

**Submission
No 5**

DRIVER LICENCE DISQUALIFICATION REFORM

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NSW Legal Assistance Forum

Submission to the Driver Licence Disqualification Reform Inquiry

1. Executive summary

The NSW Legal Assistance Forum (NLAF) is an interagency forum that brings together key legal service providers across government, non-government and private sectors and aims to facilitate access to justice for socially and economically disadvantaged people.

NLAF established a Fines and Traffic Law Working Group with the aim of reducing the number of people who experience legal problems associated with fines, licence suspension and disqualification, particularly in relation to young people and Aboriginal people disproportionately disadvantaged by lack of access to alternative transport.

Working group members have particular expertise in working with, and providing legal services to people who are socially and economically disadvantaged and have legal problems associated with fines and licensing. Working group members are well placed to comment on the proposed law reforms relating to unauthorised driving offences.

At the outset, NLAF submits that the reforms to laws relating to unauthorised driving offences are appropriate and necessary because:

- A driver's licence is a vital tool for facilitating social inclusion of people living in areas of NSW with limited access to public transport;
- There are communities in NSW (in particular, Aboriginal communities in remote NSW) where people face significant barriers to obtaining and maintaining driver licences and consequently drive unlicensed;
- Current licence sanctions for unauthorised driving do not take into account the particular circumstances of these communities – they exacerbate disadvantage and do not provide opportunities for relicensing and social inclusion; and
- There are significant financial and other costs for government, and the broader community, associated with enforcement of these aspects of the penalty system. However, these costs are disproportionate to any claimed benefit in relation to safety on NSW roads or rehabilitation of unlicensed/ disqualified drivers.

In relation to the specific reforms outlined in section 1 (a) – (e) the Terms of Reference:

- ***Right to apply for removal of outstanding disqualification periods***

NLAF submits it is appropriate to establish a right to apply to the court to have any outstanding disqualification periods removed for people who complete a minimum offence-free period. The current system does not provide an opportunity for disqualified drivers to work towards reinstatement of a licence. The proposed reform would provide such people with an opportunity to obtain a licence once again and facilitate their social inclusion, including in relation to securing employment.

- ***Abolish the Habitual Traffic Offenders scheme***

NLAF supports the abolition of the Habitual Traffic Offenders scheme. The Sentencing Council recommended that the automatic imposition of habitual traffic offender declarations be abolished. NLAF notes that no other Australian jurisdiction has a Habitual Traffic Offender scheme and there is no evaluation of the scheme that supports its retention.

- ***Provide discretion when imposing disqualification periods and revise maximum penalties for unauthorised driving***

NLAF submits that courts should be provided with discretion when imposing disqualification periods and that the maximum penalties for unauthorised driving offences should be revised because:

- the severity of some of the sanctions for unauthorised driving do not match the harm caused by the offence; and
- the sanctions have a significant negative impact on some vulnerable and marginalised groups, particularly in cases involving secondary offending.

- ***Introduce vehicle sanctions for offenders who repeatedly drive while disqualified***

NLAF does not support the imposition of vehicle sanctions imposed by police prior to a court finding of guilt. NLAF submits the sanctions imposed in this way are not justified and will have a disproportionately negative impact on people living in areas with limited access to public transport. However, NLAF acknowledges that there may be a limited role for court imposed vehicle sanctions in appropriate and restricted cases. When considering the range of sanctions that can be imposed for disqualification offences, vehicle sanctions may be more appropriate than mandatory licence disqualification.

2. Introduction

NSW Legal Assistance Forum

NLAF is an interagency forum that brings together key legal service providers¹ across government, non-government and private sectors and aims to facilitate access to justice for socially and economically disadvantaged people by:

- improving the way services and programs are designed and delivered;
- promoting cooperative arrangements and collaboration between organisations within the community and justice sectors; and
- promoting the development of innovative ways of servicing marginalised groups in the community based on relevant research and identified gaps in existing legal services.

