

Report

# Repeat traffic offenders

New South Wales

**Sentencing Council**

**SEPTEMBER 2020**



## **NSW Sentencing Council**

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# Terms of reference

The NSW Attorney General, the Hon Mark Speakman SC MP, issued the following terms of reference:

The Sentencing Council is to review the sentencing of recidivist traffic offenders who may pose an ongoing risk to the community and make recommendations for reform to promote road safety. In conducting the review, the Council should:

1. Provide sentencing statistics on such offenders and analyse them in terms of relevant offender characteristics;
2. Consider the principles the courts should apply when sentencing such offenders;
3. Have regard to the availability of, and relevant findings on, driver intervention programs and other initiatives in NSW and other comparable jurisdictions;
4. Consult with road safety and other experts, and consider international best practice, on how best to deter recidivist traffic offenders from reoffending and encourage safe driving practices; and
5. Have regard to any other matter the Council considers relevant.

[Received 18 April 2018]

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# Executive summary

- 0.1 The Attorney General, by terms of reference received on 18 April 2018, asked us to review the sentencing of repeat traffic offenders who may pose an ongoing risk to the community and to make recommendations for reform to promote road safety. The road toll – involving death or injury – is the reason for the focus on promoting road safety.
- 0.2 The existing penalty system for traffic offences works relatively well for the vast majority of drivers but it is not necessarily effective for the relatively small number of traffic offenders who continue to offend in ways that pose an ongoing risk to the community. This review, therefore, seeks to identify and deal with repeat serious traffic offenders.
- 0.3 The current system for regulating traffic offences is complex and changing. Existing penalties and interventions include:
  - licence suspension for accumulation of demerit points
  - licence suspension for certain speeding offences
  - driver disqualification for certain offences after conviction in court
  - the mandatory alcohol interlock program
  - vehicle sanctions, such as seizure or forfeiture of vehicles
  - speed inhibitor conditions
  - prevention courses such as the Traffic Offender Intervention Program, and the Sober Driver Program, and
  - increased penalties for certain second or subsequent driving offences.
- 0.4 Particular concerns have been raised about the impact of driver disqualification regimes on vulnerable, disadvantaged and marginal groups, especially in relation to health, employment, education, and family or carer obligations. Studies suggest that lengthy disqualification periods are a weak deterrent. Recent reforms to the disqualification regime to lessen its negative impacts have been favourably reviewed.
- 0.5 Drivers with one or more offences (including high risk offences) in the past 5 years are overrepresented in fatal and serious injury crashes, while drivers with no offences are underrepresented. However, drivers with multiple offences (including high risk offences) account for 3% of all licence holders. We estimate that there are approximately 10,000 offenders a year who are dealt with by the courts for repeat major offences for the purposes of the *Road Transport Act 2013* (NSW). However, we also note that the reoffending rates for driving offences that involve a specified harm or risk of harm (such

as death or bodily harm) are relatively low when compared with the rates for serious assault.

- 0.6 Our conclusion is that serious repeat traffic offenders should generally be subject to program requirements and similar interventions aimed at changing offending behaviour. This is preferable to simply increasing levels of punishment either for serious first offences or repeat offences. Our recommendations also seek to focus on the group of repeat serious traffic offenders who are not already potentially subject to specific, targeted interventions.
- 0.7 Sentencing is only one approach to modifying the behaviour of drivers, including repeat driving offenders. These other approaches include road safety education and other community awareness initiatives, situational responses, use of technology and availability of public transport. In order to reinforce the deterrent message, we recommend further raising community awareness of available penalties for traffic offences, including the fact that some driving offences are punishable by imprisonment. **(Recommendation 1.1)**

### **Offence and offender categories and their coverage (Chapter 2)**

- 0.8 The category of “major offence” used by the *Road Transport Act 2013* (NSW) is inadequate for identifying high risk repeat offenders. It is both over inclusive (in that it covers low range alcohol offences) and under inclusive (in that it does not include any speeding offences, not even high range speeding offences).
- 0.9 Rather than proposing significant amendments to the definition of “major offence” which would have consequences for the administration of existing parts of the *Road Transport Act 2013* (NSW), we propose a new category of “repeat serious traffic offender” which seeks to include offences that can be identified with high risk driving activities. However, one minor amendment that we do propose is one relating to dangerous driving offences. Although technically included, the dangerous driving offences in s 52A of the *Crimes Act 1900* (NSW) should be expressly included in the definition of “major offence”. **(Recommendation 2.1)**
- 0.10 A “repeat serious traffic offender” should be anyone convicted of a “major offence” (according to the *Road Transport Act 2013* (NSW)) that has a sentence of imprisonment as a maximum penalty or of various unauthorised racing and related offences, and has committed at least one other such offence in the previous 5 years. **(Recommendation 2.2)** We equate the offences included in this definition with high risk driving activities.
- 0.11 This definition of “repeat serious traffic offender” should not include unauthorised driving generally, and instead should focus on the offences that lead to the disqualification of the driver or suspension of the licence in the first place.
- 0.12 We use this definition of “repeat serious traffic offender” in our recommendations to determine:

- eligibility for programs that address attitudes to risk (Chapter 3)
- ineligibility for a restricted (or “work”) licence (Chapter 4), and
- eligibility, in certain circumstances, to take part in a sober driver program as a program that addresses attitudes to risk (Chapter 5).

0.13 We considered expanding the circumstances that amount to dangerous driving under s 52A of the *Crimes Act 1900* (NSW), in particular, to include mobile telephone use. We concluded that there was insufficient evidence about driver distraction to support such a change. However, we do recommend making it easier to prove dangerous driving offences involving drugs by allowing blood samples to be taken from a driver when an accident results in grievous bodily harm. (**Recommendation 2.3**)

### **Addressing the attitudes to risk of repeat serious traffic offenders (Chapter 3)**

0.14 Transport for NSW should consider developing programs that address the attitudes to risk of repeat serious traffic offenders and should be empowered to require that a repeat serious traffic offender complete such a program before they can drive again. Such programs should also be available as a condition of a sentencing order and should also be available to prisoners, whether on remand or serving a sentence of imprisonment. (**Recommendation 3.1**)

0.15 Programs aimed at changing driver attitudes to risk and risk management are particularly relevant for repeat offenders who are unaffected by the current penalty regime. There are a number of programs that currently address drivers’ attitudes to risk, including the TRIP program (in NSW), the RYDA program (in NSW), and the UK National Speed Awareness Course.

0.16 The programs should be targeted at those drivers who are potentially not subject to other available programs, such as drug and/or alcohol related schemes. Making any programs available to offenders who are in custody or as a condition of a sentencing order will help ensure that all who may benefit can take part.

0.17 The programs should also be made available state-wide in a timely, efficient way and disadvantaged offenders should not be prevented from taking part because of the cost of a program.

0.18 There is already some limited evidence about the effectiveness of such approaches. However, we recommend that the introduction of these intensive programs be accompanied by a rigorous evaluation of their effectiveness for repeat serious traffic offenders.

### **Restricted licences (Chapter 4)**

0.19 A restricted licence scheme, sometimes also referred to as a “work licence” scheme, should be introduced for appropriate cases to avoid the disproportionate impact (and negative safety outcomes) of the automatic disqualification regime particularly in relation

to Aboriginal people, and rural and other disadvantaged communities.

**(Recommendation 4.1)**

- 0.20 A restricted licence would be available for drivers facing disqualification after court proceedings. It is intended only for cases where drivers, who are not repeat serious traffic offenders, do not pose a traffic safety risk to the community and loss of a licence would make it practically impossible for them or their family members to seek or provide essential medical treatment or care, or to participate in employment or meet obligations arising from legal proceedings.
- 0.21 Excluded from the scheme would be drivers who are:
- subject to mandatory alcohol interlock
  - subject to a mandatory program as a result of high range speeding that we propose in Recommendation 6.2, or
  - convicted of one of the unauthorised driving offences, except for those who are driving while their licence is suspended for non-payment of fines.
- 0.22 The conditions of a restricted licence may include restrictions as to time, locality, type of vehicle and purpose of the trip. A driver who breaches any conditions will be returned to a court which may revoke the licence.
- 0.23 There are costs involved in a restricted licence scheme, but also benefits which outweigh them.
- 0.24 A restricted licence scheme would allow some offenders to participate in necessary activities without further offending or taking part in associated risky behaviours that may be associated with unauthorised driving. It would reduce reoffending and the associated costs in court time and, in some cases, imprisonment. Restricted licences also aim to avoid the “double punishment” imposed on drivers who often live in areas (such as rural or outer urban areas) that are inadequately served by public transport. The scheme would also benefit drivers’ broader networks. For example, it would lessen the negative (and potentially criminogenic) impact of a license disqualification on a driver’s family, and would ensure continuation of the family’s level of income.
- 0.25 These benefits outweigh the concerns about detecting non-compliance and practical concerns about the movement of necessary data between the relevant electronic data systems maintained by Transport for NSW, the Department of Communities and Justice and the NSW Police Force. While making such changes may be difficult, especially with legacy systems, it is not impossible. Forms of technology used to monitor drivers, when rolled out for other purposes, may also be adapted to monitor drivers who are subject to restricted licences.
- 0.26 We suggest a trial period for the scheme that is not geographically restricted. The scheme should only be extended if positively reviewed.

## Drug and alcohol repeat offenders (Chapter 5)

- 0.27 Alcohol and drug use is one of the top factors involved in traffic accidents that result in death or serious injury.
- 0.28 In light of recent changes to the law around drug and alcohol driving offences, we recommend only a number of small changes to improve the operation of the system and reduce the possibility of repeat offending that risks community safety.
- 0.29 The law should be changed to allow drivers to apply to a court for an alcohol interlock exemption when their circumstances change (**Recommendation 5.1**) This would remedy the anomaly that a driver who must undertake an interlock period cannot apply for an interlock exemption if there has been a change in circumstances.
- 0.30 It should be possible to require a driver who is subject to a mandatory alcohol interlock order to undertake a drink driving or related education program. (**Recommendation 5.2**) Some research has pointed to findings that drink driving behaviour tends to return after an interlock period ends, and suggests there is a need to combine interlock programs with interventions that are more likely to foster long-term behavioural change.
- 0.31 The NSW Sober Driver Program is a 3-day (20 hour total) therapeutic course that seeks to change the “attitudes and behaviours of repeat and high risk drink drive offenders”. Studies have found it effective in reducing repeat drink driving offences. Currently it is limited to offenders under an interlock exemption order or who are subject to a community-based order arising from a drink driving offence. The Sober Driver Program (or equivalent program) should therefore also be made available
- as a specified alcohol or other drug education program under the yet to be commenced s 215C of the *Road Transport Act 2013* (NSW)
  - as a drink driving or related education program for drivers under a mandatory interlock order (see Recommendation 5.2), and
  - as a program that satisfies the program requirement for a suspended or disqualified repeat traffic offender to drive again (see Recommendation 3.1), so long as one of the qualifying offences involved the use of drugs or alcohol. (**Recommendation 5.3**)

## High range speeding offenders (Chapter 6)

- 0.32 Drivers who exceed the speed limit by more than 45km/h are a relatively small group of offenders with a relatively high rate of reoffending. Such speeding carries a high risk of serious injury and death. We recommend a number of approaches to reduce the high risk of reoffending.
- 0.33 The current outdated speed inhibitor provisions should be replaced by a provision that is flexible enough to allow a variety of technological options for limiting and monitoring a driver’s speed. (**Recommendation 6.1(1)**) Trials of speed limiting and monitoring technology in NSW and elsewhere have shown that intelligent speed adaptation (ISA)

devices can at least stop some drivers from speeding while the devices are in place. They can, therefore, reduce accidents and deaths that result from speeding.

- 0.34 As part of these new arrangements, the government should investigate the feasibility of a speed monitoring/limiting program that allows selected speeding offenders to have part of their suspension period lifted so that they can drive but only when they have an ISA device fitted to their vehicle. **(Recommendation 6.1(2))** Since speeding usually results in suspension after a penalty notice has been issued, the requirement to participate would be imposed by Transport for NSW rather than the courts.
- 0.35 Given the relatively high chance of reoffending, many among the high range speeding offenders would benefit from being required to undertake a program aimed at changing their attitudes to risk and, therefore, their offending behaviour. It should, therefore, be possible for Transport for NSW to require a driver who has exceeded the speed limit by more than 45km/h to participate in a program proposed by Recommendation 3.1. Any period of suspension or disqualification should not end until the driver has undertaken the program to the satisfaction of Transport for NSW. **(Recommendation 6.2)** Because of the need for further evidence and analysis to determine the benefits and costs of such a scheme, we consider that there should be a trial subject to review by Transport for NSW. Any such trial should be available across the state and specifically not limited to metropolitan areas.
- 0.36 In NSW, a driver who exceeds the speed limit by more than 45km/h is subject to a fine of \$3,300 (30 penalty units) and 6 months disqualification, or, in the case of the driver of a heavy vehicle or coach \$5,500 (50 penalty units) and 6 months disqualification. When dealt with as a penalty notice offence, the fines range (depending on vehicle type and whether or not the offence occurs in a school zone) between \$2435 and \$3821.
- 0.37 The extreme risk of injury or death involved in exceeding the speed limit by more than 45km/h and the obviously deliberate nature of such offending, warrants more serious maximum penalties than these. Therefore, a driver who exceeds the speed limit by more than 45km/h and has, in the previous 5 years, committed one or more offences of exceeding the speed limit by more than 45km/h should not be dealt with by way of penalty notice but should instead be subject to a maximum penalty of:
- imprisonment for 9 months and/or 50 penalty units, and automatic disqualification for 12 months (with a minimum disqualification of 6 months), or
  - imprisonment for 12 months and automatic disqualification for 12 months (with a minimum disqualification of 6 months), in the case of the driver of a heavy vehicle or coach. **(Recommendation 6.3)**
- 0.38 Since demographic information is not included in penalty notice records, the Government should closely monitor the impact of these new penalties on vulnerable communities.

# Recommendations

## 1. Introduction

### **Recommendation 1.1: Raising community awareness of available penalties**

Transport for NSW and the NSW Police Force should develop a road safety campaign, or add a component to an existing campaign, that draws attention to the fact that drivers who engage in risky behaviour, such as speeding or drink driving, may be punished by imprisonment, especially if they kill or seriously injure someone as the result of their behaviour.

## 2. Offence and offender categories and their coverage

### **Recommendation 2.1: Dangerous driving offences as “major offences”**

The definition of “major offence” in s 4(1) of the *Road Transport Act 2013* (NSW) should be amended to refer expressly to the offences of dangerous driving causing death or grievous bodily harm, and aggravated dangerous driving causing death or grievous bodily harm in s 52A of the *Crimes Act 1900* (NSW).

### **Recommendation 2.2: Repeat serious traffic offenders**

A “repeat serious traffic offender” should be anyone convicted of:

- (a) a “major offence” as defined in the *Road Transport Act 2013* (NSW) s 4(1) that has a sentence of imprisonment as a maximum penalty, or
- (b) certain unauthorised racing and related offences: *Road Transport Act 2013* (NSW) s 115, s 116(2)(a)-(d),

and has, in the 5 years before that offence, committed at least one other such offence.

### **Recommendation 2.3: Drug tests where accidents result in grievous bodily harm**

Schedule 3 of the *Road Transport Act 2013* (NSW) should be amended to ensure that, when an accident results in grievous bodily harm to another, blood samples taken from a driver after an accident can be tested for drugs.

## 3. Addressing the attitudes to risk of repeat serious traffic offenders

### **Recommendation 3.1: Programs to address attitudes to risk**

- (1) Transport for NSW and Corrective Services NSW should consider developing programs for serious and repeat traffic offenders that seek to address their attitudes to risk.
- (2) Transport for NSW should be empowered to require repeat traffic offenders to participate in such programs.

- (3) A suspended or disqualified offender must complete such a program to the satisfaction of Transport for NSW before they can drive again.
- (4) Such programs should also be available as a condition of a sentencing order and should also be available to prisoners, whether on remand or serving a sentence of imprisonment.
- (5) Fees may be charged for approved courses, but only if concession rates and assistance are available to people in severe financial hardship.

## 4. Restricted licences

### Recommendation 4.1: Restricted licences

- (1) A restricted licence should be available to a court to grant to anyone subject to automatic disqualification, but only where:
  - (a) they are not:
    - (i) a “repeat traffic offender” as defined in Recommendation 2.2,
    - (ii) subject to the mandatory alcohol interlock program under Division 2 of Part 7.4 of the *Road Transport Act 2013* (NSW)
    - (iii) subject to mandatory program participation proposed in Recommendation 6.2, or
    - (iv) convicted of one of the unauthorised driving offences listed in the table to s 205A of the *Road Transport Act 2013* (NSW), except for driving while licence suspended or cancelled for non-payment of fines under s 54(4) of the *Road Transport Act 2013* (NSW), and
  - (b) the licence is needed to prevent the driver or a family member from being deprived of:
    - (i) essential medical treatment
    - (ii) essential personal care
    - (iii) their only practical means of participating in the laws, customs, traditions and practices of the Aboriginal or Torres Strait Islander community or group to which they belong
    - (iv) their principal source of income
    - (v) their only practical means of travelling to and from their usual place of employment
    - (vi) their only practical means of travelling to and from their usual place of education,
    - (vii) their only practical means of meeting obligations in relation to or arising from legal proceedings, and
  - (c) they do not pose a traffic safety risk to the community.

In the case of an Aboriginal person or a Torres Strait Islander, family member includes a person who is part of extended family or kin according to the Indigenous kinship system of the person’s culture.
- (2) A driver may apply to the court for:
  - (a) a restricted licence at the time of sentencing, or



(b) a restricted licence or variation of an existing restricted licence at any time if the driver's circumstances in relation to one of the factors listed at (1)(b) have changed.

(3) The restricted licence must specify:

- (a) the times when the person may drive
- (b) the locality in which and/or the roads on which the person may drive
- (c) the type of vehicle which the person may drive, and
- (d) the purposes for which the person may drive.

The purposes should be restricted to those matters listed at (1)(b).

(4) If a driver breaches a restricted licence, the court must revoke the restricted licence unless it is satisfied that there are good reasons for excusing the breach.

(5) In determining whether there are good reasons to excuse the breach, the court should have regard to:

- (a) the extent to which the breach was deliberate or accidental;
- (b) any extenuating circumstances that explain the breach;
- (c) any prior breaches; and
- (d) the extent to which the driver has otherwise complied with the conditions of the restricted licence, such that it would be unjust to revoke it.

(6) Revocation of the restricted licence should result in:

- (a) the re-commencement of the underlying period of disqualification from the point at which the restricted licence was granted
- (b) the offender being unable to apply for a restricted licence during the period of disqualification, and
- (c) the offender being unable to apply for the removal of the disqualification under s 221B of the *Road Transport Act 2013* (NSW).

(7) If the order for a restricted licence is in place at the end of the disqualification period, the driver must apply for a new licence as they would at the end of any disqualification period.

## 5. Drug and alcohol repeat offenders

### **Recommendation 5.1: Application for interlock exemption where circumstances have changed**

- (1) The *Road Transport Act 2013* (NSW) should be amended so that a person subject to a mandatory interlock order may apply for an interlock exemption order if their circumstances (in relation to those factors listed in s 212(3)) have changed since the time of conviction.
- (2) If such an application is made, the court should determine whether to grant an interlock exemption order by having regard to the matters set out in s 212(3)-(5) of the *Road Transport Act 2013* (NSW).

### **Recommendation 5.2: Mandatory programs for interlock participants**

The *Road Transport Act 2013* (NSW) should be amended so that Transport for NSW may:

- (1) require an offender to whom a mandatory interlock order applies to undergo a drink driving or related education program, and
- (2) extend the interlock period until such time as the program is completed to the satisfaction of Transport for NSW.

### **Recommendation 5.3: Expanding the Sober Driver Program**

The Sober Driver Program (or equivalent program) should be made available as a:

- (a) specified alcohol or other drug education program under s 215C of the *Road Transport Act 2013* (NSW)
- (b) drink driving or related education program for drivers under a mandatory interlock order (see Recommendation 5.2), and
- (c) program that satisfies the program requirement for a suspended or disqualified repeat traffic offender to drive again (see Recommendation 3.1), so long as one of the qualifying offences involved the use of drugs or alcohol.

## 6. High range speeding offenders

### **Recommendation 6.1: Speed limiters/monitors**

- (1) The provisions relating to speed inhibitor conditions in s 204(4) and s 204(6) of the *Road Transport Act 2013* (NSW) should be repealed and replaced by a provision that is flexible enough to allow a variety of technological options for limiting and monitoring a driver's speed.
- (2) The government should investigate the feasibility of a speed monitoring/limiting program that allows selected speeding offenders to have part of their suspension period lifted so that they can drive but only when they have an ISA device fitted to their vehicle.

### **Recommendation 6.2: Mandatory program participation for high range speeding offenders**

- (1) When, as a result of an offence of exceeding the speed limit by more than 45km/h:
  - (a) a driver's license is suspended (whether by notice issued by the police, by Transport for NSW, or by operation of demerit points), or
  - (b) a driver is found guilty by the Local Court,

Transport for NSW may require the driver undertake a program of the kind identified in Recommendation 3.1(1), subject to Recommendation 3.1(4).

- (2) Any period of suspension or disqualification does not end until the driver has undertaken the program to the satisfaction of Transport for NSW.

### **Proposal 6.3: Imprisonment as a maximum penalty for a second high range speeding offence**

The law relating to drivers who exceed the speed limit by more than 45km/h should be amended so that a driver who exceeds the speed limit by more than 45km/h and has, in the previous 5 years, committed one or more offences of exceeding the speed limit by more than 45km/h:

- (a) may not be dealt with by way of a penalty notice for the offence, and
- (b) should, instead, be subject to a maximum penalty of:
  - (i) imprisonment for 9 months and/or 50 penalty units, and automatic disqualification for 12 months (with a minimum disqualification of 6 months), or
  - (ii) imprisonment for 12 months and automatic disqualification for 12 months (with a minimum disqualification of 6 months), in the case of the driver of a heavy vehicle or coach.



# 1. Introduction

## In Brief

This review looks at the sentencing of repeat traffic offenders who may pose an ongoing risk to the community and makes recommendations for reform to promote road safety. The existing penalty system works relatively well for the vast majority of drivers but it is not necessarily effective for the relatively small number of repeat serious traffic offenders. In our view, repeat offending should generally be targeted by program requirements and similar interventions aimed at changing offending behaviour. In order to reinforce the deterrent message, we recommend raising community awareness of available penalties for traffic offences, including the possibility of imprisonment.

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## This review

- 1.1 We have been asked to review the sentencing of repeat traffic offenders who may pose an ongoing risk to the community and make recommendations for reform to promote road safety.
- 1.2 We received terms of reference for the review from the Attorney General on 18 April 2018. These are reproduced at page vi.

- 1.3 We received 19 preliminary submissions (which are listed in Appendix A), before releasing a consultation paper<sup>1</sup> on 4 December 2018. In response to the consultation paper, we received a further 9 submissions. These are listed in Appendix B. We also conducted the consultations that are listed in Appendix C.
- 1.4 Our general conclusion is that the existing penalty system works relatively well for the vast majority of drivers who seldom or never reoffend, if they offend at all. The data we set out in our Consultation Paper shows that traffic offenders are generally dealt with through fines (either court-imposed or through a penalty notice) and unsupervised community orders (court-imposed).<sup>2</sup> While these may deter the general population from further offending, they are not necessarily effective responses for those who can be identified as repeat serious traffic offenders. This review, therefore, seeks to deal with the group of traffic offenders who continue to offend in ways that pose an ongoing risk to the community. One challenge for this report is to identify repeat serious traffic offenders so that they can be dealt with appropriately when their offences are proven or admitted.

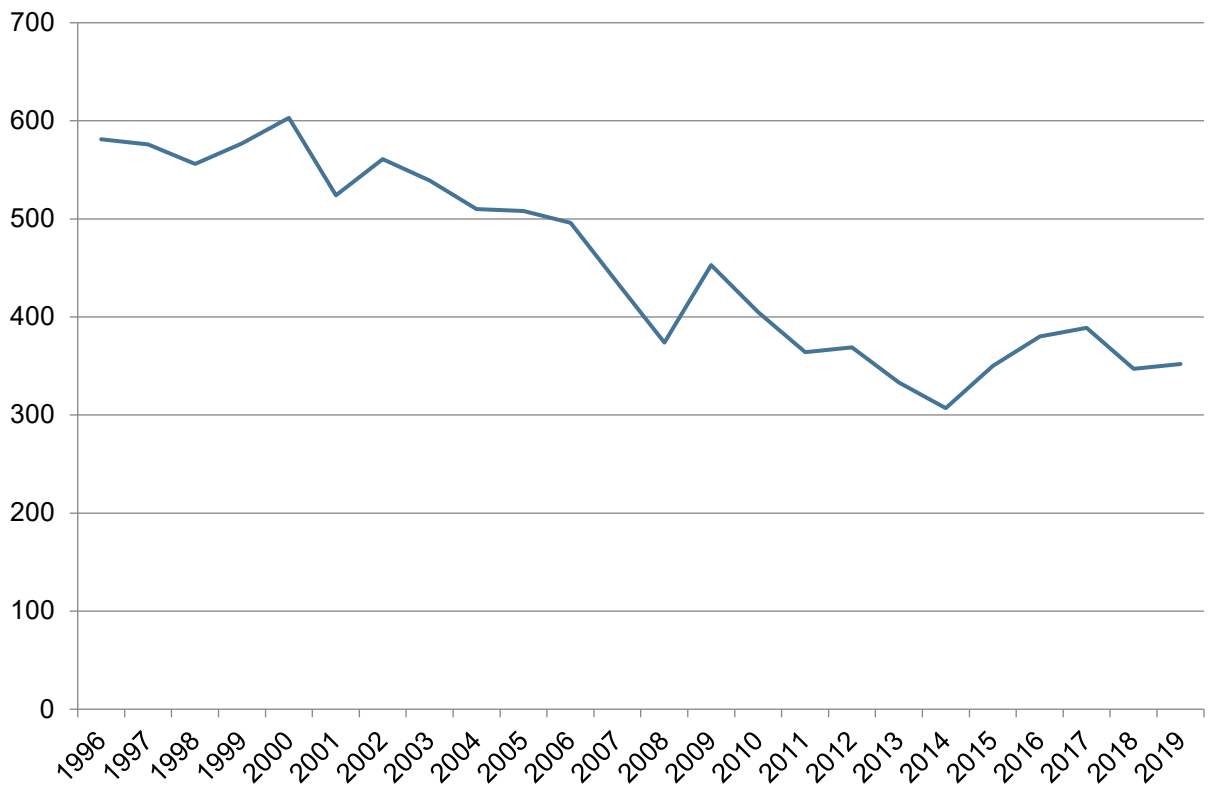
## The road toll

- 1.5 The road toll – involving either death or injury – is the reason for the review’s focus on promoting road safety.
- 1.6 The 2019 preliminary provisional road toll is 352 deaths (equivalent to a fatality rate of 4.35 per 100,000 population). The NSW State Priority aims to reduce road deaths by at least 30% from 2011 levels by 2021.<sup>3</sup> In 2011, there were 364 road deaths.
- 1.7 Figure 1.1 sets out road deaths for 1996-2019. It shows a downward trend.

