

THE ROAD TRANSPORT ACT 2013; NAVIGATING THE NEW REGIME

LEGAL AID COMMISSION
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INTRODUCTION;

In introducing the Road Transport Bill to Parliament in February 2013 the Transport Minister advised Parliament that,

".....These bills...remove anomalies, inconsistency and a degree of complexity in the legislation that impacts on every citizen in New South Wales"

and that they,

"represent[s] a simplification of the structure of legislation without major changes to policy."

Whilst I think these comments were essentially accurate, there was the need for a number of amendments in the Upper House, one being to remove what would have become a major anomaly and I also think that an opportunity to make some important changes, especially in our regular area of work, may have been lost.

However it should be noted that the Government has referred issues regarding Driver Licence Disqualification Reform to the Legislative Assembly Committee on Law and Safety for inquiry, so in one area at least there may be some change.

I don't intend to simply go through the new legislation and tell you what the new sections are. This has already been done by the RMS with reference to both the old and new legislation. I have an electronic version, which runs to over 50 pages. I have provided it to Leanne Robinson and am sure she will send it on to those that are interested in it.

What I intend to do is simply address some issues that have been raised in relation to the legislation and also give an

indication of what approach the Law Society has taken with our submission to the Committee on Law and Safety. I understand that Legal Aid has also made a submission.

The Road Transport Act 2013 is an amalgamation of four other Acts; the Road Transport (General) Act 2005 (the compliance and enforcement provisions), the Road Transport (Driver Licensing) Act 1998, the Road Transport (Vehicle Registration) Act 1997 and the Road Transport (Safety and Traffic Management) Act 1999. It commenced on 1st July 2013.

SECTION 9;

The reason I mention this section is because without an amendment in the Upper House we would have ended up with a bizarre situation.

Section 9 deals with the determination of whether an offence is a first offence or a second or subsequent offence. The original legislation referred to a person being "found guilty" of another offence, which would have included a section 10 dismissal (where a person is found guilty but no conviction is recorded). However **section 205**, which deals with disqualification periods, referred to "conviction" and the calculation of the appropriate disqualification period related to whether a person had been convicted or not.

This would have led to a bizarre situation of fines and periods of imprisonment for second offences being based on previous matters dealt with under section 10 and disqualification periods for the same second offence being calculated without reference to section 10 matters.

It was acknowledged by the Minister in the Legislative Council as an "*unintended departure from the current arrangements*" but my cynical view is that it might have been an attempt by the RMS to "*sneak it through*". We will never know, but at least it was amended by the Parliament, having been brought to their attention by both the Law Society and the Chief Magistrates Office.

I cannot leave any discussion about section 9 without bringing to your attention **section 9(8)** and **section 9(9)**.

Section 9, by providing a definition of "*first offence*" and "*second or subsequent offence*", provides it all purposes and is for use for different penalties or for disqualification periods or for forfeitures. A definition of second or subsequent offence was previously confined to section 25A dealing with driving whilst disqualified etc.

Section 9(8) says that an offence is a "first offence" if it is not a second or subsequent offence. Helpful.

But even better is section 9(9) which says that if a Court is satisfied that a person is guilty of an offence but cannot determine whether the offence is a first offence or a second or subsequent offence then the court may only impose a penalty as if it were a first offence. In other words, if you can't work your way through ss(1) to (7) then just rely on ss(9).

I am sure there is a rule of statutory interpretation somewhere that describes such a sub-section and probably in Latin. I am sure it may become well used.

SECTION 203;

This section provides that section 10 of the Crimes (Sentencing Procedure) Act 1999 does not apply if a person has been dealt with by section 10 in the previous 5 years for a whole range of offences.

This was previously **section 187(6)** of the Road Transport (General) Act 2005 and also existed in previous legislation. It is not new but it does restrict the Court's discretion.

It does appear however that the offences caught by the section have been extended to include those referred to in 203(2) (f) as *"an offence against the heavy vehicle driver fatigue/speeding compliance provisions."*

SCHEDULE 3 CLAUSE 16(1)(b)- REFUSE BREATH ANALYSIS;

There was some concern that the penalties for this offence had been reduced. Unfortunately that is not the case and in a convoluted way they have remained the same.

I think it stems from the fact that the offence arises in the Schedule to the Act rather than the Act itself.

However the definition in Section 4 of "major offence" clearly includes the offences under **Clause 16(1) (b)**, 17 and 18 and the disqualification periods for refusing breath analysis remain the same as HPCA.

The other penalties are in **Clause 16(1) (b)** and remain 30 penalty units and 18 months imprisonment for a first offence

and 50 penalty units and 2 years imprisonment for a second offence.

THE NEW SECTION 206A;

On 19th June 2013 the Government introduced the Road Transport Amendment (Disqualification on Conviction) Bill 2013 into the Parliament. It has passed the Lower House and is due to be debated and probably passed by the Upper House in August.