NLAF Fines and Traffic Law Working Group

From time to time NLAF convenes working groups that address specific issues that relate to access to justice for socially and economically disadvantaged persons in NSW. NLAF has established a Traffic and Fines Law Working Group with the aim of reducing the number of people who experience legal problems associated with fines, licence suspension and disqualification, particularly in relation to young people and Aboriginal people disproportionately disadvantaged by lack of alternative transport. Members of the working group include representatives from the following organisations:

- Aboriginal Legal Service;
- Community Legal Centres;
- Legal Aid NSW;
- Public Interest Advocacy Centre (PIAC);
- Salvos Legal; and
- Shopfront Youth Legal Centre.

Working group members have particular expertise in working with, and providing legal services to people who are socially and economically disadvantaged and have legal problems associated with fines and licensing.

Working group members have identified that the current laws relating to unauthorised driving offences have a significant negative impact on socially and economically disadvantaged people with limited access to public transport. Accordingly, one of the objectives of the working group is to explore practical and workable options for licensing non-licensed drivers and re-licensing disqualified drivers. Working group members have undertaken detailed consideration of reform of the driver licensing system and are well placed to comment on the proposed law reforms relating to unauthorised driving offences.

3. The need for law reform

At the outset, NLAF submits that the reforms outlined in section 1 (a) – (d) of the Terms of Reference are appropriate and necessary because:

- A driver's licence is a vital tool for facilitating social inclusion of people living in areas of NSW with limited access to public transport;
- There are communities in NSW (in particular, Aboriginal communities in remote NSW) where a significant proportion of people face significant barriers to obtaining and maintaining driver licenses and consequently drive unlicensed;
- Current licence sanctions for unauthorised driving do not take into account the particular circumstances of these communities – they exacerbate disadvantage and do not provide opportunities for relicensing and social inclusion; and
- There are significant financial and other costs for government, and the broader community, associated with the enforcement of these aspects of the penalty system. However, these costs

¹ Aboriginal Legal Service NSW/ACT, Community Legal Centres NSW, Department of Attorney General and Justice (DAGJ), LawAccess NSW, Law and Justice Foundation of NSW, Law Society of NSW, Legal Aid NSW, Legal Information Access Centre, State Library (LIAC), NSW Bar Association, Public Interest Advocacy Centre (PIAC), Public Interest Law Clearinghouse (PILCH) NSW

are disproportionate to any claimed benefit in relation to safety on NSW roads. In some respects, no benefit at all has been able to be measured.

3.1 The power of a driver's licence

In areas of NSW with limited access to public transport, a car and a driver's licence is needed to do things that most people take for granted. Without a licence, in country areas:

- Public transport can be limited, expensive and inconvenient; and
- Long distances can make it almost impossible to get to work, TAFE or university, buy fresh food, take children to school, see a doctor, or visit family and friends.

For Aboriginal people living in country areas, driving a car can significantly improve access to employment, training and study opportunities.

A valid driver's licence unlocks opportunities to:

- Learn, through education and training;
- Work in paid or voluntary work;
- Connect with family and friends; and
- Go shopping, go to the doctor and visit the local community library or swimming pool or access other government services.

3.2 Barriers to obtaining and maintaining a driver's licence in Aboriginal communities

Members of Aboriginal communities, particularly communities in remote NSW, encounter a range of barriers that can prevent or obstruct them from obtaining and maintaining a driver's licence. These include literacy problems and difficulties passing the driver knowledge test; limited access to licensed drivers to supervise learner drivers; and the costs associated with obtaining a licence, owning and maintaining a car being unaffordable². Furthermore, it has been acknowledged by the research literature³ that the graduated licensing systems increase the difficulties of obtaining licences for individuals in disadvantaged groups and remote communities.

In addition to these barriers, many Aboriginal people experience difficulties obtaining the proof of identity documents necessary to apply for a licence, such as birth certificates and certificates evidencing a change of name.

Birth certificates

Many Aboriginal people do not have birth certificates. In such cases, they face the extra hurdles of securing registration documents required to obtain a birth certificate and then applying for a birth certificate before they can apply for a driver's licence. Aboriginal people living in remote communities may encounter the following barriers that prevent them from successfully completing the registration process:

- The process of registering and applying for a birth certificate may be experienced as complex and overwhelming, particularly when people have low levels of literacy and are unfamiliar with the procedure;
- The costs associated with registering the birth and obtaining the birth certificate may be prohibitive; and
- Long distances between remote communities and the nearest place where a person can secure assistance with the registration (e.g. registry office / government access centre) may render such services inaccessible.

