

**Submission
No 13**

DRIVER LICENCE DISQUALIFICATION REFORM

Organisation: The Chief Magistrate of the Local Court

Name: Judge Graeme Henson

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The Chief Magistrate of the Local Court

22 July 2013

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

Dear Sir/Madam

Submission – Inquiry into driver licence disqualification reform

I write on behalf of the Local Court of New South Wales in response to the public call for submissions in respect of the above inquiry.

The Local Court has jurisdiction to determine charges for offences under the road transport legislation, including unauthorised driving offences formerly contained in sections 25 and 25A of the *Road Transport (Driving Licensing) Act 1998* (now sections 53 and 54 of the *Road Transport Act 2013*).

Unauthorised driving offences have historically been, and continue to be, the subject of proceedings before the Local Court on a daily basis. The Court presently sits in more than 135 locations across the State and in every region a significant portion of its workload comprises proceedings for unauthorised driving offences. The Judicial Commission of New South Wales' most recent study of common offences in the Local Court identified five unauthorised driving offences as coming within the top twenty most frequently dealt with offences:¹

Offence	Rank (2010)	Rank (2007)	Rank (2002)	No. of cases	% of all cases (n = 103,584)
Drive while disqualified (s 25A(1), RT(DL) Act)	5	4	4	5,136	5.0
Drive while suspended (s 25A(2), RT(DL) Act)	7	7	10	3,839	3.7
Drive while never having been licensed (s 25(2), RT(DL) Act)	12	9	-	3,444	3.3
Drive without being licensed (s 25(1), RT(DL) Act)	15	12	12	2,101	2.0
Drive while licence suspended due to fine default (s 25A(3A)(a), RT(DL) Act)	18	-	-	1,481	1.4
			TOTAL	16,001	15.4

¹ Brignell G, Baghizadeh Z & Poletti P, 'Common offences in the NSW Local Court: 2010', *Sentencing Trends & Issues* (No. 40, May 2012)

In the Court's experience, it is also not uncommon for a person appearing before it on an unauthorised driving charge to have a history of committing such offences and already be subject to licence disqualification, sometimes for a very lengthy period.

Against this background, magistrates are well aware of the broader social and economic impacts that a conviction for an unauthorised driving offence and the resultant licence disqualification may have upon an individual. Submissions on the hardship that will be occasioned to a person as a result of disqualification are frequently made. In this respect, the comments of Justice Howie in the Court of Criminal Appeal's Guideline Judgement on High Range PCA offences² are pertinent:

145 ... the disqualification of a person from driving may have a very significant impact upon the offender's ability to obtain or retain employment or may interfere with the offender's capacity to function in the community. Of course the impact will differ from person to person and from locality to locality within the State. However, if a conviction is warranted because of the seriousness of the offence, the court can rarely refuse to take that course simply because of its impact upon the offender's licence.

In light of this, from the Court's perspective any review of unauthorised driving offences would benefit from the consideration and clear articulation in the road transport legislation of the intended purpose/s of the licence disqualification regime as a whole, including whether it is a protective measure directed at public safety and/or is effectively a penalty in nature. The Court of Criminal Appeal has made various observations in that regard, such as the following:

- "Licence disqualification is such a significant matter and can have such a devastating effect upon a person's ability to derive income and to function appropriately within the community that it is a matter which, in my view, must be taken into account by a court when determining what the consequences should be, both penal and otherwise, for a particular offence committed by a particular offender."³
- "The fact that the commission of serious driving offences is taken to warrant a level of automatic licence disqualification indicates that the Parliament has adopted a significant protective measure, in the interests of public safety, where an offender has demonstrated a level of irresponsibility which is incompatible with the statutory privilege of holding a driver licence."⁴
- "One of the purposes of a period of disqualification is to impress upon the offender the seriousness of the offence and the necessity of complying with road rules".⁵ However, in this case involving an offender with a formerly excellent driving record, the Court considered this purpose was achieved by the offender's conviction and imprisonment, such that there was no relevant purpose to warrant him being subject to a period of licence disqualification upon his release from prison.

As is evident from those observations, the approach taken to the objective/s of licence disqualification can logically be expected to have an effect upon the circumstances in which licence disqualification should be imposed (whether by operation of legislation or by order of a court) and the appropriate length of any disqualification period.

² [2004] NSWCCA 303

³ Above note 2 at [116]

⁴ *Elyard v R* [2006] NSWCCA 43 at [30]

⁵ *Preston v R* [2011] NSWCCA 25 at [47]

For example, it might be assumed a significant objective is community safety. If so, one might expect the utility of a period of licence disqualification upon conviction for an offence of driving without being licensed that occurs in circumstances where the person has not otherwise committed an offence against the road transport legislation to be less than where the driving in question has given rise to a risk to public safety. Another significant objective may be deterrence from reoffending. If so, this is already expressly encapsulated in the availability and imposition of a penalty such as a fine, insofar as it is one of the purposes of sentencing set out in section 3A of the *Crimes (Sentencing Procedure) Act 1999*.