The Bill provides the insertion of a section 206A in the Act which will provide that when a person is disqualified as a consequence of being convicted of certain serious driving offences and is sentenced to imprisonment then the period of disqualification is extended so that the period of disqualification is served after the person is released from detention.

The offences caught by the provision include **all major offences** (as defined in section 4, not section 205 as suggested by the AG in the second reading speech) and offences against **section 115** (racing, attempts on speed records and other speed trials) and **section 116(2)** (aggravated burn out offences i.e. road and drag racing and other activities).

Sentences caught by the provision do not include a suspended sentence or a sentence to be served in the community or by way of home detention, which I assume is meant to mean ICO's.

The section applies in such a way that the period of disqualification imposed is extended by the period of

imprisonment that is served after the disqualification has commenced.

It should be pointed out that the proposed ss(4) provides that the period of imprisonment does not include any period that the person has been released on parole. This means that if the person is released on parole then the disqualification period will be reduced accordingly and a person can apply for a licence earlier. Query what happens if the person offends again and goes back into custody for both the balance of parole and fresh offending.

It should also be highlighted that the proposed ss(5) provides that the extension of the period of disqualification by the operation of section 206A is subject to any court order relating to the operation of the section. According to the AG this means the court has a discretion to make a specific order regarding the operation of the extension and that a court can order that the disqualification period is not extended "*.....if they consider that is justified in a particular case*".

No guidance is given on when this should occur and practitioners should be familiar with ss(5) in case a situation arises where it is appropriate to seek an order from the court for the extension not to apply.

TRANSITIONAL ARRANGEMENTS;

The new legislation only commenced on **1st July 2013** and the vast majority of matters presently before the Court are prosecutions under the old legislation.

Not surprisingly the old legislation continues to apply for any offence or alleged offence against the old road transport legislation and any proceedings for such offences (**Clause 6 of Schedule 4 of the Road Transport Act 2013**).

It does not mean that old offences before the court can be dismissed as was asked of me by a practitioner a couple of weeks ago.

HTO ANOMALY;

The much disliked Habitual Traffic Offender declarations continue in the new legislation and in preparation for today Danielle Roth has found what appears to be anomaly that you should be aware of.

Under the old legislation a **25(3) offence (2nd or subsequent unlicensed driving)** under the Road Transport (Driver Licensing) Act was counted for the purpose of a HTO declaration (or a "relevant offence"). This was the offence that also carried an automatic 3 year disqualification.

Under the new legislation the **25(3) offence** becomes a **53(4) offence (2nd or subsequent unlicensed driving)**. However in the definition of "relevant offence" in the **new section 216** for HTO declarations the offence to be counted is a **53(3) offence** not a **53(4) offence**.

A **53(3) offence** is actually a first or second never licensed offence (previously a 25(2) offence) and was not previously caught by the HTO provisions.

It would appear in the drafting that they have incorrectly included **53(3)** rather than **53(4)**. It will be interesting to see if the RMS computer system has been set up in such a way that it imposes HTO declarations when a 53(3) offence is one of the three convictions within 5 years.

There does not appear any logical reason as to why a **53(3) offence (1st or 2nd never licensed)** should now be included at the expense of a **53(4) offence** (that carries an automatic 3 year disqualification). Especially in circumstances where the Government and the RMS were keen to make it clear that there was no major change in policy in introducing the new Act.

It is an anomaly that should be brought to the attention of the RMS so as it can be remedied though that will not be necessary if HTO'S are abolished all together.

COMMITTEE ON LAW AND SAFETY INQUIRY;

In June the Government referred to the Legislative Assembly Committee on Law and Safety a number of issues in relation to the possible reform of the law as it relates to "**unauthorised driving offences**". Such offences are drive while disqualified, cancelled or suspended, drive while cancelled or suspended due to fine default and drive while never having been licensed.

The five issues referred to the Committee are;

- (1) Establishing a right to apply to the court to have any outstanding disqualification periods removed for people who complete a minimum offence free period.
- (2) Abolish the Habitual Traffic Offenders scheme.

- (3) Provide the courts with discretion when imposing disqualification periods for unauthorised driving offences by providing for automatic and minimum periods rather than mandatory periods and requiring disqualification periods to run from the date of conviction unless otherwise ordered.
- (4) Revise the maximum penalties prescribed for unauthorised driving offences.
- (5) Introduce vehicle sanctions for offenders who repeatedly drive while disqualified.

In short the Law Society submission has said **yes to (1) to (4) and no to (5)**. I understand the Legal Aid Commission submission to adopt a similar approach. The Committee will hold public hearings in August and report in September.

It is not clear what has given rise to this inquiry but I note that a number of the issues are matters that the Law Society has raised with Government, both past and present, on a number of occasions. Abolishing HTO's and changing the disqualifications periods that apply to these type offences are two areas where change is needed.

