

Repeat Traffic Offenders

Legal Aid NSW submission to
the NSW Sentencing Council

March 2019

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Legal Aid 
NEW SOUTH WALES

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Legal Aid NSW's Cooperative Legal Service Delivery Program (**CLSD**) comprises 12 regional justice partnerships across regional and remote NSW. The aim of the partnerships is to improve access to justice for disadvantaged people in regional and remote areas.

Legal Aid NSW provides state-wide criminal law services through the in-house Criminal Law Division and private practitioners. The Criminal Law Division services cover the full range of criminal

matters before the Local Courts, District Court, Supreme Court of NSW and the Court of Criminal Appeal as well as the High Court of Australia.

Our Driver Reform Implementation Team assists in the implementation of the driver licence disqualification reforms. The team provides services across the state, with a particular focus on Aboriginal people and disadvantaged people in rural and remote locations where lengthy disqualification periods have a disproportionate effect. The team has created educational materials for both the legal profession and community, and delivers community legal education sessions on the reforms.

Legal Aid NSW welcomes the opportunity to make a submission to the NSW Sentencing Council's review of repeat traffic offenders. Should you require any further information, please contact:

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Introduction

Legal Aid NSW welcomes the opportunity to provide input to the Sentencing Council's review.

Our responses to the specific questions outlined in the Consultation Paper are set out in the following sections.

In general, we note that the vast majority of people sentenced for driving offences resulting in death and serious injury are not repeat traffic offenders¹. We would therefore urge caution in ensuring that approaches recommended to reduce offending are not unduly targeted towards the very small group of repeat offenders. Even if such responses were effective in reducing reoffending, the statistics provided indicate that this would likely have a very small impact on overall road safety.

We suggest that far greater improvements to community safety could be obtained by greater investment in programs and initiatives that address the factors that often underlie traffic offending. In addition to specific driving education programs, these include greater availability of drug and alcohol rehabilitation programs in regional and remote areas. This includes the provision of culturally appropriate services available for Aboriginal people². We also would support the expansion of the Magistrates Early Referral Into Treatment (MERIT) program, increased availability of Work and Development Orders (WDO), and initiatives to reduce unauthorised driving in Aboriginal communities.

We also make the below comments in relation to the requirement in Term of Reference 4 – that the Sentencing Council consult with experts, and consider international best practice, on how best to deter recidivist traffic offenders from reoffending and encourage safe driving practices.

- In relation to the use of average speed cameras, addressed at paragraph 1.80 of the Consultation Paper, we acknowledge that this may be a matter that falls outside the expertise of the Sentencing Council. However, we suggest that the increased use of average speed cameras is a matter that should be considered when consulting with experts in response to Term of Reference 4. While they do have limitations, these cameras are likely to have a broader deterrent effect than individual interventions, such as speed limiting devices.
- We note that the NSW Centre for Road Safety's statistics indicate that, between 2013 and 2017, rear end collisions contributed to 3,520 deaths and serious injuries in NSW. JIRS statistics for 2014 to 2018 show that about 27% of defendants sentenced for an offence under rule 126 of the *Road Rules 2014* had previously been convicted of an offence of the same type. For rule 127 of the *Road Rules 2014* (fail to keep safe distance between long vehicles), around 31% of sentenced offenders had a prior conviction of the same type. As such, we suggest that it would

¹ Consultation Paper, pp 14.

² When referring to Aboriginal people throughout this submission we are referring to both Aboriginal and Torres Strait Islander people.

be appropriate for the Sentencing Council to consider tailgating offences when consulting with experts on best practice for encouraging safe driving practices.

Consultation questions

1.1: Identifying repeat offending

The existing scheme for categorising repeat offending is appropriate. The existing list of offences for which there are increased penalties for second or subsequent offences is sufficiently broad to capture a range of offending. The majority of offences that contain automatic or mandatory periods of disqualification upon conviction are already included, and other relevant offences are adequately dealt with under the demerit point system.

