



Driver Licences, Diversionary Programs and Transport Justice for First Nations Peoples in Australia

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Abstract

In Australia, one significant cause of the imprisonment and disadvantage of First Nations people relates to transport injustice. First Nations people face obstacles in becoming lawful road users, particularly in relation to acquiring driver licences, with driving unlicensed a common pathway into the criminal justice system. This paper identifies that while some programs focus on increasing driver licensing for First Nations people, there are significant limitations in terms of coverage and access. Further, very few diversionary or support programs proactively address the intersection between First Nations people's driver licensing and the criminal justice system. Nevertheless, it is argued that scope does exist within some state and territory criminal justice programs to enhance transport justice by assisting First Nations people to secure driver licensing. This paper highlights the need for accessible, available and culturally safe driver licensing support programs in First Nations communities led by First Nations people.

Keywords: Driver licences; diversionary program; transportation justice; First Nation Peoples; Australia.

Introduction

The Australian settler state is predicated on a fundamental transport injustice. The agents of the settler state have been highly mobile, and a consequence of this mobility has been to render First Nations people *immobile* (Anthony and Blagg 2020; Povinelli 2019). The laws and policing around the road and motor vehicles have been significant sites of this transport injustice (Anthony and Tranter 2018). Road rules and motor vehicle law and regulations, although formally dedicated to the public good of road safety, are experienced by First Nations people as vectors of constraint used to criminalise the mobility of First Nations people (Clarsen 2018: 168; Johansen and Wilson et al. 2021). This paper draws upon documentary analyses of publicly available resources on driver licensing programs for First Nations people and diversionary programs within the criminal justice system. It argues that there is capacity within the criminal justice system for programs that enhance transport justice for First Nations people through facilitating driver licences. This argument has three parts. The first considers the transport injustice facing First Nations people (particularly in relation to licensing) and identifies that a dearth of culturally safe licensing support



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programs contributes to the high rate of unlicensed driving offences. The second part examines existing state and territory criminal justice diversionary programs that could be utilised to support First Nations people to become licensed to drive. As significant resources are expended in prosecuting and sentencing First Nations people with respect to traffic offences, it would be appropriate if these institutional interventions could be directed to addressing the structural causes of First Nations people's interactions with the criminal justice system through facilitating licensing. The third part argues that there must be a fundamental reorientation towards First Nations people's transport justice in Australia. Rather than emphasising criminality, resources and support for First Nations communities need to provide culturally appropriate and accessible pathways to licensing. These programs should focus on learner drivers within communities and ensure that they become appropriately licensed prior to interactions with the criminal justice system. Further, these programs should include diversionary options for First Nations people who do enter the settler state's criminal justice system due to traffic offences. Although the factors contributing to transport injustice for First Nations people are intersectional and complex—such as lack of documentation, literacy, and poverty—breaking the nexus between driving unlicensed and criminalisation would be a substantial step towards transport justice in Australia.

This paper is informed by a study involving documentary analysis of two aspects of the settler state. The first was First Nations people-focused driver licensing programs, and the second was diversionary programs within state and territory criminal justice systems. Documentary analysis involves the structured identification and examination of found 'texts' to produce 'rich descriptions of a single phenomenon, event, organisation or program' (Bowen 2009: 29). There are two stages (Dalglish, Khalid and McMahon 2020). The first stage is identification of documents. The second is the 'iterative' (Bowen 2009: 32) process of interpreting and extracting meaning from the identified documents.

In this study, documents relating to diversionary programs were relatively easy to identify. These programs were highly visible within the written materials of the criminal justice system, enshrined in legislation and policy, highlighted on government websites, and discussed in grey literature such as annual and evaluative reports. Documents relating to diversionary programs were identified by searching official primary legal repositories for each state and territory and searching through the Department of Justice, police, and court digital presences. As is often done in documentary analysis, secondary sources were identified and examined to assist the 'interpretation' of the primary documents (Karppinen and Moe 2019: 252) and to identify any programs that might have been missed in the primary searches.

Documents relating to First Nations people's driver licensing programs were more challenging to identify. Generic material about driver licensing (as with documents relating to diversionary programs) was relatively easy to identify in searches of primary law repositories and in the digital presence of state and territory transport and police agencies. Documents relating specifically to programs for First Nations people's licensing were less evident through these processes. These programs are rarely grounded in formal law and policy; as such, they were not identifiable through searching primary law repositories. Often, these programs are short-lived and do not have an archived digital presence. Triangulation and drawing upon secondary literature became the main methods of identifying relevant material relating to these programs. This involved a tracking process of noting mentions of a program in secondary literature and then following reference trails and undertaking bespoke searches. Often the only documentary traces of these programs were elusive mentions in other documents such as annual reports, media releases or conference papers. Therefore, the slippage identified by Karppinen and Moe (2019: 252), where 'secondary literature' is also primary 'documents' for analysis, occurred in this study.