I note also that in the current LRC review of the Crimes (Sentencing Procedure) Act 1999 there was a submission lodged by Her Honour Magistrate Clare Farnan that raised a number of the issues, now picked up by the Committee's Terms of Reference.

Many would consider an inquiry looking at giving courts a greater discretion and revising maximum penalties as a relative

positive move. Hopefully it will provide an opportunity for these important issues to be properly canvassed rather than the debate that we have become use to, usually via the front page of the Daily Telegraph and the ensuing few hours on commercial talk back radio.

In relation to the possibility of providing automatic and minimum periods of disqualification and revising maximum penalties the Law Society, as part of its submission, has provided a table setting out the current regime and our proposed changes.

I have set this for you below. It is not meant to be a proposal cast in stone but a starting point at least.

Offence	First offence	Second or subsequent Offence within 5 years
Drive while disqualified <i>(current penalty)</i>	<ul style="list-style-type: none"> • Maximum fine of \$3,300.00 • Unlimited maximum disqualification period • A mandatory disqualification period of 12 months • A maximum jail term of 18 months 	<ul style="list-style-type: none"> • Maximum fine of \$5,500.00 • Unlimited maximum disqualification period • A mandatory disqualification period of 2 years • A maximum jail term of 2 years
<i>(proposed changes)</i>	<ul style="list-style-type: none"> • Maximum fine of \$3,300.00 • A maximum jail term of 18 months • Automatic period of disqualification of 12 months. Court has discretion to reduce to a minimum of 9 months • 	<ul style="list-style-type: none"> • Maximum fine of \$4,400.00 • A maximum jail term of 2 years • Automatic period of disqualification of 2 years. Court has discretion to reduce to a minimum of 18 months

<p>Drive while suspended</p> <p><i>(current penalty)</i></p>	<ul style="list-style-type: none"> • Maximum fine of \$3,300.00 • A maximum jail term of 12 months • Unlimited maximum disqualification period • A mandatory disqualification period of 12 months or a mandatory disqualification period of 3 months if you have been suspended for non-payment of a fine 	<ul style="list-style-type: none"> • Maximum fine of \$5,500.00 • Unlimited maximum disqualification period • A mandatory disqualification period of 2 years • A maximum jail term of 2 years
<p><i>(proposed changes)</i></p>	<ul style="list-style-type: none"> • Maximum fine of \$2,200.00 • A maximum jail term of 12 months • Automatic period of disqualification of 9 months. Court has discretion to reduce to a minimum period of 6 months. 	<ul style="list-style-type: none"> • Maximum fine of \$3,300.00 • A maximum jail term of 18 months • Automatic period of disqualification of 18 months. Court has discretion to reduce to a minimum of 12 months.
<p>Drive while cancelled</p> <p><i>(current penalty)</i></p>	<ul style="list-style-type: none"> • Maximum fine of \$3,300.00 • Unlimited maximum disqualification period • Mandatory disqualification period of 12 months • A maximum jail term of 18 months 	<ul style="list-style-type: none"> • Maximum fine of \$5,500.00 • Unlimited maximum disqualification period • Mandatory disqualification period of 2 years • A maximum jail term of 2 years
<p><i>(proposed changes)</i></p>	<ul style="list-style-type: none"> • Maximum fine of \$1,100.00 • A maximum jail term of 6 months • Automatic period of disqualification of 6 	<ul style="list-style-type: none"> • Maximum fine of \$2,200.00 • A maximum jail term of 12 months • Automatic period of disqualification of 12

	months. Court has discretion to reduce to a minimum period of 3 months.	months. Court has discretion to reduce to a minimum period of 6 months.
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The basis of the proposed changes is to acknowledge that dwd, dws and dwc should carry different penalties according their level of seriousness rather than carry the same penalties for fines, imprisonment and periods of disqualification.

It is also proposed that the different offences carry automatic and minimum periods of disqualification rather than mandatory so as to provide courts with a greater discretion.

Abolishing the Habitual Traffic Offenders scheme would be most welcome and introducing a right to apply to the court for outstanding disqualification periods to be removed would also be a welcome addition.

Introducing vehicle sanctions for those who repeatedly drive while disqualified is not supported, even though it is a power available now to the Police for certain other types of offences.

Whilst ever drive while disqualified is the 2nd or 3rd most common offence dealt with by the Local Court one can only imagine the facilities that the Police would need to hold the number of vehicles involved.

If such a system was introduced there would be need to be provision for car owners and others to apply to the court for the sanction to be lifted so as the vehicle could be returned. One can only imagine the outcry that would result in the first case where a vehicle, relied upon by others to transport a sick

child, was sitting in Police car yard somewhere having been impounded the day before.

The deliberations of the Committee will be closely observed, as will their recommendations. I hope for a positive outcome in an area of the law long overdue for some change.

CONCLUSION;

I trust that those matters outline above are of some assistance to you in your practice.

It is only hoped that we see some changes soon.

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28th July 2013.