There is a high demand for the issue of birth certificates in remote Aboriginal communities in NSW. Births Deaths and Marriages (BDM) recently participated in an interagency outreach project⁴

²These difficulties are detailed in Elliot & Shanahan (2008) *Investigation of Aboriginal Driver Licensing Issues*. The Report was commissioned by the RTA (now Roads and Maritime Services).

³Senserrick, T & Haworth N (2005) "Review of literature regarding national and international young driver training, licensing and regulatory systems, Report to Western Australia Road Safety Council" Monash University Accident Research Centre.

⁴The project was coordinated by the Cooperative Legal Services Delivery Unit at Legal Aid NSW. Participating agencies included Legal Aid NSW, Aboriginal Legal Services, Western NSW Community Legal Centre, Thiyama-li Family Violence Legal Service, Ashurst

involving the delivery of legal and government services to Bourke and Brewarrina communities. BDM took approximately 280 birth certificate applications for Aboriginal people in a period of less than eight hours.

It is also worth noting the significant issues in accessing birth certificates in cross-border communities where people may have been born in a different jurisdiction to where they reside. This is particularly the case in Aboriginal communities such as Dareton on the Victorian/NSW border, and Toomelah and Bogabilla on the NSW/Queensland border.

Change of name

For a number of reasons, a person may have been registered at birth with a different name to the one they currently use. Roads and Maritime Services (RMS) requires the name on the driver's licence to match that of the birth certificate. An Aboriginal person currently using a name that is different to that on their birth certificate may strongly object to this requirement for a range of cultural and personal reasons⁵.

If a person wishes to apply for a driver's licence using a different name to the one recorded on their birth certificate, they must formally change their name. The process of securing a change of name can be lengthy, complex and costly⁶. The realisation of what may be involved in obtaining a driver's licence may be overwhelming. In addition, the experience may also be distressing because it may require the Aboriginal person to confront or relive past traumatic events associated with a name that is deliberately not being used. The working group are aware of a number of cases where people were in distress at the prospect of having to use the name on their birth certificate as they did not consider this their actual name.

The barriers to obtaining and maintaining a driver's licence discussed above, contribute to the prevalence of unlicensed driving in some Aboriginal communities in remote NSW as noted in a recent research report.⁷ The report found that 29% of Aboriginal respondents who had never held a licence had driven on a NSW road in the previous year, with some driving once per week. In addition, the NSW Law Reform Commission (LRC), in its report on the penalty notice system, stated that during its consultations, it was made aware of Aboriginal communities where there were only one or two licensed drivers.

It follows that the prevalence of unlicensed driving makes such communities particularly susceptible to licence sanctions. The significant negative consequences of such sanctions are discussed below.

3.3 The negative impact of licence sanctions on vulnerable and marginalised people

The NSW LRC report on the penalty notice system stated that driver licence sanctions:

*'can cause severe social and financial problems for people who live in areas not well served by public transport and who require a driver licence to work or to access essential services.'*⁸

The disproportionate and oppressive effects on marginalised sections of the community - such as Aboriginal people, young people, prisoners, and people living in areas with limited access to public transport - are also outlined by the NSW Sentencing Council in its Interim Report, titled *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, and in the LRC Consultation Paper 10 (CP 10).⁹

The suspension or cancellation of a driver licence can:

- make it harder to keep a job;

Lawyers, Births Deaths & Marriages, State Debt Recovery Office, Office for Fair Trading, Roads & Maritime Services, Centrelink, Centacare, Transport for NSW, Australian Human Rights Commission, Kingsford Legal Centre, and Medicare Local + Aboriginal Medical Services.

⁵ These include: a child may have been forcibly removed from their family and given a different name to that of their family name; for cultural reasons, a person who shares the same name as a parent, may not use that name once the parent dies; a person may have become estranged from their family or from one parent because of violence or abuse and taken on a different name to that of their birth name; or child's parents may separate and subsequently the child takes on the surname of a stepfather rather than the name given at birth.

⁶ Children under 18 years must obtain a court order to change their name. A parent must apply on the child's behalf under the *Family Law Act* for such an order. Young people who are 18 years and older are required to sign a statutory declaration regarding the name change. The current cost for an application for change of name is \$174.00.