The second stage of analysis was more straightforward. As the research focused on the capacity of diversionary programs to provide pathways for First Nations people's licensing, the analysis and interpretation of the identified documents was principally denotive. The focus was on understanding the formal structure and operation of diversionary programs, the capacity for diversionary programs to facilitate access to licensing, and the forms and success of First Nations people's licensing programs. This involved extracting core information from identified documents, such as type of program, entry and exit points for participants, and evaluation of evidence. These tabular datasets became the basis of the argument presented in this paper.

As such, it is acknowledged that this approach may have missed some government supports for driver licensing. For example, employment services might include driver licensing supports (should this be a requirement of available employment opportunities) or some First Nations people or other dedicated individuals delivering the services may be providing tailored support for First Nations applicants. However, this paper argues that such supports should routinely be available to any First Nations person seeking a driver licence, whether for a first licence or as a diversionary option; therefore, should such supports be available, these should be readily identifiable from the sources and documentation included in this review if they are to be known, accessed and efficacious. Notably, searches were conducted until June 2022; any subsequently introduced programs are excluded.

Transport Injustice in Australia and Community Licensing Programs

In Australia, First Nations people frequently suffer significant transport and mobility disadvantage (Cullen and Clapham et al. 2016; Rajan 2019: 6). It is well recognised that a feature of this disadvantage are the barriers faced by First Nations people regarding becoming licensed to drive (Helps and Moller et al. 2008; Ivers and Hunter et al. 2016: 381). However, First Nations people need to drive motor vehicles to access services, employment and education and for cultural and community reasons (Frederick and Stefanoff 2011). This is particularly true in rural and remote Australia, where there is non-existent public transport; however, it is also a reality for First Nations people living in regional Australia and the outer metropolitan suburbs, where public transport options are limited. The need to drive and the barriers to licensing lead to many instances of unlicensed driving (Australian Law Reform Commission 2018: 415). Often, instances of unlicensed driving are the primary interaction between First Nations people, especially those from remote communities, and the legal system (Anthony and Blagg 2013: 55–56; Helps and Moller et al. 2008: 62). This interaction is heightened particularly by the intensity of policing received by First Nations people from roadside enforcement officials. First Nations drivers and vehicles owned by First Nations people are more likely to be intercepted by roadside enforcement than non-First Nations drivers and vehicles (Hopkins 2022; Porter and Cunneen 2020: 400). The combined effect of these is the disproportionate representation of First Nations people in custodial sentences for unlicensed or other driving offences (Australian Law Reform Commission 2018: 416; McGaughey, Pasca and Millman 2018: 185). However, the over-representation of First Nations people within the criminal justice system is not limited to people from regional, rural and remote communities. First Nations people from urban centres also face obstacles to licensing adequate transport and higher roadside enforcement surveillance and scrutiny, which increase negative interactions with the criminal justice system (Ivers and Hunter et al. 2016; Rajan 2019).

