

**Submission
No 25**

DRIVER LICENCE DISQUALIFICATION REFORM

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**LEGISLATIVE ASSEMBLY
COMMITTEE ON LAW AND SAFETY**

INQUIRY INTO LICENCE DISQUALIFICATION REFORM

NSW Government submission

INTRODUCTION

The Legislative Assembly Committee on Law and Safety has been asked to review options to reform the law related to unauthorised driving offences. In this submission, the term 'unauthorised driving offences' refers to the offences of drive while licence disqualified, suspended or cancelled, and unlicensed driving.

There are often two stages of offending for unauthorised driving offences:

1. The principal offence which leads to the person being disqualified. This may be a traffic offence but it may also be failure to pay a fine unrelated to driving (e.g., for illegal parking, fishing without a licence or failing to vote).
2. The subsequent act of driving while disqualified.

The Committee's Terms of Reference require it to consider a range of possible reforms to licence disqualification, including creating a right to apply to a court to have disqualification lifted after a minimum offence-free period. In considering these reforms, it is important for the Committee to distinguish between disqualified drivers who put the public at risk on the one hand, and on the other, those who pose no real risk to public safety.

In some cases, the original offence that led to a loss of licence may be a series of traffic violations, and some disqualified drivers are not safe on the roads, such as those who have been disqualified for dangerous high speed pursuits. The reforms referred to in the Committee's Terms of Reference would require strong and effective safeguards so that drivers who pose a serious risk to the public are kept off the roads.

However, unauthorised driving offences do not necessarily involve poor driving behaviour. While some unauthorised drivers who have lost their licences may have engaged in unsafe road behaviour, others may have had their licences administratively suspended for the non-payment of fines. The fines may have resulted from traffic management behaviour or from conduct that has nothing to do with driving. For example, a person may lose their licence because they fail to pay parking fines or fail to vote. If they then drive in order to take their children to school, or to attend a medical appointment, the act of unauthorised driving may not usually pose any risk to public safety (although it is a breach of the law). There will be many such cases where the act of unauthorised driving is not dangerous.

Part I of this submission provides general factual material to inform the Committee of the context of unauthorised driving and the impacts of the current licence disqualification regime. Part II sets out information relevant to the specific options the Committee's Terms of Reference require it to consider.

PART I

The context for unauthorised driving and the impacts of the current licence disqualification regime in NSW

A. Background

In NSW, there are more than 600 hundred offences under road transport legislation. The offences vary in seriousness and impact on road safety (e.g., stopping in a no standing zone, compared to driving at 45kmh over the speed limit). For this reason, they attract a wide range of penalties, from demerit points and fines through to terms of imprisonment.

When a person is convicted in court of an offence against road transport legislation, in addition to the penalties that normally apply (which might include imprisonment), the court may also order that the person be disqualified from holding a driver licence.¹ That is, the court can impose a disqualification period, for example, for speeding offences or for breaches of the road rules.

There are some offences where a period of disqualification will always be imposed. These are:

- unlicensed driving
- driving while licence disqualified, suspended or cancelled
- drag racing
- major offences (drink driving, drug driving, predatory driving, police pursuits, negligent driving, murder or manslaughter arising out of the use of a motor vehicle, negligent driving causing death or grievous bodily harm, furious, reckless or menacing driving, and failing to assist after a crash causing injury).

B. Prevalence of unauthorised driving offences

Unauthorised driving offences constitute a high proportion of offences prosecuted in the Local Court. In 2010, the offences of drive while disqualified and drive while suspended were, respectively, the fifth and seventh most common principal offences.²

In 2012, unauthorised driving offences were the third most common principal offences for people found guilty in the Local Court, after regulatory driving offences (speeding, parking and drink driving offences) and assault.³

There is evidence to suggest that a large proportion of unauthorised drivers continue to drive. Studies suggest a range from 25% to 75%, but a figure in the fifty percentile range may be more accurate.⁴ At least one Australian study has reported that disqualified drivers in country areas are more likely to drive illegally.⁵ In areas where public transport options are limited, the ability to drive is often an essential pre-requisite for employment, as well as for access to education, health and other essential good and services.

¹ Section 204(1) *Road Transport Act 2013*.

² Judicial commission, *Common Offences in the NSW Local Court: 2010*, Sentencing Trends and Issues No 40 May 2012, p7.

³ BOCSAR, NSW Criminal Court Statistics 2012, Table 1.7

⁴ Crime Research Centre, University of Western Australia, *The Disqualified Driver Study*, September 2003, pp. v and 7

⁵ Smith and Maisey, *Survey of driving by disqualified and suspended drivers in Western Australia*, (1990) Federal Office of Road Safety CR94 Canberra

C. Why is unauthorised driving so prevalent?

(i) Non-payment of fines leading to licence disqualification

The majority of licence suspensions are for the non-payment of fines. In 2012, a total of 286,185 licences were cancelled or suspended. Approximately 52% of licences suspended were for fine default (147 592), 16% for demerit points (45 328), and 5% for driving while disqualified by a court (15 553).

