

**Submission
No 23**

DRIVER LICENCE DISQUALIFICATION REFORM

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INQUIRY INTO DRIVER LICENCE DISQUALIFICATION REFORM

Legal Aid NSW Submission

to the

LEGISLATIVE ASSEMBLY COMMITTEE ON LAW AND SAFETY

JULY 2013

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 36 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW criminal law practice provides legal assistance and representation in criminal courts at each jurisdictional level throughout the State, including proceedings in Local Court and Children's Court, committals, indictable sentences and trials and appeals. Our specialist criminal law services include the Children's Legal Service, Prisoners' Legal Service and the Drug Court.

Legal Aid NSW is well placed to provide a frontline perspective to Inquiry into Driver Licence Disqualification Reform. Traffic and vehicle related offences are consistently amongst the most common offences dealt with by the Local Court, with almost 20% of finalised cases being for "unauthorised driving offences". While legal aid is only available for traffic matters *where there is a real possibility of a term of imprisonment being imposed*, in 2010 Drive While Disqualified had the highest custodial rate of the top 20 offences dealt with by the Local Court.¹

Should you require any further information, please contact Annmarie Lumsden, Executive Director, Strategic Policy and Planning at [REDACTED]

¹ Judicial Commission of NSW *Common Offences in the NSW Local Court*. 2010, May 2012

Introduction

Legal Aid NSW supports the proposed reforms being considered by the Legislative Assembly Committee on Law and Safety Inquiry into Driver Licence Disqualification Reform as set out in terms of reference 1(a) to (d). As a member of the NSW Legal Assistance Form (NLAf), Legal Aid NSW endorses the NLAf submission to the Legislative Assembly Committee on Law and Safety Inquiry into Driver Licence Disqualification Reform which comprehensive sets out the reasons why the proposed reforms are both appropriate and necessary. Those reasons include the disproportionate and oppressive effects of licence sanctions under the current regime on vulnerable and marginalised people, including Aboriginal people, young people, prisoners and people living in areas with limited access to public transport, as well as the unjustifiably high cost to government of enforcing the current system, in particular the costs to the corrections and criminal justice systems. The NLAf submission is supported by case studies which reflect the common experience of Legal Aid NSW solicitors who provide legal services to economically or socially disadvantaged people with legal problems associated with unauthorised driving offences.

Legal Aid NSW takes this opportunity to reinforce aspects of the particular reforms set out in the terms of reference 1(a) to (e) that it considers significant.

1. (a) Establish a right to apply to the court to have any outstanding disqualification periods removed for people who complete a minimum offence free period

Legal Aid NSW supports establishing a right for persons to apply to the Court to have any outstanding disqualification periods removed after completing a minimum offence free period.

Any outstanding disqualification periods should include all existing unserved disqualification periods, including those imposed as a result of a HTO declaration.

The minimum offence free period should be dependent upon the type of offence(s) for which the outstanding disqualification period(s) were imposed. Specifically, the minimum offence free period should be referable to whether the offence involved unauthorised driving which was otherwise safe, on the one hand, or dangerous driving which endangered public safety, on the other.

Dangerous driving which endangered public safety would include, for example, PCA and excessive speeding offences as well as the major driving offences under section 188 of the *Road Transport (General) Act 2005* which include drink driving, predatory driving, police pursuits, murder or manslaughter arising out of the use of motor vehicle, causing grievous bodily harm, furious, reckless or menacing driving and failing to assist after a crash causing injury.

The sanction of withdrawal of driving privileges should be less severe for driving which is simply unauthorised than for driving which endangers public safety.

Where the offence(s) for which the outstanding disqualification period(s) were imposed involved unauthorised driving which was otherwise safe, minimum offence free period should be two years.

Where an offence for which any outstanding disqualification period was imposed involved dangerous driving the minimum offence free period should be a longer period, say 4 years from that dangerous driving offence.

Legal Aid NSW submits that this differential minimum offence free period would appropriately reflect the community expectation that people who show a disregard for community safety are adequately punished while also offering a realistic incentive to maintain compliance with the object of regaining the benefits of holding a valid drivers licence.

In deciding whether to remove the disqualification period(s), the court should be able to take into account all relevant factors, including any change of circumstances since the offence(s) were committed, and should be satisfied that it is appropriate, in all of the circumstances, to do so.

In the event of a refusal, Legal Aid NSW submits that a person be able to make a further application to remove any outstanding disqualification period after 12 months.

1. (b) Abolish the Habitual Traffic Offenders (HTO) scheme

Legal Aid NSW supports abolition of the Habitual Traffic Offenders (HTO) scheme.