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1. NSW Sentencing Council, *Repeat Traffic Offenders*, Consultation Paper (2018).  
2. Chapter 2.  
3. NSW, *State Priorities* (2015).

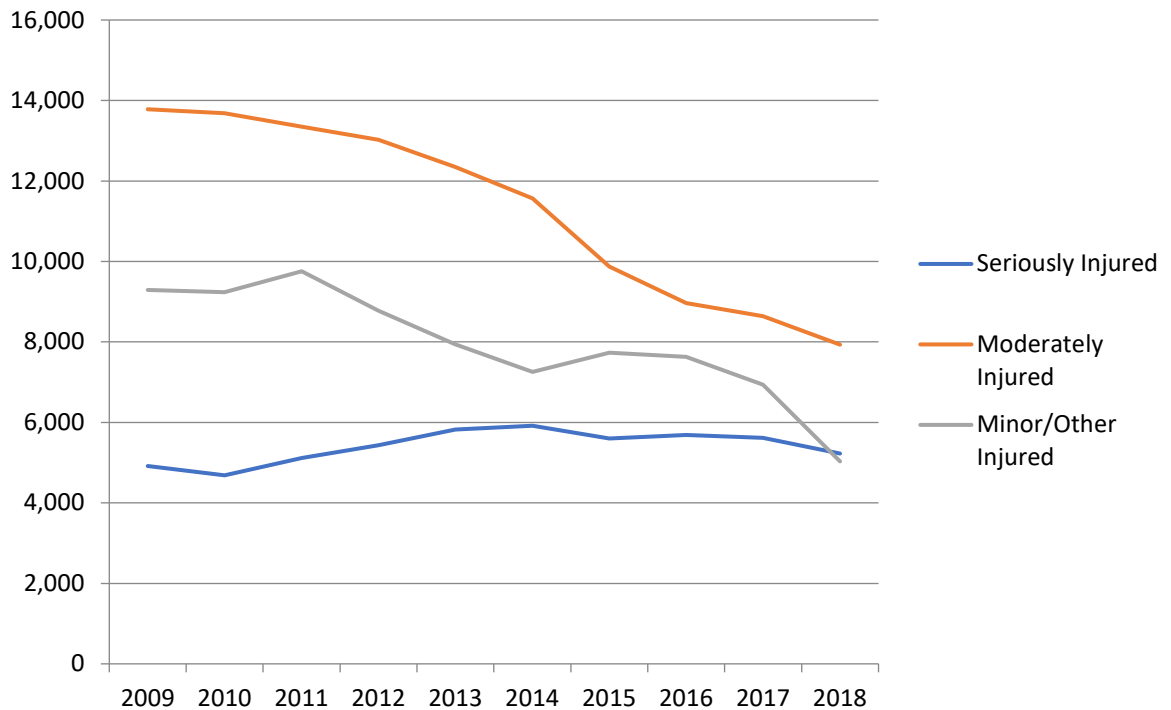
**Figure 1.1: Road deaths in NSW – 1996-2019**



Source: Centre for Road Safety. Note, the data for 2019 is a preliminary provisional number.

- 1.8 As with deaths, it appears that the number of injuries is falling. Figure 1.2 sets out road user injuries for 2008-2017. The declining trend is most noticeable for moderate and minor injuries.

**Figure 1.2: Road user injuries in NSW, 2008-2017**



Source: Transport for NSW, Centre for Road Safety.

## The existing system of regulating traffic offences

- 1.9 There are two main sources for dealing with traffic offenders, including repeat traffic offenders:
- sentencing law and other responses that apply across the criminal law, as set out in the *Crimes (Sentencing Procedure) Act 1999* (NSW), the *Fines Act 1996* (NSW) and case law, and
  - special penalties and interventions that apply to traffic offences, chiefly set out in the *Road Transport Act 2013* (NSW).
- 1.10 The focus of this report is in the area of the second group – special penalties and interventions.

### Special penalties and interventions

- 1.11 The following paragraphs outline the special penalties and interventions that are currently available in relation to various traffic offences in NSW.
- 1.12 **Licence suspension**, where a driver cannot drive for a prescribed period. It can take a number of forms:



- *immediate licence suspension* that may be imposed by a police officer within 48 hours of a penalty notice being issued or a driver being charged for various dangerous and reckless driving offences, some prescribed concentration of alcohol (“PCA”) and drug driving offences, some unauthorised racing offences, police detected offences of exceeding the speed limit by 45km/h (for unrestricted licence holders) or 30km/h (for learner or provisional licence holders)<sup>4</sup>
  - *suspension for accumulation of demerit points* incurred by a driver for one or more of over 600 offences related to driving or using motor vehicles,<sup>5</sup> or
  - *administrative licence suspension* or cancellation imposed by Transport for NSW for drivers who have been detected exceeding the speed limit by more than 30km/h.<sup>6</sup>
- 1.13 **Driver disqualification** where a driver may not drive for the period of disqualification and must apply for a new licence before they can drive again. A disqualification arises after a court conviction for certain road transport offences and may be either automatically imposed or ordered by the court. Particular issues surrounding the driver disqualification system are set out below.<sup>7</sup>
- 1.14 **Mandatory alcohol interlock program** where a driver is disqualified for a specified period and may then obtain an interlock licence that allows them to drive a vehicle fitted with an interlock device that requires the driver to have a zero blood alcohol concentration.<sup>8</sup>
- 1.15 **Vehicle sanctions** where courts and police may impose sanctions on a driver’s vehicle for certain offences.<sup>9</sup> These sanctions include:
- *Police seizure of vehicles or confiscation of number plates* where police officers may take action to seize a vehicle or confiscate number plates if a police officer reasonably believes that a driver has committed certain sanctionable offences,

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4. *Road Transport Act 2013* (NSW) s 224. See also NSW Sentencing Council, *Repeat Traffic Offenders*, Consultation Paper (2018) [5.5]–[5.9].

5. *Road Transport Act 2013* (NSW) s 32; *Road Transport (Driver Licensing) Regulation 2017* (NSW) sch 1–2. See also NSW Sentencing Council, *Repeat Traffic Offenders*, Consultation Paper (2018) [5.10]–[5.30].

6. *Road Transport Act 2013* (NSW) s 59; *Road Transport (Driver Licensing) Regulation 2017* (NSW) cl 67. See also NSW Sentencing Council, *Repeat Traffic Offenders*, Consultation Paper (2018) [5.31]–[5.33].

7. [1.29]–[1.37].

8. *Road Transport Act 2013* (NSW) s 211, s 209(1) definition of “interlock driver licence”; *Road Transport (Driver Licensing) Regulation 2017* (NSW) cl 83(3).

9. *Road Transport Act 2013* (NSW) pt 7.6.

including exceeding the speed limit by 45km/h (police detected), offences relating to police pursuits and various racing and road racing-related offences.<sup>10</sup>

- *Court ordered forfeiture of vehicles* where a driver has committed certain repeat offences, including sanctionable offences. The forfeited vehicle may be sold, disposed of or used for educational programs or crash testing.<sup>11</sup>

1.16 **Speed inhibitor conditions** that allow the fitting of a device that prevents a vehicle from travelling over 60km/h when a driver has been convicted of driving at a speed dangerous to the public or any other prescribed speeding offence.<sup>12</sup> However, the provision that allows this (that was originally enacted in 1937) appears to be inoperative and is arguably outdated.

1.17 **Prevention courses.** There are two existing systems for delivering courses to driving offenders as well as one that is awaiting implementation:

- *the Traffic Offender Intervention Program* - a community based recidivist prevention course that a court can order an offender undertake before sentencing<sup>13</sup>
- *the Sober Driver Program* - a therapeutic group course that seeks to change the “attitudes and behaviours of repeat and high risk drink drive offenders”,<sup>14</sup> which is delivered to offenders under an interlock exemption order and offenders under Community Corrections supervision,<sup>15</sup> and
- an “alcohol or other drug education program” under s 215C of the *Road Transport Act 2013* (NSW) (a section introduced in 2018 that is yet to commence) which Transport for NSW may require a driver to complete, before they can drive again, if they have committed a driving offence involving drugs or alcohol.<sup>16</sup>

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10. See NSW Sentencing Council, *Repeat Traffic Offenders*, Consultation Paper (2018) [6.33]–[6.40].

11. See NSW Sentencing Council, *Repeat Traffic Offenders*, Consultation Paper (2018) [6.41]–[6.43].

12. *Road Transport Act 2013* (NSW) s 204(4), s 204(6) definition of “speed inhibitor condition”. See also NSW Sentencing Council, *Repeat Traffic Offenders*, Consultation Paper (2018) [6.62]–[6.63].

13. *Criminal Procedure Regulation 2017* (NSW) pt 9. See also NSW Sentencing Council, *Repeat Traffic Offenders*, Consultation Paper (2018) [6.93]–[6.102].

14. NSW Government, “Sober Driver Program” <[www.soberdriverprogram.nsw.gov.au/](http://www.soberdriverprogram.nsw.gov.au/)> (retrieved 1 September 2020).

15. See NSW Sentencing Council, *Repeat Traffic Offenders*, Consultation Paper (2018) [6.103]–[6.107].

16. *Road Transport Act 2013* (NSW) proposed s 215C: *Road Transport Legislation Amendment (Penalties and Other Sanctions) Act 2018* (NSW) sch 1 [16] (not yet commenced).

1.18 **Increased penalties for second or subsequent driving offences** where some offences under the *Road Transport Act 2013* (NSW) carry harsher penalties for second or subsequent major driving offences.<sup>17</sup>

1.19 Further information about these penalties, including statistics relating to their use and assessments of their effectiveness, is set out in the Consultation Paper.<sup>18</sup>

### Complexity of the current system

1.20 The Consultation Paper details the complexity of the law's response to repeat traffic offenders. In it we set out the framework for dealing with all traffic offenders (including repeat traffic offenders) so that readers can see the complexity and inconsistency of the current system.

1.21 Some of the existing provisions are also not generally known or well understood. Some preliminary submissions suggest approaches to repeat offending, such as vehicle confiscation and destruction,<sup>19</sup> that are already available in certain circumstances.

1.22 The complexity of the current system is perhaps not surprising, since the *Road Transport Act 2013* (NSW) is the product of incremental changes originally made to the *Traffic Act 1909* (NSW) and to its successor acts, the *Road Transport (General) Act 1999* (NSW) and the *Road Transport (General) Act 2005* (NSW).

1.23 One example of the complexity of the system can be seen in the fact that, in theory, there are at least three different ways in which a driver who exceeds the speed limit by more than 45km/h may have their licence suspended, and one way in which they may be disqualified from driving:

- Within 48 hours of a penalty notice being issued or the driver being charged with exceeding the speed limit by more than 45km/h, a police officer may issue an immediate suspension notice.<sup>20</sup>
- Upon conviction for exceeding the speed limit by more than 45km/h, the court must impose a licence disqualification of at least six 6 months.<sup>21</sup>
- When a driver pays a penalty notice amount for exceeding the speed limit by more than 45km/h, or has not paid the amount but the time for electing to take the matter to court has lapsed, Transport for NSW may cancel or suspend that driver's licence for

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17. See NSW Sentencing Council, *Repeat Traffic Offenders*, Consultation Paper (2018) [1.34]–[1.40].

18. NSW Sentencing Council, *Repeat Traffic Offenders*, Consultation Paper (2018) ch 5–6.

19. Pedestrian Council of Australia, *Preliminary Submission PTR19*, 3–4; M Bloor, *Preliminary Submission PTR13*; N Cowling, *Preliminary Submission PTR3*.

20. *Road Transport Act 2013* (NSW) s 224(1)(c).

21. *Road Rules 2014* (NSW) r 10-2(3).

a period that it may specify by notice (currently 6 months to align with the minimum disqualification period).<sup>22</sup>

- A driver can, as a result of exceeding the speed limit by more than 45km/h, accumulate sufficient demerit points for their licence to be suspended under the demerit points scheme.<sup>23</sup>

1.24 There are also complicated provisions setting out how these interact when they are imposed at different times for the same offence.<sup>24</sup>

1.25 Another example of complexity may be found in the use of the definition of “major offence” in the *Road Transport Act 2013* (NSW). “Major offence” means any of the following crimes or offences (or equivalent major offences under previous acts):<sup>25</sup>

- an offence in respect of the death of or bodily harm to another person caused by or arising out of the offender’s use of a motor vehicle for which the offender is convicted of:
  - murder or manslaughter, or
  - wounding or grievous bodily harm with intent, reckless grievous bodily harm, causing injuries by furious driving, causing grievous bodily harm by unlawful or negligent act or omission, or any other offence under the *Crimes Act 1900* (NSW) (“*Crimes Act*”)<sup>26</sup>
- predatory driving, not stopping in a police pursuit, or failing to stop and assist after a crash<sup>27</sup>
- driving or attempting to drive with a PCA<sup>28</sup>
- driving or attempting to drive with certain drugs, driving or attempting to drive under the influence of alcohol or any other drug, driving furiously, recklessly, at speed or in

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22. *Road Transport Act 2013* (NSW) s 59; *Road Transport (Driver Licensing) Regulation 2017* (NSW) cl 67.

23. *Road Transport Act 2013* (NSW) s 32, s 33; *Road Transport (Driver Licensing) Regulation 2017* (NSW) sch 1.

24. *Road Transport Act 2013* (NSW) s 206B; *Road Rules 2014* (NSW) r 10-2(4).

25. *Road Transport Act 2013* (NSW) s 4(1) definition of “major offence”.

26. *Crimes Act 1900* (NSW) s 33, s 35, s 53–54.

27. *Crimes Act 1900* (NSW) s 51A, s 51B, s 52AB.

28. *Road Transport Act 2013* (NSW) s 110(1)–(2), s 110(3)(a)–(b), s 110(4)(a)–(b), s 110(5)(a)–(b).

a manner dangerous to the public, menacing driving, and failing to stop and assist after a crash causing injury<sup>29</sup>

- negligent driving causing death or grievous bodily harm<sup>30</sup>
- refusing or failing to submit to a breath analysis, refusing or failing to provide or preventing sample taking, or wilfully introducing or altering the concentration or amount of alcohol or other drugs,<sup>31</sup> or
- aiding, abetting, counselling or procuring the commission of, or being an accessory before the fact to, any of the above offences.

1.26 The definition of “major offence” is used in several parts of the *Road Transport Act 2013* (NSW). In all but one of these parts, the list of offences included in the definition has proved insufficient to the purpose of the provision and other offences have been added:

- Some offences in the *Road Transport Act 2013* (NSW) attract harsher penalties if they are a “second or subsequent offence”. Second or subsequent offences are determined by whether they (and the notional first offence) are certain prescribed offences which include “major offences”<sup>32</sup> as well as certain unauthorised driving offences (but excluding offences of driving while licence suspended or cancelled for non-payment of fines).<sup>33</sup>
- A driver who commits a “major offence” must be removed from the mandatory alcohol interlock program.<sup>34</sup> Eligibility for the mandatory alcohol interlock program, however, depends on a separate category of “alcohol-related major offence”.<sup>35</sup>
- A driver who is convicted of a “major offence” must receive a period of automatic licence disqualification.<sup>36</sup> However, disqualification is also automatically applied to drivers convicted of certain unauthorised driving offences (including driving while licence suspended or cancelled for non-payment of fines)<sup>37</sup> and certain speeding, road racing and learner licence holder offences.<sup>38</sup>

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29. *Road Transport Act 2013* (NSW) s 111, s 112(1)(a)–(b), s 117(2), s 118, s 146.

30. *Road Transport Act 2013* (NSW) s 117(1)(a)–(b).

31. *Road Transport Act 2013* (NSW) sch 3 cl 16(1)(b), sch 3 cl 17–18.

32. *Road Transport Act 2013* (NSW) s 9.

33. *Road Transport Act 2013* (NSW) s 53(3), s 54(1), s 54(3)–(4).

34. *Road Transport Act 2013* (NSW) s 215(2)(a).

35. *Road Transport Act 2013* (NSW) s 209(1) definition of “alcohol-related major offence”.

36. *Road Transport Act 2013* (NSW) s 205.

37. *Road Transport Act 2013* (NSW) s 53(3), s 54(1), s 54(3)–(4); s 205A.

38. *Road Rules 2014* (NSW) r 10-2(5)(b), r 10-2(3)(b); *Road Transport Act 2013* (NSW) s 115(5), s 116(7); *Road Transport (Driver Licencing) Regulation 2017* (NSW) cl 15(1), s 15(3)–(4).

1.27 Complexity cannot, therefore, be avoided when tailoring approaches to particular offenders within the existing regulatory scheme. We accept this reality where, later in this report we adopt a new category of “repeat serious traffic offender” which draws on the existing “major offence” category, but with certain inclusions and exclusions as each case requires.

### A changing environment

1.28 The *Road Transport Act 2013* (NSW) has been subject to a number of substantial changes in recent years. Some of the schemes that have been introduced have not yet been fully implemented or have not been in operation long enough to analyse their effect. Our recommendations do not seek to impact on these new arrangements. They include:

- **Penalty notices for some alcohol or other drug related offences.** Amendments were passed in 2018<sup>39</sup> to deal more effectively with certain relatively high volume driving offences that were then being dealt with by the courts. From May 2019, the offences of driving with a low range, special range or novice range PCA or with the presence of any other drug,<sup>40</sup> where it is a “first offence”, are dealt with by penalty notice. The courts will only deal with second or subsequent offences.<sup>41</sup> Administrative suspension by Transport for NSW (not exceeding 3 months) has also been extended to these offences.<sup>42</sup>
- **Alcohol or other drug education programs.** Under amendments that have not yet commenced, Transport for NSW may require a person to undertake a specified alcohol or other drug education program if they have been convicted of an alcohol or drug-related driving offence,<sup>43</sup> or have committed such an offence and been dealt with by penalty notice.<sup>44</sup>
- **Driver disqualification reforms.** A new driver disqualification scheme commenced in October 2017.<sup>45</sup> It replaced an earlier scheme that was widely criticised. The new scheme, amongst other things, reduced disqualification periods, reduced the maximum terms of imprisonment available for unauthorised driving offences, abolished the habitual traffic offenders scheme and allowed offenders to apply to have their disqualifications lifted after a specified offence-free period. As we discuss,

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39. *Road Transport Legislation Amendment (Penalties and Other Sanctions) Act 2018* (NSW) sch 1.

40. *Road Transport Act 2013* (NSW) s 110(1)–(3), s 111(1).

41. *Road Transport Act 2013* (NSW) s 9(2A).

42. *Road Transport Act 2013* (NSW) s 59(1), s 59(4A).

43. Under *Road Transport Act 2013* (NSW) s 110–112.

44. *Road Transport Act 2013* (NSW) proposed s 215C: *Road Transport Legislation Amendment (Penalties and Other Sanctions) Act 2018* (NSW) sch 1[16] (not yet commenced).

45. *Road Transport Amendment (Driver Licence Disqualification) Act 2017* (NSW) sch 1.

later, these reforms have been subject to review by the Bureau of Crime Statistics and Research (“BOCSAR”).<sup>46</sup>

- **Mandatory alcohol interlock.** Amendments that commenced in December 2018 have extended the mandatory alcohol interlock scheme to “first offences” of driving with a mid-range PCA and driving under the influence of alcohol.<sup>47</sup>

### Particular issues relating to driver disqualification

- 1.29 For the reasons we set out in the following paragraphs, we are not seeking to expand the disqualification regime and are recommending, in Chapter 4, a further amelioration of it to help prevent a group of first-time traffic offenders from becoming repeat offenders and engaging in risky behaviour.
- 1.30 A number of submissions raise concerns about the impact of driver disqualification regimes, drawing attention to the impact that lengthy periods of disqualification can have on employment, education and family or carer obligations and the ability to meet personal medical needs.<sup>48</sup> The impacts can be particularly harsh on vulnerable, disadvantaged and marginal groups.<sup>49</sup> Such circumstances can lead to reoffending<sup>50</sup> and increasingly punitive responses from the criminal justice system.<sup>51</sup> The impact can be particularly marked on Indigenous communities and others who live in remote areas that do not have public transport.<sup>52</sup>
- 1.31 NSW Parliamentary committees have also observed that disqualification is particularly onerous for certain groups of people including professional drivers, people requiring a licence for family dependency or employment reasons,<sup>53</sup> and people living in remote areas.<sup>54</sup>

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46. [1.34].

47. *Road Transport Act 2013* (NSW) s 209, s 211, amended by *Road Transport Legislation Amendment (Penalties and Other Sanctions) Act 2018* (NSW) sch 1 [10]–[13].

48. Chief Magistrate of the NSW Local Court, *Preliminary Submission PTR17*, 1; Mid North Coast Community Legal Centre, *Submission TR3*, 7–8.

49. Mid North Coast Community Legal Centre, *Submission TR3*, 7–8.

50. Chief Magistrate of the NSW Local Court, *Preliminary Submission PTR17*, 1; Mid North Coast Community Legal Centre, *Submission TR3*, 3; NSW Legal Assistance Forum, *Submission TR4*, 4–5; Legal Aid NSW, *Submission TR5*, 9–10; The Shopfront Youth Legal Centre, *Submission TR6*, 3.

51. Mid North Coast Community Legal Centre, *Submission TR3*, 7; Legal Aid NSW, *Submission TR5*, 9.

52. Mid North Coast Community Legal Centre, *Submission TR3*, 9; NSW Legal Assistance Forum, *Submission TR4*, 3; Chief Magistrate of the NSW Local Court, *Preliminary Submission PTR17*, 1.

53. Parliament of NSW, Joint Standing Committee on Road Safety (Staysafe), *Speed Zoning and its Impact on the Demerit Points Scheme*, Report 4/55 (2014) [5.20].

54. NSW Legislative Assembly, Committee on Law and Safety, *Driver Licence Disqualification Reform*, Report 3/55 (2013) vii, [3.2].

- 1.32 Studies have also suggested that lengthy disqualification periods are a weak deterrent. Generally, a person disqualified for a long period is more likely to commit a subsequent traffic offence.<sup>55</sup> This, however, is not necessarily true for all types of offending. Other contributing factors, such as alcohol use, must be considered alongside the length of disqualification.<sup>56</sup>
- 1.33 Similar observations<sup>57</sup> motivated the reforms to the disqualification regime that were passed in 2017. These reforms:
- replaced mandatory disqualification periods with shorter automatic periods (and minimum periods)<sup>58</sup>
  - allowed the disqualification periods for unauthorised driving offences to be served concurrently rather than consecutively
  - abolished imprisonment for a first offence of driving while suspended due to fine default and significantly reduced terms of imprisonment for other unauthorised driving offences<sup>59</sup>
  - allowed offenders to apply to have their disqualifications lifted after a period of time,<sup>60</sup> and
  - abolished the habitual traffic offenders scheme,<sup>61</sup> which added to all other disqualification periods, a further 5 year disqualification for those who committed three eligible offences.
- 1.34 Some submissions have commented favourably on these reforms<sup>62</sup> and a BOCSAR study has also shown positive results. The study found that the reforms led to a:

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55. S Moffat and S Poynton, *The Deterrent Effect of Higher Fines on Recidivism: Driving Offences*, Crime and Justice Bulletin No 106 (NSW Bureau of Crime Statistics and Research, 2007) 9–10; NSW Legislative Assembly, Committee on Law and Safety, *Driver Licence Disqualification Reform*, Report 3/55 (2013) vii, [4.10].

56. L Trimboli and N Smith, *Drink-Driving and Recidivism in NSW*, Crime and Justice Bulletin No 135 (NSW Bureau of Crime Statistics and Research, 2009) 13.

57. NSW, *Parliamentary Debates*, Legislative Assembly, 12 September 2017, 93–97 (M Speakman, Attorney General).

58. See NSW Sentencing Council, *Repeat Traffic Offenders*, Consultation Paper (2018) [5.38]–[5.47].

59. See NSW Sentencing Council, *Repeat Traffic Offenders*, Consultation Paper (2018) [5.81].

60. See NSW Sentencing Council, *Repeat Traffic Offenders*, Consultation Paper (2018) [5.58]–[5.63].

61. *Road Transport Act 2013* (NSW) s 216–221 repealed by *Road Transport Amendment (Driver Licence Disqualification) Act 2017* (NSW) sch 1 [14].