A number of reports have drawn attention to the link between licence suspension for fine default and subsequent licence disqualification by the court.⁶ If someone lacks the willingness or capacity to pay a fine (e.g., for parking tickets or other traffic infringements), then licence suspension is inevitable. If the person continues to drive, they are committing further unauthorised driving offences and they risk court attendance and further penalties such as lengthy terms of licence disqualification and imprisonment. This is known as 'secondary offending'.

Prior to 1 January 1988, people who could not afford to pay their fines had the option of 'cutting out' the fines by short stays in prison. At that time, almost 50% of prison admissions were people seeking to cut out their fines. This practice ceased after a fine defaulter was assaulted in prison and left permanently injured.

From 1998 to 2007 there were very limited ways people who lacked the capacity to pay their fines could avoid licence sanctions. A proportion of people in this situation continued to drive while suspended and had their licences disqualified by the courts. The more they offended, the lengthier the term of disqualification and the greater the likelihood of a prison sentence.

In recent years, the Department of Attorney General and Justice (DAGJ) has worked with the (then) Roads and Traffic Authority (now Roads and Maritime Services – RMS), NSW Police, the State Debt Recovery Office (SDRO), the Legal Aid Commission and a range of non-government organisations to identify and implement solutions to this problem.

A range of measures have been introduced to reduce the likelihood that disadvantaged people will have their licences suspended due to fine default, thereby reducing their risk of incurring licence disqualifications. These measures include the introduction of Centrepay (direct payments from Centrelink entitlements) for the payment of fines (in 2007), simpler forms, new fine referral arrangements between the courts and the SDRO, and the successful Work and Development Order (WDO) scheme.

The WDO scheme allows certain categories of people (e.g., those in acute financial hardship) to 'cut out' their fines by voluntary work, educational courses, counselling, medical and mental health treatment, and drug or alcohol treatment. If a person enters into a WDO, the SDRO may direct RMS to lift a licence suspension, but a WDO cannot remove or reduce a period of licence disqualification imposed by the court.

In 2012, notwithstanding these reforms, 16% of people whose principal offence was drive while licence disqualified or suspended had been suspended for fine default.⁷

⁶ See for example, NSW Parliament, Standing Committee on Law and Justice, *Community based sentencing options for rural and remote areas and disadvantaged populations*, 2006; NSW Sentencing Council *The effectiveness of fines as a sentencing option: Court imposed fines and penalty notices*, October 2006; NSW Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal Communities*, 2009; NSW Law Reform Commission, *Penalty Notices*, 2012

⁷ Information provided by BOCSAR July 2012.

(ii) The cumulative nature of disqualifications for unauthorised driving and the Habitual Traffic Offenders scheme

The prevalence of unauthorised driving offences is linked not only to fine enforcement, but to the mandatory and cumulative nature of disqualification periods for these offences, and the operation of the Habitual Traffic Offender (HTO) scheme.

If a person is convicted of an unauthorised driving offence the court is obliged to impose a mandatory period of disqualification – there is no discretion, regardless of the circumstances of the case.

Other offences, such as low, mid and high range prescribed concentration of alcohol ('PCA', i.e. drink driving) offences have automatic and minimum disqualification periods. This means that if a court makes no specific order, the automatic disqualification period applies. The court has the option, however, of either reducing the disqualification period to the statutory minimum or increasing the disqualification period (there is no upper limit).

Disqualification periods for unauthorised driving offences are also fully cumulative, and not concurrent. This means that the disqualification period does not commence until any existing disqualifications have expired. This is at odds with most other penalties that the courts can impose, such as imprisonment, which can be served concurrently.

In contrast, court-imposed disqualification periods for major driving offences generally run from the date of conviction, and are not cumulative.⁸

Under the HTO scheme, a person is declared a habitual traffic offender following conviction for a third or subsequent 'serious' driving offence and is disqualified for five years. This includes people convicted of driving while disqualified and therefore captures people whose primary offence may be unrelated to driving. The five year period is in addition to the disqualification period imposed for the substantive driving offence and must be served cumulatively.

The effect of the HTO scheme and the cumulative nature of disqualification periods have been to substantially increase the length of time people can be disqualified from driving. People can accumulate substantial disqualification periods, without a limit, should they continue to drive while disqualified, even when they do so safely.

Particularly long disqualification periods can arise where a person is subject to more than one Habitual Traffic Offender declaration. This leads to accumulated five-year disqualification periods under the scheme on top of disqualifications for the traffic offence in question (including unauthorised driving). The Sentencing Council has noted examples of people disqualified for ten years or longer.⁹

D. Impact on rural and regional communities

RMS statistics indicate that the relative proportion of disqualified drivers (relative to licence suspensions) is much higher in regional NSW than in metropolitan areas, as illustrated by Figure 1 below.¹⁰ This shows that, for this sample of Local Government Areas (LGAs):

- Court disqualifications amounted to an average of 20.5% of all licence suspensions and disqualifications in regional areas.