Recent research has recognised significant barriers to obtaining a driver licence for First Nations people in Australia (Porykali and Cullen et al. 2021; Australian Law Reform Commission 2018: 414; (see generally Cullen and Clapham et al. 2016; Cullen and Clapham et al. 2017). Barriers to licensing include distance (Helps and Moller et al. 2008), literacy (see generally Cullen and Clapham et al. 2016: 5), numeracy (Cullen and Clapham et al. 2016), opportunity (Naylor 2010), access to vehicles (Helps and Moller et al. 2008; Rosier and McDonald 2011: 7), lack of documentation (see generally Cullen and Clapham et al. 2016), fear of authority (Rumble and Fox 2006: 3), an associated sense of shame (Cullen and Clapham et al. 2016), or hopelessness (Edmonston and Rumble et al. 2003), and other nuanced cultural (Elliott and Shanahan Research 2008: 21; McGaughey, Pasca and Millman 2018: 187), social (Cullen and Clapham et al. 2016) or financial factors (see Currie and Senbergs 2007: 9.1–9.10; McGaughey, Pasca and Millman 2018: 187). However, as Anthony and Blagg have identified, deficit-based characterisation of First Nations people conceals governments' lack of services in remote communities, lack of culturally appropriate testing and tests in language and the placement of licensing in police stations (2012: 52–53). Researchers, community members and governments have all recognised the need for alternate pathways—such as simplified learner's permit requirements, recognition of existing competencies or the issuing of 'community' licences—for driver licensing, particularly for First Nations people from remote communities (see generally Australian Law Reform Commission 2018: 414; Cullen and Clapham et al. 2016). Where transport disadvantage becomes highly problematic is in the disproportionate impact of transport-related legal problems, such as licence cancellation due to unpaid fines (including fines unrelated to driving), experienced by First Nations people (Cullen and Clapham et al. 2016). This can cause ongoing trouble with the legal system and a cascading descent into custodial sentencing and lifelong social disadvantage (see generally Cunneen 2018; Currie and Senbergs 2007). While alternate licensing pathways are recognised as one way to mitigate the 'cycle of licensing adversity' (Currie and Senbergs 2007: 6), the dearth of available services enabling or facilitating licensing in First Nations communities is a significant barrier to achieving transport justice (see generally Williamson, Thompson and Tedmanson 2011). Coupled with this is the lack of ongoing funding to support licensing in remote communities across many jurisdictions (Williamson, Thompson and Tedmanson 2011). Put simply, this problem will continue to manifest without ongoing funding of dedicated programs focused on addressing barriers to licensing, such as proof of identity, cost of applications, in-language testing, access to vehicles and appropriate licensed drivers to mentor and supervise learner drivers (see Cullen and Clapham et al. 2016).

Driver licensing in Australia is the responsibility of state and territory governments. Each uses a graduated licensing system where novice drivers progress through various stages of licensing to phase them from lower-risk to higher-risk driving conditions as they gain experience and develop critical driving skills (Senserrick and Willams 2015). It is noted that this language of risk tends to obfuscate experience and competence in remote communities, irrespective of licensing programs, where 'there is a sense that you do not need a licence to drive in the bush; not having a driver licence is the norm and is intergenerational' (Barter 2015: 66). In each of these stages, drivers are given increasing freedom and responsibility and, eventually, are permitted to drive without restriction (Senserrick and Willams 2015). Each state and territory prescribes somewhat different assessments, minimum requirements and applicable restrictions to progress through the stages; however, all centre around common road rule regulations (*Road Transport (Driver Licensing) Regulation 2000* (ACT) pt III; *Road Transport (Driver Licensing) Regulation 2017* (NSW) pt III; *Motor Vehicles Act 1949* (NT) pt II; *Transport Operations (Road Use Management—Driver Licensing) Regulation 2010* (Qld) pt III; *Motor Vehicles Regulations 2010* (SA) pt IV; *Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2021* (Tas) pt II; *Road Safety (Driver) Regulations 2019* (Vic)

pt II; *Road Traffic (Authorisation to Drive) Regulations 2014* (WA) pt II). All include formal knowledge tests of these rules and regulations and a practical driving assessment with a qualified assessor (Senserrick and Williams 2015). While knowledge tests are increasingly available online, these are typically in English, despite efforts to increase educational resources in First Nations languages (Rajan 2019) and are increasing in terms of complexity and time commitment. Practical assessments are predominantly available only via a road authority branch or police station in remote locations, with few First Nations driving instructors and assessors available (Clapham and Khavarpour et al. 2005).

Despite decades of national, state and territory formal road safety strategies and accompanying action plans, only recently have these foundational documents mentioned First Nations people or explicitly targeted support to remote areas where licensing support needs are greatest (Infrastructure and Transport Ministers 2021: 18, 23). Historically, support programs specific to First Nations people's licensing have been settler state-driven and lacking cultural safety and sustainability. For example, Rajan's 2019 review highlighted that more than 30 projects in New South Wales (NSW), Australia's most populous state, have been 'small scale and had a short lifespan' (18). The road authority in NSW and other jurisdictions with remote communities belatedly established programs as more complex graduated systems emerged to facilitate remote licensure by periodically sending authorised personnel to remote locations (Rajan 2019). Any one community might then be visited once a year or less and if 'sorry business' or other attendance conflicts arise on the day, the candidate must wait out another cycle. Unsurprisingly, these have been insufficient in both supply and demand (Rajan 2019).