62. The Shopfront Youth Legal Centre, *Submission TR6*, 3; Legal Aid NSW. *Submission TR5*, 9.



- 56% reduction in licence disqualification periods
- 24% reduction in average prison sentences imposed for unauthorised driving
- 19% reduction in the monthly number of people in prison whose most serious offence was unauthorised driving.

The study observed no significant change in the proportion of offenders receiving a licence disqualification from the court or in the proportion receiving a custodial sentence. Further, an analysis of monthly road crashes between November 2012 and January 2018 indicated that the more lenient penalties have had no immediate adverse impact on road deaths or injuries involving unauthorised drivers or those involving authorised drivers.<sup>63</sup>

- 1.35 The NSW Government has also pointed to unpublished BOCSAR data that it submits shows the reforms have led to a 34% reduction in the monthly number of Indigenous people in prison whose most serious offence was unauthorised driving.<sup>64</sup>
- 1.36 The driver disqualification regime has also encouraged the use of dismissals and conditional discharges under s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) as a way for courts to avoid imposing automatic disqualification on a proved offender.
- 1.37 A 2004 study by BOCSAR showed that the use of dismissals and conditional discharges for PCA offences had increased sharply over the previous 10 years. The study also noted marked variations across particular Local Court locations.<sup>65</sup>

## Our approach to repeat serious traffic offenders

- 1.38 While the existing penalty system generally deters most drivers from further offending, it does not necessarily respond effectively to those who can be identified as repeat serious traffic offenders. Our recommendations, therefore, seek to deal with this group of continuing traffic offenders who pose an ongoing risk to the community.
- 1.39 The NSW Government submits that there needs to be a tighter focus on “the small group of high-risk repeat offenders that pose the greatest risk to the community”.<sup>66</sup>

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63. S Poynton and F Leung, *Early Indicators of the Impacts of the NSW Driver Licence Disqualification Reforms*, Bureau Brief No 135 (NSW Bureau of Crime Statistics and Research, 2018).

64. NSW Government, *Submission TR2*, [5.6.1].

65. S Moffat, D Weatherburn and J Fitzgerald, *Sentencing Drink-Drivers: The Use of Dismissals and Conditional Discharges*, Crime and Justice Bulletin No 81 (NSW Bureau of Crime Statistics and Research, 2004) 3–4.

66. NSW Government, *Submission TR2* [5.1].

- 1.40 As we note in our Consultation Paper, reviewing the sentencing of “recidivist traffic offenders who may pose an ongoing risk to the community” and making recommendations to “promote road safety” necessarily involves identifying the offences that represent the most serious risk of harm to the community and the offenders who commit them.

### Identifying repeat serious traffic offenders

- 1.41 One challenge for this report is to identify repeat serious traffic offenders so that they can be dealt with appropriately when their offences are proven or admitted. It is only when this occurs that they can be subject to relevant penalties and interventions. As with all crime, there will always be a gap between incidents that are recorded and offences that are proved and subject to a sentence or other intervention.

### Accident and licence data

- 1.42 Transport for NSW has provided us with data relating to fatal crashes and serious injury crashes in the five year period between 2013 and 2017 setting out these drivers’ traffic offence histories in the previous 5 years and differentiating between high risk offences and other offences. High risk offence, in this context, includes offences for high range speeding (30km/h over the speed limit and above), mid and high range drink driving, drug driving, negligent driving, unlicensed driving, dangerous/reckless/menacing driving, burnout/street racing, and driving causing death or injury.<sup>67</sup> This data shows an overrepresentation of drivers with one or more offences at least one of which is high risk in the 5 years before the fatal or serious injury crash.
- 1.43 A large proportion of the drivers identified in the accident data below (66% in the case of fatalities, 58% in the case of injuries) are not prior offenders and/or only become potential “repeat offenders” of any sort when they actually kill or injure somebody. The remaining have a mix of past offences (more than two), some, or all of which, do not involve high risk offences.
- 1.44 In the five year period, there were 2,386 drivers involved in a fatal crash. Of these, 166 drivers had no previous traffic offences recorded, but had not been licensed for at least 5 years, and 286 did not have their licence numbers recorded. Of the remaining 1934 drivers, in the five years before the crash:
- 798 (41%) had no offences
  - 483 (25%) had one offence
  - 444 (23%) had multiple offences (but no high risk offences), and
  - 209 (11%) had multiple offences (including a high risk offence).

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67. NSW Government, *Submission TR2* [2.3]–[2.4].

1.45 When the above data is compared with figures for all licence holders, it can be seen that drivers with one or more offences (including high risk offences) in the past 5 years are overrepresented in fatal crashes, while drivers with no offences are underrepresented. In particular, the data above shows that drivers with multiple offences (including high risk offences) account for:

- 11% of drivers involved in a fatal crash, but
- 3% of all licence holders.

1.46 In the five year period, there were 44,600 drivers involved in a serious injury crash. Of these, 3597 drivers had no previous traffic offences recorded, but had not been licensed for at least 5 years, and 4830 did not have their licence numbers recorded. Of the remaining 36,173 drivers, in the five years before the crash:

- 12,761 (35%) had no offences
- 8202 (23%) had one offence
- 10,920 (30%) had multiple offences (but no high risk offences), and
- 4290 (12%) had multiple offences (including a high risk offence).

1.47 When the above data is compared with figures for all licence holders, it can be seen that drivers with one or more offences in the past 5 years are overrepresented in serious injury crashes, while drivers with no offences are underrepresented. In particular, the data shows that drivers with multiple offences (including high risk offences) account for:

- 12% of drivers involved in a serious injury crash, but
- 3% of all licence holders.

The data also shows that drivers with multiple offences (but no high risk offences) account for:

- 30% of drivers involved in a serious injury crash, but
- 21% of all licence holders.

1.48 We note, however, that while the above data relates to approximately 4500 drivers over a period of 5 years (that is, less than 1,000 annually) who have caused a fatal or serious injury crash and have a record of one or more offences at least one of which is high risk, the total number of drivers who have such a driving record would amount to something in the order of 180,000 drivers. This presents a considerable challenge to identifying drivers to target within the criminal justice system with a view to prevention.

## Offence data

- 1.49 In our Consultation Paper we identify, in a four-year period (to March 2018), some 8,874 serious driving offences under the *Road Transport Act 2013* (NSW) that involved a second or subsequent major offence.<sup>68</sup> This group of offences broadly aligns with the high risk group identified in the Transport for NSW data. However, excluded from these figures is a large number of excessive speeding offences (30km/h over the speed limit) and a small number of dangerous driving offences in the *Crimes Act 1900* (NSW). We are unable to identify how many of the large number of penalty notice recipients for excessive speeding involved or contributed to repeat serious traffic offending. Excessive speeding involved over 17,000 penalty notices in the 2017-2018 financial year; dangerous driving and related offences in the *Crimes Act* involved an annual average of about 107 offenders.<sup>69</sup>
- 1.50 While the precise numbers cannot be ascertained, the number of repeat serious offenders on the figures outlined above cannot amount to more than, say, 10,000 offenders per year.
- 1.51 That we are dealing with a relatively small number of high risk repeat offenders is emphasised by the prior offending and reoffending rates for driving offences involving harm or a specified risk of harm.
- 1.52 Reoffending rates for driving offences that involve a specified harm or risk of harm (that are dealt with by the courts) are relatively low compared to, for example, serious assault. Table 1.1 sets out the prior offending characteristics for driving offences dealt with by the courts in 2016 that involve a specified harm or risk of harm. It compares the 385 appearances for driving offences with the 8,057 appearances for serious assault offences in the same period.

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68. NSW Sentencing Council, *Repeat Traffic Offenders*, Consultation Paper (2018) ch 2.

69. NSW Sentencing Council, *Repeat Traffic Offenders*, Consultation Paper (2018) ch 2.

**Table 1.1: Prior offending and reoffending characteristics for persons with at least one proven driving offence involving specified harm or risk of harm in 2016 in any NSW court**

		Driving offences involving harm		Serious assault offence	
		N	%	N	%
<b>Prior offending</b>		n=385		n=8,057	
Total court appearances (5 years)	0	309	80.3	3,346	41.5
	1	24	6.2	1,492	18.5
	2	17	4.4	967	12.0
	3+	35	9.1	2,252	28.0
Total appearances with any proven driving offence (5 years)	0	351	91.2	6,005	74.5
	1	16	4.2	1,309	16.2
	2	16	4.2	488	6.1
	3+	2	0.5	255	3.2
Total appearances with any proven drive whilst disqualified or suspended (5 years)	0	369	95.8	7,151	88.8
	1	7	1.8	583	7.2
	2	8	2.1	219	2.7
	3+	1	0.3	104	1.3
Total appearances with any proven dangerous or negligent acts ANZSOC 04 (5 years)	0	374	97.1	7,616	94.5
	1+	11	2.9	441	5.5
Total appearances with any proven driving offence involving harm (5 years)	0	384	99.7	8,044	99.8
	1+	1	0.3	13	0.2
Total appearances with any proven PCA offence (5 years)	0	368	96.6	7,126	88.4
	1	13	2.5	813	10.1
	2	4	0.9	110	1.4
	3+	0	0.0	8	0.1
<b>Reoffending</b>		n = 355		n=7,425	
	Any new charge within 12 months of index	27	7.6	2,203	29.7

Source: NSW Bureau of Crime Statistics and Research request no 18-16506.

### Developing appropriate responses and interventions

- 1.53 As this is a sentencing review, our recommendations can only deal with repeat serious traffic offenders whose behaviour is the subject of proven or admitted charges for serious offences, usually by charge and conviction and also, in certain cases, by penalty notice. Our attention is generally on those who have committed two high risk offences. Our definition of repeat serious traffic offender in chapter 2, therefore, identifies a group

of offenders that broadly aligns with the high risk offenders that are the subject of the Transport for NSW data outlined above.<sup>70</sup>

- 1.54 We also propose dealing with one high risk offence that we have identified as having a reasonably high chance of repetition, that is, speeding at more than 45km/h.
- 1.55 Our recommendations seek to address the group of repeat serious traffic offenders who are not potentially subject to specific, targeted interventions other than increased penalties for second or subsequent offences and disqualification from driving. Our recommendations, therefore, do not intend to duplicate coverage of people who are subject to existing interventions, such as the alcohol interlock scheme.
- 1.56 As we expand in the following chapters, our view is that repeat offending should generally be targeted by program requirements and similar interventions rather than further increased sentences. The recommendations in this report aim to change offending behaviour of those who are repeat traffic offenders or who are likely to become repeat traffic offenders. This is a proper alternative to simply increasing levels of punishment either for serious first offences or repeat offences.
- 1.57 Marginal increases in maximum terms of imprisonment and other responses (such as new repeat or habitual driving offences) are unlikely to result in increased deterrence for this target group of high risk repeat offenders. For example, in Tasmania, the Law Reform Institute observed, in relation to repeat drink driving offenders:
- Stakeholders highlighted that the progressively harsher criminal justice response (such as increased penalties and mandatory penalties) does not appear to be effective for a cohort of recidivist drink drivers and expressed the view that these offenders should be considered as offenders with chronic health issues that require a more therapeutic response.<sup>71</sup>
- 1.58 With one exception in the case of repeat high-range speeding (which, until now, has been a fine only offence), we are therefore not proposing any such increases or substantially adding to the list of repeat offences. We are also not adopting suggestions that there should be marginal increases in the penalties for subsequent driving offences after the second offence.
- 1.59 We also aim not to increase the pool of disqualified drivers or those who otherwise drive without proper authority. There is a risk in some groups that this will simply add to offending behaviour when drivers are not authorised. We especially bear in mind the impact on particular communities of the disqualification regime as we describe above.

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70. [1.42]-[1.47].

71. Tasmania, Law Reform Institute, *Responding to the Problem of Recidivist Drink Drivers*, Issues Paper 23 (2017) [1.1.3].

## Other approaches to the problem

- 1.60 There are many ways of addressing the road toll apart from modifying the behaviour of drivers through sentencing. In the Consultation Paper we set out some of the ways to reduce risk and modify driver behaviour that do not involve changing the current sentencing regime. They are:
- **road safety education and other initiatives**, delivered in a variety of contexts
  - **situational responses**, including improving detection in known offending hotspots as well as improving road infrastructure
  - **technology**, to ensure or encourage compliance with driving laws, and
  - **public transport**, particularly at key times and in key places, can help avoid offending behaviour by offering alternative transport options.<sup>72</sup>
- 1.61 While some of these approaches are outside the scope of this review, others are sufficiently related to the sentencing process to fall within scope. In this Chapter, we make one recommendation in relation to raising community awareness of available penalties. We make recommendations about the use of technology in Chapter 6.

### Raising community awareness of available penalties

#### **Recommendation 1.1: Raising community awareness of available penalties**

Transport for NSW and the NSW Police Force should develop a road safety campaign, or add a component to an existing campaign, that draws attention to the fact that drivers who engage in risky behaviour, such as speeding or drink driving, may be punished by imprisonment, especially if they kill or seriously injure someone as the result of their behaviour.

- 1.62 Community awareness of available maximum penalties needs to be raised for their deterrent message to be received. Deterrence of risky behaviour is currently achieved by promoting the availability of demerit points, loss of licence and heavy fines. However, the possibility of a sentence of imprisonment for some driving offences will not have the strong deterrent effect intended if people are not aware of it.
- 1.63 Some of the campaigns about driving offences, developed by Transport for NSW, together with the NSW Police Force, focus on fines, demerit points and loss of licence. For example, the “Stop it ... or cop it” campaign focuses on certainty of enforcement and immediacy of penalty, such as demerit points, heavy fines and loss of licence to deter

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72. NSW Sentencing Council, *Repeat Traffic Offenders*, Consultation Paper (2018) [1.66]–[1.90].

drivers from breaking the law.<sup>73</sup> Likewise, the “Double demerits” campaign highlights increased demerit points, and consequent loss of licence, during holiday periods.<sup>74</sup>

1.64 We are not aware of any campaigns that draw attention to the possibility of imprisonment for certain driving offences, particularly when they result in death or serious injury.

1.65 One submission notes:

The advertising campaigns which are designed to minimise driving offences which entail a high risk of injury (eg PCA, speeding, mobile phone use) often focus on the likelihood of being caught by police. Many in the community believe that the loss of their licence and a heavy fine is the worst outcome they will face if they are detected. Not many turn their mind to the possibility of going into custody as a possible outcome. The deterrent effect of the custodial penalties which are to be imposed following *Whyte* is not achieved without community awareness that full-time custody will be the likely outcome, even for a person of good standing within the community, if speed or their level of intoxication causes them to harm or even kill another person while driving. There is scope for community awareness raising about this reality.<sup>75</sup>

## This report

1.66 This report has 5 other chapters:

- **Chapter 2: Offence and offender categories and their coverage** establishes the definition of “repeat serious traffic offender” for the purpose of the schemes and programs proposed in the remainder of the report.
- **Chapter 3: Addressing the attitudes to risk of repeat traffic offenders** proposes the development of programs that will help repeat serious traffic offenders (and some potential repeat offenders) address their attitudes to risk and thereby reduce repeat offending.
- **Chapter 4: Restricted licences** aims to prevent repeat offending by addressing some of the negative outcomes of the licence disqualification scheme on people who may otherwise become repeat offenders.

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73. Transport for NSW, “Stop it ... or Cop it” (2019) *Centre for Road Safety* <[roadsafety.transport.nsw.gov.au/campaigns/enhancedpolice.html](https://roadsafety.transport.nsw.gov.au/campaigns/enhancedpolice.html)> (retrieved 2 September 2020).

74. Transport for NSW, “Double Demerits: Think Twice before Breaking the Rules” (2019) *Centre for Road Safety* <[roadsafety.transport.nsw.gov.au/campaigns/double-demerits.html](https://roadsafety.transport.nsw.gov.au/campaigns/double-demerits.html)> (retrieved 2 September 2020).

75. NSW, Office of the Director of Public Prosecutions, *Submission TR9*, 3.



- **Chapter 5: Drug and alcohol repeat traffic offenders** proposes changes to improve the operation of the mandatory alcohol interlock scheme and an expansion of the sober driver program.
- **Chapter 6: High range speeding offenders** proposes a number of approaches to reduce reoffending in drivers who exceed the speed limit by 45km/h: a new framework for delivering intelligent speed adaptation systems; a mandatory program for first time high-range speeding offenders to address their attitudes to risk; and a maximum penalty of imprisonment for those who exceed the speed limit by more than 45km/h as a second or subsequent offence.



# 2. Offence and offender categories and their coverage

**In Brief**

The category of “major offence” used by the *Road Transport Act 2013* (NSW) is inadequate for identifying high risk repeat offenders. We propose a new category of “repeat serious traffic offender” which seeks to include offences that can be identified with high risk driving activities. We also recommend a minor amendment to the way “major offence” is defined in the legislation. Finally, we recommend making it easier to prove dangerous driving offences involving drugs by allowing blood samples to be taken from a driver when an accident results in grievous bodily harm.

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  - Expressly defining dangerous driving offences as “major offences” ..... 24
- Repeat serious traffic offenders** ..... 25
- Dangerous driving offences** ..... 27
  - Drug testing after an accident causing grievous bodily harm ..... 29

2.1 The recommendations in this chapter deal with offence and offender categories within the *Road Transport Act 2013* (NSW) and their coverage. In particular, this chapter recommends introducing a new category of offender called a “repeat serious traffic offender”. We explain who would be captured by the definition and how the definition would interact with our other recommendations.

## Major offences

2.2 In deciding how to identify repeat serious traffic offenders, we considered using the current definition of “major offence” in the *Road Transport Act 2013* (NSW). We list the offences that are major offences in Chapter 1.<sup>1</sup>

2.3 Ideally, we would have preferred to align the offences committed by repeat serious traffic offenders with the “major offences”. However, we concluded that “major offence” does not sufficiently address questions of risk and is potentially both under and over inclusive for our purposes. It is over inclusive in as far as it includes low range prescribed concentration of alcohol (“PCA”) offences which exist in very large volumes,

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1. [1.25].

and under inclusive in as far as it doesn't include any of the calibrated speeding offences, even high range ones, such as exceeding the speed limit by more than 45km/h. The NSW Government submission's category of high risk offences takes a similar approach by including high range speeding offences and excluding low range PCA offences.<sup>2</sup>

- 2.4 Any direct amendments to the definition of "major offence" would have consequences for the administration of existing parts of the *Road Transport Act 2013* (NSW) that rely on that definition.
- 2.5 As we note in Chapter 1,<sup>3</sup> among other things, the definition of "major offence" forms part of the definition of "second or subsequent offence" for the purposes of escalated penalties for some offences in the *Road Transport Act 2013* (NSW),<sup>4</sup> and also identifies some of the offences that are subject to periods of automatic licence disqualification.<sup>5</sup>
- 2.6 Rather than disrupt the operation of the parts of the *Road Transport Act 2013* (NSW) that draw on the definition of "major offence", we have decided to recommend:
- establishing a new category of "repeat serious traffic offender" to determine eligibility or ineligibility for specialist programs outlined in Chapter 3, and
  - dealing with high range speeding offenders by separate arrangements outlined in Chapter 6.
- 2.7 Before discussing these recommendations, we recommend a minor amendment to the definition of "major offence" in the *Road Transport Act 2013* (NSW) to improve its application.

### Expressly defining dangerous driving offences as "major offences"

#### **Recommendation 2.1: Dangerous driving offences as "major offences"**

The definition of "major offence" in s 4(1) of the *Road Transport Act 2013* (NSW) should be amended to refer expressly to the offences of dangerous driving causing death or grievous bodily harm, and aggravated dangerous driving causing death or grievous bodily harm in s 52A of the *Crimes Act 1900* (NSW).

- 2.8 The offences of dangerous driving causing death or grievous bodily harm, and aggravated dangerous driving causing death or grievous bodily harm in s 52A of the *Crimes Act 1900* (NSW) ("*Crimes Act*") are not, like the other driving offences in the

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2. NSW Government, *Submission TR2*, 4, footnote 4.

3. [1.26].

4. *Road Transport Act 2013* (NSW) s 9.

5. *Road Transport Act 2013* (NSW) s 205.

*Crimes Act*, expressly included in the list of major offences. We do, however, note that s 52A is already covered by the definition of “major offence” in a technical sense, as “an offence against ...any other provision of the *Crimes Act 1900*”.<sup>6</sup> However, this may lead to a risk that the offence is overlooked by the courts or not counted in statistical analysis.

- 2.9 This recommendation, therefore, involves a minor, technical amendment. We are not recommending that any offences be added to the definition of “major offence”. In particular this is to avoid increasing the number of people who may become subject to the disqualification regime. This is because of resource limitations and other problems with the disqualification regime, such as its discriminatory impact on offenders from rural areas and problems arising from its inclusion of people who have committed offences of greatly varying severity.<sup>7</sup>

## Repeat serious traffic offenders

### **Recommendation 2.2: Repeat serious traffic offenders**

A “repeat serious traffic offender” should be anyone convicted of:

- (a) a “major offence” as defined in the *Road Transport Act 2013* (NSW) s 4(1) that has a sentence of imprisonment as a maximum penalty, or
  - (b) certain unauthorised racing and related offences: *Road Transport Act 2013* (NSW) s 115, s 116(2)(a)-(d),
- and has, in the 5 years before that offence, committed at least one other such offence.

- 2.10 This definition of “repeat serious traffic offender” will be used in our recommendations to determine:
- eligibility for programs that address attitudes to risk (Chapter 3)
  - ineligibility for a restricted (or “work”) licence (Chapter 4), and
  - eligibility, in certain circumstances, to take part in a sober driver program as a program that addresses attitudes to risk (Chapter 5).
- 2.11 We equate the offences included in this definition with high risk driving activities.
- 2.12 We have adopted the term “repeat serious traffic offender” for convenience. It is a matter for drafting how these offenders who we intend to target by our recommendations are ultimately identified. We propose using the current “major

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6. *Road Transport Act 2013* (NSW) s 4(1) definition of “major offence” (a)(ii).

7. See [1.30]–[1.31].

offences” as part of the definition of a “repeat serious traffic offender” with some modifications. Excluding offences that do not have a penalty of imprisonment will remove a number of relatively less serious, and high volume, PCA and drug driving offences, namely:

- driving with a novice range PCA<sup>8</sup>
- driving with a special range PCA<sup>9</sup>
- driving with a low range PCA,<sup>10</sup> and
- driving with the presence of certain illicit drugs or morphine.<sup>11</sup>

2.13 The other PCA and drug offences, which are subject to maximum penalties of imprisonment, are more likely to be the result of an offender’s deliberate choice.

2.14 Mechanisms may be available, if required, for dealing with low level offenders through the yet to be commenced option for Transport for NSW to require drivers who have committed a drug or alcohol related driving offence to undertake a specified alcohol or other drug education program.<sup>12</sup> There is also the option, in appropriate cases, of charging drivers with driving or attempting to drive while under the influence of alcohol or any drug, which does attract a sentence of imprisonment as a maximum penalty.<sup>13</sup>

2.15 We also propose including in the definition of “repeat serious traffic offender”, people convicted of the unauthorised racing and related offences. This is because these offences are already treated as though they are major offences, since they have escalated penalties for second or subsequent offences and are subject to automatic disqualification provisions. This inclusion is supported by the NSW Government submission which includes burnout and street racing offences in its category of high risk offences.<sup>14</sup>

2.16 Our definition of “repeat serious traffic offender” does not include unauthorised driving generally, and instead focuses on the offences that lead to the disqualification or suspension of the licence in the first place. This avoids potential problems of double counting, where the two qualifying offences are the original offence and the offence of

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8. *Road Transport Act 2013* (NSW) s 110(1).

9. *Road Transport Act 2013* (NSW) s 110(2).

10. *Road Transport Act 2013* (NSW) s 110(3).

11. *Road Transport Act 2013* (NSW) s 111(1), s 111(3).

12. *Road Transport Act 2013* (NSW) proposed s 215C: *Road Transport Legislation Amendment (Penalties and Other Sanctions) Act 2018* (NSW) sch 1 [16] (not yet commenced).

13. *Road Transport Act 2013* (NSW) s 112.

14. NSW Government, *Submission TR2*, 4, footnote 4.

driving while disqualified as the result of the original offence. It also avoids including as part of the scheme those who accrue demerit points for minor infringements. A licence holder who has been suspended for loss of demerit points twice in a particular period may already be required to undertake a driver knowledge test and/or education course before being permitted to drive again.<sup>15</sup>

- 2.17 The term “convicted” in Recommendation 2.2 means that the definition of “repeat serious traffic offender” does not include people who receive a non-conviction order under s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) for committing one of the listed offences. We think that including such people in the definition of “repeat serious traffic offender” would defeat the purpose of non-conviction orders.
- 2.18 We are not including any of the calibrated speeding offences in this recommendation. In Chapter 6, we recommend making drivers who exceed the speed limit by more than 45km/h subject to program requirements before they are permitted to drive again. Since the recommendation in Chapter 6 applies to first time offenders, there is no need to include them in a scheme that involves a similar arrangement for second or subsequent offenders.

## Dangerous driving offences

- 2.19 The *Crimes Act 1900* (NSW) offences of dangerous driving and aggravated dangerous driving causing grievous bodily harm or death are included in the offences that make up a repeat traffic offence.
- 2.20 A driver is guilty of dangerous driving causing death or grievous bodily harm if their vehicle is involved in an impact that causes the death of or grievous bodily harm to another person and the driver was driving:
- under the influence of alcohol or of a drug, or
  - at a speed dangerous to others, or
  - in a manner dangerous to others.<sup>16</sup>

The maximum penalty for such an offence is imprisonment for 10 years.

- 2.21 A driver is subject to an increased maximum penalty of imprisonment for 14 years where they commit an offence of dangerous driving causing death or grievous bodily harm in circumstances where:

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15. *Road Transport Act 2013* (NSW) s 43A.