1.2: Dealing with repeat driving offenders

Legal Aid NSW agrees with the proposition in the Consultation Paper that monetary penalties and lengthy disqualification periods may not have a significant deterrent effect on offending³. Rather than deterring unlawful behaviour, the fine and penalty notice system compounds the social and economic disadvantage faced by many vulnerable people, in particular Aboriginal people.

As such, proven alternatives should be available in sentencing. Given that the reasons for traffic offending can be diverse, sentences should be flexible and able to be tailored to the circumstances of each case and each individual's particular risk factors for reoffending. A wide discretion for sentencing courts is critical when dealing with repeat driving offenders.

As we discuss below, we have significant concerns regarding the implementation of the ignition interlock program. While the use of interlock devices may be a useful sentencing alternative in some circumstances, we submit that the inequities within the existing penalty regime need to be addressed as a matter of priority.

We note that the Paper raises the possibility of a high risk traffic offender scheme, akin to the existing schemes for violent and sex offenders in NSW. The gradual expansion of these schemes to a broader range of offences is at odds with the Sentencing Council's own cautions against net-widening,⁴ and is of great concern. We strongly oppose any proposal to introduce high risk traffic offender orders, whether through expansion of existing schemes or establishment of a separate scheme.

2.1: Driving offences resulting in death

The current maximum penalties for driving offences resulting in death are adequate and provide sufficient scope for sentencing in respect of a wide range of offending conduct.

³ See Consultation Paper, pp 37, 87.

⁴ NSW Sentencing Council, *High Risk Violent Offenders* (2012).

The availability of a broad range of sentencing options is particularly important in relation to the offence of negligent driving causing death, where there may be a low level of culpability on the part of the driver, notwithstanding the very significant harm caused.

The concept of negligence is a relatively low hurdle in criminal cases. Many incidents involving negligence are finalised on the spot by the issuing of an infringement notice. Section 117 of the *Road Transport Act 2013* presents particular difficulties in sentencing, because the available sentences reflect the harm caused, rather than any increased culpability on the part of the driver. That is, a driver may behave in exactly the same way, for example, by failing to notice an oncoming vehicle, but the available penalties vary markedly depending on the harm that results from that behaviour.

For these reasons, it is important to ensure that the full range of non-custodial alternatives are available in these cases. In appropriate cases, it may be useful for non-custodial orders to include a condition that the offender attend an intensive driver education course.

2.2: Driving offences resulting in injury

In our view, existing penalties for driving offences causing injury are appropriate. See 2.1 above in relation to sentencing outcomes for negligent driving causing grievous bodily harm.

2.4: Speeding offences

In our view, the existing maximum penalties for speeding offences are appropriate.

If speed adaptation devices were utilised, it may be appropriate for an order requiring the fitting of such a device to be made, in cases involving repeat high range speeding offences.

2.5: Alcohol and drug-related driving offences

In general, existing maximum penalties for alcohol and drug-related driving offences are appropriate, with the exception of 'drug present in system' offences. In our view, the imposition of automatic disqualification and significant monetary penalties may result in harsh outcomes in cases where offenders are found to have a residual presence of drugs in their system, but are not impaired in any way. This is particularly the case given the very lengthy periods for which particular drugs can be detected in a person's system after use.

As we note in response to Chapter 7, there is a need for improved access to drug and alcohol programs in regional and remote communities. This would support the increased use of culturally appropriate programs as part of community based sentencing options for Aboriginal people.

2.6: Fatigue related driving offences

We suggest that existing penalties for fatigue related offences are appropriate.

2.7: Driving offences carrying a high risk of harm

In general, existing penalties for these offences are appropriate, although we note that further time will need to elapse to properly assess the impacts of recent increases to penalties for offences associated with mobile phone use.

3.1: Guideline judgments

In our view, the guideline judgments on dangerous driving and high range prescribed concentration of alcohol remain appropriate. We do not consider that any other offences should be subject to guideline judgments, given the current constraints that exist in sentencing most high risk or dangerous offences, such as automatic periods of disqualification upon conviction.