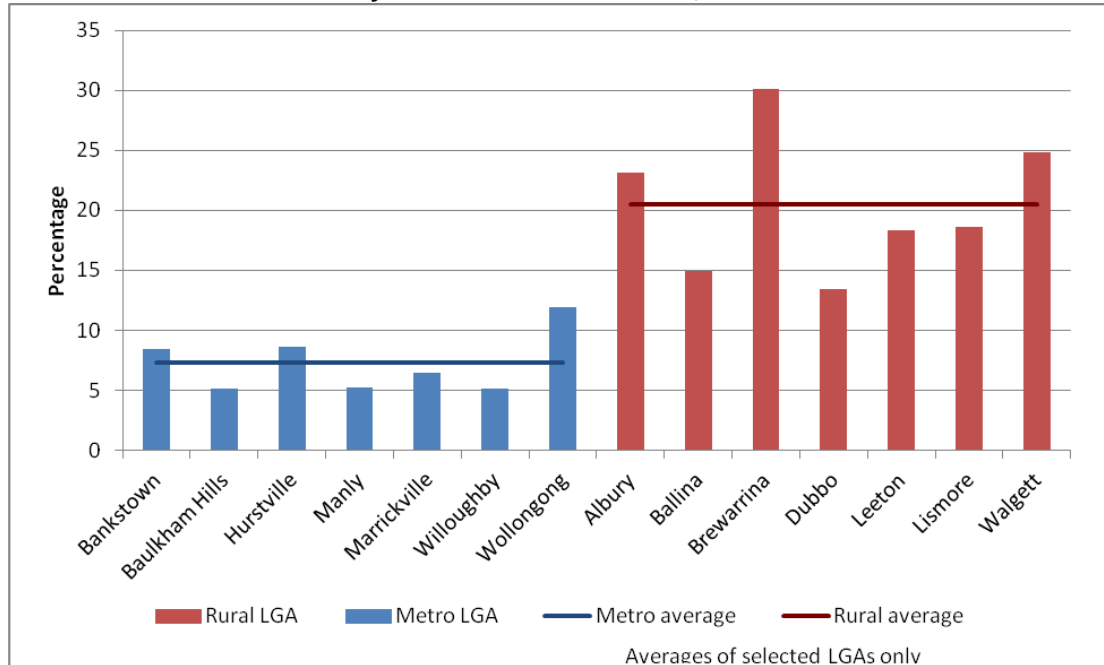
⁸ The Government has introduced the *Road Transport Amendment (Disqualification on Conviction) Bill 2013* which will ensure that people who are sentenced to imprisonment for a serious driving offence cannot serve their disqualification period concurrently with their prison sentence.

⁹ NSW Sentencing Council, *Effectiveness of fines as a sentencing option*, October 2006, pp165.

¹⁰ Information provided by RTA, based on suspensions and disqualifications in 2009

- By contrast, in metropolitan areas, court disqualifications made up only 6.3% of all licence suspensions and disqualifications.

Figure 1: Disqualified drivers as a percentage of all suspended and disqualified drivers, by Local Government Area, 2009



The high rate of court disqualification in regional areas probably reflects that:

- Driving is a fundamental necessity in rural areas, so 'secondary offending' may be more prevalent.
- The chances of detection are much higher in small communities.

A recent report on rural and regional disadvantage in the administration of the law in Victoria noted that mandatory loss of licence was a significant issue for rural and regional communities.

With no discretion available to Magistrates, they must impose penalties that may have much greater consequences to many living in rural and smaller regional communities, including the loss of livelihoods for people living in areas where large distances are required to be travelled and no public transport is available... Often whole families can be penalised as a result. For farmers, the consequences of a loss of licence can be ruinous.¹¹

Impacts such as these need to be balanced against the countervailing risk to public safety when the Committee considers reforms such as those set out in its terms of reference. Those drivers who pose a serious risk to the public will need to be kept off the roads even where this causes hardship. As noted above, some disqualified drivers will have been disqualified for a 'primary' offence posing a risk to public safety, while others will have been disqualified for fine default for activities unrelated to driving.