⁷ Research Report, *An investigation of Aboriginal driver licensing issues*, December 2008 commissioned by the RTA (as it was known before becoming Roads and Maritime Services)

⁸ NSW Law Reform Commission, *Penalty Notices* February 2012 p xxi

⁹ NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010) [5.64]-[5.68]; NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [5.19]-[5.24].

- stop someone from being able to find work;
- aggravate other financial hardships;
- push people down a 'slippery slope' towards more contact with the criminal justice system (through secondary offending); and
- ultimately lead to imprisonment.

The current licence sanctions do not accommodate the needs of vulnerable population groups – they exacerbate the disadvantage experienced by marginalised groups and do not provide opportunities for relicensing and social inclusion.

3.4 The costs of the system

The costs of enforcing the current system are very high.

The LRC report on the penalty notice system refers to the evaluation of the Work Development Order scheme and highlights the cost to government of secondary offending¹⁰: Over the past 10 years, over 9000 people have been jailed for driving while licence disqualified or suspended. The cost of incarcerating someone is approximately \$280 per person per day¹¹.

In addition to prison costs, there are tens of millions of dollars spent by police, prosecutors and the courts in charging and handling these types of offences every year.

The even greater hidden costs are for the people excluded from a more active role in society by not having a driver's licence. Without a licence, many people:

- Cannot find or keep a job;
- If they do find a job, it is usually lower paying than if they had a licence, or
- Live on Centrelink allowances.

Not having a driver's licence costs the person and their families significantly - both financially and socially.

4. Proposed reforms

NLAF's submissions in relation to the specific reforms proposed in the Terms of Reference of the Inquiry are set out below.

4.1 Right to apply for removal of outstanding disqualification periods

NLAF submits that it is appropriate to establish a right to apply to the court to have any outstanding disqualification periods removed for people who complete a minimum offence free period.

The current system does not provide an opportunity for disqualified drivers to work towards reinstatement of a licence. For people with long periods of licence disqualification, there is little hope of getting their licence back. This means there is little motivation, and virtually no incentive to stay off the road and comply with their current period of disqualification.

At the same time, a person who has turned their life around and fixed their behaviour continues to suffer the consequences of not having a driver's licence – social exclusion and poverty.

Currently, there is no appropriate incentive within the system to encourage disqualified drivers to comply with their penalty. Licence disqualifications remain long after people have moved on and grown up. For example, a person with a licence disqualification period of ten or twenty years who last committed a driving offence in their mid 20's, has no hope a decade or two later to have their court ordered disqualifications reduced or removed.

The proposed reform would provide such people with an opportunity to obtain a licence once again and facilitate their social inclusion, including in relation to securing employment.

The case studies below show the difficulties and disadvantage faced by disqualified drivers who have reformed their behaviour but cannot get their licence back.

¹⁰ NSW Law Reform Commission, *Penalty Notices* February 2012 [8.29]

¹¹ NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011) 47 – The estimate in 2011 was \$270 per day. Accordingly, NLAF members conservatively estimate these costs have increased by \$10 per day over the last few years.

John – 33 years old

Ten years ago, John was homeless, struggling with drug addiction, and had been convicted of several minor criminal offences. Today John is a successful technical analyst in a multinational company.

Seven years ago, when he was homeless, John was disqualified from driving. His main offences were driving whilst suspended and disqualified, plus some demerit point offences. He has not committed any further offences since February 2006, but is banned from driving till May 2019.

While staying in a refuge several years ago, John became involved with a Salvation Army program. With the Salvos' help, he was able to turn his life around.

He has been awarded a \$5000 scholarship for outstanding work, and has been promoted to a position of responsibility in his job.

Not having a driver's licence makes John's life very difficult. He lives on the Central Coast and travels to the Sydney CBD every day using public transport.

John is a very different person compared to when he committed his driving offences. He has developed a real sense of personal responsibility. The Salvos' believe if John were given a second chance, he would be a good driver.

Marco – 27 years old

Marco grew up in a household where he witnessed and was subject to serious domestic violence. He missed large parts of his schooling, and at age 17 he moved out of the family home to live with his foster grandmother.