3.3: Subjective Circumstances

In general, we consider that the sentencing principles relating to subjective circumstances are appropriate for dealing with repeat driving offenders, however, we note the following:

- In regional areas, being unable to drive over long distances can make it impossible to get to work, school, buy groceries or visit a doctor. In our experience, the lack of available and affordable public transport in many regional, rural and remote areas tends to be a significant factor in re-offending. Any changes to subjective circumstances proposed by the Sentencing Council should ensure that courts may continue to take the availability of alternative transport into account for offenders living in regional areas.
- Non-driving related prior offences should not be given significant weight. Driving offences are committed by people across all socio-economic backgrounds and consideration of non-driving criminal history can lead to disproportionate penalties for vulnerable and disadvantaged people. We see no strong justification for a person who has no criminal record to be in a substantially better position than a person with a history of non-driving related offending.
- Similarly, there is an argument against giving significant weight to subjective factors such as character. Driving offences pose a different type of risk to the community than other types of offending. Anyone can pose a serious risk to the community, regardless of factors such as their status, employment history, and access to stable housing. While good character may be relevant, giving significant weight to this factor may lead to disproportionate outcomes for vulnerable and disadvantaged people with the same level of culpability.

3.5: Repeat offending

We submit that existing sentencing principles relating to repeat offending are appropriate.

4.1: Fines and penalty notices

We agree with the comments in the Consultation Paper, which raise questions about the efficacy of monetary penalties as a deterrent.

Various inquiries and reports have highlighted that large fine debt and fine enforcement measures have a crippling effect on vulnerable people, including people on low incomes,

prisoners, the homeless, and people with mental illness or cognitive impairments⁵. The disproportionate impact of fines on Aboriginal people is also well documented.⁶ Aboriginal people are more likely to accumulate large fine debts and be subject to enforcement measures, including driver licence sanctions.

Work and Development Orders

WDOs are an important initiative in addressing these issues. Expansion and promotion of the WDO program and improved accessibility of sponsors could assist in reducing the imposition of driver licence sanctions as a result of unpaid fines, and therefore meaningfully contribute to a reduction in traffic offending related to unauthorised driving. The program might also have broader impacts (beyond unauthorised driving offences) if WDO sponsors are providers of driving programs. We discuss this issue further in section 7.4.

However, despite the benefits of WDOs, fine mitigation schemes are not a substitute for a well-designed and fair penalty regime, which ensures that monetary penalties are only issued in appropriate circumstances, and for appropriate amounts.

Penalty notice reform

Penalty notice amounts are often disproportionate to the seriousness of the offending behaviour, and are higher than what would be imposed by a court for the same offence. Currently, Legal Aid NSW spends a significant amount of time giving advice to people who wish to contest a penalty notice in court: not because they deny the infraction, but because they cannot pay and a court is likely to impose a lesser fine. This is an inefficient use of our resources and those of the courts.

As we noted in our submission to the Australian Law Reform Commission's Pathways to Justice Inquiry, we suggest that these issues should be addressed by:

- the introduction and greater use of lower level or alternative penalties instead of infringement notices, particularly increased and more consistent use of cautions;
- maximum penalty notice amounts which do not exceed 25% of the maximum available fine for an offence;
- separate penalty notice amounts for people under 18 and people on a Centrelink benefit; and
- limits on the number of penalty notices able to be issued in one transaction.

⁵ NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices, Interim Report* (2006) [3.33]-[3.38]; NSW Law Reform Commission, *Sentencing, Report 79* (1996) [3.45]; R Fox, *Criminal Justice on the Spot: Infringement Penalties in Victoria, Australian Institute of Criminology* (1995) [1.1.4]; Homeless Persons' Legal Service and Public Interest Advocacy Centre, *Not Such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW* (2006); S Clarke, S Forell and E McCarron, 'Fine But Not Fair: Fines and Disadvantage', *Justice Issues, Law and Justice Foundation of New South Wales* (2008); NSW Department of Attorney General and Justice, *A Fairer Fine System for Disadvantaged People* (2011); NSW Law Reform Commission, *Penalty Notices, Report 132* (2012).

