The Shopfront
YOUTH LEGAL CENTRE

NSW Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001

7 September 2012

By email

Dear Sir/Madam

Sentencing: Question Paper 10: Ancillary orders

The Shopfront Youth Legal Centre welcomes the opportunity to make a submission to this reference.

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 and based in Darlinghurst in inner-city Sydney, the Shopfront is a joint project of Mission Australia, the Salvation Army and the law firm Freehills.

The Shopfront's main area of practice is criminal law. Two of our solicitors are accredited specialists in criminal law; one is also an accredited specialist in children's law. Our four solicitors appear almost daily for vulnerable young people in the Local, Children's, District and occasionally Supreme Courts.

The Shopfront's clients come from a range of cultural backgrounds, including a sizeable number of indigenous young people. Common to nearly all of our clients is the experience of homelessness: most have 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, often co-existing with a substance abuse problem.

Scope of this submission

Although the Shopfront is a youth legal service, and has expertise in children's matters, the majority of our clients are in fact young adults aged 18 to 25. We therefore have an extensive working knowledge of adult sentencing law and practice. In accordance with the terms of reference, our submission is confined to adult sentencing issues.

Time does not permit us to make a more comprehensive submission. However, we would welcome the opportunity to make further comments or to attend consultations if you consider this would be helpful. In this regard, please do not hesitate to contact me, preferably by email at jane.sanders@freehills.com

Yours faithfully

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The Shopfront Youth Legal Centre is a service provided by Freehills in association with Mission Australia and The Salvation Army

THE SALVATION ARMY
Mission Australia
Freehills

Sentencing: Question Paper 10: Ancillary orders

Question 10.1: Compensation orders

Are compensation orders working effectively and should any changes be made to the current arrangements?

We are unable to make a general comment about whether compensation orders are working effectively. Most of our clients have little or no capacity to pay, and compensation orders are not often made against them.

We support the proposition that the court should take into account the amount of any compensation order when making a decision about imposing a fine. We also agree that compensation orders should take precedents over fines in terms of which is paid first.

Under no circumstances do we support the payment of compensation or any monetary amount as a condition of a bond (see our response to question 7.4 in our submission on Question Paper 7). We also have problems with the payment of compensation being made an enforceable condition of a forum sentencing outcome intervention plan.

We do not recommend any changes to current arrangements, except perhaps the provision of greater assistance for victims to pursue civil enforcement of unpaid compensation.

Question 10.2: Driver licence disqualification

1 What changes, if any, should be made to the provisions governing driver licence disqualification or to its operational arrangements?

We see the need for substantial changes in this area. The Shopfront Youth Legal Centre has made numerous submissions and representations in relation to this issue. Extracts from some of our submissions are attached as Appendix A to this submission.

We agree with the comments made in the preliminary submission of Magistrate Claire Farnan, referred to in paragraphs 10.31 to 10.33 of the Question Paper.

We agree with the option proposed in paragraph 10.34, i.e. removing the automatic 3-year disqualification period for a second offence of driving unlicensed (when the offender has not held a licence in the preceding 5 years).

However, this recommendation does not go far enough. The disqualification regime applicable to driving while suspended, unlicensed or disqualified is in urgent need of reform.

We would comment that paragraph 10.27 of the Question Paper is somewhat misleading as to the current state of the law. For a first offence of driving in breach of a fine-default suspension, the automatic minimum disqualification period is 3 months. For all other offences of driving while suspended, cancelled or disqualified, the automatic minimum disqualification is 12 months. For a second or subsequent offence of driving while suspended, cancelled or disqualified, the mandatory minimum disqualification is 2 years. Further, these disqualification periods are *cumulative* upon any existing suspension or disqualification.

In our view the mandatory disqualification periods of 12 months for a first offence and 2 years for a second subsequent offence are too long and should be reduced. However, the greatest evil is in the accumulation of these disqualifications. As far as we are aware, section 25A of the *Road Transport (Driver Licensing) Act* is the only provision in the Road Transport legislation which imposes cumulative disqualifications.