E. Impact on Aboriginal communities

A report prepared for the then Roads and Traffic Authority found that unlicensed driving is prevalent in Aboriginal communities. More than half the licence holders surveyed for the study

¹¹ R Coverdale, Postcode justice: Rural and regional disadvantage in the administration of the law in Victoria, Deakin University, Centre for Rural and Regional Law and Justice, July 2011, p.66.

had had their licence suspended or cancelled for unpaid fines or demerit points. The report found that a significant proportion (42%) had outstanding debt to the SDRO and many young people had accrued debts of \$5000 or more.¹²

Inevitably, high rates of licence suspension for unpaid fines translate into high rates of court disqualification and imprisonment. A submission on behalf of communities in the Tabulam area in NSW describes the situation that exists in many remote communities:

*Individuals often receive substantial custodial sentences of six to eighteen months for driving offences. Additional lengthy disqualification periods are also considered a veritable death sentence for many people in relation to their licences and economic and social prospects. Whilst the need to enforce unlicensed driving is acknowledged, the already existing disadvantage, isolation and welfare dependence experienced by the ... community is dramatically compounded as individuals are provided with little hope of ever obtaining a licence as a result of previous mistakes. For example, not having a driving licence creates a substantial barrier against members of this remote community obtaining and retaining employment, seeking medical attention or simply having access to fresh fruit and vegetables and cheaper food to improve their general health and well being.*¹³

The Tabulam submission highlights the nexus between a driver licence and educational and employment opportunities. Driver licences can play a pivotal role in 'closing the gap', as noted by the Commonwealth Parliament's Standing Committee on Aboriginal and Torres Strait Islander Affairs:

*Assisting Indigenous people to obtain drivers licences is critical in relation to improving Indigenous disadvantage. Once one family member has obtained their licence and is employed the flow on effect can be very positive for other family members....Gaining a drivers licence can open doors to new prospects such as access to continuing education and employment opportunities. This is important in regional and remote Australia where education and employment opportunities are dispersed and public transportation may not exist or may be very limited.*¹⁴

Nearly a quarter of all Indigenous appearances in the NSW Local Court are for road traffic and motor vehicle regulatory offences.¹⁵ In 2012, of the 694 people sent to prison where a driving licence offence was their principal offence, nearly 30% (200) were Indigenous.¹⁶

As when considering the impacts of the current driver disqualification regime on rural communities, consideration of the impacts on Aboriginal communities must be balanced against any countervailing risk to public safety.

F. Impact on the criminal justice system

As noted above, unauthorised driving offences constitute a high proportion of offences prosecuted in the Local Court.

In 2012, drive while disqualified or suspended was the third most commonly charged offence, and drive unlicensed was the tenth most commonly charged offence.¹⁷

¹² RTA Research Report, *An investigation of Aboriginal driver licensing issues*, December 2008

¹³ Submission to conduct a pilot program to address the issue of driving whilst disqualified/unlicensed in indigenous communities in the Tabulam area, March 2010.

¹⁴ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing time – Time for doing: Indigenous youth in the criminal justice system*, Parliament of Australia, 2011.p 95

¹⁵ BOCSAR, *Reducing Indigenous contact with the court system*, Bureau Brief 54, December 2010.

¹⁶ BOCSAR, *NSW Criminal Court Statistics 2012*, Tables 1.7 and 1.9

¹⁷ *Ibid.*, Table 1.1

Convictions for unauthorised driving offences generate a significant number of appeals to the District Court. In 2010, 38% of appeal cases in the District Court (2859 appeals) involved traffic and vehicle regulatory offences. Of this group, 48% related to unauthorised driving offences.

The penalties imposed on people convicted of unauthorised driving offences range from fines and bonds to imprisonment. These penalties are in addition to the period of licence disqualification imposed by the court.

In 2010, drive while disqualified had the highest custodial rate of the top 20 offences dealt with by the Local Court – a higher rate than for high and mid range PCA offences and assault.¹⁸ In that year, 712 people received a term of imprisonment where drive while disqualified was their principal offence, and the average term of imprisonment and the median non parole period was six months.¹⁹ In 2012, the number sentenced to full time imprisonment for driver licence offences was 694.²⁰

The prosecution of these offences and the management of offenders generate substantial costs for the criminal justice system. Costs are incurred by:

- police (who not only charge but may appear as witnesses in court proceedings)
- prosecutors and defence
- legal centres
- courts
- Corrective Services NSW
- Roads and Maritime Services.

G. Existing mechanisms to reduce or remove disqualification periods

It is difficult to avoid an automatic or mandatory licence disqualification for an unauthorised driving offence.

A person who has been disqualified from driving by the court has the right to appeal the decision. From April 2010 to March 2013, more than 4300 appeals against the severity of sentences for unauthorised driving offences were dealt with by the District Court. In addition, there were 460 appeals against convictions and 29 appeals against the adequacy of the sentence.²¹ Less than 25% of appeals against conviction are upheld.²²

If the conviction (and therefore the disqualification) is upheld, there are very few options to obtain relief from the disqualification period, regardless of its length or the impact on the individual or their dependents.

It is possible to apply for an annulment of a conviction, but this is rarely sought or granted. An application may also be made to the Attorney General for the exercise of the Royal Prerogative of Mercy but, again, these applications are rarely successful. Only 26 applications were granted between 1999 and 2010.

