NSW Sentencing Council Review of Repeat Traffic Offenders

NSW Government response to the recommendations

April 2022

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INTRODUCTION

In February 2018, as part of the Road Safety Plan 2021, the NSW Government announced that it would work in collaboration with the NSW Sentencing Council to review sentencing of high risk, repeat traffic offenders who may pose an ongoing risk to the community.

The NSW Sentencing Council is an independent advisory body established under legislation that provides advice to the Attorney General on sentencing matters, alongside other functions. There are 16 members of the Sentencing Council including judges, prosecutors and criminal defence lawyers, victims' advocates and NSWPF, as well as representatives from the community.

The review commenced in 2018. Transport for NSW (TfNSW) provided a submission on current policy and analysis related to repeat offenders and provided evidence in hearings of the NSW Sentencing Council. Submissions were also received from a range of stakeholders and interested community organisations and members.

The final report includes 12 recommendations and was published on the NSW Sentencing Council’s website in December 2020. As the recommendations relate to road transport law and road safety outcomes, the Attorney General referred development of the NSW Government response to the Minister for Transport and Roads.

The supported recommendations will be integrated within the NSW Government’s 2026 Road Safety Action Plan alongside other road safety engagement, education, enforcement and infrastructure measures.

1 COMMUNITY AWARENESS

Recommendation 1.1: Raising community awareness of available penalties

TfNSW and the NSWPF Force (NSWPF) 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.

Response: Support in principle

Road safety advertising in NSW is informed by crash and offence analysis, attitudinal research and marketing insights. Core messages are tested with the target audience to ensure they are persuasive and meet an information need.

Where relevant, the NSW Government provides information about penalties for unsafe driving behaviour as a supporting component to advertising or in other communications, such as online and media releases. This includes content appropriate for Aboriginal and culturally and linguistically diverse audiences.

Research indicates that advertising which highlights more extreme consequences of crashes, including death, are not necessarily the most likely to result in behavioural change. This is because high-risk drivers can dismiss the messages as unlikely or irrelevant to them.

A review of road safety advertising in NSW was undertaken by an independent consultant in 2018 as part of the NSW Government's Road Safety Plan 2021. The review found that the approach in NSW is consistent with practice in other jurisdictions and recommended an ongoing focus on informational and positive messaging.

A new advertising campaign focused on imprisonment as a penalty is therefore not currently planned, but penalty information will continue to be provided as a supporting message.

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).

Response: Support

As noted by the Sentencing Council, the definition of "major offence" in the *Road Transport Act 2013* (NSW) already includes, but does not explicitly list, section 52A of the *Crimes Act 1900* (NSW). Minor amendment to the drafting of s4(1) of the *Road Transport Act 2013* (NSW) to also specify section 52A in the definition (without limiting or changing the current scope of the section) will be considered in future technical updates to the legislation.

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 five years before that offence, committed at least one other such offence.

Response: Noted

The key purpose of the proposed definition is to define the offender cohorts for new measures in recommendations 3.1, 4.1 and 5.3. The response to each recommendation is outlined below.

It is noted that any new measures require a clear, evidence based outline of the eligible offenders (for the Courts and/or TfNSW administration), with a focus on the small group who repeatedly commit higher risk offences and/or have a history of offending.

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.

Response: Support in principle

The NSW Government recognises the intent of the recommendation, which is to ensure that in cases where a person is seriously injured, evidence of drug impairment is available to the NSWPF and the Court. This supports safety outcomes by ensuring that offences and penalties are appropriately applied to serious traffic offenders.

Currently, all motor vehicle drivers involved in fatal crashes are subject to mandatory drug and alcohol testing. This focuses mandatory testing on the most serious crashes. Any change to the testing regime, including expanding the circumstances in which blood and urine samples are collected and/or analysed, would have a significant effect on road users, the NSWPF and health resources.

The NSW Government has commenced development of a new five year road safety plan for NSW. Options to address this aspect of the testing regime will be considered as an action for inclusion in the plan.

3 ADDRESSING THE ATTITUDES TO RISK OF REPEAT SERIOUS TRAFFIC OFFENDERS

Recommendation 3.1: Programs to address attitudes to risk

(1) TfNSW and Corrective Services NSW should consider developing programs for serious and repeat traffic offenders that seek to address their attitudes to risk.

(2) TfNSW 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 TfNSW 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.

Response: Support in principle

As part of the NSW Government's Road Safety Plan 2021, TfNSW is currently developing a new drink and drug driving education strategy that will require offenders to undertake an education course prior to reapplying for their licence (see response to recommendations 5.2 and 5.3). This will provide an appropriate behaviour change program for a significant proportion of the 'serious and repeat traffic offenders' identified by the Sentencing Council.