It may be that multiple purposes are desirable or appropriate, each of which may factor more or less prominently in the circumstances of a given case. Whatever policy approach is taken (this ultimately being a matter for the legislature), clear articulation of the underlying objective/s of licence disqualification would assist both the consistency of the licence disqualification regime as a whole and the courts in the task of dealing with offences under the road transport legislation.

I turn now to the issues set out in the terms of reference.

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

As the terms of reference specifically relate to unauthorised driving offences, the following comments are accordingly limited to licence disqualification for those offences.

A distinguishing factor of unauthorised driving offences from other offences under the road transport legislation is that the contravention lies in the act of driving, rather than the manner of driving. This is not to downplay the seriousness of such offences, noting in particular that the offence of driving while disqualified often occurs in circumstances of contempt of a previous court-ordered disqualification, but simply to observe that concerns as to public safety will often be less prominent. In that regard, although section 54(8) (formerly section 25A(7)) allows the court to impose a period of licence disqualification in addition to the automatic period of disqualification upon conviction for certain unauthorised driving offences, in my experience this occurs rarely and in the large majority of cases the automatic period is applied.

As a result, I consider there would be merit in there being scope to remove or reduce an automatic disqualification period arising out of regulatory cancellation or suspension of a person's licence (subject in cases of fine default to arrangements being made to address the fine debt issue) following the completion of an offence-free period. If the disqualification has arisen by means other than an order of a court, a review system need not necessarily operate through the courts, but could occur administratively provided that consistent guidelines for the conduct of reviews were adopted.

It would not be desirable for a process to be established that would enable removal or reduction of a disqualification period imposed by the court upon conviction for an offence. This would effectively set up a system whereby a court decision is reviewable well after the fact and notwithstanding that other avenues of appeal could previously have been exercised. If a person chooses not to exercise an appeal right or if an appeal is unsuccessful, this would have the effect of enabling a 'second bite at the cherry' (or potentially a third, if the court's decision on the review is also appealable).

As an additional measure or an alternative to a review system, one option may be to adopt a different approach in the legislation to the accumulation of licence disqualifications for unauthorised driving offences.

An analysis by the NSW Bureau of Crime Statistics and Research in 2007 addressing driving offences more generally suggested that longer licence disqualification periods actually had little to no deterrent effect.⁶ If that is so – an observation that appears to be borne out by the Court's daily experience of individuals with a history of repeated unauthorised driving offences in spite of lengthy disqualification periods - there may be some merit in considering a legislative cap on the maximum total disqualification that can be accumulated.

To the extent it may be of concern that capping the maximum available cumulative disqualification period would effectively sanction repeat conduct, the available penalty provisions for unauthorised driving offences would continue to provide a means by which the purposes of sentencing including deterrence are pursued.

b) Abolish the Habitual Traffic Offenders scheme

I am of the view, which is shared by many magistrates, that the Habitual Traffic Offenders scheme should be abolished.

HTO declarations are regularly quashed. Data from the JusticeLink case management system indicates that from 1 July 2010 to 1 July 2011, approximately 3,000 HTO declarations were quashed in the Local Court.

The quashing of a declaration may occur for several reasons. The protracted nature of the disqualification period will often lead to a determination that a declaration would have disproportionate and unjust consequences. Further, as a matter of law, the automatic disqualification of a person from holding a licence for five years by virtue of their conviction for a relevant offence that will entail a period of licence disqualification appears tantamount to a form of double jeopardy.

- 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**

I support the provision of greater discretion to the courts when imposing disqualification periods for unauthorised driving offences.

At present, the only available discretion is the provision in section 54(8)(b) (formerly section 25A(7)(b)) to impose an additional period of disqualification for some offences. There is no ability to reduce a period of disqualification if in the circumstances of the case the court considers it to be disproportionately lengthy, other than to avoid it entirely by not proceeding to record a conviction under section 10 of the *Crimes (Sentencing Procedure) Act 1999*. Of course, "if a conviction is warranted because of the seriousness of the offence, the court can rarely refuse to take that course simply because of its impact upon the offender's licence."⁷

⁶ Moffatt S & Poynton S, 'The deterrent effect of higher fines on recidivism: Driving offences', *Contemporary Issues in Crime & Justice*, No. 106 (March 2007)

⁷ Above note 2 at [145]

Provision for automatic and minimum periods rather than mandatory provisions would go some way to addressing this difficulty. Otherwise, some alternative approaches that could be considered are:

- *Including unauthorised driving offences within the existing general provision conferring the discretion to disqualify.* As unauthorised driving offences are not 'major offences' for the purpose of the road transport legislation, if the existing mandatory disqualification periods for these offences were removed the setting of an appropriate disqualification period could simply be brought within the general power of the court to disqualify currently contained in section 204. Considerations relevant to the exercise of the discretion, for instance whether the consequences of disqualification would be disproportionate or unjust, could be addressed in the legislation in order to promote consistency of approach.
 - *Taking a risk management approach:* Disqualification for unauthorised driving offences could be considered on the basis of a risk management approach, similar to that set out in the new *Bail Act*, whereby the basis for disqualification and the appropriate period could be informed by the extent of the risk to public safety if the person was to drive.
 - *Enable a person convicted of an unauthorised driving offence to obtain a 'good behaviour licence':* there could be a similar approach to existing schemes suspending the operation of a disqualification period, such as the administrative scheme whereby a person can elect to hold a good behaviour licence as an alternative to demerit point suspension and the legislative interlock program for offenders convicted of an alcohol-related major offence. All or part of a period of disqualification could be suspended and the person permitted to hold a 'good behaviour licence' requiring them not to commit any further driving offences. If convicted of a further offence, the good behaviour licence could be revoked and the disqualification period take effect. The offences or circumstances in which this may or may not be suitable would need to be considered; for instance, an individual may already be subject to an existing disqualification period.
- ii. Requiring that disqualification periods run from the date of conviction unless otherwise ordered**

Whatever approach is taken to determining the date on which a disqualification period is to commence, it would assist if this were to be consistently addressed throughout the road transport legislation. As it is presently framed:

- *For 'major offences':*⁸ The case law indicates that due to the wording of the relevant provision, the court when disqualifying for a major offence does not have the power to require that a disqualification period commences on a date earlier or later than the date of conviction.⁹
- *For non-major offences:* It has further been observed that the wording of the general disqualification power for offences other than major offences "does not readily imply a restriction on the manner by which the courts may set the period, ie by setting the commencement and conclusion dates or by some other manner".¹⁰

⁸ As defined in section 4, *Road Transport Act 2013* (formerly section 4 and 188, *Road Transport (General) Act 2005*)

⁹ *Hei Hei v R* [2009] NSWCCA 87, *RTA v O'Sullivan* [2011] NSWSC 1258. Note, however, the apparently anomalous decision in *Meakin v DPP* [2011] NSWCA 373, in which it was held that no error was shown where the applicant was disqualified from driving for 3 years for a PCA offence and 5 years for a dangerous driving offence with those periods accumulated.

¹⁰ *Hei Hei* above note 8 at [39]

- *For unauthorised driving offences in section 54:* the provision in subsection (8) regarding disqualification is different again insofar as it provides that a disqualification period runs “from the date of expiration of the existing disqualification or suspension or from the date of such conviction, whichever is the later”.

However it is expressed, in my view the most consistent approach would be for the length of any disqualification period to amount to the total period for which a person is not permitted to drive, with that period commencing either from the date of a suspension already in force at the time of conviction if applicable, or upon conviction by the court.

d) Revise the maximum penalties prescribed for unauthorised driving offences

The maximum penalties for unauthorised driving offences would benefit from revision, particularly with regard to how they fit within the overall approach to penalties in the road transport legislation.

The offence of driving while never having been licensed is especially anomalous. It presently carries a maximum penalty of \$2,200 for a first offence, or \$3,300 or imprisonment for a period of 18 months (or both) for a second or subsequent offence. This is equal to or higher than some other driving offences that by their nature involve a risk to public safety or the causing of injury to another person, such as:

- Driving with a mid-range PCA
- Negligent driving occasioning grievous bodily harm
- Driving furiously, recklessly or in a manner dangerous to the public

These offences each carry maximum penalties of \$2,200 or imprisonment for 9 months (or both) for a first offence and \$3,300 or imprisonment for 12 months (or both) for a second or subsequent offence. In the case of a second or subsequent offence, the maximum sentence of imprisonment of 12 months is less than the 18 months available in the case of a second or subsequent offence of driving while never having been licensed.

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

This reform option is not supported. I have some concern as to the suitability of vehicle sanctions for unauthorised driving offences insofar as they are presently only directed at repeat offending in respect of a limited number of offences where the issue of risk to public safety features strongly, such as police pursuits, so-called ‘car hoon’ offences, and exceeding the speed limit by more than 45kmh.

Thank you for the opportunity to make a submission to this inquiry. Please do not hesitate to contact my office on [REDACTED] should I be able to provide any further assistance.

Yours sincerely,

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Judge Graeme Henson
Chief Magistrate