By contrast, it is still possible for a person to continue to drive when they have lost all their demerit points for driving offences that have posed a real risk to public safety. Unrestricted licence holders who are about to have their licences suspended for loss of demerit points can

¹⁸ Judicial commission, *Common Offences in the NSW Local Court: 2010*, Sentencing Trends and Issues No 40 May 2012, p12

¹⁹ *Ibid.*

²⁰ BOCSAR, NSW Criminal Court Statistics 2012, Table 1.7

²¹ Information provided by BOCSAR July 2013.

²² *Ibid.*

apply for a 12 month good behaviour period instead of serving the suspension.²³ In addition, a person who has been caught drink driving several times may still be given permission to drive earlier than would ordinarily be the case if an alcohol interlock device is fitted to prevent drink driving.

Habitual traffic offender declarations are not court orders. There is no right of appeal against an additional disqualification period imposed for being declared a habitual traffic offender. However, the court may quash an HTO declaration (on application), if it determines that the disqualification imposed is disproportionate and unjust having regard to the total driving record of the person or special circumstances of the case.

²³ If they accrue two or more demerit points while serving a good behaviour period they will be suspended for double the original suspension time.

PART II

Options to reform the law related to unauthorised driving offences

The Committee on Law and Safety has been asked to review options to reform the law related to unauthorised driving offences, such as:

- a) *Establishing a right to apply to the court to have any outstanding disqualification periods removed for people who complete a minimum offence free period;*
- b) *Abolishing the Habitual Traffic Offenders scheme;*
- c) *Providing 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.*
- d) *Revising the maximum penalties prescribed for unauthorised driving offences; and*
- e) *Introducing vehicle sanctions for offenders who repeatedly drive while disqualified*

This part of the submission provides information relevant to each of the reform options listed in the Terms of Reference

A. Right to apply to the court to have outstanding disqualification periods removed for people who complete a minimum offence free period

In some other jurisdictions it is possible to apply to the court to remove an existing disqualification period.

For example, in Queensland, if a person has been disqualified from driving for two or more years, they may apply to the court for an order to remove the disqualification after serving a minimum waiting period of two years. In deciding whether to remove the disqualification period, the court will take into account:

- the character of the applicant
- the applicant's conduct subsequent to the disqualification
- the nature of the offence that gave rise to the disqualification
- any other circumstances of the case.

A similar application may be made in Western Australia, where the factors taken into consideration by the court are almost identical to those in Queensland, with an additional consideration of 'safety of the public'. In the United Kingdom, it is also possible to apply to the court for an order to remove a disqualification period after two years.

As noted above, some disqualified drivers will pose a risk to public safety while others will not. A minimum offence-free period could require a person to have complied with traffic laws for a set period of time before they could apply to have their outstanding disqualification periods lifted. This could protect public safety. Offence free periods could be longer for those drivers whose disqualification arises from an offence posing a serious risk to public safety such as high level speeding, street racing, aggravated burnouts, or 'major offences' under the *Road Transport Act 2013*. Further, if courts had the power to remove outstanding disqualification periods, they could be required to take into account certain matters, including road safety for the public, the nature of the offence that led to the disqualification, how the person has behaved while disqualified, as well as the applicant's circumstances.

As noted elsewhere in this submission, in NSW the cumulative nature of disqualification periods for unauthorised driving offences as well as the operation of the Habitual Traffic Offender scheme have led to some people accruing lengthy disqualification periods.

A study by the Bureau of Crime Statistics and Research (BOCSAR) was unable to find evidence to support the proposition that longer licence disqualification periods reduce the likelihood of an offender appearing before the courts. For speeding offences, BOCSAR found that longer licence disqualification periods appear to *increase* the risk of subsequent offending.²⁴

Stakeholders report that very lengthy disqualification periods can encourage an 'outlaw' mentality. This means they may accrue additional, fully cumulative disqualification periods, and become firmly established on the cycle of offending, disqualification, prison term, release then further offending.

If a person is able to re-enter the licensing scheme within a reasonable period of safe driving, and after demonstrating a behavioural change, they may make a greater effort to stay within the law. The creation of incentives to comply with the law has been successful in a different context with the Work and Development Order (WDO) scheme.

The WDO scheme was designed to assist primarily disadvantaged people who had accumulated fines but lacked the capacity to pay them. Fines for some people had proven an ineffective penalty or deterrent because people were unable to pay them and this was influencing their attitude to the law. Once they were given a way to address their fine debt through the WDO scheme, the evaluation found:

*Many participants spoke of making a renewed commitment to 'clean living', buying train tickets, parking legally and generally trying to stay clear of trouble; for some this was the first time they had ever made that explicit commitment.*²⁵

While the WDO scheme provides insight into the effective use of incentives to encourage compliance with the law, it is not suitable for extension to cases of driver disqualification for several reasons. First, a WDO is an administrative order and cannot override an order made by the court. Secondly, the operation of the scheme is dependent on the participation of non-government (NGO) agencies that provide services to disadvantaged people. During the development of the scheme, NGOs made it clear that they would not be interested in participating in a court-mandated scheme.

