



THE LAW SOCIETY
OF NEW SOUTH WALES

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2 April 2019

The Hon James Wood AO QC
Chairperson
New South Wales Sentencing Council
GPO Box 31
Sydney NSW 2001

By email: sentencingcouncil@justice.nsw.gov.au

Dear Mr Wood,

Repeat traffic offenders

Thank you for the opportunity to comment on the issues raised in the consultation paper *Repeat Traffic Offenders*. We have responded to a number of questions from the consultation paper.

We look forward to further consultation with the Sentencing Council as the review progresses.

The contact person for this matter is Ms Rachel Geare, Senior Policy Lawyer, who is available on (02) 9926 0310 or at rachel.geare@lawsociety.com.au.

Yours sincerely,

Elizabeth Espinosa
President
Encl.

Question 1

1.1. Identifying repeat offenders.

(1) Is the current list of offences that make up repeat offending for the purposes of the Road Transport Act 2013 (NSW) (RTA) appropriate?

The Law Society considers that the current list of offences capable of giving rise to a determination that an offence is a second or subsequent offence, for the purposes of section 9 of the RTA, is extensive and appropriate.

(2) If not, what changes should be made to this list of offences?

The Law Society does not recommend any changes to the list of offences.

1.2. Dealing with repeat driving offenders.

(1) What options are appropriate for sentencing repeat driving offenders who may pose an ongoing risk to the community?

It is the Law Society's view that courts should have the full range of sentencing options under the RTA and the *Crimes (Sentencing Procedure) Act 1999*, to enable them to craft sentencing outcomes appropriate to the particular circumstances of each case.

The objective seriousness of traffic offences is highly variable, ranging from trivial to extremely serious. Equally, the subjective circumstances of offenders also vary widely. For this reason, courts dealing with traffic offences ought to have a wide discretion in choosing a sentence that promotes sentencing outcomes which are just and appropriate in the circumstances of the case.

Mandatory interlock orders

The Law Society is generally supportive of the mandatory interlock order scheme as a valuable tool for dealing with alcohol related traffic offences. However, the Law Society is concerned about the oppressive way in which interlock orders can operate on those who either cannot afford the high cost of the program or whose employment relies upon the ability to drive a vehicle that cannot be fitted with an interlock device.

A person who finds themselves in the invidious position of not being able to afford the cost of the program, but does not qualify for a fee exemption, is subject to a disqualification period of five years. In this way, the mandatory interlock order program impacts disproportionately upon those members of society who are already disadvantaged and marginalised by reason of their impecuniosity.

In the case of a person whose employment relies upon driving a vehicle to which an interlock device cannot be fitted, such a person may not only become unemployed, but also have grave difficulty finding employment for the duration of the disqualification and the subsequent interlock period, with devastating financial consequences. This is particularly an issue for persons living in rural and remote areas where there is limited access to public transport.

It is the Law Society's view that this outcome is plainly unjust and counterproductive.

The Law Society argues that, in order to remedy this injustice, section 212 of the RTA, which deals with interlock exemption orders, should be amended to the following effect:

- the operation of section 212(3)(c) be expanded so that it is available for all offenders; and
- section 212(5) be repealed.

(2) What sorts of offenders should they target?

As is evident from our response to 1.2(1) above, it is the Law Society's view that the legislation dealing with the sentencing of traffic offenders should leave the discretion as to the appropriate penalty to the Court, rather than seeking to "target" particular categories of offenders.

(3) What changes could be made to the law to make it more effective in dealing with repeat offenders who may pose an ongoing risk to the community?

The Sober Driver Program is a 20 hour group program designed to reduce reoffending in repeat high risk drink driving offenders. The consultation paper refers to studies which have found that the program is effective in reducing repeat drink driving offences, with participants almost half as likely as nonparticipants to drink drive again – an effect that lasted for up to 5.5 years.¹

However, an offender may only be ordered to complete the program by a Magistrate where the offender is subject to the supervision of Community Corrections or where an interlock exemption order is made. We suggest consideration be given to broadening the range of repeat high risk offenders required to complete the Sober Driver Program.

Given the program is supervised by either Community Corrections or Managed Training Services (MTS) there may not be a need for additional funding for the increase in service provision that would be required by such a change. We note that the MTS program costs participants \$700. Consideration will need to be given to ensure that economically disadvantaged persons (including those who are legally assisted) are not directed to the MTS program by such an order, or that financial assistance is made available.