⁶ See, for example, Australian Law Reform Commission, *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (2017) pp 387.

As discussed below, we maintain our position that driver licence sanctions should not be available to enforce fines.

Imprisonment for unpaid fines

We strongly support the ALRC recommendation that fine enforcement regimes should not directly or indirectly allow for imprisonment⁷. The ALRC noted this was a disproportionate response to fine default and recommended legislative amendment to this effect. As a result, Legal Aid NSW supports amendments to the *Fines Act 1996* to remove the option of imprisonment following the breach of a community correction order or community service order made under Division 5 of Part 4 of that Act.

5: Suspension, disqualification and unauthorised driving

In our view, the imposition of licence suspensions as a result of non-driving related conduct, such as non-payment of fines, is a significant contributor to traffic offending and to the overrepresentation of Aboriginal people in custody. We support the ALRC's recommendation that suspension of driver's licences for fine default should be avoided⁸.

In many communities, a driver licence is essential for independence, employment and social connection. The need to drive can lead to secondary offending, cycles of unauthorised driving and imprisonment⁹. For these reasons, we would be very supportive of legislative amendments to provide that licence sanctions may only be imposed following the commission of a traffic offence.

We support the recent shift to automatic and minimum disqualification periods rather than mandatory periods. A penalty regime that imposes mandatory periods of disqualification lacks the ability to tailor a penalty to the specific facts and circumstances of the offence and the offender. This is ineffective in reducing reoffending and can result in disproportionate and oppressive effects of licence sanctions on vulnerable people.

We also strongly support the recent driver disqualification reforms which reduced penalties for unauthorised driving, abolished the Habitual Traffic Offenders Scheme and introduced a scheme for certain disqualified drivers to apply for the removal of their disqualification period.

Ongoing evaluation of these reforms should provide further insight into preventing repeat driving offences and allow Government and stakeholders to assess the impact of the reforms.

In particular, we suggest that future evaluations should consider the appropriateness of offences that have been excluded from the scheme which enables the removal of disqualification periods. Legal Aid NSW supports the broadening of eligibility for the scheme, and considers that it would be more appropriate for courts to determine whether

⁷ Recommendation 12-1, Australian Law Reform Commission. *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (2017).

⁸ Ibid, Recommendation 12-2.

⁹ Ibid; pp 404-405.

individual cases should be dealt with under the scheme, rather than retaining blanket exclusions for certain offences.

We are particularly concerned that a number of excluded offences do not always involve a high risk of death or bodily harm, and are often committed by young people. The incentive for such offenders to rehabilitate is undermined if they are facing lengthy and irrevocable disqualification periods. Further, the exclusion of manslaughter, which may involve a wide variety of offending behaviour, could have a particularly harsh impact.

We do not support further restrictions on the ability of courts to dismiss or discharge traffic offenders without conviction.

6.1: Ignition interlock programs

We acknowledge that other jurisdictions may have had some success with interlock programs¹⁰. In principle, we support alternatives to licence sanctions and other penalties. However, to promote increased use of the devices, and to ensure that the interlock program does not disproportionately impact on disadvantaged people, we suggest that the current scheme requires reform. This includes full subsidisation of the costs of fitting a device.

In our experience, the most common reason that people do not fit an interlock device to their vehicle is the cost. The limited discount available for concession cardholder holders results in a cost that is still unsustainable for those on a low income. The severe financial hardship assistance scheme can provide up to 100 per cent assistance, but only for three months at a time. The application process is complex and disadvantages people who have difficulty navigating the legal system or are from a linguistically diverse background.