B. Abolishing the Habitual Traffic Offenders scheme

As noted above, drivers who accumulate three convictions in five years for certain driving offences (including driving while unlicensed or disqualified or while licence suspended) are declared 'habitual traffic offenders'.²⁶

Drivers are disqualified from driving for a further five years unless a court rules otherwise (minimum two years). This is in addition to any disqualification and any other penalty imposed for the third major offence. The court also has the option to order a longer period of disqualification, including disqualification for life.

²⁴ BOCSAR, *The deterrent effect of higher fines on recidivism: driving offences*, Crime and Justice Bulletin No. 106, March 2007

²⁵ NSW Department of Attorney General and Justice, *A fairer fine system for disadvantaged people: An evaluation of time to pay, cautions, internal review and the Work and Development Order scheme*, July 2011 p 42

²⁶ Until 2009, a licence suspension due to fine default was a relevant offence for the purposes of the HTO scheme. While this has now changed, there are potentially a significant number of people who were declared habitual traffic offenders prior to 2009, whose underlying problem was the inability to pay fines

Like some court-imposed disqualifications, Habitual Traffic Offender (HTO) disqualification periods are fully cumulative, and do not commence to run until any other disqualification period has expired.

As noted above, there is no right of appeal against an additional disqualification period imposed for being declared a habitual traffic offender. However, the court may, at the time of conviction, or at a later time, quash the declaration if it determines that the disqualification imposed is disproportionate and unjust having regard to the total driving record of the person or special circumstances of the case.

No other Australian jurisdiction has an HTO scheme. There has been no evaluation of the scheme's effectiveness. However, as noted above, a BOCSAR study did not find evidence that supported the proposition that longer licence disqualification periods reduce the likelihood of an offender appearing before the courts.

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:

- 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.
- Sanctions become meaningless when people are disqualified for very lengthy periods of time.
- A declaration constitutes a double penalty, as an offender has already been punished for the offences giving rise to the declaration.²⁷

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

RMS is responsible for maintaining the driving records of offenders. The driving record brings into one register all the independent court decisions, but it is up to RMS to record these court events in the chronological order in which they occurred and then sequence the application of the related disqualification periods as provided under the applicable provision in the road transport law.

RMS has advised that automatic declarations under the HTO scheme and statutory and automatic disqualifications for unauthorised driving offences present administrative challenges due to the often complex nature of cases. In most cases there are continual offences, court hearings, court judgements and sanctions which make maintaining records difficult and require many manual adjustments of RMS records.

The current provisions have also proven to cause considerable confusion for the convicted person, legal representatives, court frontline staff and RMS frontline staff as to when the convicted person can lawfully obtain a driver licence. This complexity means most courts refer convicted persons to RMS to interpret the effect and commencement dates of the disqualification period or for advice as to when the person is eligible to obtain a driver licence.

In 2012, RMS had to write to NSW courts on 384 occasions seeking clarification as to the disqualification orders made by courts for either unauthorised driving offences or HTO

²⁷ NSW Sentencing Council, Effectiveness of fines as a sentencing option, October 2006, pp165-166

declarations. On two occasions where the decision of the court was viewed as invalid by RMS, RMS sought judicial review in the Supreme Court.²⁸

Customers and legal representatives have raised fairness concerns that an offence dismissed under section 10 of the *Crimes (Sentencing Procedure) Act 1999* can still count as a strike towards being declared a habitual offender. In these cases, the offender avoids disqualification for the substantive driving offence that was dealt with under section 10 but will still be disqualified as a consequence of being declared a habitual traffic offender.

In recent years there has been an increase in magistrates quashing HTO declarations at the time of conviction and at a later time. Nearly all declarations quashed at a later time were those that were automatically applied under statute, which in turn attracted five year disqualification periods. In 2012, there were 2628 HTO declarations made, with courts quashing a total of 3344 declarations (noting HTO declarations quashed that year may have been made in previous years).

C. Providing courts with discretion when imposing disqualification periods for unauthorised driving offences

The Law and Safety Committee's terms of reference suggest two options for providing courts with discretion:

- 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.*

The following sections provide information relevant to each of these options in turn.

(i) Automatic rather than mandatory disqualification periods

At present, unauthorised driving offences attract mandatory disqualification periods. The court has no discretion to either reduce or increase the disqualification period, having regard to the circumstances of the case. For example, when a person has a record of driving in a manner which poses a serious risk to public safety, at present courts are limited as to the length of disqualification they can impose.

Major offences, which include drink and drug driving, negligent driving occasioning death or grievous bodily harm or driving in a furious or reckless manner or at a dangerous speed, have automatic and minimum disqualification periods. This means that if a court makes no specific order, the automatic disqualification period applies. The court has the option, however, of reducing the disqualification period to the statutory minimum or increasing the disqualification period (there is no upper limit).