2. Driving Offences Involving Harm or High Risk of Harm

2.1. Driving Offences Resulting in Death

(1) Are the maximum penalties for driving offences resulting in death appropriate? If not, what should they be?

In the Law Society's view, the maximum penalties for driving offences resulting in death are appropriate.

The Law Society notes the passage from the decision of the Court of Criminal Appeal in *R v Borkowski* [2009] NSWCCA 102 cited at paragraph 2.7 of the consultation paper:

As the law presently stands, there is a rational, logical and cohesive hierarchy of offences concerned with the infliction of death or serious injury by the use of a motor vehicle. The offences range from negligent driving causing grievous bodily harm ... through the driving offences in the *Crimes Act* to manslaughter by gross criminal negligence. All of these offences involve varying degrees of negligence, however the actual conduct may be described, ranging from a lack of care and proceeding through dangerousness to culpable negligence.

¹ NSW Sentencing Council, *Repeat Traffic Offenders*, December 2018, para 6.107.

The moral culpability involved in driving offences which result in a death, or deaths, vary greatly from momentary inattention at one end of the scale, to a complete abandonment of responsibility on the other. The maximum penalties prescribed for driving offences reflect that variability.

(2) Are the sentencing outcomes for driving offences resulting in death appropriate? Bearing in mind the availability of new sentencing orders, what should the sentencing outcomes be, and how could they be achieved?

In the Law Society's view, the sentencing outcomes for offences resulting in death are, generally speaking, appropriate. While it is always possible on a superficial reading of the facts to point to isolated outcomes which appear out of step with community expectations, the general sentencing trends in respect of driving offences involving death are appropriate and reflect the large variability in moral culpability referred to above.

2.2. Driving Offences Resulting in Injury

The Law Society's views in respect of driving offences involving injury are identical to those set out at 2.1 above.

2.3. Identifying Other Offences That Carry a High-Risk Harm

(1) What other driving offences should be considered in the group of offences carrying a high risk of harm?

The Law Society is of the view that there are no other offences that should be included in the category of offences carrying a high risk of harm. We suggest that speeding offences and offences involving the use of a mobile phone ought not be categorised as necessarily attracting a high risk of harm.

We acknowledge that many serious collisions involve elements of speeding and driver distraction through mobile phone use. However, it does not follow that offences involving exceeding the speed limit by more than 30km/h and/or using a mobile phone necessarily attract a high degree of risk. These are offences which are ubiquitous and, in the vast majority of cases, do not result in any collision at all.

The risk attached to driver behaviour such as speeding and use of mobile phones depends very much on the particular circumstances in which the behaviour occurs. For example, speeding along a highway with three lanes in each direction and a dividing concrete barrier at 2:00am in the morning when there is no other traffic around is unlikely to attract a high risk of harm. However, the same speeding behaviour may attract a great risk of harm if it is undertaken during peak hour in a high traffic situation. Similarly, it is evidently dangerous to use a mobile phone to text while driving in traffic at a high speed. Texting while stationary in a traffic jam is not. It should be noted that where speeding and using a mobile phone is undertaken in circumstances which give rise to a real danger to other road users, the offences of negligent driving and dangerous driving are available.

2.4. Speeding Offences

(1) Are the maximum penalties for high range speeding offences appropriate? If not, what should they be?

It is the Law Society's view that the maximum penalties for high range speeding offences are appropriate.

It is the Law Society's view that further education of highway patrol officers is desirable to ensure that they are aware of the option of charging the more serious offences of negligent driving or dangerous driving where speeding and/or mobile use offences are committed in circumstances which attract a high degree of danger to other road users.

(2) Are the sentencing outcomes for high range speeding offences appropriate? Bearing in the mind the availability of new sentencing orders, what should the sentencing outcomes be, and how should they be achieved?

It is the Law Society's view that the sentencing outcomes in respect of offences of exceeding the speed limit (that is, contravention of Rule 20 of the Road Rules) are appropriate.

We again note that in appropriate circumstances offences of negligent driving and dangerous driving are available.

2.5. Alcohol and drug related driving offences

(1) Are the maximum penalties for alcohol and drug related driving offences appropriate? If not, what should they be?

It is the Law Society's view that, for the most part, the maximum penalties for alcohol and drug related driving offences are appropriate. However, the Law Society does not support recent amendments introduced by the *Road Transport Legislation Amendment (Penalties and Other Sanctions) Act 2018*, which allow infringement notices to be issued in respect of novice, special and low range PCA offences. We have further concerns with the amendments equating DUI offences with high range PCA offences introduced by the *Road Transport Legislation Amendment (Road Safety) Act 2018*.