We have observed that these cumulative disqualifications have had a huge impact upon our clients, in a manner that is greatly disproportionate to the severity of the offending. The case studies below illustrate some of the problems that arise. We would emphasise that these case studies (even the apparently extreme case of Vicky) are not isolated examples.

Case study: Vicky

Vicky, aged 25, grew up in a dysfunctional family environment and was in the care of the Department of Community Services during her teens. Vicky was homeless for some years but with the help of an after-care service, has now been able to obtain Department of Housing accommodation.

As a young adolescent Vicky was diagnosed with various mental and developmental disorders. These have continued into adulthood and affect her ability to function in society.

While homeless during her teens, Vicky incurred a large number of fines, mainly for travelling on trains without a valid ticket. These fines were referred to the SDRO, and then to the RTA, which imposed a "customer business restriction". She was told that she would not be able to apply for a licence until her fines were paid in full.

Like many young people in her situation (with or without mental health problems) Vicky felt that she would never be able to pay off her fines, and would never be able to get her licence. She took the risk of driving without a licence, and not surprisingly was soon picked up by police and charged with driving unlicensed.

On her first conviction for driving when never licensed, Vicky received a small fine and no disqualification, but was soon charged with a second offence. Despite Vicky's mental health problems, the magistrate in this case felt that diversion under section 32 of the *Mental Health (Forensic Provisions) Act* was inappropriate for traffic offences. It must be said that the magistrate was prepared to extend Vicky some leniency, adjourning her case in order to give Vicky the opportunity to sort out her fines and apply for a licence.

The Shopfront Youth Legal Centre assisted Vicky in making annulment applications for some of her fines, and to make a time-to-pay arrangement for the others. Unfortunately, due to her poverty, mental health problems, and chaotic lifestyle, Vicky missed a couple of these payments. She also committed another unlicensed driving offence during the adjournment period, which disentitled her to any leniency the magistrate might have contemplated. The magistrate recorded a conviction and Vicky received the mandatory 3-year disqualification.

Since receiving her 3-year disqualification, Vicky has been charged several times with driving while disqualified. The first time, she faced a very understanding magistrate who was prepared to dismiss the charges under section 32 of the *Mental Health (Criminal Procedure) Act*, on condition that she accept psychiatric treatment and psychological counselling.

Unfortunately, the court's patience (and the limits of the discretion available under the mental health legislation) was soon to run out. Just before she turned 21, Vicky was charged with another instance of driving while disqualified. She had driven off to try to avoid the police, and so was also charged with dangerous driving. It is worth noting that this is the only time Vicky has ever been charged with an offence involving dangerous driving; to date, she has never been charged with a drink-driving offence, and has incurred only minor speeding offences.

Vicky was refused bail and spent almost 2 months in custody before being sentenced. She was sentenced to a 9-month prison term with immediate release on parole. This immediate release was granted only because Vicky was lucky enough to strike a very compassionate magistrate – the same one who had previously dealt with her under the mental health legislation. He recognised that keeping Vicky in jail would cause her to lose her housing and jeopardise any potential for rehabilitation.

Vicky spent the next 7 months on parole, and managed to complete it without re-offending. However, she has since been charged with further offences of driving while disqualified. The most recent of these occurred while fleeing a violent domestic situation. She has again been placed on a suspended sentence. Any sort of slip-up, whether driving-related or not, will land her back in jail.

Vicky has now been disqualified from driving until she is well into her fifties. Even if all her habitual traffic offender declarations are quashed, she will still be ineligible for a licence until she is well into her forties. Unless her licence disqualifications can be remitted, it is likely that her 2-year-old daughter will be able to get a licence before Vicky can.

Case study: Nathan

Nathan, aged 22, had a difficult childhood and adolescence. His mum was in and out of jail and his relationship with his dad was not always good. He spent most of his late teens either homeless or living in supported youth accommodation. To his credit, Nathan managed to get his driving licence and purchase a cheap car when he was only 17.