The current penalties for the unauthorised driving offences can produce anomalous results. A person who is caught driving while disqualified for the second time will have a further mandatory two year disqualification imposed. This is the same period as can be imposed for a second high range PCA offence, and it is greater than the minimum period for a second mid range PCA offence. Unlike PCA and speeding offences, unauthorised driving offences do not involve an inherent risk to public safety.

If penalties for unauthorised driving were to be changed to automatic penalties rather than mandatory penalties, along the lines of current 'automatic' penalties, this would involve:

- a minimum disqualification period

²⁸ *RTA v Papadopoulos* [2010] NSWSC 33 and *RTA v Tamara O'Sullivan and others* [2011] NSWSC 1258.

- a default disqualification period which would apply unless the court selected another period of time
- no maximum period.

This would allow courts to let the automatic/default penalty apply where appropriate, but also to impose a higher penalty where the seriousness of the offending warrants it, or a lower penalty where appropriate (but not below a specified statutory minimum). For those drivers with a record of dangerous driving, this would allow courts to impose a longer disqualification period where appropriate. For those drivers who have lost their licence because they have not paid fines but nevertheless, for example, drive their children to school, the courts would be able to impose a penalty proportionate to the seriousness of the offence (although not below the statutory minimum).

(ii) Commencing disqualification periods on the date of conviction unless the court orders otherwise

The time when a disqualification period commences varies according to the type of offence.

Disqualification periods for unauthorised driving offences are fully cumulative, and not concurrent. This means that the disqualification period does not commence until any existing disqualifications have expired. This is at odds with other penalties that the courts can impose, such as imprisonment, which can be served concurrently.

Fully cumulative disqualification periods can result in extremely lengthy disqualification periods. As noted above, such periods do not reduce re-offending but can actually have a criminogenic effect.

In contrast, court-imposed disqualification periods for major offences generally run from the date of conviction, and are not cumulative but can be served concurrently.

The Government has introduced the *Road Transport Amendment (Licence Disqualification on Conviction) Bill 2013* to make an exception to the general rule that disqualification commences on conviction.²⁹ If enacted, this Bill will ensure that people who are sentenced to imprisonment for a serious driving offence cannot serve their disqualification period concurrently with their prison sentence. This avoids the potential result that an offender may avoid serving any disqualification period in the community, and is consistent with the aim of imposing appropriate rather than fixed and inflexible disqualification terms.

(iii) Summary – providing courts with discretion when imposing disqualification periods

If automatic rather than mandatory disqualification periods applied to unauthorised driving offences, and these periods commenced on conviction unless otherwise ordered, the courts would have the ability to choose a penalty (above the statutory minimum) depending on the circumstances of each case.

When deciding on the length of disqualification periods, the court would be able to take into account the other punishments imposed on offenders (which can include prison terms), and the circumstances of the offence (from dangerous high speed pursuits and drag racing at one of the spectrum to driving children to school at the other). At the same time, courts would retain the ability to impose very long disqualification periods for serial and recalcitrant offenders, including life bans.

²⁹ This Bill was passed by the Legislative Assembly on 19 June 2013 and had its first reading in the Legislative Council on the same date. Debate is expected to resume in the Spring 2013 session.

(iv) Other issues for courts in setting disqualification periods

There is a practical problem faced by courts when setting the length of disqualification periods. This arises when a person's licence has been suspended by police. At sentencing, section 225 of the *Road Transport Act 2013* requires the court to take into account the suspension period when determining the appropriate disqualification period to impose on the offender.

It would be useful to clarify that, in this circumstance, the relevant date to take into account is the date police suspended the driver. If, for example, a driver was suspended on 8 June and, on conviction on 21 August, the court considers that a 12 month disqualification is appropriate, the expiry date for the disqualification would be 7 June in the following year.

A further anomaly relates to the operation of section 225 of the *Road Transport Act 2013*. This section states that the court 'must' take into account the suspension imposed by police when disqualifying an offender for a major offence under section 205 of the Act. However, it does not place the same requirement on the court when ordering disqualification periods for other offences for which licences may be immediately suspended by police.

D. Revising the maximum penalties prescribed for unauthorised driving offences

It is a general principle of the criminal law that punishment should be proportionate to the level of criminality involved, taking into account the actual harm or risk of harm caused by the offending.

The maximum prison sentence for drive while disqualified, suspended or cancelled for a first offence is 18 months, and for a second or subsequent offence it is 2 years.³⁰ These are the same maximum prison penalties that may be imposed for high range PCA offences.³¹

It should be noted that if an unauthorised driver also engages in dangerous driving behaviour (eg speeding or drink driving) the prison penalties for those dangerous offences will also apply.