Automatic licence suspension

We have concerns that dealing with low-range PCA offences by penalty notices rather than by the courts will dilute the "drink driving is a crime" campaign.

Further, automatic suspension effectively undermines the court's discretion, because it is likely that if a person court-elects on a penalty notice they will have already served their suspension period by the time the matter is listed in court. The effect of court election should be to stay the process of the immediate suspension.

A successful appeal against an immediate licence suspension is difficult because the person must demonstrate "exceptional circumstances", which is a high threshold. The new provisions impose the same test and burden for a first-time offender who is just over the low-range limit as that applied to a repeat offender for a second and subsequent high range PCA.

There is a genuine deterrent factor for first time low-range PCA offenders in going to court – the experience, and shame, of having to appear before a Magistrate, undertake a traffic offender program, and be warned of the consequences of further offending may well have a significantly greater deterrent effect on future offending than a penalty notice, fine and suspension.

Many first offenders may not seek legal advice following receipt of an infringement notice and may therefore be unaware of the alternative options available at court, including a discharge without conviction, a possible reduction in penalty and the availability of therapeutic models such as traffic offender programs.

The imposition of a penalty notice and an immediate three-month suspension was justified by the Minister on the basis of reducing the pressure on the court system. However, recent statistics show that low-range PCAs were only 1.9% of all Local Court matters.² Further, we are concerned that the reforms will actually increase the burden on the Local Court. It is likely that there will be a significant increase in urgent applications for appeals against the licence suspension, resulting in two hearings rather than one.

The automatic licence suspension will impact on people's livelihoods, particularly in regional and rural areas that lack public transport options and where courts sit on a part-time basis. Driving while suspended offences will increase, snowballing into further periods of disqualification. The new legislation appears to be contrary to the Government's 2017 reforms which were aimed at reducing the length of disqualification periods. In support of the 2017 reforms, the Attorney General noted that the driver licence disqualification framework:

... has a serious adverse social impact, particularly on vulnerable people and people in regional and rural areas, as long disqualifications affect the ability to travel for education and employment purposes.

...it contributes to the over-representation of Aboriginal people in the criminal justice system, with more than 14 per cent of those sentenced and almost a third of those imprisoned for unauthorised driving identifying as Aboriginal.³

The court process is valuable because it has a salutary effect upon offenders and allows identification of offenders with underlying problems, such as alcohol and drug issues, which can be addressed as part of the sentencing proceedings. It is the Law Society's view that these changes are likely to lead to an increase in the number of offenders committing second or subsequent PCA offences.

Equating a DUI offence with a high range PCA offence

We are opposed to the increase in the maximum penalties for driving under the influence of drugs ("DUI offence") to reflect maximum fines, prison terms and disqualification periods available and applied to high range PCA drink driving offences introduced by the *Road Transport Legislation Amendment (Road Safety) Act 2018*.

The legislation increased the maximum penalty available in the case of a first offence to 30 penalty units or imprisonment for 18 months or both. The automatic disqualification period has been increased to three years, with a minimum disqualification period of 12 months. For a second or subsequent offence, the maximum penalty has been increased to 50 penalty units or imprisonment for two years, or both. The automatic disqualification period has been increased to five years, with a minimum disqualification period of two years.

The amendments double both the maximum term of imprisonment and the minimum disqualification period for the offence of driving under the influence.

We have serious concerns with equating a DUI offence with a high range PCA offence. A high range PCA offence involves a high degree of intoxication, and therefore affectation, by alcohol. In contrast, a DUI requires only affectation to some material degree, no matter how slight. In fact, a DUI offence does not require that the accused's ability to drive a motor vehicle is impaired to any extent at all (see *Director of Public Prosecutions (NSW) v Kirby*

² NSW Bureau of Crime Statistics and Research, *NSW Local Criminal Court Statistics October 2012 to September 2017*, for the year 2016-2017.

³ Road Transport Amendment (Driver Licence Disqualification) Bill 2017, Second Reading Speech, 12 September 2017, p1.

[2017] NSWSC 1754 at [17] to [21]). It is therefore an affront to justice to treat all DUI offences as involving the same level of criminal culpability as high range PCAs.