The cost of interlock devices leaves many vulnerable and disadvantaged people in the community excluded from interlock programs, which creates a two-tier penalty system; one for those who can afford the interlock device and one for those who cannot. Those who cannot afford to fit a device may face disqualification periods that are 10 to 20 times longer than those who are able to participate in the program. For example, for a first mid-range PCA offence, the disqualification will be a maximum of six months if the person has the capacity to pay for and fit an interlock device, but five years if they do not. :

The shorter interlock period is presented as an incentive but this assumes that people are not fitting interlock devices merely by choice. In our experience, this is not the case. Our experience with many clients who are unable to fit an interlock device appears to be indicative of a broader issue. The Consultation Paper notes that, as at October 2018, 15,957 interlock orders had been made¹¹. However, over a similar period, only 6,900 interlock licences were issued¹². While more detailed statistical analysis will hopefully be provided in the forthcoming review of the scheme, these figures seem to indicate that a

¹⁰ Consultation Paper, pp 98.

¹¹ Consultation Paper, pp 99.

¹² NSW, *Parliamentary Debates*, Legislative Council, 18 September 2018 (Catherine Cusack).

large number of people subject to interlock orders do not go on to fit a device. While there may be a range of reasons for this, our casework indicates that cost is a substantial factor.

Lengthy disqualification periods are disproportionate and, as is noted at paragraph 5.67 of the Consultation Paper, they are not an effective deterrent. Rather, they are more likely to result in repeat traffic offending.

There is only a very limited discretion for an exemption from an alcohol interlock order, and it must be sought at sentence. We suggest that legislative amendment is required in order to:

- reframe s 211 of the *Road Transport Act 2013*, to more effectively offer an incentive to fit an interlock device, as opposed to a punishment for being unable to fit one. This could be achieved by providing that, after the expiry of the minimum disqualification period, a person remains disqualified for the duration of the interlock period, unless a device is fitted. This would still result in a longer period of disqualification for disadvantaged people, but there would be less disparity, and the disqualification period would have a sounder footing;
- provide a single, broad discretion for courts to make exemption orders on grounds such as ‘special circumstances’, or ‘the interests of justice’;
- enable courts to depart from the five year disqualification period where this outcome would be unjust or disproportionate, and provide an avenue for people to apply to have existing disqualification periods quashed on this basis;
- remove s 212(5)(a) of the *Road Transport Act 2013*, which provides that, except in limited circumstances an exemption order may not be made solely on the basis that the offender cannot afford to fit an interlock device;
- require that courts explain to any unrepresented defendant that they may seek an interlock exemption order; and
- provide clear mechanisms for the review of orders, for example, by allowing offenders to:
 - apply to the court for an exemption order *after* an interlock order has been made;
 - seek an exemption from the court or Roads and Maritime Services (RMS) if they are not able to complete the full interlock period due to a change in circumstances;
 - allowing an offender to apply to RMS to reduce the five year disqualification period if they are unable to fit an interlock device and the imposition of a five year period would be unjust and disproportionate.

We also support a significant expansion of the concessions and financial assistance available under the scheme. In our view, the costs of fitting a device should be fully subsidised by the state. The basis for using alcohol interlock devices is to encourage safe driving behaviour and reduce reoffending. Any costs associated with fully subsidising the fitting of devices would be more than offset by savings in further prosecutions and imprisonment that may otherwise flow from repeat offending. A fully subsidised scheme for all participants would encourage the use of interlock devices, and may also mitigate the need for a number of the legislative amendments suggested above.

6.2: Vehicle sanctions

We are not aware of any evidence suggesting that vehicle sanctions are effective in deterring repeat traffic offenders. The seizure of vehicles and registration plates can have a significant impact on families and people from rural and regional communities where there are multiple users of one car or car sharing arrangements exist. As a result, Legal Aid NSW opposes any expansion of these provisions.