Soon after, he incurred a parking fine which he did not pay. It is unclear whether Nathan was even aware that he had been fined, but just after he turned 18 his licence was suspended. Nathan never received the suspension letter. He had been forced to leave his accommodation, and unable to find a permanent home he could not update the RTA with a new address.

About three months later, Nathan was pulled over by the police. He was told that his licence had been suspended. He was charged with driving while suspended and told not to drive again. Because Nathan was basically living in his car, he felt he could not simply abandon his car by the side of the road and so he continued to drive. He was pulled over by police again later that day and charged with a second count of driving while suspended.

Largely because of his homelessness, Nathan missed his court date. He was convicted of both offences in his absence, and disqualified from driving for a total of 3 years. He had already been off the road for over a year when he came to the Shopfront Youth Legal Centre for advice. We assisted him in having both convictions annulled. This was a long and complicated process because of Nathan's circumstances. The first charge was eventually dismissed because Nathan had been unaware of the suspension of his licence. Nathan pleaded guilty to the second charge of driving while suspended, but recognising that he had already spent such a long period off the road, the Magistrate dismissed the charge under section 10 of the *Crimes (Sentencing Procedure) Act*.

This means that Nathan is no longer disqualified and will be able to apply for his licence again. Nathan was fortunate that he had the self-restraint not to drive during his disqualification, and that he was able to access appropriate legal advice and advocacy.

Case study: Ben

Ben is a young man from a migrant background who grew up in Western Sydney. Like many young people, his ability to drive is central to his identity, and more importantly to his ability to obtain employment. Ben got his learner's licence at 16, and provisional licence at 17. Unfortunately, he incurred some minor traffic fines which he was unable to pay. The fines were referred to the SDRO and his licence was suspended.

Shortly after this, while still 17 years old, Ben was caught driving while suspended and had to appear in the Local Court. He admitted knowing his licence had been suspended, but needed to drive for work and could not pay the fines. He simply did not know what to do. Before going to court, he managed to deal with his fines and to get his licence back. However, despite his age and circumstances, the magistrate recorded a conviction and imposed the automatic 12-month disqualification that the law provided for at the time.

Ben did not have any legal advice about his right to appeal, and did not appeal this conviction. Had he appealed, and been legally represented, it is likely that a District Court judge may have been prepared to deal with him under section 10 of the *Crimes (Sentencing Procedure) Act* or under the *Children (Criminal Proceedings) Act* without any disqualification being imposed.

Several months later, after turning 18, Ben was caught driving while disqualified. In this instance, largely due to the harsh way in which he had been treated by the magistrate on the earlier matter, the magistrate showed him some leniency. Ben was released on a section 10 bond.

Regrettably, Ben was again caught driving while disqualified only one day before the end of his disqualification period. He was a passenger in a car being driven by a friend. The friend double-parked the car for a few minutes, leaving Ben alone. When another driver returned to one of the cars blocked by his friend's car, Ben got into the driver's seat and reversed a few metres in order to let him out. He was spotted immediately, because police officers in the vicinity were familiar with him and knew about his disqualification.

The magistrate dealing with this matter took the view that Ben had already "used up his section 10" and refused to extend any further leniency. Ben is now serving a further 2-year disqualification period, which is severely undermining his ability to maintain employment.

We call for the amendment of section 25A so that disqualifications are not cumulative. At the very least there should be a presumption that the disqualification will commence on the day on which it is imposed, and a discretion for the magistrate to make it cumulative if he or she believes this is warranted.

We also support an upper limit on accumulation of disqualifications, somewhat similar to the restriction on the Local Court's power to accumulate sentences of imprisonment. We are of the view that the total period of disqualification imposed (whether by a court or by automatic operation of law) for licence-related offences should never exceed 3 years.

We support the proposal for a re-licensing scheme as outlined in paragraph 10.35 and 10.36. However, our primary position is that the automatic and cumulative disqualifications for licence-related offences should be reformed, as recommended above.

We are also in support of "good behaviour licences" as proposed in paragraph 10.37, but we believe they should extend to offences other than drink-driving offences.

