NEW SOUTH WALES

THE CHIEF MAGISTRATE OF THE LOCAL COURT

13 June 2018

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

Dear Chairperson

Re: Preliminary submission- Recidivist traffic offenders

I am writing in response to the Sentencing Council's recent invitation to make a preliminary submission in relation to sentencing of recidivist traffic offenders.

Voluntary interlock scheme

In the Court's view, the Council should give consideration to the introduction of a voluntary interlock scheme for those drivers who have received longer periods of disqualification for drug and alcohol related offences, but have not committed a mandatory interlock offence (within the meaning of section 209 of the *Road Transport Act 2013* (NSW)). Consideration of this option could include the potential for such an initiative to reduce reoffending in a broader section of the community. A voluntary commitment from those offenders for whom a lengthy disqualification period might reduce or remove their capacity to meet employment, education and family obligations may reduce the pressures associated with these ongoing responsibilities which can lead offenders to drive whilst disqualified.

I make this observation based on experience that suggests lengthy disqualification periods are often ineffective in deterring repeat offending. It is also reasonably common knowledge that license disqualifications are particularly disadvantageous, and can lead to greater hardship, for offenders in rural and regional areas where public transport is limited or non-existent. However, the hardship which an offender may suffer as a result of the loss of their licence, even in circumstances where it will have a severe impact due to the unavailability of alternative transport, will not of itself amount to special circumstances when an offender seeks leniency on sentence. Nor is it proper or desirable to dismiss a matter under section 10(1) of the *Crimes (Sentencing Procedure) Act 1999* without conviction in order to avoid some other legislative provision which is otherwise applicable (see *R v Fing* (unreported, NSWCCA, 4 October 1994); *R v Stephenson* [2010] NSWSC 779), such as a mandatory license disqualification period.

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In this context, a voluntary scheme could supplement a reduced disqualification period similarly to the current mandatory scheme. The scheme would have the same benefits which have been identified for the mandatory scheme, in that it is aimed at separating drinking from driving and reducing road safety risks. In addition, a voluntary scheme may have the added benefit of reducing the pressures which lead drivers to breach lengthy disqualification periods in order to uphold employment and family responsibilities in a broader section of the community. This may result in a reduction in the proportion of offenders prosecuted in the Local Court for driving whilst disqualified.

Delays initiating prosecutions and efficacy of intervention programs

I note in conducting this review, TOR 3 indicates the Council will have regard to findings on driver intervention programs. Within this context, the Council may also give consideration to the impact which delays in initiating prosecutions for driving offences may have on the risk of recidivism in traffic offenders. Particular focus could be given to whether the efficacy of interventionist sentencing options in such a context may be compromised.

Uncertainty surrounding Habitual Offender Declarations

Following the repeal of the Habitual Traffic Offender Scheme and the conferral of jurisdiction on the Local Court for the removal of licence disqualifications on 28 October 2017, there has been division amongst the magistracy as to whether an application may still be made to the Court for a Habitual Offender Declaration (HOD) to be quashed. This issue falls upon the drafting and interpretation of the transitional provision contained in clause 65 of Schedule 4 of the *Road Transport Act*, a matter which I understand has been raised with the Attorney General and the Minister for Roads, but which has not yet been resolved.

The Court is aware of scenarios which may be considered disadvantageous to drivers the subject of HODs, where the legislation is read as abolishing the Court's power to quash (upon an application made following the commencement of the reforms). Of particular concern to some stakeholders is the inability of the Court to quash a declaration on this reading of the legislation, or to remove a licence disqualification where the offender is ineligible as a result of a conviction for a serious offence (pursuant to section 221D of the *Road Transport Act*).

No such eligibility criteria previously existed under the Habitual Offender Scheme, which leaves open whether it was Parliament's intention that a category of driver who may previously have been able to drive again under the Habitual Offender Scheme, may now never be permitted to under the disqualification removal provisions, depending on which reading of the transitional provision in clause 65 is adopted. I am not aware of any appellate proceedings on foot challenging interpretation of these provisions.

Given the current division amongst the magistracy, it is a real possibility that some such offenders may gain access to more favourable treatment under the Habitual Offender Scheme, where a magistrate considers they are still able to utilize the power to quash a declaration. Clarification of this matter should be considered by the Sentencing Council given the potential for drivers convicted of more serious offences to receive inconsistent outcomes.

Thank you for the opportunity to raise these matters for the Council's consideration. Should you wish to discuss any details further, please do not hesitate to contact my office.

Yours sincerely,

Judge Graeme Henson AM
Chief Magistrate