6.3: Intelligent speed adaptation systems

Legal Aid NSW acknowledges the evidence from other jurisdictions demonstrating the effectiveness of intelligent speed assistance technology in addressing dangerous forms of repeat offending.¹³ We note the concerns expressed in the Consultation Paper regarding the task of accurately mapping the speed limits for the vast NSW road network.¹⁴

We also have concerns regarding the safety of speed limited vehicles when overtaking on country roads. Speed limiters may extend the time it takes to overtake slower vehicles, increasing the length of time spent on the incorrect side of the road. We acknowledge that safe overtaking should not involve speeding, however, we suggest that the ability to safely overtake is a critical factor when assessing technology options for speed limiting devices.

Assuming that available technology adequately reflects these safety concerns, we support options that provide alternatives to driver licence sanctions, fines and other penalties. However, without subsidisation of costs, we are concerned that the use of these systems may lead to disproportionate impacts for disadvantaged people, as outlined above in relation to interlock devices. As such, we submit that if such devices are introduced, the cost of their installation should be fully subsidised.

6.4: Specialist traffic courts or lists

Legal Aid NSW does not support a specialist traffic court or court list to deal with repeat traffic offending at this point in time. The Consultation Paper indicates that there is not strong evidence of the effectiveness of such courts. In addition, if traffic courts were to have access to a range of alternative sanctions or other improved processes, this would likely disadvantage people from rural and remote areas, who may not have such a list or court available to them in their location.

6.5: Prevention courses

Legal Aid NSW supports the use of prevention courses for traffic offenders. In our experience, the Traffic Offender Intervention Program (TOIP) is generally a useful educational opportunity for offenders to understand and address issues of traffic offending.

We are aware, through our community programs, that there are issues in relation to the accessibility and flexibility of the TOIP for people living in some regional and remote areas. In particular, there are concerns that some providers of the TOIP may not offer sufficient

¹³ Consultation Paper, pp 98.

¹⁴ Consultation Paper, pp 111.

flexibility in the timing and location of programs to facilitate participation by people living in small towns. These people may benefit most from undertaking the program, but may face significant hurdles travelling to larger town centres where programs are delivered. We suggest that the Sentencing Council should consider ways to improve the equitability of access to the program.

In general, we agree with the suggestion in the paper that there may be some benefit in running courses over a longer period. However, we note that some flexibility would be required in certain regional and remote locations so as not to create an impediment to participation.

Anecdotal feedback from our casework is that many drivers would benefit from attending the TOIP towards the end of a period of disqualification. However, we note that there is limited evidence of the impact the course has on re-offending rates¹⁵. Legal Aid NSW would support a rigorous evaluation of the TOIP, including its impact on re-offending, particularly for high-risk recidivist offenders. The review should also consider whether the program is being effectively targeted towards the needs of people likely to commit further offences.

One option for encouraging participation in driving education programs may be a voluntary demerit point reduction scheme, which would allow eligible people to have demerit points waived if they attend a designated prevention program. Such a scheme could provide an early intervention option, to address problematic driving behaviour upon receipt of demerit points, but before a serious offence occurs.

6.6: Stricter penalties

Legal Aid NSW does not support the introduction of stricter penalties. This is in light of the wide scope of current penalties, the lack of evidence to suggest that increasing maximum penalties reduces driving reoffending and the disproportionate impact such penalties have on vulnerable people.

7.2: Remote and regional communities

Legal Aid NSW strongly supports the increased accessibility (both location and cost) of prevention courses in remote and regional communities.

As we note above, a greater availability of drug and alcohol programs, and MERIT, in regional and remote communities will assist in addressing underlying issues associated with traffic offences. Drug and alcohol programs and services should be culturally appropriate for Aboriginal people.

We suggest that MERIT be expanded to provide:

- greater availability in regional and remote NSW;
- the inclusion of individuals suffering from alcohol abuse problems in all MERIT locations; and

¹⁵ Consultation Paper, pp 116.

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- the inclusion of people in custody and those charged with strictly indictable and/or violent offences.