Additionally, we support the repeal of the Habitual Traffic Offender provisions. Habitual Traffic Offender declarations serve no useful purpose and are at odds with the evidence which suggests that, beyond a certain point, disqualifications have little or no deterrent value.

We are also of the view that automatic or mandatory disqualifications should *not* apply to children, whether they are dealt with in the Children's Court or the Local Court. A court would still have the discretion to impose a disqualification on a child.

Finally, we recommend that *all* children charged with traffic offences should be dealt with in the Children's Court and not the Local Court, for the reasons expressed in Appendix A to this submission and illustrated in the case study of Marco below.

Case study: Marco

Marco, now in his mid-20s, grew up in a household where he witnessed and was subject to serious domestic violence from his stepfather. As a result, he missed significant periods of his schooling, and at age 17 he moved out of the family home to live with his foster grandmother.

Marco was initially unable to obtain a licence because he had insufficient documentary identification to satisfy the Roads and Traffic Authority. His birth certificate bears one surname but his other documentary identification, including school records from 1992 onwards, bore another. By the time he had managed to gather the necessary identification documents, he was already disqualified from driving.

Marco's first two offences of unlicensed driving were committed while he was under 18, and dealt with by the Local Court. Most of Marco's traffic offences were committed near his home or near his foster grandmother's place. Driving was an escape for his during a turbulent period in his life.

By the time he turned 18, Marco was already disqualified from driving until the age of 23. He committed further offences of driving while disqualified at age 18. As a result, Marco ended up being disqualified for a total of 9 years from 2002 to 2011.

Court records show that Marco was unrepresented on every court sentence date, except his last one in 2003. It is worth noting that Legal Aid does not usually provide representation for people appearing in Local Courts for traffic matters. Although aid is available in exceptional circumstances, including where the defendant is under 18, this is not widely known or publicised. Being unrepresented, Marco did not have anyone to assist him to place before the court any submissions about mitigating circumstances or (when he was still a juvenile) about the use of sentencing options under the *Children (Criminal Proceedings) Act*. Nor did Marco have access to any legal advice about his appeal rights (unfortunately he did not become aware of the service provided by the Shopfront Youth Legal Centre until some years later).

Marco's most recent traffic offence was committed in December 2002, and he has demonstrated good behaviour and maturity since that time. In 2008 we sent a petition to the Governor of New

South Wales seeking that Marco's licence disqualifications be remitted. This application highlighted the obstacles faced by Marco in his apprenticeship as a mechanic, and getting to and from work without a licence, as well as the mitigating circumstances surrounding Marco's offences. Unfortunately this application was unsuccessful.

2 Should driver licence disqualification be made available in relation to offences that do not arise under road transport legislation?

We do not support the extension of driver licence disqualifications to other offences. If the primary purpose of licence disqualification is to promote road safety by deterring people from committing traffic offences and by taking dangerous drivers off the road for a period of time, we fail to see how the imposition of licence disqualifications for non-traffic offences would achieve this.

However, if licence disqualification is to be extended in this way, we would support it being available only for offenders found guilty of motor vehicle theft offences (as is the situation in the ACT). The provisions in other jurisdictions, which impose disqualifications for offences where a car is used in the commission of an offence, are too broad. We are concerned that disqualification may be inappropriately used for offences which have a tenuous connection with driving.

Question 10.3: Non-association and place restriction orders

1 Should non-association and place restriction orders be retained?

We do not support the retention of non-association and place restriction orders. In our experience they are rarely imposed, which suggests that the courts do not regard them as necessary or useful. Where they are used, they are likely to be imposed against disadvantaged people such as Aboriginal people and young people, who may have real difficulty complying with such orders and who may find it difficult to seek variation or revocation of the order.

The imposition of non-association and place restriction orders raises real civil liberties issues and, despite the exceptions prescribed by the legislation, it is too broad in its application. We agree with the observation in paragraph 10.46 of the Question Paper that the legislation was ostensibly introduced to deal with gang-related activity, but does not appear to have been used to that effect.