The maximum prison sentence for drive while licence cancelled, suspended – fine default for a first offence is 18 months, and for a second or subsequent offence it is two years.³² Once again, these are the same maximum prison penalties that may be imposed for high range PCA offences. Fines can be imposed for a wide range of regulatory offences that have nothing to do with driving behaviour (such as fishing without a licence).

Fine default can arise from a lack of a capacity to pay fines, and a number of measures have been taken to assist people in this position (such as time to pay arrangements and the WDO scheme). However, there will still be people who are convicted for this offence where the underlying issue is poverty rather than wilful disregard for the law. Where a fine defaulter has the capacity to pay their fine, the SDRO has extensive enforcement powers. The SDRO can make property seizure orders, garnishee wages, and issue community service orders. If a person breaches a community service order they may be imprisoned.

The maximum prison sentence for a second or subsequent offence of unlicensed driving – never licensed is 18 months.³³ This is greater than the maximum prison sentence that may be imposed for a second or subsequent mid range PCA offence.³⁴

³⁰ Section 54(1) *Road Transport Act 2013*.

³¹ Section 110(5) *Road Transport Act 2013*.

³² Section 54(3) *Road Transport Act 2013*.

³³ Section 53 *Road Transport Act 2013*.

³⁴ Section 110(4) *Road Transport Act 2013*.

The mandatory disqualification period for drive while licence is disqualified, suspended or cancelled is 12 months for a first offence and 2 years for a second or subsequent offence. This equates to the minimum disqualification period applying to a high range PCA offence.

The mandatory disqualification period for a second or subsequent offence of unlicensed driving – never licensed is 3 years. This is greater than the minimum disqualification period applying to a second or subsequent offence of high range PCA.

E. Introducing vehicle sanctions for offenders who repeatedly drive while disqualified

The problem of unauthorised driving in NSW is decreasing. The number of people charged with the offences of drive while licence disqualified or suspended have dropped by 25% since 2009.³⁵ This reverses the upward trend in these offences that was evident between 2003 and 2008. The decrease in these offences is likely partially attributable to reforms adopted in 2008 to address fine debt, including the introduction of Centrepay and the WDO scheme.

Vehicle sanctions include the confiscation of number plates or the confiscation of vehicles themselves. Options for imposing vehicle sanctions include:

- sanctions imposed immediately at the roadside by police
- sanctions imposed as part of a court sentence.

When considering who should impose a penalty, in the criminal justice sphere, police detect and investigate breaches of the law, while courts independently assess the evidence, determine guilt and impose the sanction determined by the State.

An exception has been made to this general rule with respect to certain offences that involve a serious and immediate threat to community safety.

Under the current law, police are empowered to seize the number plates or confiscate the cars of people who commit the following dangerous offences:

- Police pursuits (Skye's law)
- Speeding by more than 45kph
- Hoon offences (speed and drag racing).³⁶

Such vehicle sanctions are not available for drink driving offences, or for speeding offences where a person speeds less than 45kph over the speed limit.

The plates or cars may be confiscated for a fixed period of 3 months. A person can apply to the court after 5 days to have the plates/car returned and the Local Court can consider any 'extreme hardship' to a person other than the alleged offender.³⁷ Extreme hardship is not defined in the relevant section of the Act, but may include hardship to family members who depend on access to the vehicle and who may experience significant difficulty in maintaining access to employment, education etc, particularly in regional communities.

If a person is later found guilty of a second such dangerous offence, the car can be forfeited by order of the court. To avoid forfeiture, it must be demonstrated that forfeiture would cause 'extreme hardship' to the offender or another person. 'Extreme hardship' is defined in the forfeiture provisions as excluding 'financial loss or difficulty in carrying out employment (whether

³⁵ Refer BOCSAR, Criminal Court Statistics, 2009, 2010, 2011, 2012.

³⁶ Sections 237 & 238 *Road Transport Act 2013*.

³⁷ Section 249(3)(b) *Road Transport Act 2013*.

paid or unpaid) or in travelling to a place of employment or business or to any place for the purposes of education, training'.³⁸

Where the offender was not the owner of the vehicle in which the offences were committed, confiscation of the plates or the car will not take place. Instead, the RMS has the power to suspend the registration of the vehicle on a second offence, after sending the owner a warning notice for a first offence. Registration may be suspended for 3 months if the RMS is satisfied on the balance of probabilities that the owner has failed to prevent repeated offences. The owner is given the opportunity to show cause why registration should not be suspended and may appeal a decision to suspend to the court.

Seven offences have been created to discourage people from trying to get around the confiscation laws (for example, affixing fake number plates, driving without plates).

Extension of vehicle sanctions to unauthorised driving offences would be likely to have a particular impact on indigenous people (one quarter of all Indigenous appearances in the Local Court are for driving licence offences) and people living in regional NSW (where the relative proportion of disqualified drivers is higher). It may also impact on family members who may lose access to the family car.

³⁸ Section 246(2) *Road Transport Act 2013*.