The Shopfront
YOUTH LEGAL CENTRE

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By Email

Repeat traffic offenders: submission from The Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre welcomes the opportunity to provide a submission in response to your Consultation Paper on *Repeat traffic offenders*. We thank you for allowing us an extension of time.

About The Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged young people aged 25 and under. Established in 1993, the Shopfront is a joint project of Mission Australia, the Salvation Army and the law firm Herbert Smith Freehills.

We represent and advise young people on a range of legal issues, with a primary focus on criminal law. We are based in the inner city of Sydney but work with young people from all over the Sydney metropolitan area. Our four solicitors appear almost daily for vulnerable young people in the Local, Children's and District Courts.

The Shopfront's clients come from a range of cultural backgrounds, including a sizeable number of indigenous young people. Common to most of our clients is the experience of homelessness, having been forced to leave home due to abuse, neglect, domestic violence or extreme family dysfunction. Most of our clients have limited formal education and therefore lack adequate literacy, numeracy and vocational skills. A substantial proportion also have a serious mental health problem or an intellectual disability.

General comments

Firstly, we commend the Sentencing Council on having prepared a detailed Consultation Paper which draws a clear distinction between offenders whose actions pose a real danger on the road, and those whose offending is related to the status of their licence or registration.

We will not be addressing all the questions posed in the Consultation Paper, but will focus on the issues most relevant to our service and our clients.

The Shopfront's solicitors have extensive experience appearing for children and young adults charged with traffic offences. We also act for clients in licence suspension appeals, applications to quash habitual traffic offender declarations and applications for re-licensing.

Our volume of work in this area is partly due to the fact that Legal Aid is not widely available for traffic matters in Local Courts, and also because our vulnerable young clients face significant barriers when it comes to obtaining and keeping a driver licence.

Problems such as poverty, immaturity, lack of access to public transport, lack of access to driving tuition, licence sanctions imposed due to inability to pay fines, and ignorance about appeal and review rights all play their part.

It is important that any response to repeat traffic offenders recognises the personal and social circumstances in which the offending takes place.

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Section 2: Driving offences involving harm or a high risk of harm

Question 2.5: We wish to comment particularly about the offence of "drive with illicit drug present in oral fluid/ blood/urine".

As to the maximum penalty, it is entirely appropriate that this offence does not carry a sentence of imprisonment. The maximum fine is high but the court has discretion, having regard to the circumstances of the offence and the offender's capacity to pay.

We are strongly only opposed to the existence of an automatic disqualification period for this offence. This is because the offence can be made out if a person has a mere trace of an illicit drug in their saliva or bloodstream. The analysis certificates provided by the police in these cases do not reveal the concentration of drugs in the driver's system. There need not be (and in most cases there is not) any evidence of intoxication or impairment to driving.

Unlike PCA offences (where the blood-alcohol concentration levels bears some relationship to the degree of impairment), there appears to be no sound scientific basis for criminalising driving with the mere presence of illicit drugs in one's system.

In our view this offence should be repealed. If it is to be retained as an offence, we would like to see more robust evidence linking a particular concentration of drugs to impairment of driving. The testing threshold must be raised to an appropriate level so as to exclude people with small traces of the substance in their system.

Although illicit drugs undoubtedly have the capacity to impair driving, and a significant proportion of people involved in fatal crashes have illicit drugs in their system, it is noteworthy that illicit drugs are often present together with alcohol or other substances which impair driving. People who are *affected* by drugs can of course be charged with "driving under the influence".

We note that police will be able to issue penalty notices for "drive with illicit drug" offences (along with low, special and novice range PCA) from May 2019. We are not opposed to this in principle. However, we strongly oppose the accompanying police power to issue an immediate suspension notice.

Traditionally, immediate suspensions have been associated with offences carrying a high risk of harm, where there is a case to be made for immediately taking the driver off the road. Examples include mid- and high-range PCA, driving under the influence and driving more than 45 km over the speed limit.

As already discussed, a driver charged with "drive with illicit drug in oral fluid" may have only a small trace of drugs in their system and their driving may not be impaired at all. The level of impairment of a driver in the novice, special or low-range PCA is also relatively low and, in our view, does not justify an immediate suspension.

Although a driver may appeal to the Local Court against an immediate suspension notice, the appeal may take some weeks to be listed and the licence suspension is not stayed in the meantime. Further, the test for granting such an appeal is "exceptional circumstances", which is a very high bar.

We believe the introduction of immediate suspension notices to accompany penalty notices for these offences is calculated to remove discretion from the courts and place it in the hands of the police. This is inappropriate and will likely lead to injustice.

Section 3: Sentencing principles

We do not wish to comment in detail about sentencing principles. In general we believe that current sentencing principles are appropriate.

We would only say that the sentencing principles relating to repeat offending may be inappropriate insofar as they rely heavily on specific and general deterrence.

Deterrence can be a blunt instrument which often fails to achieve its objectives. There is ample criminological research on this subject. In a traffic context, it has now been accepted by the legislature that lengthy disqualification periods do not achieve their intended deterrent effect and indeed become counterproductive.