The Sentencing Council of NSW reviewed the operation of the HTO scheme when it examined the effectiveness of fines as a sentencing option. It noted that the majority of submissions it received opposed the scheme, citing a range of reasons, including:

- A declaration constitutes a double penalty, as an offender has already been punished for the offences giving rise to the declaration;
- The scheme can create 'crushing' periods of disqualification, severely limiting employment prospects;
- The scheme has a disproportionate impact on certain marginalised groups in the community, particularly on young people who need licences to obtain employment; and
- Sanctions become meaningless when people are disqualified for very lengthy periods of time.²

It is the experience of Legal Aid NSW solicitors that the scheme can also create uncertainty in relation to the imposition of disqualification periods for subsequent offences. The main reason for this is that the additional 5 year disqualification period arising from HTO declarations is cumulative on any Court imposed disqualification period in that they do not commence until any Court imposed disqualification period has expired. There may also be multiple declarations.

In addition to supporting abolition of the HTO scheme, Legal Aid NSW is of the view that the Court should retain the ability to quash existing HTO declarations, or to reduce the disqualification period to 2 years, if it is satisfied that the disqualification imposed is disproportionate and unjust having regard to the total driving record or the special circumstances of the case.

² NSW Sentencing Council, *Effectiveness of fines as a sentencing option*, October 2006, pp 165-166

1. (c) Provide courts with discretion when imposing disqualification periods for unauthorised driving offences by:

i) Providing for automatic (and minimum) periods rather than mandatory periods; and

ii) Requiring that disqualification periods run from the date of conviction unless otherwise ordered.

Automatic (and minimum) periods rather than mandatory periods

A penalty regime that imposes mandatory periods of disqualification lacks the ability to tailor a penalty to the specific facts and circumstances of the offence and the offender, resulting in disproportionate and oppressive effects of licence sanctions on vulnerable and marginalised people, including Aboriginal people, young people, prisoners and people living in areas with limited access to public transport, as well as their families and communities.

Legal Aid NSW is of the view that the task of weighing up the diverse circumstances of the offence and of the offender in order to reach the most appropriate sentence is best achieved by the exercise of judicial discretion, including when disqualification periods for unauthorised driving offences are imposed.

Legal Aid would welcome a regime that provided for automatic (and minimum) periods. Legal Aid understands that under such a regime, the automatic disqualification period applies with the court having the discretion to reduce the disqualification period to the statutory minimum or to increase the disqualification period.

Providing for automatic (and minimum) periods rather than mandatory periods would give the court with the opportunity to formulate a sentence that appropriately reflects the objective seriousness of the offence, as well as the offender's prior traffic history, while also taking into account other factors such as the offender's work and family commitments and the availability of transport.

Requiring that disqualification periods run from the date of conviction

As with any sentencing regime certainty in the penalty imposed is fundamental. Arriving at the correct start and end dates for a subsequent offence is an exercise that can take up significant Court time and lead to confusion and error.

Legal Aid NSW supports disqualification periods running from the date of conviction unless otherwise ordered by the Court. This would not only create more certainty in relation to the length of disqualification periods, but would allow the Court to consider the totality of the offender's conduct and the punishments imposed, ensuring that the disqualification period is proportionate, just and appropriate in all of the circumstances of the case.

1. (d) Revise the maximum penalties prescribed for unauthorised driving offences

Legal Aid NSW would welcome a reduction in the penalties for unauthorised driving offences.

The principle of proportionality requires that the severity of the penalty corresponds with the harm caused by the offence. Legal Aid NSW is of the view that the current regime is disproportionately harsh and would welcome a review of penalties that reflects the distinction between offences unauthorised driving and offences involving dangerous driving, such as excessive speeding and PCA offences, which endanger public safety.

In addition, the length of automatic (and minimum) disqualification periods of should be referable to the seriousness of the unauthorised driving offence, with drive while disqualified as most serious, followed by drive while cancelled and then drive while suspended.

1. (e) Introduce vehicle sanctions for offenders who repeatedly drive while disqualified

Legal Aid NSW is of the view that vehicle sanctions for driving while disqualified could create exceptional difficulties for other persons who may have an interest in the vehicle or who rely on it.

However, Legal Aid NSW acknowledges that there may be a limited role for court imposed vehicle sanctions for offenders who repeatedly drive while disqualified.

Concluding remarks

In the experience of Legal Aid NSW sanctions under the current driver licence disqualification regime have a disproportionate and oppressive effect on vulnerable and marginalised people, including Aboriginal people, young people, prisoners and people living in areas with limited access to public transport. In addition, the cost to government of enforcement of the regime is unjustifiably high, particularly in terms of the administration of the criminal justice system and incarceration of offenders. Legal Aid NSW is of the view that there are sound policy reasons for reform of the current system and the proposed reforms set out in terms of reference 1(a) to (d) will go a long way in addressing these issues.

Legal Aid NSW values the opportunity to make a submission to the Legislative Assembly Committee on Law and Safety in relation to the Inquiry into Driver Licence Disqualification Reform, and would be interested in appearing at a public hearing to give evidence.