We attach a copy of the submission we made to the Ombudsman in 2004. At that time, the legislation was very new and our main experience of non-association and place restriction conditions was in relation to bail. Our clients still have significant problems with the imposition of non-association and place restriction conditions on bail undertakings (see discussion on this issue in our submission to the NSWLRC on *Bail*).

Case study: Tyrone

Tyrone is a young Aboriginal man who lives with family members near "The Block" at Redfern.

He had no criminal history until age 19, when he was caught attempting to sell a small quantity of drugs to an undercover police officer. Tyrone pleaded guilty to supplying a prohibited drug and was sentenced to a good behaviour bond.

The police applied for a place restriction order banning Tyrone from "The Block", even though this was only metres away from his house. "The Block" is also the home of many members of Redfern's Aboriginal community, including some of Tyrone's relatives, and is the site of the Redfern Community Centre. The Local Court magistrate made the place restriction order and Tyrone had to appeal to the District Court to get it removed.

2 Should any changes be made to the regulation and operation of non-association and place restriction orders?

If non-association and place restriction orders are to be retained, we believe they should only be available where the offender has been convicted of a serious indictable offence, i.e. an offence punishable by imprisonment for 5 years or more. The current threshold of 6 months' imprisonment is too low, and means that an order may be made in relation to trivial offences such as goods in custody.

The Shopfront Youth Legal Centre
September 2012

Sentencing: Question Paper 10: Ancillary orders

Appendix A: extracts from previous submissions in relation to driver licence disqualification and related issues

1 Extract from submission to National Youth Commission Inquiry into Youth Homelessness, June 2007

Young people are particularly affected by the SDRO's power to impose sanctions on driver licences. This happens at an early stage in the enforcement process and is difficult to reverse without paying the fines in full, making several regular repayments, or having the fines annulled.

The situation has improved in recent years, mainly because the SDRO will now lift licence sanctions after six regular payments on a time-to-pay arrangement, instead of waiting until the fines are paid in full. However, many people still believe they will have to pay off their fines in full before becoming eligible for a licence. Even those who know they can have sanctions lifted after 6 regular payments often lack the means or stability to make these payments.

It is common for our clients to feel they will never be able to pay off their fines, and to abandon all hope of getting a licence. In these circumstances they are often tempted to drive unlicensed, incurring further fines and lengthy disqualification periods.

The problem is compounded by the fact that the law imposes draconian penalties (including imprisonment) and lengthy mandatory disqualification periods for driving without a valid licence. For example, a first offence of driving while cancelled, suspended or disqualified incurs a 12-month disqualification, cumulative on any existing disqualification or suspension period. For a second or subsequent offence, the mandatory period increases to 2 years. Driving when never licensed does not incur a mandatory disqualification for a first offence, but for a second offence there is a mandatory three-year disqualification[1].

Magistrates have a limited discretion to dismiss the matter (or impose a bond) without recording a conviction; this means that no disqualification is imposed. Indeed, we have found most magistrates to be reasonably sympathetic towards those who have been charged with driving during a fine-default suspension. Some magistrates will adjourn the matter, allowing the defendant some time to sort out their fines and to get their licence. Then, if the defendant can demonstrate that they have done this, the magistrate will exercise their discretion not to impose a conviction or disqualification.

However, magistrates cannot keep exercising this discretion with repeat offenders. While it might be said that people who chose to drive unlicensed deserve to bear the consequences, we believe that the consequences are disproportionate to the severity of the offending. Once a person is disqualified by the court, there is usually no turning back and it is easy to accumulate years of disqualification. There may also be a "habitual traffic offender declaration" which (unless the magistrate decides to vary or quash it) means an extra 5 years off the road[2].

Imprisonment is also a real risk for disqualified drivers. NSW criminal court statistics show that court appearances for driver licence-related offences increased from 7,641 in 1994 to 18,943 in 2005. The number of people sentenced to imprisonment for such offences rose from 443 to 1027 in the same period[3]. While there could be other factors responsible for this increase, our experience suggests that the fine enforcement regime is a major contributor.