Section 4: Fines and penalty notices

We have written at length in other submissions about the ineffectiveness of fines and penalty notices as a response to offending by young people. See, for example:

- Penalty Notices - Submission to NSW Law Reform Commission, December 2010 (Part 6.9 and 6.10)
- The effectiveness of fines as a sentencing option - Submission to the NSW Sentencing Council, September 2007 (pages 2- 3)
- Fines - Submission to the Office of State Revenue, Fines Act Review, June 2002. (Parts 3.2 and 3.3)

We concede, however, that the fine enforcement system is now more flexible and less likely to cause injustice to people who cannot afford to pay.

Section 5: Suspension, disqualification and unauthorised driving

Question 5.1: By and large, the current system of licence suspension is reasonably fair and transparent. Suspension periods are generally three months or six months, which is long enough to provide some deterrent effect yet not so long as to be crushing for most drivers.

The fact that learner and provisional drivers may appeal against demerit point suspensions provides an important safeguard, although it must be said that the right of appeal is not widely known among young drivers, and there is a risk that instead of exercising their appeal rights they will continue driving whilst suspended (without understanding the seriousness of their conduct).

We would also like to see full licence holders given the right of appeal against demerit point suspensions, instead of being limited to the current good behaviour licence option.

The introduction of a mandatory driver education program for people who have been suspended more than once is potentially a positive step. However, we have yet to see the details of this program and cannot comment on whether it is likely to be effective.

As mentioned elsewhere, we have concerns about the power of police to issue immediate suspension notices, particularly as this is being rolled out to low-level offences. The test for appealing against an immediate suspension is “exceptional circumstances”, which in our view is unreasonably high.

In our view, immediate suspension should be reserved for very serious offending which places the public at immediate risk. If it is to be used for less serious offences, it should only be in a circumstances where the driver has committed multiple repeat offences.

Question 5.3: As to penalties for unauthorised driving, we believe that the penalties in place since October 2017 are now appropriate. Prior to the amendments the penalties, and in particular the mandatory disqualifications, were grossly disproportionate and were counterproductive to the aims of road safety.

We commend the NSW Government on the reforms which took effect in October 2017, lowering maximum penalties and automatic disqualification periods for unauthorised driving offences and providing a scheme for disqualified drivers to reapply for their licences after an offence-free period. These reforms are already beginning to have an impact on our clients and are affording them an opportunity to drive lawfully and safely instead of being shut out of the licensing system.

There are practical measures that are more effective than heavy penalties in preventing unauthorised driving. For example, there have been changes to the fine enforcement system in recent years which provide more flexibility for people who are unable to pay their fines (eg Work and Development Orders) so they are less likely to be unlicensed due to fine default. We are also aware that Government agencies such as the NSW Registry of Births, Deaths and Marriages have made efforts to assist Aboriginal people to obtain identification so that they may get their licences.

See also our comments on young drivers below.

Section 6: Special penalties and interventions for driving offences

Question 6.1: It is beyond our expertise to comment on whether the mandatory alcohol interlock program is *effective* in dealing with repeat traffic offending.

However, we wish to make some comments about the significant injustices caused by the current scheme.

Although a court has the power to grant an alcohol interlock exemption order, this power is limited. For example, an exemption cannot be granted merely because the driver cannot afford to install the interlock equipment. Instead, a driver has to rely on financial assistance which may be available from a non-government agency, but which is not guaranteed. More importantly, if an exemption is not granted at the time of sentencing, it cannot be applied for at a later stage.

An offender who is subject to a mandatory interlock order, but who does not install the interlock device, will be disqualified for five years. This is an extremely long period which is likely to be crushing and potentially counterproductive to road safety.

It is unreasonable that an offender is unable to apply for an exemption order *after* sentencing, particularly if their circumstances have changed.

A large proportion of traffic offenders are unrepresented at court. Legal Aid is generally unavailable for traffic offences, and there is a large number of disadvantaged people who cannot afford a private solicitor. These offenders are unlikely to be aware of the mandatory interlock scheme and the need to seek an exemption at the time of sentence.

Further, there will be offenders who may not have grounds for an exemption at the time of sentence but whose circumstances may change soon after (eg they may lose their job and/or have to sell their car).

Question 6.2: We cannot comment on whether the current system of vehicle sanctions is effective in dealing with repeat offending. Until recently, vehicle sanctions have applied to a relatively small range of offences and, in our experience, have not been heavily utilised.

It may be the case that removing the vehicle is more effective than suspension or disqualification, particularly for drivers who are young or otherwise impulsive. However, great care must be taken to avoid hardship to third parties.

Question 6.5: In relation to prevention courses, we have had numerous clients referred to the Traffic Offender Intervention Program. While they generally report having learnt and benefited from the course, we have doubts about whether this lecture-based program is effective in dealing with repeat offending.