16. *Crimes Act 1900* (NSW) s 52A(1), s 52A(3).

- a PCA of 0.15 (or more) was present in the driver’s breath or blood
  - the driver was driving at more than 45km/h over the speed limit
  - the driver was escaping pursuit by a police officer, or
  - the driver’s ability was very substantially impaired because they were under the influence of a drug (other than intoxicating liquor) or a combination of drugs (which may include intoxicating liquor).<sup>17</sup>
- 2.22 One stakeholder raises the possibility of adding further to the list of circumstances that establish “dangerous driving”, as well as amending provisions that currently prevent gathering evidence that a driver was under the influence of drugs following an accident.<sup>18</sup> Generally, such changes are technically beyond the terms of reference of this review because there is no direct relationship between the circumstances of aggravation for the offence and “repeat serious traffic offenders”. However, we are recommending one change aimed at ensuring that the risky behaviour of driving under the influence of a drug is adequately dealt with.<sup>19</sup>
- 2.23 We considered adding mobile telephone use to the circumstances of dangerous driving with the aim of making the availability of imprisonment act as a strong deterrent to mobile telephone use, if a driver kills or causes grievous bodily harm as a result of dangerous driving. However, we concluded that such a change would need to be supported by evidence. The National Road Safety Strategy 2011–2020 cites driver distraction as a significant contributor to crash casualties. However, there is currently insufficient data on the roles that particular forms of driver distraction play in crashes.<sup>20</sup> Some research suggests a significant risk of vehicle accidents connected with mobile telephone use (both handheld and hands-free), even before the advent of touch screens.<sup>21</sup> However, there is little evidence to show that it poses as serious a degree of impairment or risk as the existing dangerous driving circumstances. Problems of proof in crash situations may partially explain this lack of evidence.
- 2.24 The provisions setting out prohibited use of a mobile phone are currently included in *Road Rules 2014* (NSW).<sup>22</sup> Transport for NSW has also recently completed the Mobile Phone Camera Detection pilot<sup>23</sup> and is currently preparing advice to Government on

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17. *Crimes Act 1900* (NSW) s 52A(7).

18. NSW Police Force, Crash Investigations Unit, Traffic and Highway Patrol Command, *Submission TR8*, 7–8.

19. [2.26]–[2.27].

20. Australia, *Inquiry into the National Road Safety Strategy 2011–2020* (2018) 26.

21. K Young, M Regan, M Hammer, *Driver Distraction: A Review of the Literature*, Report No 206 (Monash University Accident Research Centre, 2003) 3–10.

22. *Road Rules 2014* (NSW) r 300, r 300-1.

23. Transport for NSW, “Caught on Camera! Penalties now Apply” (Media Release, 1 March 2020).



options for an ongoing program to increase the perceived risk of detection and deter drivers from mobile phone use.

- 2.25 In our view, Transport for NSW should further investigate the risks posed by drivers using mobile telephones, possibly in the context of its investigation of driver distraction. We note that data from the first 12 months of the operation of the phone use detection cameras will be available in due course.

### Drug testing after an accident causing grievous bodily harm

#### **Recommendation 2.3: Drug tests where accidents result in grievous bodily harm**

Schedule 3 of the *Road Transport Act 2013* (NSW) should be amended to ensure that, when an accident results in grievous bodily harm to another, blood samples taken from a driver after an accident can be tested for drugs.

- 2.26 Currently, following an accident, taking a blood sample that can be tested for drugs is only authorised if the accident is fatal or it is believed that it will be fatal within 30 days of the accident occurring.<sup>24</sup>
- 2.27 This causes problems with proving that drug use contributed to an accident for the purposes of a charge of dangerous driving causing grievous bodily harm under s 52A of the *Crimes Act*. Recommendation 2.3 is intended to help investigators determine whether a driver has engaged in such dangerous conduct.

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24. See especially *Road Transport Act 2013* (NSW) sch 3 cl 5A(3), cl 12, cl 27(2)(a).



### 3. Addressing the attitudes to risk of repeat serious traffic offenders

#### In Brief

We recommend that Transport for NSW consider developing programs that address the attitudes to risk of repeat serious traffic offenders. Transport for NSW should be empowered to require that a repeat serious traffic offender complete such a program before they can drive again. Such programs should also be available as a condition of a sentencing order and should also be available to prisoners, whether on remand or serving a sentence of imprisonment. The programs should be targeted at those drivers who are not subject to other available programs. They should also be available state-wide in a timely, efficient way and disadvantaged offenders should not be prevented from taking part.

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#### Recommendation 3.1: Programs to address attitudes to risk

- (1) Transport for NSW and Corrective Services NSW should consider developing programs for serious and repeat traffic offenders that seek to address their attitudes to risk.
- (2) Transport for NSW should be empowered to require repeat traffic offenders to participate in such programs.
- (3) A suspended or disqualified offender must complete such a program to the satisfaction of Transport for NSW before they can drive again.
- (4) Such programs should also be available as a condition of a sentencing order and should also be available to prisoners, whether on remand or serving a sentence of imprisonment.

(5) Fees may be charged for approved courses, but only if concession rates and assistance are available to people in severe financial hardship.

- 3.1 This recommendation is targeted at changing the behaviour of repeat traffic offenders as defined in Chapter 2, by having them address their attitudes to risk.
- 3.2 We recommend that Transport for NSW and Corrective Services consider developing programs to address the attitudes to risk of serious and repeat traffic offenders. This chapter considers the application of such programs to repeat traffic offenders. Such programs could also be applied to other serious traffic offenders. In Chapter 6 we propose applying such programs to high range speeding offenders.

## Legislative framework

- 3.3 The legislative model for supporting such a program may be found in the yet to be commenced provisions<sup>1</sup> that will allow Transport for NSW to require a person to undertake a specified alcohol or other drug education program if they have committed an alcohol or drug-related driving offence.<sup>2</sup> Under this model, a person's licence suspension or cancellation or other licence ineligibility will be extended until such time as RMS is satisfied that the person has undertaken, and passed the program. The education program, once commenced, will be available for Transport for NSW to impose in its discretion on segments of a potentially large group of alcohol and drug-related driving offenders. During the 4 years covered by Table 3.1 (below), there were 79,894 drivers dealt with by the Local Court who could have been eligible for such an education program on their first major offence and 12,132 drivers on their second or subsequent major offence.
- 3.4 Following this model, Recommendation 3.1(2) proposes that Transport for NSW have the discretion to require participation in a program envisaged by Recommendation 3.1(1).
- 3.5 The "repeat serious traffic offender" as we define them in Chapter 2 will, almost inevitably be subject to automatic minimum periods of licence disqualification, if they are not already subject to licence suspension. Recommendation 3.1(3), therefore, proposes that a suspended or disqualified offender must complete such a program to the satisfaction of Transport for NSW before they can apply for a licence (in the case of disqualification) and drive again.

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1. *Road Transport Act 2013* (NSW) s 215C: *Road Transport Legislation Amendment (Penalties and Other Sanctions) Act 2018* (NSW) sch 1 [16] (not yet commenced).

2. Under *Road Transport Act 2013* (NSW) s 110–112.

## Program content

- 3.6 Transport for NSW and Corrective Services NSW should investigate and develop programs designed to improve cognitive skills and build resilience that may improve a person's ability to deal with high risk situations. In our view, programs aimed at changing driver attitudes to risk and risk management are particularly relevant for repeat offenders who have proved unaffected by existing penalty regimes, including driver disqualification. Some submissions support such an approach.<sup>3</sup>
- 3.7 Any such programs should not be about driving skills (whether basic or advanced) or knowledge of road rules. The Joint Select Committee on Road Safety has noted evidence that mandatory retesting of driver knowledge would have little impact on road safety and would not address factors that impact on safe driving such as experience, attitude and risk management.<sup>4</sup> We do not expect that general driver education programs aimed at one-time or very occasional traffic offenders, like the Traffic Offender Intervention Program, will effectively target the underpinning attitudes and motivations for various forms of high risk traffic offending.

### Potential models

- 3.8 There are a number of models that can be considered when developing a program to address offenders' attitudes to risk:
- the TRIP program (in NSW)
  - the RYDA program (in NSW), and
  - the UK National Speed Awareness Course.
- 3.9 All seek to address, at least in part, attitudes that lead to offending, such as a driver's attitudes towards risk and consequences. The last two are aimed at more general populations than just repeat or high risk offenders. However, all these programs provide examples of approaches that could be adopted when dealing in a more targeted way with repeat serious traffic offenders. There is already some limited evidence about the effectiveness of such approaches. However, we recommend that the introduction of these intensive programs be accompanied by a rigorous evaluation of their effectiveness for repeat serious traffic offenders.

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3. The Shopfront Youth Legal Centre, *Submission TR6*, 4; Law Society of NSW, *Submission TR7*, 7–8; NSW Police Force, Crash Investigations Unit, Traffic and Highway Patrol Command, *Submission TR8*, 5; NSW, Office of the Director of Public Prosecutions, *Submission TR9*, 8; Amy Gillett Foundation, *Preliminary Submission PTR15*, 4.

4. Parliament of NSW, Joint Standing Committee on Road Safety (Staysafe), *Driver Education, Training and Road Safety*, Report 3/56 (2017) [3.6]–[3.13].

### **The TRIP program**

3.10 The TRIP program is a joint project of Transport for NSW and Corrective Services NSW. It is a group program for people convicted of high risk driving offences who are in custody or subject to an order with Community Corrections. The high risk driving offences are serious or repeat drink driving, drug driving, excessive speeding, police pursuit or negligent driving. The aim of the program is to help offenders avoid reoffending and be safe and legal drivers in future. The TRIP program, which includes 10 two-hour sessions of group work and some take home tasks, aims to assist offenders to:

- understand the link between high risk driving and road deaths and injuries
- increase awareness of things about them or their lives that led to the offence, and
- learn skills and strategies to be a safe and legal driver.<sup>5</sup>

3.11 We understand the TRIP program is being evaluated in a pilot phase.

### **The RYDA Program**

3.12 RYDA is a program delivered in NSW by Road Safety Education. It is an example of a program that is about awareness, not just technical knowledge. It draws on insights not only from driving experts, but also experts in the field of psychology and education. The program involves a series of workshops for secondary students that focus on cognition development, building and increasing social competency and resilience and motivating low risk behaviour. It aims to challenge students to change the way they think about road safety and lay the foundation for safe road use. Each year, the program is delivered to over 50,000 secondary students from more than 650 participating schools.<sup>6</sup>

3.13 The program has gradually moved away from delivering information through experts towards using facilitators to help the students to deal with situations where they need to make a decision about safe driving behaviour. The changes have been made with input from partnerships and research. The course is internally evaluated 3-6 months after delivery to check, among other things, whether participants report changing behaviours as a result.<sup>7</sup>

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5. NSW Communities and Justice, *Compendium of Offender Behaviour Change Programs: Offender Services and Programs* (Corrective Services NSW, 2020) 108–110.

6. Road Safety Education, "RYDA" (2020) <[www.rse.org.au/about-ryda/](http://www.rse.org.au/about-ryda/)> (retrieved 3 September 2020).

7. B O'Donnell, General Manager, Education and Communications, Road Safety Education, *Consultation* (17 October 2018).

## UK National Speed Awareness Course

- 3.14 This course targets low-range speeding drivers, and allows them to complete a short course rather than accepting demerit points and a fine.<sup>8</sup> Eligible drivers are those who exceed the speed limit by not more than 10% plus 9 miles per hour, and who have not completed the course in the previous three years.<sup>9</sup>
- 3.15 The course addresses behavioural factors that increase risks of offending including the driver's views about, and attitudes to, risk and consequences.<sup>10</sup> The course combines presentations and interactive learning in a classroom setting.<sup>11</sup>
- 3.16 A 2018 study compared the 1.4 million participants against drivers eligible for the course who elected not to participate. It found that, in the three years following the course, participants were consistently less likely to reoffend than if they had not completed the course. Six months after completion, participants had a 5% chance of reoffending, compared with 7% if they had not participated. This difference persisted at the 36-month mark (21% as compared with 23%).<sup>12</sup> However, the study also found that drivers with past motoring convictions (whether they agreed to take part in the course or not) were 23% more likely than drivers without a previous conviction to be observed reoffending within 6 months of a course offer. This group was consistently more likely to reoffend up to 3 years after a course offer.<sup>13</sup>
- 3.17 The study found that the course had no discernible effect on collision rates.<sup>14</sup> This was likely due to the infrequency of collisions and the small sample size. It is also worth noting that the course has only been used for people who have committed minor traffic offences. The course's focus on low-level breaches, rather than deliberate, higher risk, offending, may be the reason why it has had little or no impact on collision rates. The

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8. NDORS, "National Speed Awareness Course" <[www.ndors.org.uk/courses/national-speed-awareness-course-nsac](http://www.ndors.org.uk/courses/national-speed-awareness-course-nsac)> (retrieved 3 September 2020).

9. Ipsos MORI, *Impact Evaluation of the National Speed Awareness Course*, Final Report (University of Leeds, 2018) 8.

10. Ipsos MORI, *Impact Evaluation of the National Speed Awareness Course*, Final Report (University of Leeds, 2018) 9.

11. Ipsos MORI, *Impact Evaluation of the National Speed Awareness Course*, Final Report (University of Leeds, 2018) 9.

12. Ipsos MORI, *Impact Evaluation of the National Speed Awareness Course*, Final Report (University of Leeds, 2018) 16–17.

13. Ipsos MORI, *Impact Evaluation of the National Speed Awareness Course*, Final Report (University of Leeds, 2018) 20.

14. Ipsos MORI, *Impact Evaluation of the National Speed Awareness Course*, Final Report (University of Leeds, 2018) 26–27.

course was, however, correlated with a reduction in the risk of an injury collision of 14%.<sup>15</sup>

## Targeting the program effectively

- 3.18 Based on the data we refer to below, repeat traffic offenders as we define them are likely to amount to approximately 3,500 offenders per year. This raises the question of appropriately targeting scarce resources to those offenders who will most benefit from a program that addresses attitudes to risk.
- 3.19 One approach would be for Transport for NSW to ensure that suitable drug or alcohol-related repeat traffic offenders instead participate in one of the available alcohol or drug programs. Alcohol and drug dependency potentially present different issues which should be addressed by specialised programs. This can be managed through the discretion we recommend Transport for NSW be given to determine who should participate in any recommended program. Transport for NSW is currently investigating which cohorts of offenders should be targeted for a drug or alcohol program to achieve the strongest road safety outcomes.<sup>16</sup>
- 3.20 In considering how many drivers could be subject to a recommended program, we have examined the number of those sentenced in the Local Court for a second or subsequent relevant driving offence under the *Road Transport Act 2013* (NSW) in the four year period January 2016 to December 2019. These are set out in Table 3.1, together with the number of drivers sentenced in the Local Court for a first such offence.

**Table 3.1: Drivers sentenced for a first or second or subsequent major offence under the *Road Transport Act 2013* (NSW), NSW Local Court, 2016 –2019**

Offence under Road Transport Act 2013 (NSW)	1st offence	2nd or subsequent offence	Mandatory interlock available	s 215C program
s 110(1) drive with novice range PCA	1012	120	Y	Y
s 110(2)(a)/(b) drive/attempt drive with special range PCA	2791	378	Y	Y
s 110(3)(a)/(b) drive/attempt drive with low range PCA	19272	1855	Y	Y
s 110(4)(a)/(b) drive/attempt drive with middle range PCA	23127	2965	Y	Y

15. Ipsos MORI, *Impact Evaluation of the National Speed Awareness Course*, Final Report (University of Leeds, 2018) 26–27.

16. Information supplied by Transport for NSW, 15 June 2020.



Offence under Road Transport Act 2013 (NSW)	1st offence	2nd or subsequent offence	Mandatory interlock available	s 215C program
<b>s 110(5)(a)/(b)</b> drive/attempt drive with high range PCA	8613	1678	Y	Y
<b>s 111</b> drive/attempt drive with presence of certain drugs	21756	4583		Y
<b>s 112(1)(a)/(b)</b> use/attempted use of a vehicle under the influence of alcohol or any other drug	2461	440	Y	Y
<b>s 117(2)</b> drive vehicle on road recklessly/furiously or speed/manner dangerous	1585	114		
<b>s 118</b> menacing driving	241	9		
<b>s 146</b> failing to stop and assist after impact causing injury	32	0		
<b>s 117(1)(a)/(b)</b> negligent driving causing death/grievous bodily harm	961	6		
<b>sch 3 cl 16(1)(b)</b> refuse/fail to undergo breath analysis following arrest	685	94	Y	
<b>sch 3 cl 17</b> refuse/fail to provide samples or prevent sample taking	153	16	Y	
<b>sch 3 cl 18</b> wilful introduction/alteration of concentration or amount of alcohol or other drugs	24	3		

Judicial Commission of NSW, Judicial Information Research System, Sentencing Statistics.

3.21 The vast majority of cases in Table 3.1, where the offender was sentenced for a second or subsequent major offence, are related to alcohol or drugs (although not all of these are second or subsequent “alcohol-related major offences”). Many of these are already potentially subject to one or more special arrangements aimed at reducing reoffending, namely:

- mandatory interlock for second or subsequent alcohol-related major offences,<sup>17</sup> or
- an education program for alcohol and other drug related driving offences (under proposed s 215C of the *Road Transport Act 2013* (NSW), not yet commenced).<sup>18</sup>

3.22 This leaves a smaller group of offenders who are potentially not covered by one of these drug and/or alcohol related schemes. The number of matters sentenced by the

17. See [5.13]–[5.23].

18. See [1.28].

Local Court for a second or subsequent offence for these other offences amounts to only 132 over 4 years.

- 3.23 The repeat traffic offences under the *Crimes Act 1900* (NSW) cannot be identified in the statistics available to us by a separate, higher, penalty. However, the overall number of these offences being sentenced in the courts (whether or not it is a first major offence) is considerably lower and therefore the number of those eligible to participate is not expected to be great.<sup>19</sup>

## Ensuring coverage for all eligible offenders

- 3.24 While participation in such programs would generally be in addition to any court order, Recommendation 3.1(4) is intended to ensure that such programs are available as a condition to a sentencing order and also for offenders who are in custody, whether on remand or serving a sentence of imprisonment.
- 3.25 We note that a sentencing court may, as part of an order (either an intensive correction order, community correction order or conditional release order), impose requirements including that an offender participate in a rehabilitation program or receive treatment, abstain from alcohol and/or drugs, or be subject to supervision.<sup>20</sup> Under such an order, the court may require an eligible person to undertake the Sober Driver Program,<sup>21</sup> as has previously been the courts' practice for good behaviour bonds, community service orders and intensive correction orders.<sup>22</sup>
- 3.26 We have already noted that the TRIP program can be delivered to drivers who are in custody. The availability of such programs in custody may particularly benefit some Aboriginal people. One submission supports the expansion of programs in custody to reintegrate Aboriginal people into the community. It suggests that High Intensity Program Units offer a good opportunity to provide driver education and access to programs to inmates who are serving short sentences and due to be released within six months.<sup>23</sup>

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19. See NSW Sentencing Council, *Repeat Traffic Offenders*, Consultation Paper (2018) table 2.1, table 2.2.

20. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 73A(2), s 89(2), s 99(2).

21. NSW Communities and Justice, *Compendium of Offender Behaviour Change Programs: Offender Services and Programs* (Corrective Services NSW, 2020) 105–107. See [5.34]–[5.39].

22. NSW Government, "Program Participants CSNSW Sober Driver Program" (2016) <[www.soberdriverprogram.nsw.gov.au/Pages/program-participants/csnsw-sdp.aspx](http://www.soberdriverprogram.nsw.gov.au/Pages/program-participants/csnsw-sdp.aspx)> (retrieved 3 September 2020).

23. Legal Aid NSW. *Submission TR5*, 17.

## Ensuring coverage across NSW

- 3.27 From a practical perspective, any licence disqualification period which requires completion of a program for it to end, needs to be available to offenders across the state in a timely, efficient way. If the programs are not readily available, it is foreseeable that the participation requirement may lead to unauthorised driving and worse road safety outcomes, particularly if availability is limited in rural NSW where road trauma outcomes are more severe. Legal Aid's observation in relation to TOIP - that some flexibility would be required in certain regional and remote locations so as not to create an impediment to participation - applies equally to the delivery of other programs.<sup>24</sup>
- 3.28 The practical difficulties of delivering programs in rural areas could be addressed by delivering them electronically. For example, they could be delivered by way of audio-visual link, as is the case with the Sober Driver Program, or by using a downloadable application on a laptop, phone or tablet that is supported by verification technology. In more recent times, members of the community are gaining greater experience of undertaking learning modules and other interactions through video conferencing applications. One option might be for a pilot scheme to be delivered in rural areas.

## Ensuring equitable access

- 3.29 The cost of the program may be a barrier for many offenders. We need to ensure that disadvantaged offenders are not prevented from taking part.
- 3.30 Recommendation 3.1(5) aims to do this, and envisages concession rates and assistance for people in severe financial hardship similar to those currently in place for the Alcohol Interlock Program, under s 48 of the *Road Transport Act 2013* (NSW), whereby:
- service providers offer a concession rate of 35% for certain holders of Pensioner Concession Cards, Low Income Health Care Cards and Department of Veterans Affairs Gold Cards, and
  - full or partial financial assistance is available from Transport for NSW for participants in severe financial hardship.<sup>25</sup>

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24. Legal Aid NSW. *Submission TR5*, 12–13.

25. NSW, Roads and Maritime Services, *Alcohol Interlock Program: Participant Guide* (2018) 10.



## 4. Restricted licences

### In Brief

We recommend a restricted licence scheme for appropriate cases to avoid the disproportionate impact and negative safety outcomes of the automatic disqualification regime particularly on Aboriginal people, and rural and other disadvantaged communities. A restricted licence is intended for cases where offenders do not pose a traffic safety risk to the community and loss of a licence would make it practically impossible to seek or provide essential medical treatment or care, or to participate in employment or meet obligations arising from legal proceedings. A driver who breaches any conditions would be returned to a court which may revoke the licence.

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### Recommendation 4.1: Restricted licences

- (1) A restricted licence should be available to a court to grant to anyone subject to automatic disqualification, but only where:
  - (a) they are not:
    - (i) a “repeat traffic offender” as defined in Recommendation 2.2
    - (ii) subject to the mandatory alcohol interlock program under Division 2 of Part 7.4 of the *Road Transport Act 2013* (NSW)
    - (iii) subject to mandatory program participation proposed in Recommendation 6.2, or

- (iv) convicted of one of the unauthorised driving offences listed in the table to s 205A of the *Road Transport Act 2013* (NSW), except for driving while licence suspended or cancelled for non-payment of fines under s 54(4) of the *Road Transport Act 2013* (NSW), and
- (b) the licence is needed to prevent the driver or a family member from being deprived of:
  - (i) essential medical treatment
  - (ii) essential personal care
  - (iii) their only practical means of participating in the laws, customs, traditions and practices of the Aboriginal or Torres Strait Islander community or group to which they belong
  - (iv) their principal source of income
  - (v) their only practical means of travelling to and from their usual place of employment
  - (vi) their only practical means of travelling to and from their usual place of education
  - (vii) their only practical means of meeting obligations in relation to or arising from legal proceedings, and
- (c) they do not pose a traffic safety risk to the community.

In the case of an Aboriginal person or a Torres Strait Islander, family member includes a person who is part of extended family or kin according to the Indigenous kinship system of the person's culture.

- (2) A driver may apply to the court for:
  - (a) a restricted licence at the time of sentencing, or
  - (b) a restricted licence or variation of an existing restricted licence at any time if the driver's circumstances in relation to one of the factors listed at (1)(b) have changed.
- (3) The restricted licence must specify:
  - (a) the times when the person may drive
  - (b) the locality in which and/or the roads on which the person may drive
  - (c) the type of vehicle which the person may drive, and
  - (d) the purposes for which the person may drive.

The purposes should be restricted to those matters listed at (1)(b).
- (4) If a driver breaches a restricted licence, the court must revoke the restricted licence unless it is satisfied that there are good reasons for excusing the breach.
- (5) In determining whether there are good reasons to excuse the breach, the court should have regard to:
  - (a) the extent to which the breach was deliberate or accidental
  - (b) any extenuating circumstances that explain the breach
  - (c) any prior breaches, and
  - (d) the extent to which the driver has otherwise complied with the conditions of the restricted licence, such that it would be unjust to revoke it.

- (6) Revocation of the restricted licence should result in:
  - (a) the re-commencement of the underlying period of disqualification from the point at which the restricted licence was granted
  - (b) the offender being unable to apply for a restricted licence during the period of disqualification, and
  - (c) the offender being unable to apply for the removal of the disqualification under s 221B of the *Road Transport Act 2013* (NSW).
- (7) If the order for a restricted licence is in place at the end of the disqualification period, the driver must apply for a new licence as they would at the end of any disqualification period.

- 4.1 This recommendation for restricted licences (sometimes called “work” or “extraordinary” licences) aims to avoid unauthorised driving and the associated negative road safety outcomes and repeat offending. It also addresses the continuing concern about the disproportionate impact of unauthorised driving offences on Aboriginal people, and rural and other disadvantaged communities. The number of people receiving restricted licences under this recommendation is likely to be small.
- 4.2 This recommendation is in addition to the recent disqualification reforms whereby a disqualified driver can apply to have their disqualification lifted after a period of time.<sup>1</sup>

## Background

- 4.3 Some jurisdictions have formalised restricted licence schemes for disqualified drivers. For example, in Queensland, a driver who is subject to disqualification may apply to the court for a restricted licence. A restricted licence limits the driver’s use of the licence to specified circumstances directly connected with the driver’s means of earning their livelihood. The restrictions may include the class of vehicle that may be driven, the purpose for which the vehicle may be driven and the times at which the vehicle may be driven.<sup>2</sup>

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1. *Road Transport Act 2013* (NSW) pt7.4 div 3A, inserted by *Road Transport Amendment (Driver Licence Disqualification) Act 2017* (NSW) sch 1 [15], amended by *Road Transport Amendment (Miscellaneous) Act 2019* (NSW) sch 1 [1]–[9].