In 2019, Corrective Services NSW developed and launched a new driver education and behaviour change program –TRIP. TRIP is currently delivered to custody-based high-risk offenders who have been sentenced for drink driving; drug driving; and/or negligent or dangerous driving offences.

As part of the development of the new road safety plan, TfNSW will consider a further targeted program to address risk taking by the small group of repeat offenders that are outside current and planned initiatives and may pose a high risk to the community.

Detailed aspects of any program, including eligible offenders, referral pathways, availability in regional NSW, appropriateness for offenders of different ages and cultural backgrounds, licensing consequences, fee payment options, successful course completion criteria, and any potential legislative changes, will be considered following further analysis, noting the key principles recommended by the Sentencing Council.

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.

Response: Not supported

The NSW Government does not currently support the introduction of restricted licences for offenders who are subject to a licence sanction. Licence sanctions apply for serious offences only, including those that carry a significant road safety risk. When consistently and swiftly applied, licence sanctions are proven to deter further offending.

Licence disqualification applies automatically when an offender is convicted of a major offence in Court. However the Court takes personal circumstances into account in sentencing, including for first time offenders. If appropriate, options available to the Court that allow first time offenders to return to licensing sooner include ordering less than the 'automatic' disqualification period that is prescribed in the legislation (though no less than the minimum period), or dismissal of charges without a conviction being recorded.

A driver who faces licence suspension under the Demerit Points Scheme (administered by TfNSW) may elect to be of Good Behaviour for a 12-month period as an alternative to serving the suspension period. Other licence sanctions administered by TfNSW for high risk offences (such as excessive speeding or drink or drug driving), or applied at the roadside by the NSWPF, can also be appealed.

Operationally, the introduction of the proposed restricted licence would increase the workload of the Court in assessing applications (potentially at multiple points), and in dealing with breaches of conditions. Further analysis would be required to understand the road safety risk profile of the offenders who would be part of any scheme, as this may have implications for insurer pricing of compulsory third-party insurance. The system would also require administration by TfNSW, as well as increase complexity of enforcement for the NSWPF.

Loss of licence can have a significant effect on offenders, including younger drivers and residents in regional areas. These groups are also overrepresented in road trauma. The NSW Government delivers, through the Community Road Safety, a range of public and community education measures as well as targeted initiatives that aim to prevent serious offending (and potential trauma and licensing implications) and to support safe and legal driving. This includes ongoing road safety advertising campaigns, road safety education delivered to all students through schools, the Safer Drivers Course for young drivers, and the Driver Licensing Access Program, which supports Aboriginal and disadvantaged drivers to get and retain their licence.

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).

Response: Support in part

Any drink driving offender who receives a mandatory alcohol interlock order has 28 days from their sentencing date to appeal and seek an exemption order. It is important that there is certainty and finality in sentencing – for offenders, as well as TfNSW in administering interlock licensing and the NSWPF in enforcement.

For offenders who experience a change in their circumstances after an interlock order is made, TfNSW administers a concession and severe financial hardship scheme to support program participation by all. This can provide up to 100% of interlock program costs.

Offenders who have or develop mild to moderate medical conditions can have their interlock device adjusted by their device provider (with approval from TfNSW) to enable them to enter or continue in the interlock program.

However, TfNSW will consult with stakeholders on potential legislative changes to allow offenders with an interlock order who develop a serious medical condition (i.e. that prevents them providing a sufficient breath sample to operate an interlock) to seek an interlock exemption from the Court after their initial sentencing. This would apply to a very small number of offenders who are physically unable to comply with their order (consistent with current policy), and would not be expected to compromise the overall safety benefits of the interlock program.

As a key principle, any interlock exemption order considered for this small cohort would not result in an offender returning to licensing earlier than if the exemption had been made at their original sentencing. All recipients of an interlock exemption order are also required by TfNSW to complete an education program (Sober Driver Program), a program which has been shown

to reduce the risk of recidivism, before they return to licensed driving (consistent with current requirements for offenders who receive an exemption).

Recommendation 5.2: Mandatory Programs for Interlock Participants

The *Road Transport Act 2013* (NSW) should be amended so that TfNSW 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 TfNSW.

Response: Support in principle

In 2018, the NSW Government introduced a suite of legislative reforms that significantly strengthened the penalty framework for drink and drug driving offenders, including expansion of the interlock program. This package of reforms also included legislation changes (yet to commence) that will support the final element of the reform, which is new education requirements for drink and drug driving offenders. This reform is expected to apply to offenders that have an interlock order, as well as those that do not.