Marco was initially unable to get a driver's licence because he did not have the right identification. By the time he organised the necessary ID, he was already disqualified from driving.

Marco committed his first two offences of driving while unlicensed when he was under **18**. By the time he reached the age of 18, Marco was already disqualified from driving until he turned **27** in 2011.

Marco committed his most recent traffic offence in December 2002. He has shown good behaviour and maturity since that time. In 2008 he sent a petition to the Governor of New South Wales seeking a pardon for his licence disqualifications. Marco highlighted the obstacles he faces as an apprentice mechanic, his trouble getting to and from work, as well as other mitigating facts about his original offences. The process was time-consuming and ultimately unsuccessful.

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 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 his time homeless and in and out of school because of his unstable relationship with his family. Between the ages of 15 and 18, he spent approximately three years in and out of juvenile detention centres and was not in regular contact with his family during that time.

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.

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 and to apply for remission of the remaining period of disqualification.

In addition, the absence of a right to remove outstanding disqualification periods is also at odds with the Work & Development Order (WDO) scheme whereby disadvantaged people with outstanding fines can "work off" those fines by undertaking rehabilitative, vocational or volunteering activities. In some places where NLAF members have assisted clients to manage their fines and have license restrictions lifted by getting them onto time-to-pay arrangements or have referred them to a WDO sponsor, the existence of a long term disqualification lessens the positive incentive to participate in the WDO activity.

4.2 Abolish the Habitual Traffic Offenders scheme

NLAF supports the abolition of the Habitual Traffic Offender (HTO) scheme.

The Sentencing Council in its Interim Report, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices* (2006), noted that mandatory disqualification provisions and the automatic imposition of Habitual Traffic Offender Declarations:

"have led to 'crushing' periods of disqualification, particularly for young people without qualifications for whom the lack of a licence significantly impacts on their chances of employment, and arguably contains little incentive to refrain from driving."

The Sentencing Council recommended that the automatic imposition of habitual traffic offender declarations be abolished.

NLAF notes that no other Australian jurisdiction has such a scheme and there is no evaluation of the scheme that supports its retention.

NLAF also notes that in remote communities where there is little or public transport infrastructure to regional centres for medical services, shopping, employment or education, the imposition of licence disqualification (including an HTO) only further entrenches disadvantage. NLAF members note that in communities where there are few licensed drivers or registered vehicles, their clients may have no choice other than to drive unlicensed to access these services.

The following case study demonstrates the deleterious impact of the current regime in Aboriginal communities, and how the severity of the sanctions are disproportionate to the harm caused by unauthorised driving.

Kerry

Kerry is an Aboriginal woman in her early 40s living on the mid North Coast with her chronically ill husband and four children. Kerry lost her licence when she was 17 for a low range drink driving offence. Over the years she was charged many times for driving whilst disqualified and has been declared an habitual traffic offender. Kerry has no other criminal charges on her record. A few years ago, Kerry spent 6 months in gaol, during which time her children were removed and placed in care.

After a period of non-offending, Kerry recently reversed a car out of her driveway to clear access. She parked in the street outside her house and was seen by police. She was charged and is facing imprisonment again. Kerry and her family are currently experiencing extreme hardship. Her husband has been on life support in an intensive care unit after a serious infection and is now in a wheelchair and unable to drive. Kerry is his carer, and has to rely on others for transport to frequent medical appointments. If she is goaled again, her husband has no ability to look after the kids and it is likely that they will return to foster care.

Kerry has completed a course to get her L's, has got her fines under control and does not have a history of reckless or unsafe driving behaviour. Her record of driving unlicensed is related to family and community obligations, and is seriously compromising her family's wellbeing and capacity to access treatment, work and education.

4.3 Provide courts with discretion when imposing disqualification periods for unauthorised driving offences and revise the maximum penalties prescribed for unauthorised driving offences

Currently the penalties for unauthorised driving offences (as defined in the Terms of Reference of the Inquiry) range from court imposed fines to imprisonment. Almost all also carry mandatory licence disqualification periods of up to 2 years. The licence disqualification periods are cumulative.