2. *Transport Operations (Road Use Management) Act 1995* (Qld) s 87.

- 4.4 Arrangements in other Australian jurisdictions include the extraordinary licence scheme in Western Australia,<sup>3</sup> restricted driver licences in Tasmania,<sup>4</sup> and restricted licences in the Australian Capital Territory.<sup>5</sup>
- 4.5 It has been suggested that in NSW the courts can use various forms of conditional release to impose a form of restricted licence, by ordering, as a condition of the discharge, that the offender be restricted to driving in certain circumstances, for example, for employment purposes only.<sup>6</sup> We accept this is possible in theory but are not aware it has ever been done in practice.

## Features of the scheme

- 4.6 Our proposed scheme is set out in Recommendation 4.1. It is based in part on the schemes in Queensland (restricted licences for disqualified drivers) and Western Australia (extraordinary licences for disqualified drivers).<sup>7</sup>

### Available for cases of automatic disqualification

- 4.7 A restricted licence would be available for a court to impose instead of automatic licence disqualification in appropriate cases. Automatic disqualification occurs when a person is convicted in court of certain prescribed offences:
- **major offences**, including driving offences involving drugs or alcohol, driving offences involving death or injury, and other dangerous driving offences<sup>8</sup>
  - **unauthorised driving offences**, including driving while never licenced, licence disqualified, licence suspended, licence refused or cancelled<sup>9</sup>

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3. *Road Traffic (Authorisation to Drive) Act 2008* (WA) s 25–39;

4. *Vehicle and Traffic Act 1999* (Tas) s 18.

5. *Road Transport (Driver Licensing) Regulation 2000* (ACT) cl 47; *Road Transport (General) Act 1999* (ACT) s 67A.

6. Austroads, *The Forrest Review: Driver Licensing and Barriers to Indigenous Economic Participation*, Research Report AP-R537-17 (2017) 26.

7. *Transport Operations (Road Use Management) Act 1995* (Qld) s 87–88; *Road Traffic (Authorisation to Drive) Act 2008* (WA) s 25–39.

8. *Road Transport Act 2013* (NSW) s 205, s 4(1) definition of “major offence”.

9. *Road Transport Act 2013* (NSW) s 205A.



- **speeding or road racing offences**,<sup>10</sup> and
  - **driving as a learner driver without an appropriate supervisor**.<sup>11</sup>
- 4.8 The length of an automatic disqualification depends on the type of offence and if the person has previously been convicted of a major offence. The disqualification period may range from a few months to a few years. Currently, the court can increase the automatic disqualification period but cannot impose a period shorter than a prescribed minimum.
- 4.9 Our restricted licence scheme applies only to those who are disqualified after court proceeding and would not be available for people whose licence is suspended. For example, a person whose licence is automatically suspended because they have accumulated demerit points, or who is given an immediate suspension for prescribed concentration of alcohol (“PCA”) offences, would not be able to access the recommended scheme. The scheme of extraordinary licences in Western Australia makes similar exclusions.<sup>12</sup> Likewise, in Tasmania, restricted licences are not available for middle or high range PCA offenders where they are subject to immediate disqualification under a road safety disqualification notice.<sup>13</sup>
- 4.10 We do not intend to undermine the clear immediate deterrent effect of automatic suspension or suspension for accumulation of demerit points. There is some evidence that the threat of immediate licence suspension is a better deterrent than a monetary penalty. In one survey, only 32% of respondents felt deterred from speeding by fines, while 76% felt deterred by an immediate licence suspension.<sup>14</sup> A number of submissions support the existing suspension arrangements. One submission notes that the suspension periods of 3 or 6 months are “long enough to provide some deterrent effect yet not so long as to be crushing for most drivers”.<sup>15</sup> Another considers there is an advantage in the “direct link between the offending conduct and the suspension of the licence” noting that it is “difficult to envisage any other practical means of penalising traffic offending which would be likely to be more effective”.<sup>16</sup>

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10. *Road Rules 2014* (NSW) r 10-2; *Road Transport Act 2013* (NSW) s 115(4).

11. *Road Transport (Driver Licensing) Regulation 2017* (NSW) cl 15(3).

12. *Road Traffic (Authorisation to Drive) Act 2008* (WA) s 28.

13. *Vehicle and Traffic Act 1999* (Tas) s 18(2)(c); *Road Safety (Alcohol and Drugs) Act 1970* (Tas) s 18B.

14. NSW Government, Submission No 30 to the Parliamentary Joint Standing Committee on Road Safety (Staysafe), *Inquiry into Speed Zoning and its Impact on the Demerit Points Scheme* (5 March 2014) 21.

15. The Shopfront Youth Legal Centre, *Submission TR6*, 3. But see Law Society of NSW, *Submission TR7*, 6.

16. NSW, Office of the Director of Public Prosecutions, *Submission TR9*, 6–7.

- 4.11 In any case, unrestricted licence holders who face suspension for accumulation of demerit points may currently choose to undertake a 12-month good behaviour period.<sup>17</sup>
- 4.12 Taking into account the express exclusions outlined below, the effect of Recommendation 4.1 is drivers would be able to apply for a restricted licence (and be granted one if they are not a repeat offender and meet the other eligibility criteria), if they are convicted in court and are subject to automatic disqualification for the following offences:
- offences involving death or injury arising out of the use of a motor vehicle<sup>18</sup>
  - dangerous, reckless and similar driving offences<sup>19</sup>
  - negligent driving offences where death or injury results<sup>20</sup>
  - drug driving offences<sup>21</sup>
  - road racing offences<sup>22</sup>
  - exceeding the speed limit by more than 30km/h (unless the driver is subject to our proposed regime for those who speed at more than 45km/h over the speed limit)<sup>23</sup>
  - driving while their licence is suspended or cancelled for non-payment of fines,<sup>24</sup> or
  - driving as a learner driver without an appropriate supervisor.<sup>25</sup>

### **Express exclusions**

- 4.13 Our recommendation excludes a number of automatic disqualification offences. These excluded offences account for approximately 88% of the 11,607 automatic disqualification offences committed as a first offence in July 2018-June 2019.<sup>26</sup>

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17. *Road Transport Act 2013* (NSW) s 36.

18. See *Road Transport Act 2013* (NSW) s 4(1) definition of "major offence" (a).

19. *Crimes Act 1900* (NSW) s 51A, s 51B, s 52AB and, if rec 2.1 is implemented, s 52A; *Road Transport Act 2013* (NSW) s 117(2), s 118, s 146.

20. *Road Transport Act 2013* (NSW) s 117(1)(a)–(b).

21. *Road Transport Act 2013* (NSW) s 111, s 112(1)(a)–(b).

22. *Road Transport Act 2013* (NSW) s 115.

23. *Road Rules 2014* (NSW) cl 10-2(3), cl 10-2(5).

24. *Road Transport Act 2013* (NSW) s 54(5).

25. *Road Transport (Driver Licensing) Regulation 2017* (NSW) cl 15(3).

26. NSW Bureau of Crime Statistics and Research, reference 20-18785.

- 4.14 First it excludes those offences that, for a first offence, are subject to the mandatory alcohol interlock program. These include: middle range PCA; high range PCA; use or attempted use of a vehicle under the influence of alcohol; refusal to submit to a breath analysis; and refusal to submit to the taking of a blood sample following arrest.<sup>27</sup> We do not intend to interfere with the operation of the interlock program as it applies to first offenders. Likewise, we also propose excluding any drivers who are subject to our proposed mandatory program participation for high range speeders who may otherwise qualify for the restricted licence scheme.
- 4.15 A similar question about the interaction of restricted licences with interlock has arisen in Queensland, where a 2017 review raised the possibility of tightening the eligibility criteria for a work licence to exclude middle range PCA offenders. The review noted that it would be particularly important to remove work licence availability for this group if the interlock program were to be extended to middle range PCA offenders. The proposal was justified on the grounds of the higher crash risk associated with a middle range PCA. It was also noted that work licence holders convicted of middle range PCA were more likely to reoffend than those in the low range PCA group.<sup>28</sup>
- 4.16 We also exclude from eligibility people convicted of all but one of the unauthorised driving offences listed in the table to s 205A of the *Road Transport Act 2013* (NSW) on the grounds that these drivers have already disregarded licencing requirements.
- 4.17 On the other hand, people who have driven despite having licences suspended or cancelled for non-payment of fines should be able to access the scheme, since they are part of the group of offenders that our recommendation is aimed at. According to Transport for NSW statistics, there are more fine default suspensions than any other subgroup of licence suspensions.<sup>29</sup> A 2015 Bureau of Crime Statistics and Research study has also observed a general upward trend in the number of people convicted of driving while on licence restrictions as a result of fine defaults.<sup>30</sup> However, these figures do not distinguish between court imposed fines and penalty notice fines and whether the fines or penalty notice amounts were incurred for driving offences.
- 4.18 Concerns have been expressed about the impact of suspending certain drivers, particularly Indigenous drivers, for non-payment of fines.<sup>31</sup> It has been found that drivers

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27. *Road Transport Act 2013* (NSW) s 110(4), s 110(5), s 112(1), s 209(1) definition of “mandatory interlock offence”, sch 3 cl 16(1)(b), sch 3 cl 17(1)(a1).

28. Queensland, Department of Transport and Main Roads, *Drink Driving Discussion Paper: Targeting High Risk Drink Drivers* (2017) 21–22.

29. NSW Sentencing Council, *Repeat Traffic Offenders*, Consultation Paper (2018) figure 5.2.

30. P Nelson, *Driving while Disqualified*, Bureau Brief No 103 (NSW Bureau of Crime Statistics and Research, 2015) 4–5.

31. Legislative Assembly of NSW, Committee on Law and Safety, *Driver Licence Disqualification Reform*, Report 3/55 (2013) [3.62]–[3.73].

convicted of driving while suspended or cancelled for fine default are more likely to be young, to live in regional NSW and to be in the highest quintile of disadvantage.<sup>32</sup> Where a driver accumulates sufficient fines for risky driving behaviour, they are more likely to be suspended for accumulation of demerit points, and will not be able to apply for a restricted licence.

### Eligibility criteria

- 4.19 The restricted licence would be available only where a driver has not committed another offence in the previous 5 years that would make the driver a repeat traffic offender. Granting a restricted licence to a driver who has previously committed a serious offence poses too great a risk to community safety.
- 4.20 The grounds for granting a restricted licence are based in part on criteria for an extraordinary licence in WA.<sup>33</sup>
- 4.21 We have included specific reference to Indigenous kinship and cultural obligations. NSW legislation, in other contexts, currently recognises the importance of extended family in Aboriginal culture.<sup>34</sup> In our view, this is a reasonable measure to ensure that some Indigenous people, who otherwise qualify for a restricted licence, would not be effectively prevented from caring for extended family members or from practicing cultural traditions and customs. A number of submissions to this review specifically raise concerns about the disproportionate impact of disqualification on Aboriginal communities, particularly in remote and regional locations.<sup>35</sup> The Law Reform Commission, in its 2012 review of bail observed that restrictions that conflict with cultural obligations are often breached.<sup>36</sup>
- 4.22 For similar reasons we have included specific reference to situations where a private vehicle driven by the offender is the only practical means of meeting obligations in relation to or arising from legal proceedings. This is intended to avoid, where possible, otherwise avoidable breaches that give rise to legal sanctions such as reporting and supervision conditions in relation to bail, sentencing orders, and parole as well as parenting orders.

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32. P Nelson, *Driving while Disqualified*, Bureau Brief No 103 (NSW Bureau of Crime Statistics and Research, 2015) 10.

33. *Road Traffic (Authorisation to Drive) Act 2008* (WA) s 30.

34. See, eg, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 5(1)(h).

35. Mid North Coast Community Legal Centre, *Submission TR3*, 9; NSW Legal Assistance Forum, *Submission TR4*, 6, Legal Aid NSW. *Submission TR5*, 15.

36. NSW Law Reform Commission, *Bail*, Report 133 (2012) [11.54].

- 4.24 The provisions implementing Recommendation 4.1(1)(b)(iii), (v)(vi) and (vii) will need to be carefully drafted so that the idea of “practical means”:
- does not include minimal inconvenience (for example because of public transport that is slightly slower than driving), but
  - does include significant inconvenience (for example because of great distances between country towns).
- 4.25 Since what is “practical” will depend on the circumstances of the particular case, one option is to make this a matter of guided judicial discretion, by introducing a list of matters that the court must have regard to when determining whether to grant a restricted licence. For example, in Western Australia when determining whether to grant an extraordinary licence, the court must have regard to the “circumstances of the case” and “the safety of the public generally”.<sup>37</sup> Introducing this guided court discretion should achieve decisions that are sensitive to individual circumstances.

### **Application to court**

- 4.26 We propose that the scheme be administered by the courts, at the time of sentencing. This is consistent with the approach in other jurisdictions.<sup>38</sup>
- 4.27 It should also be possible for an offender (who has not subsequently committed a repeat offence) to apply to the court for a restricted licence after sentencing, in cases where their circumstances have changed.

### **Restrictions to be specified**

- 4.28 Recommendation 4.1(3) lists the matters that the court must specify when granting a restricted licence. They are based on provisions in the Queensland and Western Australian schemes.<sup>39</sup>

### **Breach and revocation**

- 4.29 The revocation provisions are set out in Recommendation 4.1(4), (5) and (6).
- 4.30 We propose that a driver who breaches the conditions of their restricted licence should be returned to the court that granted the restricted licence to be dealt with in much the

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37. *Road Traffic (Authorisation to Drive) Act 2008* (WA) s 30(2).

38. *Transport Operations (Road Use Management) Act 1995* (Qld) s 87(1); *Road Traffic (Authorisation to Drive) Act 2008* (WA) s 30(1).

39. *Transport Operations (Road Use Management) Act 1995* (Qld) s 87(4); *Road Traffic (Authorisation to Drive) Act 2008* (WA) s 32.

same way as an offender is dealt with by courts for breach of non-custodial orders such as a conditional release order or a community correction order.<sup>40</sup>

- 4.31 We are not proposing to make it an offence to breach a restricted licence, as is the case in some jurisdictions.<sup>41</sup> However, we do propose that a driver who fails to provide good reasons for a breach should be subject to the whole of the disqualification period that would otherwise have been imposed. Further, they should be prevented from taking advantage of the provisions that allow them to apply to have that disqualification lifted.<sup>42</sup>
- 4.32 A driver should, however, have the opportunity to demonstrate to the court that there were good reasons for the breach. Recommendation 4.1(5) draws on the NSW Law Reform Commission's 2013 recommendations that set out good reasons to excuse a breach of a suspended sentence.<sup>43</sup> The final matter in the list is intended to overcome any injustice that may arise from the full disqualification period beginning to run because an otherwise compliant driver breached the restricted licence, for example, within days of the end of the period.

### End of licence period

- 4.33 If the restricted licence is in place at the end of the disqualification period, the person must apply for a new licence as they would at the end of any disqualification period.

## Impact of the restricted licence scheme

- 4.34 In the last decade, there has been some limited support for introducing a restricted licence scheme in NSW.<sup>44</sup>
- 4.35 There are costs, but, as we discuss below, there are also benefits which, in our view, outweigh these costs. However, one member of the Sentencing Council would not make this recommendation at this time, but considers that more work is required to assess the evidence for social benefit of restricted licences weighed against the possible road safety effects, and the practical ramification of the recommendation.

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40. See, eg, *Crimes (Administration of Sentences) Act 1999* (NSW) s 107C, s 108C.

41. See, eg, *Road Traffic (Authorisation to Drive) Act 2008* (WA) s 38(1); *Transport Operations (Road Use Management) Act 1995* (Qld) s 87(10).

42. *Road Transport Act 2013* (NSW) pt 7.4 div 3A.

43. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [10.73]–[10.77], rec 10.5(3).

44. Parliament of NSW, Joint Standing Committee on Road Safety (Staysafe), *Driver Education, Training and Road Safety*, Report 3/56 (2017) [3.50]–[3.52] (in relation to older drivers); Legislative Assembly of NSW, Committee on Law and Safety, *Driver Licence Disqualification Reform*, Report 3/55 (2013) [4.57]–[4.58].

- 4.36 Given the balancing involved in deciding whether to implement restricted licences, we suggest a trial period for the scheme that is not geographically restricted. The scheme should only be extended if positively reviewed.

### Road safety and unauthorised driving

- 4.37 Although some have suggested that unauthorised drivers modify their behaviour and drive more safely to avoid detection, others have argued that driving to avoid detection is not the same as safe driving.<sup>45</sup> Research has, however, identified a link between unauthorised driving and crash risk.<sup>46</sup> Data from NSW and Queensland shows a clear correlation between unauthorised driving and crash risk.
- 4.38 Driving while disqualified has a higher crash risk than all other subgroups of the “driving while under licence restrictions” category.<sup>47</sup> For example, of the 869 collisions involving unauthorised drivers in the 2 years between 1 July 2011 and 30 June 2013, 56% had been disqualified, yet disqualified drivers represented less than a quarter of active licence sanctions in NSW.<sup>48</sup> The Joint Standing Committee on Road Safety has noted suggestions that greater efforts may be required to obtain the necessary data to identify and target the unlicensed drivers who are involved in casualty crashes.<sup>49</sup>
- 4.39 A report commissioned by the Queensland Department of Transport and Main Roads has found that unauthorised drivers were up to three times more likely than authorised drivers to be involved in a crash of any type and up to four times more likely to be involved in a fatal crash. Disqualified or suspended drivers were involved in more fatal and serious injury crashes than any other categories of unauthorised drivers.<sup>50</sup>
- 4.40 The Queensland report observed that its analysis of crash data:

supports previous research that has shown a greater degree of risky driving behaviours to be present amongst unlicensed drivers involved in crashes. From a criminological perspective, the results suggest that the never licensed and the disqualified/suspended drivers may represent more deviant subgroups of drivers. The behaviour of these drivers tends to represent a more

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45. Victoria, Sentencing Advisory Council, *Driving while Disqualified or Suspended*, Report (2009) [1.25].

46. P Nelson, *Driving while Disqualified*, Bureau Brief No 103 (NSW Bureau of Crime Statistics and Research, 2015) 1.

47. P Nelson, *Driving while Disqualified*, Bureau Brief No 103 (NSW Bureau of Crime Statistics and Research, 2015) 1.

48. P Nelson, *Driving while Disqualified*, Bureau Brief No 103 (NSW Bureau of Crime Statistics and Research, 2015) 1.

49. Parliament of NSW, Joint Standing Committee on Road Safety (Staysafe) *Driver Education, Training and Road Safety*, Report 3/56 (2017) [1.20].

50. B Watson and others, *Unlicensed and Unregistered Vehicle Project*, Summary Report (Centre for Accident Research and Road Safety - Queensland, 2012) 29.

flagrant breaking of the road rules, since they have decided to drive either without a licence or in contravention of a driving ban.<sup>51</sup>

4.41 The report then suggested that:

these findings have two clear implications for road safety. Firstly, they indicate that more effective approaches are required to reduce the level of unlicensed driving. Secondly, there is a need to review policies that may be inadvertently exacerbating the problem.<sup>52</sup>

4.42 While, evidence surrounding drivers on restricted licences is mixed,<sup>53</sup> the Queensland report has highlighted earlier research which found that:

punishment avoidance and the need to drive for work purposes were the main personal influences on unlicensed driving in a survey of unlicensed drivers. In this sense, the behaviour of the disqualified/suspended drivers can be taken to represent a more flagrant breaking of the road rules than other unlicensed drivers, given they have decided to drive in contravention of a specific ban.<sup>54</sup>

This conclusion supports the idea that giving some drivers an opportunity, through a restricted licence, to engage in authorised driving may help to reduce crash risk.

4.43 Care must be taken in considering the data from other jurisdictions in relation to safety outcomes for drivers who are subject to restricted licence conditions or similar schemes, especially since many jurisdictions allow drivers who are guilty of drink or drug driving to take part. We have chosen to exclude such offenders from our recommended scheme, in preference for the alcohol interlock scheme that is already in place.

4.44 Given the relatively low numbers of drivers who will be in a position to apply our restricted licence scheme (likely to be no more than a few hundred per year), the safety impact is unlikely to be significant and should be subject to close monitoring.

### **Reduction in reoffending**

4.45 Despite the uncertain findings about safety impact, the scheme will have other benefits. It will reduce reoffending and the associated costs in court time and, in some cases, imprisonment.

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51. B Watson and others, *Unlicensed and Unregistered Vehicle Project*, Summary Report (Centre for Accident Research and Road Safety - Queensland, 2012) 31 (emphasis omitted).

52. B Watson and others, *Unlicensed and Unregistered Vehicle Project*, Summary Report (Centre for Accident Research and Road Safety - Queensland, 2012) 31.

53. B Watson and others, *Unlicensed and Unregistered Vehicle Project*, Summary Report (Centre for Accident Research and Road Safety - Queensland, 2012) 2–3.

54. B Watson and others, *Unlicensed and Unregistered Vehicle Project*, Summary Report (Centre for Accident Research and Road Safety - Queensland, 2012) 37 (emphasis omitted).



- 4.46 Restricted licences aim to avoid the “double punishment” imposed on drivers who often live in areas (such as rural or outer urban areas) that are inadequately serviced by public transport. These circumstances make it more likely that such offenders will commit further unauthorised driving offences. A restricted licence would allow offenders to continue to participate in necessary activities without further offending and associated risky behaviours. The scheme would also benefit the driver’s broader networks. For example, it would lessen the negative (and potentially criminogenic) impact of a licence disqualification on a driver’s family, and would ensure continuation of the family’s level of income.

### Interaction with non-conviction options

- 4.47 Various forms of non-conviction already allow people to continue driving without any real restrictions. There is a chance that if a restricted licence became an available sentencing option, some first time offenders who would normally receive a non-conviction order, may instead receive a conviction with a restricted licence. In the final quarter of 2018, for all traffic and vehicle regulatory offences, some 2590 offenders (or 26%) received a form of non-conviction.<sup>55</sup> Not all would have committed offences attracting automatic disqualification and not all of those would have been eligible for a restricted licence under our recommendation. However, we do not have evidence that the courts are applying these options inappropriately.
- 4.48 We would expect that the restricted licence option would be available for those offenders who, otherwise, would not receive a non-conviction option because of, for example, a non-traffic-related prior criminal history. This might be particularly applicable in the case of Aboriginal offenders who are generally less likely to receive a non-conviction option for traffic offences.<sup>56</sup>

### Enforcement

- 4.49 There are some concerns that people will simply not comply or use work as a pretext for unauthorised driving.<sup>57</sup>
- 4.50 Transport for NSW observes that, from a practical perspective, it would be very difficult to prove the purpose of travel, and enforcement (by police checks) occurs infrequently. Therefore, this could just enable those who are subject to the scheme to continue driving without any real licensing penalty.
- 4.51 Implementing a system of restricted licences would require interaction between three different electronic data systems:

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55. Source: NSW Bureau of Crime Statistics and Research, reference 19-17374.

56. See NSW Sentencing Council, *Sentencing Trends and Practices*, Annual Report 2018 (2019) [4.49].

57. Legislative Assembly of NSW, Committee on Law and Safety, *Driver Licence Disqualification Reform*, Report 3/55 (2013) [4.58].

- Transport for NSW's Driver and Vehicle System ("DRIVES")
  - the Department of Communities and Justice's Justice Link, and
  - the NSW Police Force's Computerised Operational Policing System ("COPS")
- 4.52 The DRIVES system records the details of drivers and their licences. COPS communicates with DRIVES so that police in the field who access COPS act on up to date driver licencing data.
- 4.53 The conditions that courts impose when making a sentencing order, such as an intensive correction order, community correction order or conditional release order, or a bail order, are recorded in Justice Link and also communicated to COPS. We also note that court-ordered driver disqualifications must already be communicated to the DRIVES system.
- 4.54 A restricted licence would ultimately require information to be recorded on all three systems. Any such system of recording and transferring information would require modifications to all three systems. While making such changes may be difficult, especially with legacy systems, it is not impossible, and care would need to be taken to avoid discrepancies since police rely on such records when exercising powers. We note however, that any breach by itself would only result in the driver being returned to court, rather, than, for example, being charged with an offence or returned to custody.
- 4.55 To some extent, technology may be available to assist with enforcement. For example, licence plate recognition technology can now be deployed and GPS location technology could also be used. The Victorian Sentencing Advisory Council, when considering the impact of increased likelihood of detection on disqualified or suspended drivers, recommended that, "subject to obtaining sufficient resources, Victoria Police should expand its use of automated number plate recognition technology to increase the detection of driving while disqualified or suspended".<sup>58</sup> This recommendation was made on the basis that wide publicity would be given to such an expansion of surveillance and work would be undertaken with certain sections of the Victorian community to minimise the risk of drivers feeling unfairly targeted.<sup>59</sup>
- 4.56 The number of people likely to be subject to a restricted licence under our recommendation would not justify such an investment in technology. However, enforcement of a restricted licence scheme could be an incidental aspect of any future wider technological roll-out targeting other driving behaviours.

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58. Victoria, Sentencing Advisory Council, *Driving while Disqualified or Suspended*, Report (2009) rec 2(a).

59. Victoria, Sentencing Advisory Council, *Driving while Disqualified or Suspended*, Report (2009) rec 2(b)–(c).

# 5. Drug and alcohol repeat offenders

**In Brief**

Drug (including alcohol) use is one of the top factors involved in traffic accidents that result in death or serious injury. In light of recent changes to the law regarding drug and alcohol driving offences, we recommend a number of small changes to improve the operation of the system and reduce the possibility of repeat offending that risks community safety: to allow drivers to apply for an alcohol interlock exemption when their circumstances change; to allow interlock to be combined with other interventions (such as drink driving or related education programs); and to increase the availability and use of the Sober Driver Program.