In our view, “hands on” driving tuition, together with a therapeutic approach which addresses the offender’s behaviour, is likely to be more effective in dealing with recidivous traffic offending. We would also stress the importance of providing adequate social support to those whose traffic offending is linked with circumstances such as poverty, family violence, mental illness or substance dependence. Of course, such interventions are potentially expensive, but are likely to be cost-effective in the long term.

Questions 6.6 and 6.7: We do not generally support stricter penalties as we do not believe punitive approaches are effective. However, stricter supervision on community-

based orders may be warranted if it is appropriately targeted and delivered by skilled people. We do not have any specific suggestions as to how the intensive supervision of repeat traffic offenders could be improved.

Section 7: Communities requiring special attention

Question 7.3: We wish to comment on some issues facing young people.

It is important that young people receive assistance to obtain their learner's licence and to receive driving tuition to complete their log books and obtain their Ps. A large cohort of young people in NSW do not have family members who can fulfil this role, and nor can they afford professional driving lessons. While there are some programs available to assist these young people, they are not universally available and could benefit from increased funding.

Learner and provisional drivers are also particularly vulnerable to licence suspensions. For a L or P1 driver, one speeding offence, no matter how minor, leads to a three-month suspension. Although there is a right of appeal to the Local Court, we are concerned that this right of appeal is not widely understood by young drivers, and that many will take the risk of driving while suspended instead of exercising their appeal rights.

Young people in this category are often from low socio-economic backgrounds who live in areas poorly serviced by public transport. Many of them lack formal educational qualifications and are reliant on employment such as labouring or trade apprenticeships which require driving.

We are also concerned about the immediate licence suspension for the offence of driving as an unaccompanied learner. While we accept that unaccompanied learner drivers can pose a safety risk, we are concerned that suspension serves as a further barrier to the young person moving onto their provisional licence. Instead of an immediate suspension, we would like to see young unaccompanied learners diverted into a program which would provide them with driving tuition if it is not otherwise available to them. This would assist them to obtain their provisional licence and to drive lawfully and safely.

We would also comment that the penalty notice for the offence of unaccompanied learner is inordinately high. We have written elsewhere about the inappropriateness and ineffectiveness of deterrent penalties for young people. Such large fines are likely to increase the hardship faced by young drivers and provide a further barrier to obtaining their provisional licence.

We also wish to comment about the jurisdiction of the Children's Court. Again, we have already commented about this elsewhere. See, for example, our submission to the NSW Parliamentary Inquiry on Driver Licence Disqualification Reform in 2013. We adhere to what we said in that submission:

We are of the view that the Children's Court should have jurisdiction over all traffic offences allegedly committed by young people under the age of 18.

The justification for hearing juvenile traffic offences in adult courts is usually along the lines of "Since the ability to obtain a licence is a privilege extended to adults, all traffic offenders should be dealt with as adults" and "The focus of traffic offences is deterrence and public safety. Since the risk of harm to the public caused by driving offences is the same, if not higher, when a child rather than an adult is driving, on this view, children should not be treated in any special manner in the court system".

However, we submit that such justifications are misconceived. It is adults who extend this "privilege" to young people with full knowledge of developmental difference between adults and children. We note that there are already a number of restrictions placed on learner and provisional drivers, recognising that young drivers generally pose a higher risk to road safety than more mature drivers. Many of these restrictions (such as limits on number of passengers, prohibitions on driving high-performance vehicles) are appropriate

and evidence-based. However, dealing with children in court as if they were adults is neither appropriate nor evidence-based.

In fact, the acknowledged over-representation of young drivers in traffic offences and accidents suggests that young people who commit traffic offences should be treated differently to adults. Rather than the punitive and deterrent measures which are applied to adult traffic offenders, young people require a rehabilitative approach to assist them to become safer drivers.

The history of a separate criminal jurisdiction for children has traditionally reflected the acceptance that different principles and practices should apply to children and adults. The current state of scientific knowledge on adolescent brain development adds support to this approach. It is now well-recognised that young people do not offend, nor do they respond to criminal sanctions, in the same manner as adults .

Children are less mature and more vulnerable than adults; they also respond less effectively to punitive and deterrent sanctions. They deserve the special protection, and the rehabilitative approach, afforded by the Children's Court. We are of the firm view that this applies equally to traffic matters as it does to any other matter.

The current process by which children are taken before adult courts (often unrepresented) is inappropriate, disproportionately punitive and arguably in breach of our obligations under the United Nations Convention on the Rights of the Child.

Although there is provision for the Local Court to exercise the sentencing options under the *Children (Criminal Proceedings) Act*, it is our experience that many Local Court magistrates are unaware of, or fail to consider, this. The tendency in the Local Court is to apply the sentencing principles and options relevant to adults. Children can suffer harsh penalties and lengthy disqualifications which are often inappropriate to their age and circumstances.

This situation is not assisted by the fact that children are not always legally represented in the Local Court, even though they should be entitled to Legal Aid. When children are represented in Local Court traffic matters, duty solicitors are not always well-versed in the special legislative provisions and legal principles applying to children.

Thank you for the opportunity to comment. We are happy to be contacted for further comment or discussion.

Yours sincerely

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