A DUI offence covers a wide range of offending from the relatively minor to the very serious while a high range PCA offence is, by definition, serious. Therefore, in recognition of the fact that the range of offending covered by a DUI offence is much broader than a high range PCA, the range of available disqualifications ought to be commensurately broad.

We suggest that rather than retaining the relatively rigid disqualification regime of a high range PCA (with a minimum possible disqualification of 12 months), the minimum should start at three months and the automatic period should be in line with that for a high range PCA i.e. three years, to be used in the worst-case DUI offence where someone is significantly affected. For second or subsequent offences the minimum should be six months and the automatic period should be in line with that for a high range PCA i.e. five years.

(2) Are the sentencing outcomes for drug and alcohol related driving offences appropriate? Bearing in mind the availability of new sentencing orders, what should the sentencing outcomes be, and how should they be achieved?

It is the Law Society's view that sentencing outcomes in respect of those matters which are dealt with at court are appropriate.

Question 4.1

(1) How effective are fines in dealing with repeat traffic offenders?

While fines can be an appropriate measure to enforce a punitive response to minor traffic offending, we query whether they have any deterrent effect on the behaviour of repeat traffic offenders.

The most significant problem with the fine enforcement system is the link between non-payment of fines and suspension/refusal of driver licences. Where the unpaid fines are traffic fines, this makes some sense and is perhaps justifiable; however, to impose licence sanctions for non-traffic fines is illogical and causes a great amount of injustice.

(2) How effective are penalty notices in dealing with repeat traffic offenders?

The penalty notice system devalues the justice system by reducing the process to little more than a taxation scheme. While not advocating for the abolishment of infringement notices, we suggest that better management of the system should be considered to supplement the scheme.

Perhaps the legislature could consider a staggered system, where, upon every third or fifth incident (not third or fifth notice, recognising one incident of offending could give rise to more than one notice) where infringement notices are issued, a court attendance notice is produced instead. The recipient of a court attendance notice will have demonstrated, by their recidivism, the need to have to present themselves to the court, to argue to keep their licence, or to explain their offending.

Question 5.1

(1) Does the system of licence suspension for driving offences adequately deal with repeat offenders?

Repeat offenders, by definition, need encouragement to learn why their behaviour is unacceptable and why they need to modify their behaviour. We are of the view that the

current system is too heavily biased in favour of punitive measures and fails to deliver the necessary encouragement for offenders to learn to adopt new driving behaviours.

While education is currently a feature for a person who has lost their licence twice in five years (section 43A(2) RTA), we suggest that increased quality education would yield safer drivers.

A person who loses their licence though demerit points, except, perhaps, double demerit point events, has demonstrated a continual disregard for the law. It is this disregard which requires modification.

(2) How could the current system be adjusted to deal with repeat traffic offenders more effectively?

The current system should be supplemented with more emphasis on education.

We reiterate the issues raised in 5.1(1) above.

Question 5.2

(1) Does the system of licence disqualification for driving offences adequately deal with repeat offenders?

No.

(2) How could the current system be adjusted to deal with repeat traffic offenders more effectively?

While punitive measures for the protection of the community have a place within the regime, they should not be the only tool available. Modification of attitude and conduct will not be achieved by punitive measures alone. What is required is a system to modify conduct.

Licence disqualification suggests more egregious offending than licence suspension. The consequence of more egregious offending should be to deliver more education more quickly. Education should be mandatory e.g. by attendance at specific centres analogous to attending centres for an Intensive Corrections Order. Attendance at education courses could be used by the attendee to “earn” their licence back by demonstrating real attempts to modify their conduct. In repeat offenders, aptitude testing and psychological examination may have a part to play in reviewing a person’s suitability to retain or obtain their driving licence.

The recent removal of “habitual offender declarations” demonstrates the recognition that long-term disqualification creates a criminal class; and that overly punitive measures will not work on their own.

In this regard, we note that a recent BOCSAR study found that the 2017 driver licence reforms, which removed lengthy periods of disqualification for drivers, have not increased death or injury on the road.⁴ The 2017 reforms resulted in a 56% reduction in average licence disqualifications and a 24% reduction in average prison sentences imposed for unauthorised driving offences.⁵

⁴ Bureau of Crime Statistics and Research, *Early indicators of the impacts of the NSW Driver Licence Disqualification Reforms*, August 2018, 1.

⁵ *Ibid.*

Question 5.3

(1) Does the current system of penalties for unauthorised driving help prevent repeat driving offences?