NLAF submits that the courts should be provided with discretion when imposing disqualification periods and that the maximum penalties for unauthorised driving offences should be revised because:

- the severity of some of the sanctions for unauthorised driving do not match the harm caused by the offence; and
- the sanctions deliver a significant negative impact on some vulnerable and marginalised groups, particularly in cases involving secondary offending.

Severity of sanctions vs harm caused by the offence

Unauthorised driving of itself, does not pose a significant risk to safety on the roads equivalent to the more serious speeding and drink driving offences. Proportionality requires that the severity of the sanction is matched by the harm caused by the offence. It is not appropriate to treat such offences as harshly as a high range PCA¹² and other drug and alcohol-related offences, which pose an explicit risk to public safety.

The Sentencing Council Report recommended a reconsideration of mandatory disqualifications and to allow for a differentiation where secondary offences of driving whilst suspended or disqualified result from a fine default sanction compared with those which result from a previous serious driving offence - this recommendation was adopted.

Secondary offending

Secondary offending occurs where a person continues to drive after their licence has been suspended or they have been disqualified from driving. Often the person will continue to drive unlicensed to work or to access essential services. They can then acquire subsequent convictions for driving unlicensed and driving while disqualified. Ultimately, they may be imprisoned for these secondary offences.

Fine default

The offence of drive while licence cancelled suspended - due to fine default carries a penalty of imprisonment (maximum prison term of 18 months for the first offence and two years for subsequent offences).

The Law Reform Commission in its report on the penalty notice system¹³ acknowledged that although theoretically imprisonment for debts arising from fine default is not permitted, it occurs indirectly by way of secondary offending.

The LRC report refers to the evaluation of the Work Development Order scheme and highlights that: over the past 10 years, almost two-thirds of licence suspensions were for fine default.

The following case studies from the Homeless Persons Legal Service (HPLS) at PIAC demonstrate how vulnerable people (such as people who are homeless and people with mental health problems) are susceptible to "sliding down" the path from fine default to imprisonment via secondary offending.

SR

SR was a refugee from Iraq having moved to Australia in 1994. He suffered from posttraumatic stress disorder, due to events relating to his family in Iraq. He first obtained his driver's licence in 1998 but then had lost it on 9 July 1999 due to fine default suspension. From there he had been unable to pay the fines necessary to obtain a licence but kept driving and being charged with drive whilst unlicensed, which resulted in disqualification periods being imposed by the courts.

¹² Prescribed concentration of alcohol (PCA)

¹³ NSW Law Reform Commission, *Penalty Notices* February 2012

SR lost his job and his family and was kicked out of the family home. SR came to see the HPLS Solicitor Advocate via the Homeless Persons Legal Service clinic at Edward Eagar Lodge in October 2008. SR was due to appear at Hornsby Local Court on two consecutive charges of drive whilst disqualified occurring within a short space of time, together with charges of drive whilst uninsured, drive whilst unregistered. SR had been convicted of a drive whilst disqualified charge at Sutherland Local Court two months prior and was facing the real prospect of a term of imprisonment.

BM

BM is a client of the HPLS who lives in a bus situated on a property (not belonging to him) in Sydney's southern suburbs. BM has been homeless for a number of years.

BM commenced driving over 30 years ago and had obtained a licence in the late 1970s. In 1981, he lost his licence because of non-payment of fines, which were considerable and which he was unable to pay. He subsequently drove whilst his licence was cancelled and was disqualified. From that point, the client's situation snowballed with further traffic offending resulting in bonds, community service orders and eventually prison. BM approached the HPLS Solicitor Advocate after having been charged with drive whilst disqualified. BM had a poor traffic record and the drive whilst disqualified charge for which the HPLS provided representation, was his ninth drive whilst disqualified charge. At the time of the offence, BM was under a habitual traffic offender declaration. This was imposed on top of a two-year period of disqualification ordered in the District Court of NSW following a severity appeal from a sentence of imprisonment and disqualification at Newtown Local Court for a charge of drive whilst disqualified.

The genesis of the problem for BM was a result of his initial inability to pay fines for which his licence was cancelled.