It is worth noting that, for people of licensable age (this means 16 or over, because a learner licence can be obtained at age 16), court proceedings for traffic offences are dealt with in the Local Court. In Local Courts, the Legal Aid Commission does not usually represent defendants on traffic matters, unless they face a real prospect of imprisonment. By the time the real prospect of

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[1] *Road Transport (Driver Licensing) Act* 1999 (NSW), sections 25 and 25A.

[2] *Road Transport (General) Act* 2005 (NSW), sections 198-203.

[3] NSW Bureau of Crime Statistics and Research, summary of criminal court statistics, www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_lc_05

imprisonment arises (usually a second or third drive whilst disqualified charge) it is often too late, even with excellent legal representation, to undo the damage that has already been done.

Of course it is important that drivers are licensed, to ensure that they meet basic competency and safety standards. However, we believe that making it difficult for people to obtain and retain licences is counterproductive, particularly where young and disadvantaged people are concerned. Beyond a certain point, licence suspensions or disqualifications have no deterrent value[4].

2 Extract from submission to Department of Attorney-General and Justice on the *Review of the Young Offenders Act and the Children (Criminal Proceedings) Act* , December 2011

Question 33

Should the Children's Court hear all traffic offences allegedly committed by young people?

Absolutely, yes.

The history of a separate jurisdiction for children and young people alleged to have committed offences has traditionally reflected the acceptance that different principles and practices should apply. It is simplistic to draw the line at traffic offences and argue that they are more "adult like' than other offences. This argument appears artificial when considering that the Children's Court can deal with serious matters such as break, enter and steal, robbery matters or obtain benefit by deception type matters, and the list goes on.

We refer to the comments in the "Context" section of the Consultation Paper that refer to "adolescent brain development" which differentiates adults from young people. The Consultation Paper comments*, "it is now widely accepted that these factors, as well as children's vulnerability, immaturity, and lack of experience more generally, necessitate a different criminal justice response to offending by children*."

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 CROC.

Although there is provision for the Local Court to exercise the sentencing options under the CCPA, it is our experience that many Local Court magistrates are unaware of, or fail to consider, the provisions of the CCPA. The tendency in the adult jurisdiction 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.

Further, children are not always legally represented in the Local Court, even though they should be entitled to Legal Aid. When they are represented, duty solicitors are not always well-versed in the special legislative provisions applying to children.

The comment that the focus of traffic offences is deterrence and public safety as providing some rationale as to why matters are dealt with in the Local Court, ignores the fact that the Children's Court is still able to impose deterrent measures such as disqualification where appropriate. It also ignores the fact that punitive and deterrent sanctions are unlikely to be effective when applied to children and young people.

The comment that *" …since the ability to obtain a licence is a privilege extended to adults, all traffic offenders should be dealt with as adults"* is misconceived. It is adults who extend this "privilege" to young people with full knowledge of developmental difference between adults and children. This is despite what is described in the Consultation Paper as a "higher risk" when children and young people are driving. If the concern is so great, than perhaps there should be reflection on the licensable age. However, we note that there are already a number of restrictions

[4] The NSW Court of Criminal Appeal, in a guideline judgment about high-range drink-driving, referred to research suggesting that the optimal disqualification period is 18 months and above that period the offender will simply ignore the fact of disqualification: *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No. 3 of 2002) [2004] NSWCCA 303*, http://www.austlii.edu.au//cgi-bin/disp.pl/au/cases/nsw/NSWCCA/2004/303.html?query=PCA%20guideline, citing Homel, *Penalties and the Drink Driver: A study of One Thousand Offenders*, ANZJ Crim (1981) 14 (225-241).

placed on learner and provisional drivers, recognising that young drivers generally pose a higher risk to road safety than more mature drivers.

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.

We recommend that all traffic offences allegedly committed by juveniles should be dealt with in the Children's Court. 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 also submit that, while the Children's Court should have power to impose licence disqualification, automatic and mandatory disqualifications should *not* apply in the Children's Court.