No. There is too much emphasis on punitive measures and too little emphasis on addressing recidivism.

(2) How could the current system be adjusted to deal with repeat traffic offenders more effectively?

See response to 5.2(2) above.

The Law Society supports legislative amendment to remove licence sanctions for non-traffic fine default.

6. Special penalties and interventions for driving offences

6.1. Ignition interlock programs

See our comments in response to 1.2 above.

6.4. Specialist traffic courts or lists

(1) Would a specialist traffic court or list be effective in dealing with repeat traffic offending? If so, why? If not, why not?

A traffic court would not necessarily increase efficiency and would lead to an overspecialisation of Magistrates. There is also a risk that specialist traffic courts will reinforce the widely-held misconception that traffic offences are not really “criminal”.

We note that Burwood, Parramatta and the Downing Centre Local Courts for example all have traffic lists operating as necessary and determined by the presiding Magistrate.

We would support the creation of specialists lists if they are effectively resourced to provide serious repeat offenders with an integrated, therapeutic program which is overseen by the court. In this regard, the Law Society calls for the implementation of the recommendations of the Legislative Council Committee Inquiry into the provision of drug rehabilitation services in regional, rural and remote New South Wales. We particularly support the recommendations to significantly increase funding to drug and alcohol-related health services and establish more residential rehabilitation and detoxification services throughout regional NSW, including facilities for women and children, Aboriginal people, and young people,⁶ and to consider the feasibility of establishing the Drug Court and the Magistrates Early Referral Into Treatment program in additional regional areas.⁷

(2) What type of specialist traffic court or list could be introduced in NSW to deal with repeat traffic offending?

See our response to 6.4(1).

⁶ Provision of drug rehabilitation services in regional, rural and remote New South Wales, Legislative Council Portfolio Committee No. 2 - Health and Community Services, August 2018, Recommendation 2.

⁷ Ibid. Recommendation 4.

6.7. Intensive supervision programs

How could the intensive supervision of repeat traffic offenders be improved?

We are strongly opposed to the suggestion at para 1.64 that the high risk offender scheme be expanded to traffic offences:

An alternative approach could be to have a system of extended supervision of high risk traffic offenders like the regimes that now apply to serious violence offenders and serious sex offenders. Currently, a driver convicted of manslaughter by unlawful and dangerous act may be subject to the high risk offenders regime. It is not clear that any other traffic offence would meet the definition of a serious violence offence, which requires that the offender's conduct cause death or grievous bodily harm and that the offender intend to cause or be reckless as to causing death or grievous bodily harm.

The Law Society has serious concerns with the high risk offender scheme as it applies to sexual and violent offenders, and we completely object to having that type of supervisory scheme applying to traffic offenders.

7. Communities requiring special attention

7.3. Young people

What changes should be made so that traffic law operates effectively for young people?

The Law Society supports the following suggestions for reform contained in the consultation paper:

- The Children's Court of NSW should be able to deal with all driving offences committed by young people, so that they can be dealt with in a manner proportionate to their circumstances.

With reference to this recommendation, the Law Society believes children should not be dealt with as adults for offences that can be dealt with by a court of summary jurisdiction. Furthermore, we believe s 28(2) of the *Children's (Criminal Proceedings) Act (1987)* (NSW) breaches Australia's obligations under the *Convention on the Rights of the Child* which states that the best interests of a child in criminal matters should be a primary consideration,⁸ the child's privacy in closed court legal proceedings should be protected,⁹ children and young offenders have a right to legal representation,¹⁰ and there must be an emphasis on the wellbeing and rehabilitation of a child offender.¹¹

- Mandatory disqualification under s 204(3A) of the *Road Transport Act 2013* (NSW) should not apply to children, and courts should retain discretion over whether to order disqualification for a young person, as well as the disqualification period.
- Specific places should be reserved for young traffic offenders in the Safer Drivers Course. In its preliminary submission to the consultation, Juvenile Justice NSW noted that the costs of this course compare favourably with the daily cost of keeping detainees in custody.

⁸ *Convention on the Rights of the Child*, opened for signature 20 November 1989, A/RES/44/25 (entered into force 2 September 1990), Art 3(1).

⁹ *Ibid* art 40(2)(vii).

¹⁰ *Ibid* art 40(2)(iii).

¹¹ *Ibid* art 40(1).

- There is a need for increased resources for early interventions to support young people to gain a licence lawfully and thereby reduce future traffic offending.