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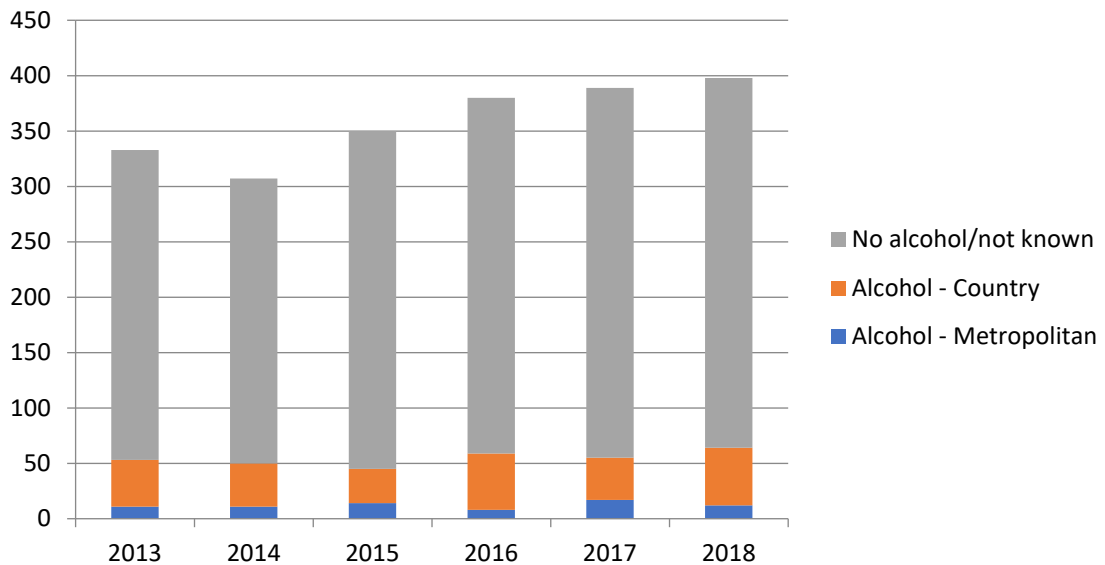
- 5.1 Drug (including alcohol) use is one of the top factors involved in traffic accidents that result in death or serious injury, as we set out below.
- 5.2 In light of the recent changes to the system for dealing with drug or alcohol driving offences outlined below – some of which have not yet been fully implemented – we are not proposing significant changes to the system for dealing with drivers who are affected by drugs or alcohol.
- 5.3 In this chapter we make a number of small recommendations to improve the operation of the system and reduce the possibility of repeat offending that risks community safety.

## Background

### Risk from driving under the influence of alcohol or drugs

- 5.4 Figure 5.1 shows road deaths where alcohol was a known factor. In 2018, alcohol was a factor in 64 road deaths (16.1%). Of these deaths, 12 took place in metropolitan areas and 52 took place in country areas.

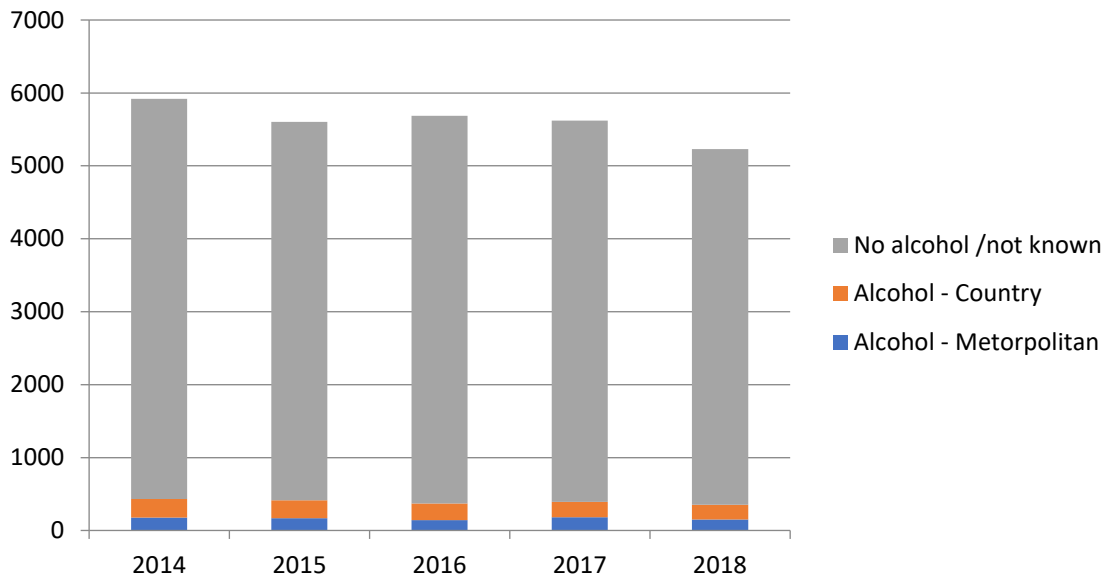
**Figure 5.1: Road deaths – alcohol, 2013–2018**



Source: Transport for NSW, Centre for Road Safety, Crash and casualty statistics (updated 4 October 2019).

- 5.5 Figure 5.2 shows serious injuries to road users where alcohol was a known factor. In 2018, alcohol was a factor in 354 serious injuries (6.8%). Of these injuries, 151 took place in metropolitan areas and 203 took place in country areas.

**Figure 5.2: Serious injuries to road users – alcohol, 2014–2018**

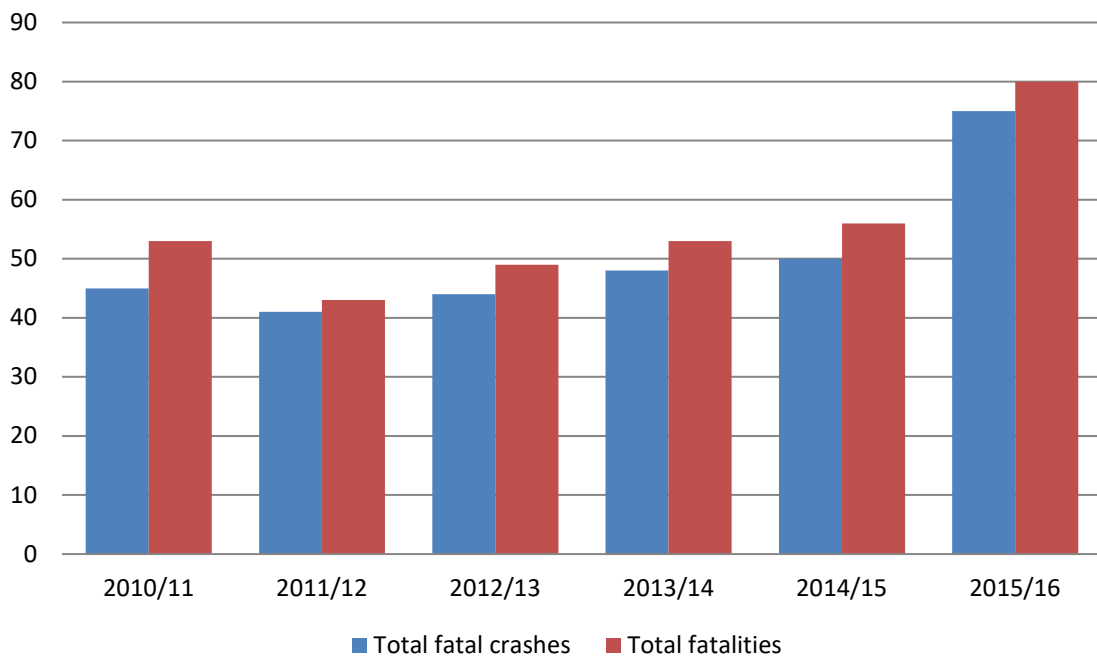


Source: Transport for NSW, Centre for Road Safety, Crash and casualty statistics (updated 4 October 2019).

5.6 According to data produced by the Centre for Road Safety, over the six financial years from 2010/11 to 2015/16, there were 303 fatal crashes, resulting in 334 deaths, which involved at least one driver with cannabis, “speed” (amphetamines/ice) or ecstasy in their system. The annual figures are set out in Figure 5.3. These deaths represent at least 16% of all deaths in the period. The 80 deaths in 2015/16 represent 20% of all deaths in that financial year. Part of the increase, however, may be attributed to enhanced drug testing in late 2014, which enabled more accurate identification of the presence of cannabis.<sup>1</sup>

1. Transport for NSW, Centre for Road Safety, *Drug Driving Trauma Trends*, Report (2017) 4.

**Figure 5.3: Fatal crashes involving a motor vehicle controller with an illicit drug, 2010/11–2015/16**

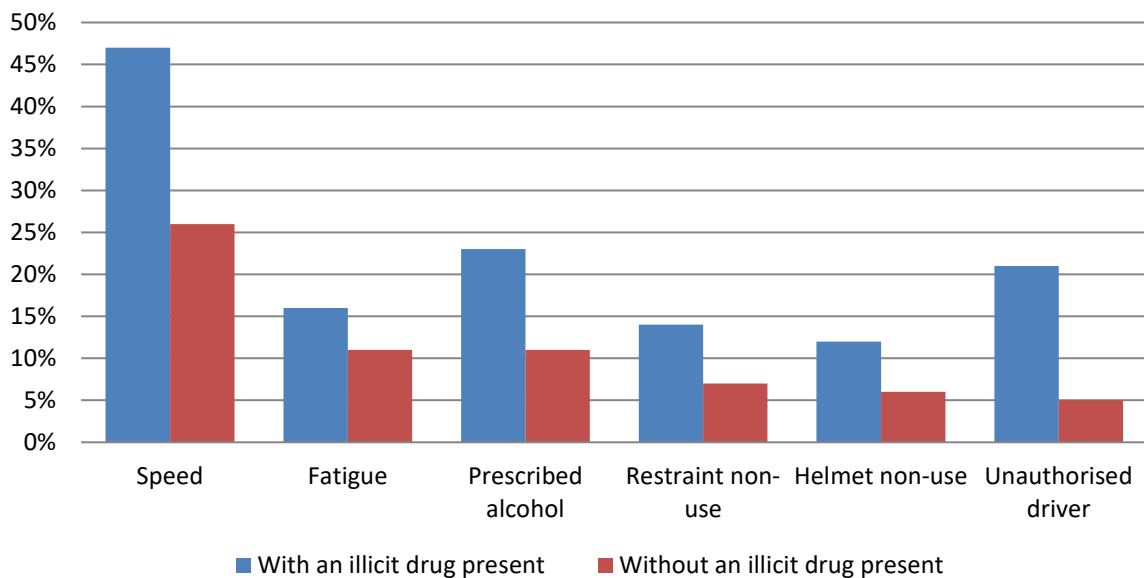


Note: "Illicit drug" refers only to cannabis, speed (amphetamines/ice) and ecstasy.  
 Source: Transport for NSW, Centre for Road Safety, *Drug Driving Trauma Trends, Report (2017) 4.*

5.7 The Centre for Road Safety data also shows that other risky behaviours are over-represented among drivers with illicit drugs present who are involved in a fatal collision.<sup>2</sup> This relationship is set out in Figure 5.4.

2. Transport for NSW, Centre for Road Safety, *Drug Driving Trauma Trends, Report (2017) 11.*

**Figure 5.4: Percentage of motor vehicle controllers with/without an illicit drug involved in a fatal crash, 2010/11–2015/16, behaviour factors**



Note: "Illicit drug" refers only to cannabis, speed (amphetamines/ice) and ecstasy.  
 Source: Transport for NSW, Centre for Road Safety, *Drug Driving Trauma Trends, Report (2017) 4*.

### Offences involving a serious risk of harm

5.8 A number of driving offences criminalise someone driving under the influence of alcohol or other drugs, or having certain illicit drugs present in their system, or having a certain prescribed concentration of alcohol ("PCA"). Three such offences that involve a serious risk of harm are:

- driving under the influence of alcohol or any other drug<sup>3</sup>
- driving with a high range PCA,<sup>4</sup> and
- driving with a middle range PCA.<sup>5</sup>

5.9 The PCA ranges are:

- **low range PCA:** a concentration of 0.05 grams or more, but less than 0.08 grams, of alcohol in 210 litres of breath or 100 millilitres of blood

3. *Road Transport Act 2013 (NSW) s 112(1)(a)*.

4. *Road Transport Act 2013 (NSW) s 110(5)(a)*.

5. *Road Transport Act 2013 (NSW) s 110(4)(a)*.

- **middle range PCA:** a concentration of 0.08 grams or more, but less than 0.15 grams, of alcohol in 210 litres of breath or 100 millilitres of blood, and
- **high range PCA:** a concentration of 0.15 grams or more of alcohol in 210 litres of breath or 100 millilitres of blood.<sup>6</sup>

5.10 The crash risk associated with a 0.15 reading (high range) is 25 times that associated with a zero reading.<sup>7</sup>

5.11 Amendments have been made so that driving with a low range PCA or with the presence of any other drug, where it is a first major offence, will be dealt with by penalty notice. The courts will, therefore, generally deal with low range PCA offences only when they are a second or subsequent major offence.<sup>8</sup>

### Available penalties and sentencing patterns

5.12 Table 5.4 sets out the penalties and the most common sentencing outcomes for the various offences for the approximately 15 months under NSW's new sentencing regime. A common penalty for the many of these offences is a fine. Fines seek to deter offending behaviour but otherwise do nothing to address offending behaviour. In the case of community correction orders and intensive correction orders, it is possible that some offenders may (depending on other eligibility requirements) undertake the Sober Driver Program which we describe below.<sup>9</sup>

**Table 5.4: Maximum penalties and sentencing outcomes for driving offences involving alcohol or drugs**

Offence		Maximum penalty	Sentencing outcome
<b>Drive/attempt drive under the influence of alcohol or any other drug</b>  <i>Road Transport Act 2013 (NSW) s 112(1)(a)–(b)</i>	First offence	18 months imprisonment and/or \$3,300 (30 penalty units); automatic 3 years disqualification (min 12 months)	Local Court 24 Sep 2018–31 Dec 2019 716 cases - fine only (45%) - community correction order (28%) - conditional release order with conviction (7%)

6. *Road Transport Act 2013 (NSW) s 108.*

7. NSW, Roads and Traffic Authority, *Drink Driving: Problem Definition and Countermeasure: Summary* (2000) 2.

8. *Road Transport Act 2013 (NSW) s 9(2A) as inserted by Road Transport Legislation Amendment (Penalties and Other Sanctions) Act 2018 (NSW) sch 1 [4].*

9. [5.34]–[5.38].



Offence		Maximum penalty	Sentencing outcome
	Second or subsequent offence	2 years imprisonment and/or \$5,500 (50 penalty units); automatic 5 years disqualification (min 2 years)	Local Court 24 Sep 2018–31 Dec 2019 157 cases - community correction order (46%) - intensive correction order (18%) - fine only (15%)
<b>Drive/attempt drive with high range PCA</b> <i>Road Transport Act 2013 (NSW)</i> s 110(5)(a)–(b)	First offence	18 months imprisonment and/or \$3,300 (30 penalty units) automatic 3 years disqualification (min 12 months)	Local Court 24 Sep 2018–31 Dec 2019 2665 offenders - community correction order (47%) - fine only (30%) - intensive correction order (14%)
	Second or subsequent offence	2 years imprisonment and/or \$5,500 (50 penalty units) automatic 5 years disqualification (min 2 years)	Local Court 24 Sep 2018–31 Dec 2019 476 offenders - intensive correction order (49%) - community correction order (34%) - imprisonment (14%)
<b>Drive/attempt drive with middle range PCA</b> <i>Road Transport Act 2013 (NSW)</i> s 110(4)(a)–(b)	First offence	9 months imprisonment and/or \$2,200 (20 penalty units) automatic 12 months disqualification (min 6 months)	Local Court 24 Sep 2018–31 Dec 2019 7287 offenders - fine only (65%) - conditional release order (without conviction) (15%) - community correction order (12%)

Offence		Maximum penalty	Sentencing outcome
	Second or subsequent offence	12 months imprisonment and/or \$3,300 (30 penalty units) automatic 3 years disqualification (min 12 months)	Local Court 24 Sep 2018–31 Dec 2019 912 offenders - community correction order (51%) - fine only (30%) - intensive correction order (9%)

Source: Judicial Commission of NSW, Judicial Information Research System, Sentencing Statistics.

## Alcohol interlock

### The alcohol interlock scheme

- 5.13 An interlock is an electronic breath test device linked to the ignition system of the vehicle. If the interlock detects more than a certain concentration of alcohol in a breath sample, the vehicle will not start.<sup>10</sup>
- 5.14 In NSW, courts are to impose restrictions on certain serious or repeat drink driving offenders, if they:
- are convicted of a “mandatory interlock offence” (that is, a novice range, special range or low range PCA offence that is a second or subsequent offence; any high range or middle range PCA offence or offence of driving under the influence of alcohol or any other drug),<sup>11</sup> or
  - were disqualified after being convicted for a “prescribed dangerous driving offence” (such as driving under influence of alcohol and causing death).<sup>12</sup>
- 5.15 The restrictions fall into two periods:
- a disqualification period, when they are disqualified from holding a licence, and

10. *Road Transport Act 2013* (NSW) s 44 definition of “interlock device”.

11. *Road Transport Act 2013* (NSW) s 210(a), s 209(1) definition of “mandatory interlock offence”.

12. *Road Transport Act 2013* (NSW) s 214(4); *Crimes Act 1900* (NSW) s 52A(1)(a), s 52A(2), s 52A(3)(a), s 52A(4).

- an interlock period, when they may obtain an “interlock licence” that allows them to drive a vehicle fitted with an interlock device that requires the driver to have a zero blood alcohol concentration (“BAC”).<sup>13</sup>
- 5.16 The minimum disqualification period ranges from 1 month to 9 months depending on the particular offence committed and whether it was a first, second or subsequent offence for an alcohol-related major offence. The court may impose a disqualification period longer than the prescribed minimum. These maximum terms range from 3 months to 12 months. The minimum interlock period ranges from 1 year to 4 years, also depending on the offence committed and may be extended (but not reduced) by court order.<sup>14</sup>
- 5.17 During the interlock period, the driver must submit to a breath test before starting the vehicle. Random breath tests are also administered throughout the journey.<sup>15</sup> Once a person successfully completes the interlock period, they can obtain a licence without interlock conditions.<sup>16</sup>
- 5.18 In certain circumstances, the court may instead issue an interlock exemption order, if it is satisfied that the offender:
- does not have access to a vehicle in which to install an interlock
  - cannot provide satisfactory breath samples because of a medical condition, or
  - is convicted of a middle range PCA offence that is a first offence and a mandatory interlock order would cause the offender severe hardship and making an exemption order is more appropriate in all the circumstances.<sup>17</sup>
- 5.19 The court cannot make an exemption order merely because the offender:
- could not afford to install or maintain an interlock device
  - will be prevented from driving in the course of their employment if a mandatory interlock order is made, or

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13. *Road Transport Act 2013* (NSW) s 211, s 209(1) definition of “interlock driver licence”; *Road Transport (Driver Licensing) Regulation 2017* (NSW) cl 83(3); NSW, Roads and Maritime Services, *Alcohol Interlock Program: Guide for Magistrates, Legal Practitioners and Police Prosecutors* (2018) 2–4, 8; Transport for NSW, “Frequently Asked Questions about the NSW Alcohol Interlock Program” (22 January 2019) *Roads and Maritime Services* <[www.rms.nsw.gov.au/roads/safety-rules/demerits-offences/drug-alcohol/alcohol-interlock-program-faqs.html](http://www.rms.nsw.gov.au/roads/safety-rules/demerits-offences/drug-alcohol/alcohol-interlock-program-faqs.html)> (retrieved 7 September 2020).

14. *Road Transport Act 2013* (NSW) s 209(1), s 211.

15. NSW, Roads and Maritime Services, *Alcohol Interlock Program: Participant Guide* (2018) 6.

16. *Road Transport Act 2013* (NSW) s 215(2)(c).

17. *Road Transport Act 2013* (NSW) s 210(b), s 212.

- the registered operator of a vehicle refuses to allow an interlock to be installed.<sup>18</sup>
- 5.20 There are policies in place to address financial hardship.<sup>19</sup> For example, there are discounted rates for concession card holders, and financial hardship assistance which covers up to 100% of program costs.
- 5.21 If the court makes an interlock exemption order, the offender is not required to complete an interlock period. However, they must still undergo a disqualification period.<sup>20</sup> If a driver is exempted from participating in the interlock program, they are disqualified for a longer upfront period than would be required if an interlock order was made.<sup>21</sup> Transport for NSW may also require a person who has received an exemption order to undertake a drink driving education program (the Sober Driver Program) before they can apply for a new licence.<sup>22</sup>
- 5.22 An offender who has received an exemption order can switch into the interlock program if there has been a change in their circumstances.<sup>23</sup> However, a driver who must undertake an interlock period cannot apply for an interlock exemption if there has been a change in circumstances, since an exemption order may only be made “at the time of conviction”.<sup>24</sup>
- 5.23 Interlocks can assist drivers to resume their normal family and work commitments, provided that the community has the assurance that an interlock is in place to prevent reoffending (avoiding the associated risk of harm). It also helps drivers who need to drive to avoid unauthorised driving and its associated risks. Special attention is therefore needed to ensure that the interlock system does not operate unfairly when a driver’s circumstances change and that the system does all it can to help drivers to avoid reoffending.

### Interlock exemption: change of circumstances

#### **Recommendation 5.1: Application for interlock exemption where circumstances have changed**

(1) The *Road Transport Act 2013* (NSW) should be amended so that a person subject to a mandatory interlock order may apply for an interlock exemption order

18. *Road Transport Act 2013* (NSW) s 212(5).

19. Under *Road Transport Act 2013* (NSW) s 48.

20. *Road Transport Act 2013* (NSW) s 212(2).

21. Under *Road Transport Act 2013* (NSW) s 205.

22. *Road Transport Act 2013* (NSW) s 212(6); *Road Transport (Driver Licensing) Regulation 2017* (NSW) cl 94(1).

23. *Road Transport Act 2013* (NSW) s 213.

24. *Road Transport Act 2013* (NSW) s 210(b).

if their circumstances (in relation to those factors listed in s 212(3)) have changed since the time of conviction.

- (2) If such an application is made, the court should determine whether to grant an interlock exemption order by having regard to the matters set out in s 212(3)–(5) of the *Road Transport Act 2013* (NSW).

- 5.24 This recommendation will remedy the anomaly that a driver who must undertake an interlock period cannot apply for an interlock exemption if there has been a change to their circumstances.<sup>25</sup> It is framed so as to ensure that a court will determine an application for an exemption order following a change in circumstances in the same way as it would an application for an exemption order made at the time of conviction.
- 5.25 This would allow an interlock exemption order to be made, for example, when the offender has developed a medical condition that prevents effective use of the interlock device (and it is not reasonably practicable to modify the interlock device to enable the offender to use it effectively). The impact of not getting an exemption and not being able to install or use an interlock device is that the person may remain disqualified for many years. Such an outcome is disproportionate to the penalty experienced by a person who can use an interlock device.<sup>26</sup>
- 5.26 One submission provides an example of a person who entered the interlock scheme but was subsequently diagnosed with throat cancer and could no longer use the interlock device. Her options under current law were to:
- continue to pay to have the device installed but not drive (as she couldn't use the device) and obtain her full licence once the interlock period expired, or
  - drop out of the interlock program and be disqualified for 5 years since she could not comply with the interlock order.
- 5.27 Neither option was ideal at a time when she needed her licence for various medical appointments.<sup>27</sup> In such a case, an interlock exemption order (even if it did involve an initial short period of disqualification) would be preferable to a mandatory interlock order.
- 5.28 Some submissions also note that a large proportion of defendants are unrepresented due to legal aid not being widely available for traffic offence matters, and some unrepresented defendants may therefore not have the knowledge or capacity to apply for an interlock exemption order in court at the time of conviction.<sup>28</sup> In our view, under the current system, it is unfair that an offender who would otherwise be eligible for an

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25. *Road Transport Act 2013* (NSW) s 210(b).

26. NSW Legal Assistance Forum, *Submission TR4*, 10.

27. NSW Legal Assistance Forum, *Submission TR4*, 10.

28. NSW Legal Assistance Forum, *Submission TR4*, 10; The Shopfront Youth Legal Centre, *Submission TR6*, 4.

interlock exemption is excluded from this arrangement simply because they are unaware it is available at the time of conviction. The implementation of our recommendation would remedy this.

### Combining interlock with other interventions

#### **Recommendation 5.2: Mandatory programs for interlock participants**

The *Road Transport Act 2013* (NSW) should be amended so that Transport for NSW may:

- (1) require an offender to whom a mandatory interlock order applies to undergo a drink driving or related education program, and
- (2) extend the interlock period until such time as the program is completed to the satisfaction of Transport for NSW.

- 5.29 The option of requiring a driver to undertake a drink driving education program is currently only available to drivers who are subject to an interlock exemption order.<sup>29</sup> We consider there is merit in extending the possibility of a drink driving education program to drivers who are subject to a mandatory interlock order.
- 5.30 Studies have found that interlock systems are generally successful at reducing repeat offending, at least while the devices are in place.<sup>30</sup> Some studies also indicate that the effects of some interlock programs persist even after removal of the device.<sup>31</sup> It has also been noted that most of the evidence about the effectiveness of overseas interlock programs relates to voluntary systems and that this evidence therefore may not be directly relevant to mandatory interlock systems.<sup>32</sup>
- 5.31 However, other research has pointed to findings that drink driving behaviour tends to return after an interlock period ends, and suggests there is a need to combine interlock

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29. *Road Transport Act 2013* (NSW) s 212(6).