The issue of fine default and secondary offending is also relevant in disadvantaged and marginalised communities, such as Aboriginal communities where the capacity to pay down large debts for fines accrued is limited. A research report about licensing in Aboriginal communities¹⁴ found that a significant proportion (42%) of the population surveyed had outstanding debt to the State Debt Recovery Office and many young people had accrued debts of \$5000 or more. Unpaid fines and outstanding SDRO debt were the most common reasons given for licence suspension or cancellation. It is NLA members' experience that it is not uncommon to assist clients with fines debt exceeding \$10,000-15,000 in some remote communities.

RMS data regarding licence suspensions also demonstrates that the areas with the highest rates of licence suspensions due to fines include areas such as Bourke, Brewarrina and Walgett – areas with a relatively high Aboriginal populations.

The LRC Report on the penalty notice system reported that during its consultations that

"grave concerns were expressed about the number of young Aboriginal men who are imprisoned for repeated 'drive while disqualified' offences, and about the consequent impact of imprisonment on them and their families."¹⁵

Aboriginal people living in NSW were 21 times more likely to be imprisoned for unauthorised /unlicensed driving offences than the broader population during 2007¹⁶. In 2008, nearly a quarter of all Indigenous appearances in the NSW Local Court were for road traffic and motor vehicle regulatory offences¹⁷. According to the 2011 NSW Criminal Court Statistics, driver licensing offences and regulatory driving offences accounted for 20% (2740) of guilty findings for Aboriginal people in finalised Local Court matters. NLA members estimate that 10 – 17% of Aboriginal prisoners are incarcerated for unauthorised driving offences.

NLA submits that in the cases where a person is convicted of an unauthorised driving offence involving drive while licence cancelled or suspended due to fine default, the penalty of imprisonment

¹⁴ RTA Research Report, *An investigation of Aboriginal driver licensing issues*, December 2008

¹⁵ NSW Law Reform Commission, *Penalty Notices* February 2012 [6.87]

¹⁶ Unpublished data from NSW Bureau of Crime Statistics and Research (2007); RMS Discussion Paper (2007) *Improving outcomes for Aboriginal Drivers: Discussion Paper*

¹⁷ NSW Bureau of Crime Statistics and Research (2009). *NSW Criminal Court Statistics Report 2008*. Sydney

should be removed. Where a person genuinely lacks the capacity to pay fines, they should not face the prospect of imprisonment because of their poverty.

Unlicensed driving

The offence of drive while never having been licenced carries a penalty of imprisonment (a prison term is not applicable on conviction for the first offence, a maximum gaol term of 18 months if convicted for subsequent offences).

There is also evidence the highest ranking LGAs for drive while never having been licensed offences are from regional and remote NSW (including Bourke, Brewarrina, Walgett, Central Darling and Walgett)¹⁸.

This case study shows why people who are suspended from driving often continue to drive with the risk of further penalties and even jail. It shows the negative impact of driver licence sanctions, not only on the driver but also on the driver's family and loved ones.

Sarah - 34 years old

Sarah is an Aboriginal woman living in the community of Jublum on the North Coast of NSW. Sarah was interviewed in November 2009 whilst in custody at Grafton Jail for driving unlicensed.

In 1994 she sat the Knowledge Test for her Learner's permit at Casino RTA. She failed the test and has never been back for another test. Sarah reads and writes reasonably well but she said "I had a good bit of trouble understanding the questions". Once she failed she did not sit the test again.

Sarah usually lives at home in the Jublum community 10 minutes by car outside of Tabulam in northern NSW. She is at home with the children most days.

Sarah and her partner Les have 5 children in their care. Their daughter, who is 16, goes to Bonalbo School (approximately 32 km away). The 4 foster children, aged 6 to 12 go to Tabulam School. They need to take the children to the bus in Tabulam each day.

Sarah had a job at the rural buying service in Tabulam. She also worked at the local café in Tabulam; she lost both these jobs due to a lack of licence.

Sarah has two children with ear problems. This means they must regularly go to the hospital 32 kilometres away at Bonalbo. There is no accessible bus service. The mission's community transport bus which goes to Casino (approximately 55 km away) once a fortnight, is only for people living on the mission.

In May 1993 Sarah was caught driving without a licence. After this she was caught more than 5 times for driving unlicensed. She said 'each time I was taking the children to school or the doctors; I only drive when my children need something.'