TfNSW is currently developing a drink and drug driving education strategy to support the provisions. This will ensure that programs are evidence based and readily available (including in regional NSW) before they are introduced as a requirement. The option of requiring an offender to retain their interlock device until their education program is complete is being considered as part of this planning.

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.

Response: Support in principle

As noted in the response to recommendation 5.2 (see above), TfNSW is currently developing a new drink and drug driving offender education strategy as part of Road Safety Plan 2021. This strategy will set the future requirements for different groups of drink and drug driving offenders, including those who have an interlock order.

The Sober Driver Program has been evaluated and shown to deliver strong benefits for drink driving offenders. Expansion (and/or delivery of an equivalent robust program) is being considered in detail as part of the education strategy development, as well as the new road safety plan.

In the interim, the program continues to be funded by TfNSW in partnership with Corrective Services NSW, and is readily available to the Court to impose as part of a supervisory order for most types of serious and repeat drink driving offences.

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 NSW 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 Intelligent Speed Adaptation (ISA) device fitted to their vehicle.

Response: Support in part

The NSW Government will, as part of the development of the new road safety plan in 2021, consider the feasibility and benefits of requiring high risk speeding offenders (or a subset of this group) to participate in an intelligent speed adaptation (ISA) program.

Any discount or removal of an effective penalty (such as a licence suspension or demerit points) in exchange for program participation is not supported at this stage. A 2013 evaluation of an ISA technology trial involving repeat offenders in Victoria found that the removal of demerit points (alongside use of ISA) had no statistically significant effect on relative crash risk or on any of the speed-related outcomes.

Specific legislative changes that may be required will be considered following assessment of the feasibility of an ISA program, noting the recommendation of the Sentencing Council that any provisions be flexible enough to accommodate emerging technologies.

In the short to medium term, lifesaving ISA (in various forms) is also expected to increasingly become a standard feature in the NSW vehicle fleet, providing benefits for all drivers. Escalating uptake has the potential to deliver safety benefits more broadly than through sentencing of offenders alone. Options to enhance vehicle safety are also being considered in the development of the new road safety plan.

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 TfNSW, or by operation of demerit points), or

(b) a driver is found guilty by the Local Court, TfNSW 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 TfNSW.

Response: Support in principle

TfNSW will, as part of the development of the new road safety plan, review the research relating to educational interventions for high range speeding offenders. This target group and behaviour will be considered alongside programs for other high risk offenders (see response to recommendation 3.1).

Recommendation 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 five 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 nine months and/or 50 penalty units, and automatic disqualification for 12 months (with a minimum disqualification of six months), or

(ii) imprisonment for 12 months and automatic disqualification for 12 months (with a minimum disqualification of six months), in the case of the driver of a heavy vehicle or coach.

Response: Further analysis required

The NSW Government has ensured that there are robust penalties in place for excessive speeding by more that 45km/h over the limit. Drivers face a fine of up to $3,300 ($2,520 if dealt with by penalty notice) and 6 demerit points. Higher fines and/or demerits apply if the offence is committed in a school zone or in a heavy vehicle.

Automatic licence suspension applies. The NSWPF have the power to immediately suspend a driver's licence at the roadside for a period of 6 months. The same 6 month licence sanction also applies if a driver is disqualified by a Court for the offence or suspended by TfNSW after being detected by a speed camera.

In the case of a repeat offence, offenders can accumulate enough demerit points to receive a demerit point suspension, which takes effect after the 6 month suspension or disqualification for the excessive speed offence, placing many offenders off the road for an even longer period.

Vehicle sanctions also apply for excessive speeding. In addition to taking a driver's licence, the NSWPF can impound, or confiscate number plates from, a vehicle for a minimum period of 3 months (a 6 month period applies if the speeding driver was also driving while disqualified). Drivers who are found guilty of a second excessive speeding offence within a 5 year period may also forfeit their vehicle.

If a speeding driver is involved in a crash that results in grievous bodily harm, they may, depending on the circumstances of the case, be charged with a number of serious offences that have terms of imprisonment as a sentencing option. This includes negligent driving offences or dangerous driving. Speeding by more than 45km/h is considered a circumstance of aggravation for dangerous driving offences, and longer terms of imprisonment (14 years if the crash results in a death) are available to the Court if a driver is found guilty.

Given the suite of existing tough penalties for the offence, the additional deterrent benefit, as well as the practical implications, of making a term of imprisonment available for a second or subsequent offence requires further analysis, particularly as the offence can be camera detected.

There are also recommendations outlined by the Sentencing Council that could result in other requirements applying to this same cohort of offenders (see response to recommendations 6.1 and 6.2). TfNSW will therefore review the evidence, and consider this recommendation further in future review of measures targeting speeding offenders.