30. K H Beck and others, "Effects of Ignition Interlock License Restrictions on Drivers with Multiple Alcohol Offenses: A Randomized Trial in Maryland" (1999) 89 *American Journal of Public Health* 1696, 1698; W J Rauch and others, "Effects of Administrative Ignition Interlock License Restrictions on Drivers with Multiple Alcohol Offenses" (2011) 7 *Journal of Experimental Criminology* 127, 135; W G M Vanlaar, M M Hing and R D Robertson, "An Evaluation of Nova Scotia's Alcohol Ignition Interlock Program" (2017) 100 *Accident Analysis and Prevention* 44, 50.

31. W J Rauch and others, "Effects of Administrative Ignition Interlock License Restrictions on Drivers with Multiple Alcohol Offenses" (2011) 7 *Journal of Experimental Criminology* 127, 139; W G M Vanlaar, M M Hing and R D Robertson, "An Evaluation of Nova Scotia's Alcohol Ignition Interlock Program" (2017) 100 *Accident Analysis and Prevention* 44, 50.

32. M Fitzharris and others, *Options to Extend Coverage of Alcohol Interlock Programs*, Research Report AP-R495-15 (Austroads, 2015) iii.

programs with interventions that are more likely to foster long-term behavioural change.<sup>33</sup>

- 5.32 A 2017 study in New Zealand found that interlock programs are most effective when they are mandatory and combined with rehabilitation programs, expanded eligibility, and reduced installation and maintenance costs.<sup>34</sup>
- 5.33 Allowing the discretion to extend the interlock period recognises that there may be reasons for a program taking longer than expected.

## Sober Driver Program

### Recommendation 5.3: Expanding the Sober Driver Program

The Sober Driver Program (or equivalent program) should be made available as a:

- (a) specified alcohol or other drug education program under the proposed s 215C of the *Road Transport Act 2013* (NSW)
- (b) drink driving or related education program for drivers under a mandatory interlock order (see Recommendation 5.2), and
- (c) program that satisfies the program requirement for a suspended or disqualified repeat traffic offender to drive again (see Recommendation 3.1), so long as one of the qualifying offences involved the use of drugs or alcohol.

- 5.34 The NSW Sober Driver Program is a 3-day (20-hour total) therapeutic course that seeks to change the “attitudes and behaviours of repeat and high risk drink drive offenders”.<sup>35</sup>
- 5.35 Offenders must currently complete the program if they are under one of the following court-imposed orders:
- an interlock exemption order, and/or

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33. K Terer and R Brown, *Effective Drink Driving Prevention and Enforcement Strategies: Approaches to Improving Practice*, Trends and Issues in Crime and Criminal Justice No 472 (Australian Institute of Criminology, 2014) 6; M Fitzharris and others, *Options to Extend Coverage of Alcohol Interlock Programs*, Research Report AP-R495-15 (Austroads, 2015) iii.

34. C Chester and H Roberts, “Improving the Effectiveness of Alcohol Interlocks in New Zealand” (2017) 64 *Probation Journal* 286, 291.

35. NSW Government, “Welcome to the NSW Sober Driver Program Website” (20 June 2019) *Sober Driver Program* <[www.soberdriverprogram.nsw.gov.au/](http://www.soberdriverprogram.nsw.gov.au/)> (retrieved 7 September 2020).

- a Community Corrections supervisory order arising from a drink driving offence.<sup>36</sup>
- 5.36 A sentencing court may, as part of a supervisory order (either an intensive correction order, community correction order or conditional release order), impose requirements including that an offender participate in a rehabilitation program or receive treatment, abstain from alcohol and/or drugs, and be subject to supervision.<sup>37</sup> Under such an order, an eligible person may be required to undertake the Sober Driver Program,<sup>38</sup> as has previously been the case for good behaviour bonds, community service orders and intensive correction orders.<sup>39</sup>
- 5.37 A person under a supervisory order is eligible for the program if they satisfy certain risk criteria and have committed:
- a repeat drink driving offence within 5 years of a previous offence, or
  - a single serious drink driving offence, such as high range PCA.<sup>40</sup>
- 5.38 A program under a Community Corrections supervisory order is completed through Corrective Services NSW without cost to the participant.<sup>41</sup> An offender completing the Program through Managed Training Services as part of an interlock exemption order must pay the program cost of \$700.<sup>42</sup> Financial assistance covering the full amount of the program is available for people experiencing financial hardship.<sup>43</sup>
- 5.39 Studies have found that the Community Corrections program is effective in reducing repeat drink driving offences:

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36. NSW Government, "Program Participants CSNSW Sober Driver Program" (2 December 2016) *Sober Driver Program* <[www.soberdriverprogram.nsw.gov.au/Pages/program-participants/csnsw-sdp.aspx](http://www.soberdriverprogram.nsw.gov.au/Pages/program-participants/csnsw-sdp.aspx)> (retrieved 7 September 2020).

37. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 73A(2), s 89(2), s 99(2).

38. See NSW Sentencing Council, *Repeat Traffic Offenders*, Consultation Paper (2018) [6.103]–[6.107].

39. NSW Government, "Program Participants CSNSW Sober Driver Program" (2 December 2016) *Sober Driver Program* <[www.soberdriverprogram.nsw.gov.au/Pages/program-participants/csnsw-sdp.aspx](http://www.soberdriverprogram.nsw.gov.au/Pages/program-participants/csnsw-sdp.aspx)> (retrieved 7 September 2020).

40. NSW Government, "Program Participants CSNSW Sober Driver Program" (2 December 2016) *Sober Driver Program* <[www.soberdriverprogram.nsw.gov.au/Pages/program-participants/csnsw-sdp.aspx](http://www.soberdriverprogram.nsw.gov.au/Pages/program-participants/csnsw-sdp.aspx)> (retrieved 7 September 2020).

41. Corrective Services NSW, *Sober Driver Program: A Guide for Magistrates, Legal Practitioners and Police Prosecutors* (2016) 6.

42. NSW Government, "Program Participants: MTS Sober Driver Program" (28 March 2017) <[www.soberdriverprogram.nsw.gov.au/Pages/program-participants/mts-sdp.aspx](http://www.soberdriverprogram.nsw.gov.au/Pages/program-participants/mts-sdp.aspx)> (retrieved 7 September 2020).

43. NSW, Roads and Maritime Services, "NSW Alcohol Interlock Program: Sober Driver Program", Fact Sheet (2018).



- A 2007 evaluation looked at all people in NSW with a drink driving offence between 2000 and 2005 and who had a previous offence within the last 5 years. It found that reoffending rates among program participants were lower than those in the comparison group – in particular for those who completed the program, within two years: 4.9% of program participants had reoffended compared with 10.2% in the comparison group. Those who completed the program were less than half as likely to reoffend compared with those in the comparison group.<sup>44</sup> A follow up study in 2010 found that, after 5.5 years, the group that were deterred from reoffending after 2 years remained deterred from reoffending.<sup>45</sup>
- The 2010 study also looked at a cohort of drink driving offenders from 2006–2007 and found that, after 2 years, the impact of the program was similar to that on the earlier cohort. It found that the program group was 36% less likely to reoffend compared with the comparison group.<sup>46</sup>

5.40 In our view, the Sober Driver Program (or equivalent program) should therefore also be made available:

- as a specified alcohol or other drug education program under the yet to be commenced s 215C of the *Road Transport Act 2013* (NSW)<sup>47</sup>
- as a drink driving or related education program for drivers under a mandatory interlock order (see Recommendation 5.2 above), and
- as a program that satisfies the program requirement for a suspended or disqualified repeat traffic offender to drive again (see Recommendation 3.1 above), so long as one of the qualifying offences involved the use of drugs or alcohol.

5.41 We understand that Transport for NSW is currently scoping a drink and drug driver education strategy which will aim to support the objectives of the recent drink and drug driving reforms by expanding the availability of evidence-based education to more drink and drug driving offenders. Transport for NSW acknowledges the benefits of the Sober

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44. M Brooks and others, *Evaluation Report: Sober Driver Program* (NSW Safedriver Program, 2007) 45–46. See also K L Mills and others, “An Outcome Evaluation of the New South Wales Sober Driver Programme: A Remedial Programme for Recidivist Drink Drivers” (2008) 27 *Drug and Alcohol Review* 65.

45. *Analysis of Recidivism Among Sober Driver Program Participants: Final Report*, Report to Corrective Services NSW (ARTD Consultants, 2010) 11. See also E Mazurski, D Withaneachi and S Kelly, “The NSW Sober Driver Program: Recidivism Rates and Program Parameters” (Paper presented at the Australasian Road Safety Research, Policing and Education Conference, Perth, 6–9 November 2011) 9.

46. *Analysis of Recidivism Among Sober Driver Program Participants: Final Report*, Report to Corrective Services NSW (ARTD Consultants, 2010) 13.

47. See [1.28]. *Road Transport Legislation Amendment (Penalties and Other Sanctions) Act 2018* (NSW) sch 1 [16] (not yet commenced).

Driver Program and it strongly supports the program. In our view, Transport for NSW should consider the program as part of the drink and drug driver education strategy.

- 5.42 Given the potentially large number of offenders who could benefit from an expansion of the program's availability, we consider that the government should investigate ways of targeting the program to smaller groups of offenders within each category.

# 6. High range speeding offenders

**In Brief**

Drivers who exceed the speed limit by more than 45km/h are a relatively small group of offenders with a relatively high rate of reoffending, and such speeding carries a high risk of serious injury and death. We recommend approaches to reduce such high risk reoffending by: using intelligent speed adaptation (ISA) systems; using mandatory program participation to change attitudes to high risk behaviour; and introducing a maximum penalty of imprisonment for a second or subsequent high range speeding offence.

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6.1 While NSW law contains a wide range of speeding offences, we have chosen to focus on those where a driver exceeds the speed limit by more than 45km/h.<sup>1</sup> This is because drivers who exceed the speed limit by more than 45km/h are a relatively small group of offenders with a relatively high rate of reoffending, and such speeding carries a high risk of serious injury and death.

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1. *Road Rules 2014* (NSW) r 10-2(3).

- 6.2 Drivers who exceed the speed limit by more than 45km/h are not currently dealt with like other high risk driving offenders, since the offence (like most other speeding offences) is a penalty notice offence<sup>2</sup> and is also not included in the definition of “major offence”.
- 6.3 The majority of high range speeding offenders, therefore, do not come before a court. For these offenders, the only sanctions are a penalty notice fine, licence suspension and accumulation of demerit points. These sanctions are not likely to change the behaviour of repeat traffic offenders.
- 6.4 We are therefore recommending approaches to drivers who exceed the speed limit by more than 45km/h that seek to reduce high risk reoffending by:
- moderating their behaviour through intelligent speed adaptation (“ISA”) systems<sup>3</sup>
  - changing their attitudes to high risk behaviour after any monitoring period through mandatory program participation,<sup>4</sup> and
  - deterring repeat speeding by introducing a maximum penalty for a second or subsequent offence of a term of imprisonment.<sup>5</sup>
- 6.5 The first two approaches can work separately or operate together. For example, an ISA system can be in place pending a driver’s satisfactory completion of a mandatory program.
- 6.6 The frameworks that we propose involve technical details, such as course content and type of ISA device, that government agencies would need to develop in order achieve the aims of our recommendations. We deal with some issues about the content of any mandatory programs in Chapter 3.<sup>6</sup>

## Background

### Risk from speeding

- 6.7 Speeding is one of the top three factors involved in motor accidents in NSW, along with fatigue and driving with a prescribed concentration of alcohol (“PCA”).

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2. *Road Transport (General) Regulation 2013* (NSW) sch 5.

3. [6.30]–[6.44].

4. [6.45]–[6.51].

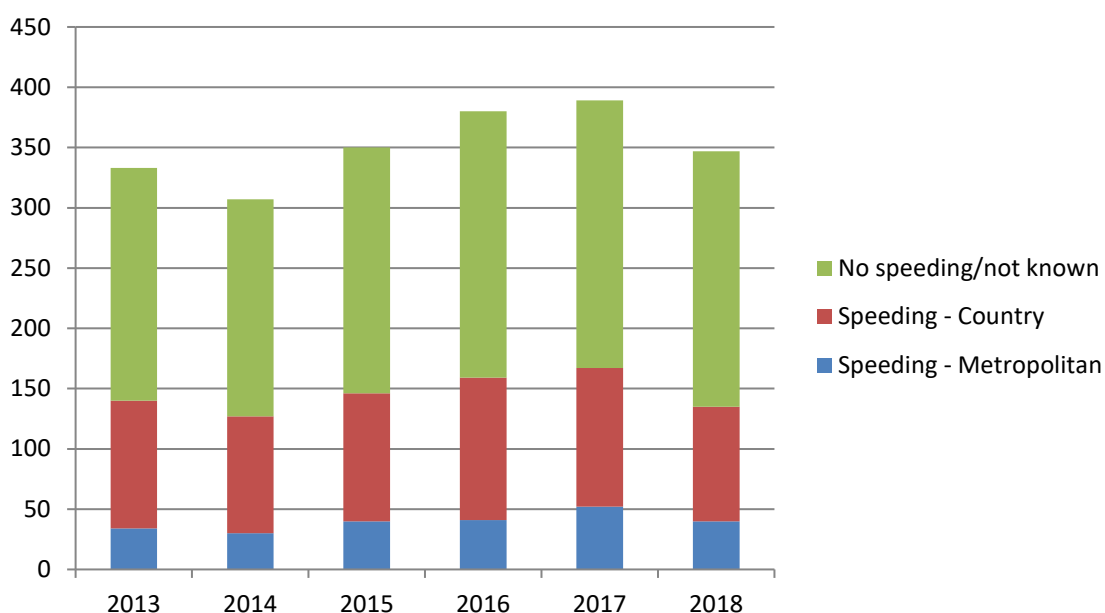
5. [6.52]–[6.64].

6. [3.6]–[3.17].

6.8 The figures we set out below relate to speeding generally, rather than speeding at more than 45km/h over the speed limit. We note, however, that the higher the speed the greater the chance of serious injury or death from a crash.<sup>7</sup>

6.9 Figure 5.1 shows road deaths where speeding was a known factor. In 2018, speeding was a factor in 135 road deaths (38%). Of these deaths, 40 took place in metropolitan areas and 95 took place in country areas. Speeding, in this context, does not differentiate between speeding that is excessive and speeding that is inappropriate for the road conditions or class of licence.<sup>8</sup>

**Figure 5.1: Road deaths – speeding, 2013–2018**



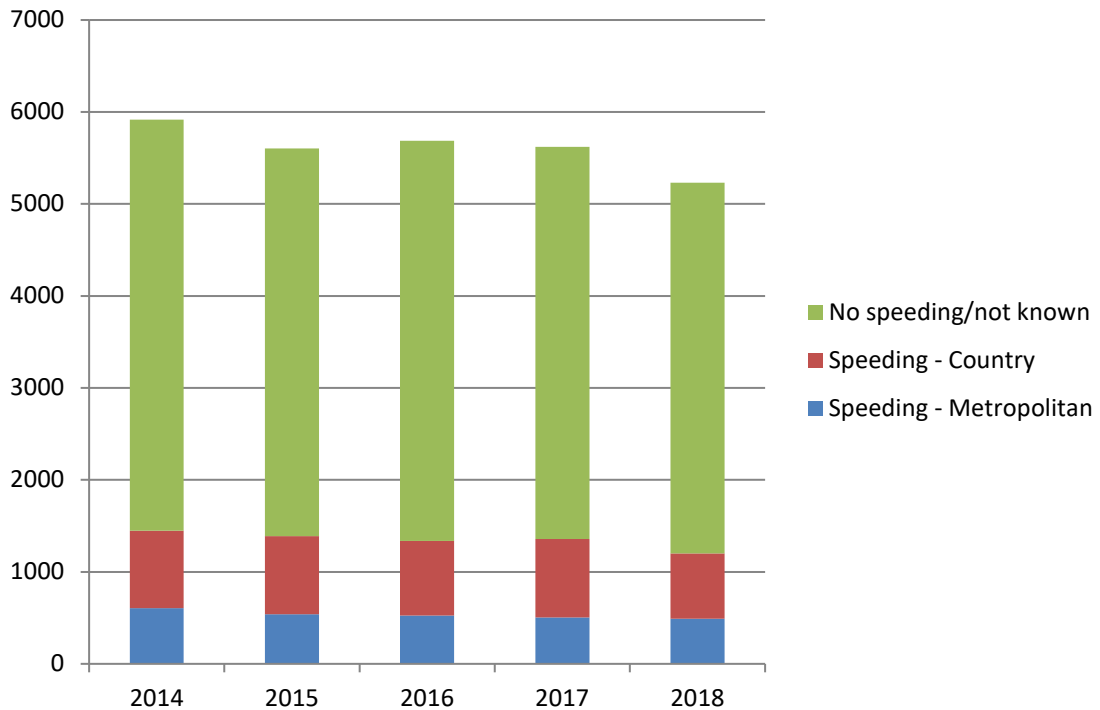
Source: Transport for NSW, Centre for Road Safety, Crash and casualty statistics (updated 4 October 2019).

6.10 Figure 5.2 shows serious road injuries where speeding was a known factor. In 2018, speeding was a factor in 1202 serious injuries (23%). Of these injuries, 491 happened in metropolitan areas and 711 happened in country areas.

7. NSW, Roads and Traffic Authority, *Speeding: Did You Know? "Safe System": The Key to Managing Road Safety*, Fact Sheet 6 (2011) 2–3; NSW, Roads and Traffic Authority, *Speeding: Did You Know? How Does Speeding Increase the Chances and Severity of a Crash?* Fact Sheet 4(2011) 1–2.

8. Parliament of NSW, Joint Standing Committee on Road Safety (Staysafe), *Driver Education, Training and Road Safety*, Report 3/56 (2017) [1.12].

**Figure 5.2: Serious injuries to road users – speeding, 2014–2018**



Source: Transport for NSW, Centre for Road Safety, Crash and casualty statistics (updated 4 October 2019).

### Current penalties and sentences

- 6.11 The offence of exceeding the speed limit by more than 45km/h principally attracts a penalty notice and demerit points. When dealt with by the Local Court, it attracts a fine as a maximum penalty and automatic disqualification upon conviction.

#### When tried in the Local Court

- 6.12 The offence of exceeding the speed limit by more than 45km/h may be tried in the Local Court in at least three circumstances:
- where the driver who is issued a penalty notice chooses to have the matter heard in court<sup>9</sup>
  - where the driver appeals an immediate licence suspension notice issued by a police officer because the driver was exceeding the speed limit by more than 45km/h,<sup>10</sup> and

9. *Road Transport Act 2013* (NSW) s 195(2).

10. *Road Transport Act 2013* (NSW) s 224(1)(c)(i), s 267, s 268(5)–(6). See NSW Sentencing Council, *Repeat Traffic Offenders*, Consultation Paper (2018) [5.5]–[5.9].

- where a driver is formally charged with the speeding offence.
- 6.13 A minimum disqualification period of 6 months applies to all drivers who exceed the speed limit by more than 45km/h. A maximum fine of \$5,500 (50 penalty units) applies to drivers of heavy vehicles or coaches and \$3,300 (30 penalty units) to all other drivers.<sup>11</sup>
- 6.14 In the four years between January 2016 and December 2019, the Local Court sentenced 1174 offenders (an average of around 293 per year) for exceeding the speed limit by more than 45km/h as a principal offence. The most common penalties were:
- a fine – 970 offenders (83%), and
  - no conviction (with or without conditions) – 184 offenders (16%).<sup>12</sup>

### **When dealt with through a penalty notice**

- 6.15 The following penalties and demerit points apply to individuals who exceed the speed limit by more than 45km/h:
- Heavy vehicle or coach (school zone) - \$3955 (level 17A) and 7 demerit points.
  - Heavy vehicle or coach - \$3821 (level 16A) and 6 demerit points.
  - Other vehicle (school zone) – \$2676 (level 15A) and 7 demerit points.
  - Other vehicle - \$2520 (level 14A) and 6 demerit points.<sup>13</sup>
- 6.16 On long weekends, the demerit points are doubled.<sup>14</sup>
- 6.17 In the financial year 2018–19, 2,941 penalty notices were issued for exceeding the speed limit by more than 45km/h.<sup>15</sup> Of these, 2,105 (71.7%) were detected by police and 836 (28.4%) were detected by speed cameras.

### **Suspension and disqualification**

- 6.18 There are a number of ways to remove a person’s driving authorisation once they are detected speeding by more than 45km/h. In theory, there are three routes to suspension and one to disqualification.<sup>16</sup> The variety of discretionary options appear intended to

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11. *Road Rules 2014* (NSW) r 10-2(3).

12. Judicial Commission of NSW, Judicial Information Research System, Sentencing Statistics.

13. *Road Rules 2014* (NSW) r 20; *Road Transport (General) Regulation 2013* (NSW) cl 123, sch 5; *Road Transport (Driver Licensing) Regulation 2017* (NSW) sch 1.

14. *Road Transport (Driver Licensing) Regulation 2017* (NSW) sch 1.

15. Revenue NSW, “Data and Statistics: Fines: Penalty Notices” <[www.revenue.nsw.gov.au/help-centre/resources-library/statistics](http://www.revenue.nsw.gov.au/help-centre/resources-library/statistics)> (retrieved 9 September 2020).

16. See [1.23].

ensure that no driver who speeds excessively can continue to drive for at least 6 months.

- 6.19 Only disqualification requires the driver to reapply before driving again, unless their licence otherwise expires during the suspension period.

### High range speeding offenders and traffic reoffending

- 6.20 Drivers detected at more than 45km/h over the speed limit appear to have a high likelihood of being repeat traffic offenders. In reaching this conclusion, we have looked at the prior and subsequent offending histories of groups of drivers who have exceeded the speed limit by more than 45km/h.

- 6.21 Because of limitations in the availability of data, we examined two groups of relevant offenders:

- drivers who received an infringement notice for exceeding the speed limit by more than 45km/h from the NSW Police Force with incident dates from January 2012 to December 2012, and
- drivers who were convicted of exceeding the speed limit by more than 45km/h in finalised court appearances from January 2012 to December 2012.

- 6.22 The prior or subsequent offences we considered were those involving injury or death or a high risk of injury or death, namely:

- exceeding the speed limit by more than 45km/h and by more than 30km/h<sup>17</sup>
- alcohol and drug offences, including driving under the influence of alcohol or any other drug, driving with a high range or middle range PCA, and driving with the presence of any other drug<sup>18</sup>
- severe and critical risk breaches of maximum work hours and minimum rest periods for drivers of fatigue-regulated heavy vehicles,<sup>19</sup> and
- offences relating to other unsafe activities including predatory driving, police pursuits, menacing driving, reckless, furious or dangerous driving, unauthorised racing and related activities, and negligent driving.<sup>20</sup>

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17. *Road Rules 2014* (NSW) r 10-2(3), r 10-2(5).

18. *Road Transport Act 2013* (NSW) s 110, s 111, s 112.

19. *Heavy Vehicle National Law* (NSW) s 228(1), s 250(1), s 256(1), s 260(1), s 263(1).

20. *Crimes Act 1900* (NSW) s 51A, s 51B(1), s 52A, s 53; *Road Transport Act 2013* (NSW) s 115(1), s 116, s 117, s 118.



- 6.23 In the case of the 2,306 drivers who received a penalty notice from the police in 2012 for exceeding the speed limit by more than 45km/h:
- 481 (20.9%) had one or more proven relevant driving offence and/or penalty notice in the previous 5 years
  - 626 (27.1%) had one or more proven relevant driving offence and/or penalty notice within 5 years of the speeding offence
  - 214 (9.3%) had one or more proven offence of driving without a licence and/or penalty notice in the previous 5 years, and
  - 461 (20.0%) had one or more proven offence of driving without a licence and/or penalty notice within 5 years of the speeding offence.<sup>21</sup>
- 6.24 It is possible that there is significant overlap between the four categories set out above.
- 6.25 We also looked at some limited data for the 457 drivers convicted in 2012 of exceeding the speed limit by more than 45km/h. In these cases we could only access data about prior and subsequent offences that were likewise the subject of a conviction. We could not link to data about prior and subsequent penalty notice offences. Of these drivers:
- 58 (12.7%) had one or more proven relevant driving offence in the previous 5 years
  - 50 (11.9%) had one or more proven offence of driving without a licence in the previous 5 years
  - 57 (12.5%) had one or more proven relevant driving offence within 5 years of the speeding offence, and
  - 90 (19.7%) had one or more proven offence of driving without a licence within 5 years of the speeding offence.
- 6.26 Again, it is possible that there is significant overlap between the four categories set out above.
- 6.27 Dealing with high range speeding offenders through the current system of penalty notices, loss of points, and suspension may not necessarily be effective for repeat offenders.
- 6.28 A 2011 audit performance report identified a “small minority of young people who will drive recklessly” who would likely not change their behaviour because of a graduated

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21. NSW Bureau of Crime Statistics and Research, reference 19-17220.

licensing system.<sup>22</sup> They found that provisional drivers constituted around 7% of licence holders but were responsible for 22% of speeding infringements in excess of 45km/h.<sup>23</sup> In the report's view, there was a need for "additional programs and sanctions" for young drivers in these and other high risk categories.<sup>24</sup>

- 6.29 The Centre for Accident Research and Road Safety - Queensland has also identified high range repeat speeders as a group requiring special attention:

Overall, the results indicate that speeding offenders are not an homogeneous group and that, therefore, more tailored and innovative sanctions should be considered and evaluated for high-range recidivist speeders because they are a high-risk road user group.<sup>25</sup>

## Intelligent speed adaptation systems

### Recommendation 6.1 Speed limiters/monitors

- (1) The provisions relating to speed inhibitor conditions in s 204(4) and s 204(6) of the *Road Transport Act 2013* (NSW) should be repealed and replaced by a provision that is flexible enough to allow a variety of technological options for limiting and monitoring a driver's speed.
- (2) The government should investigate the feasibility of a speed monitoring/limiting program that allows selected speeding offenders to have part of their suspension period lifted so that they can drive but only when they have an ISA device fitted to their vehicle.