These suggestions are reflected in recommendations of the NSW Upper House Inquiry into the provision of drug rehabilitation services in regional, rural and remote New South Wales. We have also raised issues related to these communities in sections 3.3, 6.2, 6.4, 6.5 and 7.4.

7.3: Young people

Legal Aid NSW supports all traffic matters involving young people being heard by the NSW Children's Court. This is consistent with the 2010 Strategic Review of the NSW Juvenile Justice System, which noted that hearing traffic matters in the Children's Court would be consistent with the principles of the *Children (Criminal Proceedings) Act 1987* (NSW), and would recognise that different considerations should apply to children and young people. This would also accord with the conclusions of the NSW Law Reform Commission in its 2012 report, *Penalty Notices*.

We also note the limited application of the *Young Offenders Act 1997* (NSW) in relation to traffic offences. Currently the Act does not apply to a traffic offence committed by a child who was old enough to obtain a learner licence when the alleged offence occurred. We submit that it would be appropriate for the Sentencing Council to consider removing this limitation. While a warning, caution or conference may not be appropriate for all traffic offences, they should be available for use in suitable cases.

Non-legislative reform

Young people who are involved in the criminal justice system face particular hardships in obtaining licences due to complex issues, and a lack of access to learner driver mentoring and supervised driving. This is particularly the case for young people in Out Of Home Care. Legal Aid NSW supports the Juvenile Justice suggestion in the Consultation Paper, of an exploration of the use of the Driving Change program alongside Juvenile Justice intervention or as part of a diversionary program for Aboriginal people and others¹⁶. Early intervention is likely to reduce the risk of vulnerable young people committing driving offences later in life.

7.4: Aboriginal people

Aboriginal people continue to be overrepresented in custody for driver licences offences and fine default¹⁷. Obstacles that Aboriginal communities face when trying to obtain and maintain licences are widely acknowledged¹⁸. Many of our clients encounter such barriers which make it difficult to obtain a driver licence. These include a lack of access to qualified driving instructors, the cost of a birth certificate, the limitations on who can apply for a birth certificate for a child (only parents and formal carers), and the difficulty of application

¹⁶ Consultation Paper, pp 132-133.

¹⁷ Consultation Paper, pp 135.

¹⁸ NSW Legislative Assembly Committee on Law and Safety. *Driver Licence Disqualification Reform* (2013) 14.

processes for people with literacy problems and cognitive impairments. If a birth certificate is lost, these barriers to obtaining a birth certificate can be experienced again.

A common issue faced by our clients is difficulty obtaining identification when their birth was not registered. Registration of births in Aboriginal communities is an ongoing issue, arising from both distrust of government, and the practical difficulties of registering a birth when registration requires that the parents themselves have identification.

Further, Aboriginal people in regional and remote communities often have limited or no access to public transport. Aboriginal people may also have kinship, family and community obligations that impact and put pressure on an individual to drive when not legally able to drive, for example, driving a family member to a medical appointment or driving to a funeral.

These difficulties all feed in to the high rate of unauthorised driving charges faced by Aboriginal people in regional areas.

Previous recommendations relating to driving offences and Aboriginal people

Legal Aid NSW supports the recommendation of the Royal Commission into Aboriginal Deaths in Custody that relevant factors leading to incarceration be identified and addressed, using responses that are designed and delivered with Aboriginal community organisations¹⁹. As identified in the most recent *Closing the Gap Report*, a partnership approach and a strengths-based, community-led approach are essential factors to ensure positive outcomes²⁰. Reform which is not designed and delivered with the Aboriginal community is likely to fail.

The recommendations of the Auditor-General's performance audit report set out at paragraph 7.55 of the Consultation Paper are worthwhile initiatives that will assist in reducing the number of Aboriginal people who are charged with unauthorised driving offences²¹. We strongly support these recommendations, and suggest that these initiatives could be improved further by ensuring that supports identified are adequately funded and provided by Aboriginal community organisations.

