstrated good behaviour and maturity since that time. In 2008 we sent a petition to the Governor of New South Wales seeking that Marco's licence disqualifications be remitted. This application highlighted the obstacles faced by Marco in his apprenticeship as a mechanic, and getting to and from work without a licence, as well as the mitigating circumstances surrounding Marco's offences, but was ultimately unsuccessful.

We lost touch with Marco after this and do not know whether he managed to serve out his remaining disqualification and apply for a licence.

b) Application of mandatory disqualifications to children

For the reasons set out above, we also submit that automatic and mandatory disqualifications should *not* apply to children, whether dealt with by the Children's Court or the Local Court.

Courts should retain the power to disqualify children in appropriate cases, and should have discretion over the disqualification period.

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[18] *Criminal Procedure Act* section 210

The case studies of Marco and Daniel, which are by no means isolated examples, illustrate the inappropriateness of automatic disqualifications for children.

c) The offence of unaccompanied learner

In recent times we have observed considerable hardship suffered by learner drivers who are automatically suspended or disqualified for the offence of "unaccompanied learner".

From 1 September 2008, a learner driver who is given a penalty notice or court attendance notice for this offence may have their learner licence suspended on the spot by police for 3 months[19]. This suspension may be appealed to a court, but will only be varied or quashed in exceptional circumstances.

Upon conviction by a court of an "unaccompanied learner" offence, there is an automatic 3-month disqualification. This may be reduced by the court to take into account any suspension period already served. Alternatively, the disqualification period may be increased up to a maximum of 12 months[20].

If there is to be a suspension for the offence of unaccompanied learner, we submit that this should be administratively-imposed by Roads and Maritime Services (RMS) in a similar manner as a demerit point suspension, with similar appeal rights. If police are to retain the power to suspend on the spot, this should be restricted to repeat offenders. These measures would help alleviate the hardship, and the very real potential for secondary offending, that often accompanies on-the-spot suspensions.

Faruq

Faruq is 17 and lives with his mother, who in recent times has been unable to work or to drive due to health problems. Faruq has been assisting her financially through his employment, and had provided practical assistance and care where possible.

Faruq had his learner licence but it was difficult for him to find a licensed driver to supervise him. Although his mother has a licence, for much of the time she was too unwell to supervise him.

Faruq was pulled over by the police for driving as an unaccompanied learner. He was issued with a penalty notice and an on-the-spot suspension notice. The police told him he had to leave his car where it was, or arrange for someone to come and pick it up.

Faruq's car was pulled over on a busy road and he was concerned that it was blocking the traffic, so he decided to move it and park it just around the corner. The police, who were still in the vicinity, pulled him over and charged him with driving while suspended. If convicted of this offence, Faruq would have faced 12 months' disqualification on top of the 3 months' suspension.

We appeared for Faruq in the Local Court in relation to the charge of driving while suspended. We advocated for Faruq to be dealt with under the *Children (Criminal Proceedings) Act*, in a manner appropriate to his age and circumstances, and for the court to exercise its discretion not to record a conviction. The magistrate did not agree to deal with him under the *Children (Criminal Proceedings) Act* but placed him on a bond under section 10 of the *Crimes (Sentencing Procedure) Act*, which meant that he was not disqualified and was eligible to get his licence back after serving the 3-month suspension for the unaccompanied learner offence.

Faruq eventually got his Ps, which assisted him greatly with his employment and his family responsibilities. Had he been convicted and required to serve the mandatory disqualification, in our view this would have been crushing and grossly disproportionate to the seriousness of the offence. Also, it may well have led him down the "slippery slope" towards years of disqualification.

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[19] *Road Transport Act* 2013 section 224

[20] Road Transport (Driver Licensing) Regulation 2008 clause 15

Thank you again for the opportunity to comment. We would also welcome the opportunity to give evidence at the inquiry.

Yours faithfully

[redacted]

Jane Sanders
Principal Solicitor

[redacted]