- 6.30 ISA devices can be installed in a vehicle to manage speed. There are two forms of ISA device:

- **speed limiters** that physically prevent the car from exceeding the speed limit, often subject to a safety override, and
- **speed monitors** that alert the driver when they exceed the speed limit but do not prevent speeding altogether.

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22. NSW Auditor-General, *Improving Road Safety: Young Drivers*, Performance Audit Report (2011) 13.

23. NSW Auditor-General, *Improving Road Safety: Young Drivers*, Performance Audit Report (2011) 21.

24. NSW Auditor-General, *Improving Road Safety: Young Drivers*, Performance Audit Report (2011) 13.

25. B Watson and others, "Profiling High-Range Speeding Offenders: Investigating Criminal History, Personal Characteristics, Traffic Offences, and Crash History" (2015) 74 *Accident Analysis and Prevention* 87, 87.

- 6.31 Within each of those categories, there are a variety of technological options. We do not intend our recommendations to impact on the range of options that can be employed.

### Existing legislative framework

- 6.32 The existing legislative framework for ISA systems in NSW is inadequate and provides only for speed limiters.
- 6.33 The general provisions relating to speed inhibitor conditions, except for amendments at the time of metric conversion, have effectively not been updated since 1937<sup>26</sup> – a time when speed limits, and the capacity of motor vehicles, were vastly different to what they are today. Currently, regulations may be made to impose speed inhibitor conditions, preventing a vehicle from travelling over 60km/h, when a driver is convicted of driving at a speed dangerous to the public or any other prescribed speeding offence.<sup>27</sup> No such regulations are currently in place.
- 6.34 Speed limiting/monitoring technology is already used to regulate some heavy vehicles.<sup>28</sup>

### The effectiveness of ISA systems

- 6.35 Trials of speed limiting and monitoring technology in NSW and elsewhere have shown that ISA devices can at least stop some drivers from speeding while the devices are in place:
- In 2009–2010, NSW undertook a trial of ISA systems. The ISA systems effectively reduced speeding for 89% of participating drivers,<sup>29</sup> including for repeat and deliberate speeders.<sup>30</sup> The trial results also showed, through mathematical modelling, that the ISA systems could lead to a 19% reduction in fatalities and serious injury accidents.<sup>31</sup>

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26. *Traffic Act 1909* (NSW) s 10(3B) inserted by *Motor Traffic (Amendment) Act 1937* (NSW) s 5(1)(g).

27. *Road Transport Act 2013* (NSW) s 204(4), s 204(6) definition of “speed inhibitor condition”.

28. *Road Transport Act 2013* (NSW) pt 6.2; *Road Transport (General) Regulation 2013* (NSW) cl 56.

29. Parliament of NSW, Joint Standing Committee on Road Safety (Staysafe), *Speed Zoning and its Impact on the Demerit Points Scheme*, Report 4/55 (2014) [4.47].

30. K Creef and others, “Road Safety Benefits of Intelligent Speed Adaptation for Australia” (Paper presented at Australasian Road Safety Research, Policing and Education Conference, Perth, 6–9 November 2011) 5.

31. Transport for NSW, Centre for Road Safety, “Intelligent Speed Adaptation” (21 September 2016) <[www.roadsafety.transport.nsw.gov.au/research/roadsafetytechnology/isa/index.html](http://www.roadsafety.transport.nsw.gov.au/research/roadsafetytechnology/isa/index.html)> (retrieved 8 September 2020).

- A study of a 2010 Dutch trial of ISA technology (both speed limiters and speed monitors) for serious speeders found the ISA devices to be highly effective in reducing speeding behaviour.<sup>32</sup>
  - A Malaysian study of an ISA system found that other benefits included that participants felt safer while driving, and their driving behaviour generally improved.<sup>33</sup>
  - An evaluation of a Victorian trial of speed monitoring systems for 39 recidivist offenders found that they reduced mean speed, time spent over the speed limit, and time to return to the speed limit.<sup>34</sup> The study estimated that ISA systems would likely reduce fatal accidents by 180 over a period of 5 years.<sup>35</sup>
- 6.36 ISA devices do affect driver behaviour while installed and can, therefore, reduce accidents and fatalities that result from speeding. However, some studies have noted that ISA systems are ineffective in causing long-term speeding behaviour change after they are removed.<sup>36</sup>
- 6.37 A cost benefit analysis of introducing more general ISA systems in Australia, based on the effects of different types of ISA in a UK trial, found that fitting:
- an advisory ISA device (that uses only audio and visual signals to warn drivers that they are travelling over the speed limit) to all vehicles would reduce injury crashes by nearly 8% and save \$1.2b per year
  - a supportive ISA device (that prevents the vehicle from breaking the speed limit, but that can be overridden) to all vehicles would reduce injury crashes by 15% and save \$2.2b per year, and

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32. J W G M van der Pas and others, "Intelligent Speed Assistance for Serious Speeders: The Results of the Dutch Speedlock Trial" (2014) 72 *Accident Analysis and Prevention* 78, 91.

33. S Ghadiri and others, "Intelligent Speed Adaptation: Preliminary Results of On-Road Study in Penang, Malaysia" (2013) 36 *IATSS Research* 106, 110–111.

34. K Young and others, *Repeat Speeders Trial*, Final Evaluation Report (Monash University Accident Research Centre, 2013) 107.

35. K Young and others, *Repeat Speeders Trial*, Final Evaluation Report (Monash University Accident Research Centre, 2013) 109.

36. J W G M van der Pas and others, "Intelligent Speed Assistance for Serious Speeders: The Results of the Dutch Speedlock Trial" (2014) 72 *Accident Analysis and Prevention* 78, 91; K Young and others, *Repeat Speeders Trial*, Final Evaluation Report (Monash University Accident Research Centre, 2013) 100; Parliament of NSW, Joint Standing Committee on Road Safety (Staysafe), *Speed Zoning and its Impact on the Demerit Points Scheme*, Report 4/55 (2014) [4.49] citing M A Regan and others, *On-Road Evaluation of Intelligent Speed Adaptation, Following Distance Warning and Seatbelt Reminder Systems: Final Results of the TAC SafeCar Project* (Monash University, 2006) 202.

- a limiting ISA device (that prevents the vehicle from breaking the speed limit, but cannot be overridden) to all vehicles would reduce injury crashes by 26% and save \$3.7b per year.<sup>37</sup>

6.38 The economic analysis (considering installation costs of ISA systems) showed that ISA can be a cost effective way to reduce injury crashes.<sup>38</sup> A more targeted fitting of ISA systems to identified speed offenders may prove to be even more effective at reducing injury and death.

### Developing a new framework

6.39 Recommendation 5.1(1) aims to allow for the development of more flexible options than speed inhibitor conditions that limit a vehicle to speeds under 60km/h, so that regulations can provide that certain classes of driver may be made subject to one of a variety of technological options for limiting and monitoring their speed. Various technological solutions, in addition to more traditional physical speed limiters, could include devices that send data back to the authorities about speeding behaviour,<sup>39</sup> or that simply advise drivers that they are exceeding the speed limit.

6.40 A number of reports in NSW have recommended the use of ISA devices for some traffic offenders. A report by the NSW Joint Standing Committee on Road Safety in 2014 recommended introducing user-pays, compulsory ISA devices for repeat traffic offenders.<sup>40</sup> An audit performance report in 2011 suggested that the government should consider compulsory in-vehicle monitoring through ISA systems for both young and older serious and repeat speeding offenders, pointing to their effectiveness in improving driver compliance with speed limits and reducing crashes.<sup>41</sup>

6.41 In our view some form of speed restriction or monitoring should be applied at least to high range or repeat speeding offenders. There is great potential for technology to ensure compliance. Transport for NSW would need to investigate the effectiveness of various options in changing behaviour in the high risk groups.

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37. S Doecke and J E Woolley, *Cost Benefit Analysis of Intelligent Speed Assist* (Centre for Automotive Safety Research, University of Adelaide, 2010) iii. See also J Woolley and J Crozier, *Inquiry into the National Road Safety Strategy 2011–2020* (2018) 21.

38. S Doecke and J Woolley, “Cost Benefit Analysis of Intelligent Speed Assist” (Centre for Automotive Safety Research, University of Adelaide, 2010) iii. See also J Woolley and J Crozier, *Inquiry into the National Road Safety Strategy 2011–2020* (2018) 15.

39. J W G M van der Pas and others, “Intelligent Speed Assistance for Serious Speeders: The Results of the Dutch Speedlock Trial” (2014) 72 *Accident Analysis and Prevention* 78, 79.

40. Parliament of NSW, Joint Standing Committee on Road Safety (Staysafe), *Speed Zoning and its Impact on the Demerit Points Scheme*, Report 4/55 (2014) [4.62]–[4.63], rec 13.

41. NSW Auditor-General, *Improving Road Safety: Young Drivers*, Performance Audit Report (2011) 22.

- 6.42 One option, which we consider the government should investigate, is to employ ISA devices, so that speeding offenders may have part of their suspension period lifted and be allowed to drive only when they have an ISA device fitted to their vehicle. This would have some similarities with the alcohol interlock system,<sup>42</sup> but would be different in that:
- it would not be administered by the courts, given that most speeding offenders receive penalty notices and do not come before the courts, and
  - exemption orders (which are granted by the courts) would be largely unnecessary because there would not be medical grounds for being unable to take part in the scheme as there are with alcohol interlock.
- 6.43 The requirement to participate in an ISA program would, therefore, need to be imposed by Transport for NSW. The model for such an arrangement can be found in the as yet uncommenced provisions for low range PCA offenders, whereby Transport for NSW may, by notice in writing, require a person to undertake a specified alcohol or other drug education program.<sup>43</sup>
- 6.44 Financial assistance would also need to be available to ensure that all offenders have the opportunity to participate in an ISA program. Such assistance is available for interlock participants in the form of concession rates for some concession card holders and financial assistance for people in severe financial hardship.<sup>44</sup>

## Mandatory program participation

### **Recommendation 6.2: Mandatory program participation for high range speeding offenders**

- (1) When, as a result of an offence of exceeding the speed limit by more than 45km/h:
  - (a) a driver's licence is suspended (whether by notice issued by the police, by Transport for NSW, or by operation of demerit points), or
  - (b) a driver is found guilty by the Local Court,Transport for NSW may require the driver undertake a program of the kind identified in Recommendation 3.1(1), subject to Recommendation 3.1(4).
- (2) Any period of suspension or disqualification does not end until the driver has undertaken the program to the satisfaction of Transport for NSW.

- 6.45 In our view, many among the high range speeding offenders would benefit from being required to undertake a program aimed at changing their attitudes to risk and, therefore,

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42. *Road Transport Act 2013* (NSW) s 208–215B.

43. See [1.28].

44. NSW, Roads and Maritime Services, *Alcohol Interlock Program: Participant Guide* (2018) 10.

their offending behaviour. The program should be along the lines of that recommended in Chapter 3.

- 6.46 We note that the UK National Speed Awareness Course focussed on changing the behaviour of low range speeding offenders who were assumed to be inadvertent offenders. While offending rates reduced, the Course had no detectable impact on serious accidents.<sup>45</sup> Those exceeding the speed limit by more than 45km/h are more likely to be acting deliberately, and any change in their behaviour that reduces speed is likely to lead to a reduction of instances of serious injury or death.
- 6.47 When the courts deal with such offenders, it is already possible for them to impose a conditional release order (“CRO”) that includes a rehabilitation program condition.<sup>46</sup> In the period 24 September 2018 to 31 December 2019, the Local Court dealt with 229 drivers who exceeded the speed limit by more than 45km/h in a class A or B motor vehicle. Of these, 39 (17%) received CROs.<sup>47</sup> However, we are not aware that such conditions have ever been included.
- 6.48 We recommend an approach based on the not yet commenced provisions relating to alcohol or other drug education programs under which the period of licence ineligibility is extended until the person has undertaken, and passed, the program to the satisfaction of Transport for NSW.<sup>48</sup>
- 6.49 This would ensure that all high range speeding offenders, no matter how they are dealt with, may be required to undertake a program aimed at behavioural change, and would not be permitted to drive until they have satisfactorily completed it.
- 6.50 In recommending such a scheme for drivers who exceed the speed limit by more than 45km/h, we particularly note the relatively small number of offenders (no more than 3,000 annually) compared with other driving offences that have much higher numbers but may not have the same rate of subsequent high risk offending.
- 6.51 Because of the need for further evidence and analysis to determine the benefits and costs of such a scheme, we consider that there should be a trial subject to review by Transport for NSW. Any such trial should be available across the state and specifically not limited to metropolitan areas.

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45. See [3.14]-[3.17].

46. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 99(2).

47. Judicial Commission of NSW, Judicial Information Research System, Sentencing Statistics.

48. *Road Transport Act 2013* (NSW) proposed s 215C: *Road Transport Legislation Amendment (Penalties and Other Sanctions) Act 2018* (NSW) sch 1 [16] (not yet commenced). See [1.28].

## Increased penalties for repeat high range speeding

### **Proposal 6.3: Imprisonment as a maximum penalty for a second high range speeding offence**

The law relating to drivers who exceed the speed limit by more than 45km/h should be amended so that a driver who exceeds the speed limit by more than 45km/h and has, in the previous 5 years, committed one or more offences of exceeding the speed limit by more than 45km/h:

- (a) may not be dealt with by way of a penalty notice for the offence, and
- (b) should, instead, be subject to a maximum penalty of:
  - (i) imprisonment for 9 months and/or 50 penalty units, and automatic disqualification for 12 months (with a minimum disqualification of 6 months), or
  - (ii) imprisonment for 12 months and automatic disqualification for 12 months (with a minimum disqualification of 6 months), in the case of the driver of a heavy vehicle or coach.

- 6.52 In NSW, a driver who exceeds the speed limit by more than 45km/h is subject to a fine of \$3,300 (30 penalty units) and 6 months disqualification, or, in the case of the driver of a heavy vehicle or coach \$5,500 (50 penalty units) and 6 months disqualification.
- 6.53 If the offence is dealt with by way of penalty notice, the fines range from \$2520 to \$3955 with the accrual of up to 7 demerit points (or 14 demerit points on long weekends).<sup>49</sup>
- 6.54 Every other Australian jurisdiction but one, also has a system where those who exceed the speed limit by more than 45km/h are subject to a maximum penalty of a fine that may be satisfied by the payment of a lesser amount through a penalty notice or similar arrangement.<sup>50</sup> Each jurisdiction varies in the amount of the maximum penalty, the penalty notice amount and the application of demerit points and periods of suspension or disqualification. Such variations are entirely consistent with the national road rules scheme, since penalties and penalty levels are set at the discretion of each jurisdiction.
- 6.55 The extreme risk of injury or death involved in exceeding the speed limit by more than 45km/h and the deliberate nature of such offending, warrants a more serious approach than this. As we note above, speeding is a large factor in the death and injury tolls.

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49. See [6.15]-[6.16].

50. *Road Transport (Road Rules) Regulation 2017* (ACT) cl 20; *Road Transport (Offences) Regulation 2005* (ACT) sch 1 part 1.12A item 1.4; *Transport Operations (Road Use Management—Road Rules) Regulation 2009* (Qld) cl 20; *State Penalties Enforcement Regulation 2014* (Qld) sch 1; *Australian Road Rules* (SA) r 20; *Road Traffic (Road Rules - Ancillary and Miscellaneous Provisions) Regulations 2014* (SA) reg 67(a); *Road Traffic (Miscellaneous) Regulations 2014* (SA) sch 4 pt 3; *Road Rules 2019* (Tas) r 20; *Traffic (Compliance and Enforcement) Regulations 2017* (Tas) sch 1 pt 1 div 2(1) item 33–34; *Road Safety Rules 2017* (Vic) r 20(3); *Road Safety (General) Regulations 2019* (Vic) sch 7 item 37; *Road Traffic Code 2000* (WA) reg 9(2), reg 11.



- 6.56 Earlier in this chapter, we have proposed that those who exceed the speed limit by more than 45km/h for a first time should be required to undergo a course designed to address their attitude to risk before being allowed to drive again. One of the aims of this approach is to ensure that the driver's behaviour is targeted without the need to engage the resources of the criminal justice system.
- 6.57 However, we believe that any driver who offends in this way again, after being given an opportunity to address their attitudes to risk, should be subject to a more serious set of penalty options. There are some concerns about the criminogenic effect of short sentences of imprisonment (especially since there are no programs in custody specifically aimed at addressing speeding behaviour), but we would expect imprisonment to serve as a deterrent and that it would be imposed only in the most serious cases. We note, for example, that, in the case of driving with a high range PCA (first offence), 200 of 8,578 offenders (2.3%) received a sentence of imprisonment in the period 2016–2019. In the case of driving with a high range PCA (subsequent offence), 269 of 1,672 offenders (16.1%) received a sentence of imprisonment in the same period. Setting a maximum penalty of imprisonment will also allow the courts to impose an intensive correction order or a community correction order, which would otherwise not be available at sentencing for a fine only offence.
- 6.58 The Northern Territory is the one Australian jurisdiction that sets penalties of imprisonment for exceeding the speed limit by 45km/h or more. There are two relevant offence provisions. The first is an offence under the *Traffic Act 1987* (NT) that sets a maximum penalty of \$3140 (20 penalty units) or 2 years' imprisonment.<sup>51</sup> The second is an offence of breaching a rule under the *Australian Road Rules* (NT)<sup>52</sup> that sets a maximum penalty of \$3140 (20 penalty units) or 6 months' imprisonment.<sup>53</sup> This applies to any speeding offence under the *Australian Road Rules*, which includes exceeding the speed limit by over 45km/h.<sup>54</sup> Both offences may, instead, be subject to an infringement notice imposing a fine of \$1,000 for exceeding the speed limit by over 45km/h.<sup>55</sup>
- 6.59 In 2019:
- for the offence under the *Traffic Act* there were:
    - 9 infringement notices, and
    - 52 court finalised charges (3 charges resulted in sentences of imprisonment, 3 resulted in juvenile detention, and 31 resulted in fines).

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51. *Traffic Act 1987* (NT) s 30A(1), as inserted by *Traffic Amendment Act 1998* (NT) s 6.

52. *Traffic Regulations 1999* (NT) sch 3.

53. *Traffic Regulations 1999* (NT) reg 93.

54. *Australian Road Rules* (NT) r 20.

55. *Traffic Regulations 1999* (NT) sch 1 item 1.

- for the offence under the *Australian Road Rules* there were:

- 92 infringement notices issued and
- 3 court finalised charges (1 fine, 2 withdrawn)

6.60 In some cases, the charges counted above are not the only or most serious offence committed and dealt with by the court, so the sentence imposed may not relate solely to the speeding offence. For example, the 6 charges that resulted in a custodial sentence involved dangerous driving during a police pursuit and one also involved driving with a mid-range PCA and with the presence of a drug. It is likely that a standalone speeding offence would not, by itself, receive a custodial sentence.

6.61 One reason for introducing the penalty under the *Traffic Act 1987* (NT) was that the more serious charge of dangerous driving was too difficult to prove, given the need to prove that the driving was dangerous in the particular conditions.<sup>56</sup> We agree that driving at more than 45km/h over the speed limit is objectively extremely dangerous and should be treated as such. Serious terms of imprisonment are already available in NSW where driving at more the 45km/h over the speed limit results in death or grievous bodily harm (imprisonment for 14 years and 11 years, respectively).<sup>57</sup>

6.62 In setting the maximum penalty for the offence of exceeding the speed limit by more than 45km/h on two or more occasions within 5 years, we have borne in mind the maximum penalties that currently apply to serious PCA offences:

- high range PCA (second or subsequent offence): 50 penalty units and/or imprisonment for 2 years
- high range PCA (first offence): 30 penalty units and/or imprisonment for 18 months<sup>58</sup>
- middle range PCA (second or subsequent offence): 30 penalty units and/or imprisonment for 12 months, and
- middle range PCA (first offence): 20 penalty units and/or imprisonment for 9 months.<sup>59</sup>

We have also considered the existing maximum penalties for high range speeding<sup>60</sup> and the significantly higher penalties that apply when the speeding results in death or grievous bodily harm.

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56. Northern Territory, *Parliamentary Debates*, Legislative Assembly, 1 December 1997, 270.

57. *Crimes Act 1900* (NSW) s 52A(2), s 52A(4), s 52A(7)(b).

58. *Road Transport Act 2013* (NSW) s 110(5).

59. *Road Transport Act 2013* (NSW) s 110(4).

60. [6.12]–[6.13].

- 6.63 Approximately 3,000 penalty notices are issued annually to drivers who have exceeded the speed limit by more than 45km/h. About 200 matters are currently dealt with annually by the courts. Only a small number of the offenders represented by this data will have committed the same offence on one or more occasion in the previous 5 years. In 2018/2019, of the 2602 drivers who received penalty notices for exceeding the speed limit by more than 45km/h, 163 (6.3%) had committed the same offence within the previous 5 years. Of these repeat offenders, 45 committed the previous offence on the same day.<sup>61</sup>
- 6.64 We have chosen to target those who have committed the same offence previously, rather than the larger group who may have committed other serious driving offences, because of the need to ensure that the scheme is targeted at the small number of high risk speeding offenders.
- 6.65 We note that recent amendments to the *Road Transport Act 2013* (NSW)<sup>62</sup> that made certain PCA offences penalty notice offences provide a model for determining what is a second or subsequent offence,<sup>63</sup> including where a driver commits more than one offence on the same occasion.<sup>64</sup>
- 6.66 There may be some problems of proof, where the offence has been detected by a speed camera, in identifying the driver responsible for speeding. This may already be a problem in cases where a penalty notice is challenged in court or where the speeding offence is subject to a court attendance notice. The *Road Transport Act 2013* (NSW) currently deals with questions of liability for camera recorded offences.<sup>65</sup>
- 6.67 There is an evidence gap in relation to the type of offenders who may be impacted by such a proposal, since demographic information is not included in penalty notice records. We therefore suggest closely monitoring the impact of any new penalties on vulnerable communities.

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61. Data supplied by Transport for NSW (6 April 2020).

62. Introduced by *Road Transport Legislation Amendment (Penalties and Other Sanctions) Act 2018* (NSW) sch 1.

63. *Road Transport Act 2013* (NSW) s 4(5).

64. *Road Transport Act 2013* (NSW) s 9(2A).

65. *Road Transport Act 2013* (NSW) pt 7.3 div 2.



# Appendix A:

## Preliminary submissions

- PTR1 Kevin Saul (27 April 2018)
- PTR2 Enough is Enough (8 May 2018)
- PTR3 Nan Cowling (18 May 2018)
- PTR4 Max Bancroft (18 May 2018)
- PTR5 Mark Ehrman (18 May 2018)
- PTR6 Sally Page (18 May 2018)
- PTR7 Melia Sutton (18 May 2018)
- PTR8 Helen Manning (18 May 2018)
- PTR9 (Confidential) (19 May 2018)
- PTR10 (Name withheld) (20 May 2018)
- PTR11 Nathan Smith (21 May 2018)
- PTR12 Mark Lonergan (24 May 2018)
- PTR13 Margaret Bloor (28 May 2018)
- PTR14 (Confidential) (6 June 2018)
- PTR15 Amy Gillett Foundation (8 June 2018)
- PTR16 NSW Director of Public Prosecutions (12 June 2018)
- PTR17 Chief Magistrate of the NSW Local Court (13 June 2018)
- PTR18 Juvenile Justice NSW (25 June 2018)
- PTR19 Pedestrian Council of Australia (30 June 2018)

# Appendix B:

## Submissions

- TR1 Max Bancroft (5 December 2018)
- TR2 NSW Government (28 February 2019)
- TR3 Mid North Coast Community Legal Centre (22 March 2019)
- TR4 NSW Legal Assistance Forum (29 March 2019)
- TR5 Legal Aid NSW (2 April 2019)
- TR6 The Shopfront Youth Legal Centre (5 April 2019)
- TR7 The Law Society of NSW (8 April 2019)
- TR8 NSW Police Force, Traffic and Highway Patrol Command, Crash Investigations Unit (29 April 2019)
- TR9 Office of the Director of Public Prosecutions (NSW) (10 May 2019)

# Appendix C:

## Consultations

### **NSW Legal Assistance Forum, Fines and Traffic Law Working Group**

#### **15 August 2018**

Clara Bradley (NSW Council of Social Services)  
Julianne Evans (Revenue NSW)  
Ben Finn (NSW Registry of Births, Deaths and Marriages)  
Penny Josey (Aboriginal Services Unit)  
Stephen Laskar (Legal Aid NSW)  
Jenny Lovric (Legal Aid NSW)  
Paula Novotna (Legal Aid NSW)  
Meredith Osbourne (Legal Aid NSW)  
Jane Sanders (Shopfront Youth Legal Centre)

### **Road Safety Education**

#### **17 October 2018**

Brooke O'Donnell, General Manager, Education and Communications, Road Safety Education

### **Transport for NSW, Centre for Road Safety**

#### **17 October 2018**

Gavin Crouch, Manager Sanctions, Transport Policy, Freight, Strategy and Planning  
Justina Diaconu, Principal Policy Officer  
Julie Thompson, Associate Director, Road Safety Policy

### **NSW Police Crash Investigation Unit**

#### **17 April 2019**

Assistant Commissioner Mick Corboy  
Julie Middlemiss  
Lawrence Milburn  
Sam Nelson