The last time she was caught, she was driving her daughter to the hospital. She was arrested, as she had broken a bond for driving unlicensed. She was sentenced to six months in prison, and is disqualified from driving until 2022. Without the chance to get a valid driver's licence, it is very hard to get a job, take her kids to school or get to urgent medical appointments.

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 till 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.

¹⁸ Unpublished data from Department of Attorney-General and Justice.

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.

There is one habitual traffic offender declaration on his record; if he can get this quashed he will be eligible to re-apply for his licence in 2015.

Under the current system, people who commit relatively minor offences (i.e. unauthorised driving offences associated with either fine default or unlicensed driving) may ultimately be imprisoned.

In addition, the effectiveness of licence sanctions as a deterrent to driving is questionable where people have limited transport options. The Sentencing Council¹⁹ has noted that:

"Licence sanctions have little impact on driving where that is necessary to obtain or hold employment or to access essential services, and yet deprive unlicensed drivers of any realistic opportunity of gaining a licence. People drive regardless of licence restrictions where compliance with the restriction would cause an insurmountable burden, such as getting to a job where there is inadequate or non-existent public transport; or where it would occasion difficulties in getting children to child care and school."

For the reasons listed above, NLAF submits that it is appropriate to introduce reforms that provide courts with discretion when imposing disqualification periods and revise the maximum penalties prescribed for unauthorised driving offences.

4.4 Introduce vehicle sanctions for offenders who repeatedly drive while disqualified

NLAF does not support the imposition of vehicle sanctions imposed by police prior to court for people who repeatedly drive while disqualified for the following reasons:

- At present, police have the power to impose vehicle sanctions (such as confiscating number plates and impounding cars) in limited circumstances where people intentionally engage in dangerous driving behaviour. For example, offences involving police pursuits, "hooning" or driving at a speed of 45km or more above the speed limit. In these cases, sanctions can be imposed immediately by police without a court making a finding of guilt in relation to the offence. The discretion accorded to police to impose an immediate sanction is justified for public safety reasons on the basis that the offending behaviour is inherently dangerous.

As previously mentioned, the offences of unauthorised driving do not carry any inherent risks to public safety. Imposing such a sanction cannot be justified on the grounds of public safety.

NLAF submits that the state should not be able to impose punitive measures, such as vehicle sanctions, without a court finding of guilt if there is no inherent risk to public safety (especially where there is potential for the sanctions to have significant damaging consequences on an individual, their family and community).

- It would be more appropriate to consider vehicle sanctions for offences where public safety is at risk, such as drink driving and other PCA offences.

¹⁹ NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices*, Interim Report (2006) [5.44]

- Providing police with the discretion to impose vehicle sanctions for disqualified driving prior to a finding of guilt in a court, increases the risk of corruption and unlawful discrimination in relation to enforcement of these offences.
- The imposition of vehicle sanctions will not facilitate the licensing of unlicensed or disqualified drivers. It will make it more difficult for such drivers to obtain a licence.
- Vehicle sanctions will disproportionately affect communities in rural, regional and remote (RRR) areas of NSW as there are a high proportion of disqualified drivers in these areas.
- In light of the comments in **section 3.1** of this submission about the importance of having a car and licence in areas of NSW with limited access to public transport, the imposition of vehicle sanctions will have a disproportionately negative effect on people living in these areas (such as RRR NSW).
- For the reasons outlined in **section 3.2** unlicensed driving is prevalent in some Aboriginal communities in remote NSW. There are often only a few members of the community who own a car or are licensed to drive. Consequently, these people often shoulder responsibility for transport needs of the community. In these communities, vehicle sanctions will have a punitive effect not only on the driver of a vehicle, but on family, friends and associates of the person who owns the vehicle that is sanctioned.

Notwithstanding what is said above, NLAF acknowledges that there may be a limited role for *court* imposed vehicle sanctions in appropriate cases - when considering the range of sanctions that can be imposed for disqualification offence, vehicle sanctions may be more appropriate than mandatory licence disqualification.

If vehicle sanctions are to be introduced, they should only be imposed.

- by the courts (as opposed the police prior to a matter reaching court); and
- at the court's discretion, and should not be automatic or mandatory.

In addition, the court should be required to take into account potential hardship to third parties in determining whether vehicle sanctions are appropriate.

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NLAF Fines and Traffic Law Working Group