Non-legislative reform

Some of the barriers experienced by Aboriginal people are difficult to address through legislative reform. In our view, there is a need for funded initiatives to address the underlying systemic and administrative difficulties that contribute to traffic offending by Aboriginal people.

Initiatives to address these issues might include:

¹⁹ Australia, Royal Commission into Aboriginal Deaths in Custody, National Report (1991) vol 3 [22.3.11] cited in Consultation Paper at 134.

²⁰ Department of the Prime Minister and Cabinet. *Closing the Gap Report* (2019).

²¹ 1a) improving access to a birth certificate; 1b) assisting Aboriginal people pass the driver knowledge test; 1c) assisting Aboriginal people complete supervised driving hours; 1d) improving the access and quality of driver licensing program; 2a) expanding and promoting Work and Development Orders 2b) developing and promoting diversionary and sentencing options for "driver licence" offenders.

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- Adoption of culturally appropriate identification requirements by the Registry of Births, Deaths and Marriages, as has been done by other agencies, including Centrelink and the Australian Taxation Office;
 - Automatic registration of births, and in-hospital registration practices that are culturally appropriate;
 - More frequent, and better promoted 'sign up' days, for the registration of births;
 - A formal framework for fee free birth certificates for Aboriginal people, as has been adopted in Victoria through the Koori Access Fund;
 - Reinstatement of funding for the Pathfinders National Aboriginal Birth Certificate Program, or a similar initiative. Pathfinders was a successful program that assisted 8,000 Aboriginal people to access birth certificates, which in turn enabled them to apply for a driver's licence and access other government and community services²².

We refer to our comments above in relation to the WDO scheme, and the potential benefits of improved access to sponsors, particularly those who offer driver education programs. The Birrang Learner Driver Program is a successful initiative that helps Aboriginal people access qualified driving instructors and pass their driver licence test. We are supportive of the increased availability of similar initiatives provided by Aboriginal community organisations.

The Driver Licensing Access Program is another positive approach, however, we are aware of significant waiting lists in a number of regions. We suggest that the Centre for Road Safety urgently review demand for this program, with a view to increasing the availability of places.

Support for Aboriginal people in custody

WDOs in prison

An existing MOU between Corrective Services NSW (CSNSW) and Revenue NSW places an inmate's fines on hold during incarceration (and for three months post-release).

Although CSNSW is an approved sponsor for the purposes of providing a WDO, most approved activities are only available to sentenced inmates. This means that inmates on remand can spend many months, and even years, on remand without the benefit of a WDO.

In addition, CSNSW has amended its WDO policy to allow victim restitution order debts to be included in a WDO. However, this is only the case for orders that are not connected to the offence for which the inmate is currently serving a sentence.

The above factors mean that inmates can leave custody with large unpaid fines and/or victim restitution order debts. In turn, this can result in RMS customer business restrictions, which can prevent a person from obtaining a licence.

²² <https://www.pathfinders.ngo/projects/aboriginal-birth-certificate-project/>

We suggest that CSNSW consider updating its policy to provide broader access to WDOs for people on remand, and people subject to victim restitution orders.

Driver education and access to programs

At present, a number of relevant documents including the Driver Knowledge Test Questions Class C are available to inmates via the prison portal. This portal is viewed on computers located in the library. The accessibility of these documents is problematic for many inmates. Inmates need to have the required classification to access the library, they also need to be computer literate to navigate the portal, and have sufficient literacy skills to navigate the 114 page document. We suggest that CSNSW could improve the accessibility of driver education material.

Support when leaving custody

Aboriginal people leaving custody should be provided with more assistance and support reintegrating into the community. Legal Aid NSW would support the expansion of programs in custody to reintegrate Aboriginal people into the community. Support should be culturally appropriate and include advice and assistance regarding obtaining a licence in order to reduce driver related reoffending.

The High Intensity Program Units (HIPUs) 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. The HIPUs at Wellington and Mid North Coast Correctional Centres focus on Aboriginal inmates, and may be suitable locations to trial such programs through HIPUs.