In most jurisdictions, community learner driver mentoring programs have evolved out of necessity (McRae and Deans 2014), primarily established by charities and non-profits, which have subsequently sought funding support by applications to (cyclical, uncertain) road authority community road safety funding schemes. In such programs, volunteer mentors support individuals lacking an appropriate supervisor or vehicle to achieve the supervised practice driving hours required for learners to progress to an independent driver licence (McRae and Deans 2014: 2). These requirements emerged in the late 2000s as road authorities introduced logbook requirements as high as 120 hours in some states (McRae and Deans 2014: 4). Nonetheless, attention to the specific needs of First Nations people in such programs has been limited (Bates and Buckley et al. 2015; Freethy 2012).

An early example of a more considered program implemented by state government education, transport and justice partners that aimed to involve the local First Nations community in Lismore (NSW) with language and verbal testing options achieved some success (Clapham and Khavarpour et al. 2005) but was not sustained. Only more recently have First Nations-specific licensing support programs emerged, differentiated for urban and remote communities, such as 'DriveSafe NT Remote' in the Northern Territory (Cullen and Clapham et al. 2017) and 'On The Right Track Remote' in South Australia (Nereus Consulting, *On the Right Track: Remote Evaluation Report*. 2017). These offer similar support with language and documentation, especially birth certificates, and some driving lessons, boosting licence outcomes (Cullen and Clapham et al. 2017; Nereus Consulting, *On the Right Track: Remote Evaluation Report* 2017). An exemplar of a more holistic First Nations learner driver mentoring program in NSW, 'Driving Change', is delivered at each site by a First Nations youth worker with strong links to the local community (Cullen and Clapham et al. 2017). The program adopts an intensive case management approach, including free mentored practice driving by community volunteers and referrals to other needed social welfare supports and services. This includes liaising with government agencies to arrange payment plans for state debt and fines that can accrue from driving or non-driving sanctions and, once in place, allow licence restrictions to be lifted (Cullen and Clapham et al. 2017). Sanctions relating to prior unlicensed driving are a critical factor in First Nations people avoiding or disconnecting from the licence process and compound disadvantage (ALRC Report 133. 2018). The 'Driving Change' program has achieved excellent outcomes for First Nations people in regional and remote communities gaining licences (Cullen and Clapham et al. 2017) and, through access to transport, securing greater economic participation (Porykali and Cullen et al. 2021: 5–7). While the initiative commenced as a collaboration between The George Institute for Global Health and the AstraZeneca Young Health Programme, it has resulted in a sustainable model that continues today via routine NSW Government funding (The Georges Institute for Global Health 2023).

Overall, the limited numbers of culturally safe licensing support programs and processes continue to contribute to the high rate of unlicensed driving offences recorded for First Nations people in Australia. Compounding this is that culturally safe licensing programs can exclude participants who have a record of traffic offences (Northern Territory Government 2016) and, particularly, persons already engaged in a custodial sentence (see generally Williamson, Thompson and Tedmanson 2011: 4). However, as identified in the next two sections, there is potential within existing diversionary programs and within the prison system to provide pathways for licensing for First Nations people.

Diversionary Programs with Licensing Potential

Within state and territory criminal justice systems, diversionary programs—whereby an offender is diverted from traditional sentencing and required to undertake activities directed to addressing offending behaviour or perform restitution—emerged in the 1970s (Sarre 1999: 259). Diversionary programs have become an established feature of the Australian criminal justice

system, especially in relation to drugs and alcohol-related offences and in relation to First Nations people (see e.g., Cunneen, Russell and Schwartz 2021; Hughes and Seear et al. 2019). While the evaluation of the success of diversionary programs is contested (see the debate framed by Cunneen 2006; Weatherburn, Fitzgerald and Hua 2003; see also Fishwick and Wearing 2016; Marchetti 2017; Marchetti and Ransley 2014; Stevens and Hughes et al. 2022), there is significant evidence that appropriately targeted and resourced programs can assist in reducing repeat offending behaviour (see e.g., Radke 2018; Faulks, Siskind and Sheehan 2018).

State and territory diversionary programs tend to come in two forms: non-court-appointed (sometimes called ‘police diversion’) and court-appointed programs. Non-court-appointed programs involve police discretion not to prosecute on a condition that the offender undertakes a diversionary program (Shanahan 2016: 6). Court-appointed programs, as the name suggests, are integrated into the sentencing system. There tend to be two forms of these: a pre-sentencing structure whereby the offender is diverted into an alternative program or tribunal, such as a specialist drug court, and a post-sentence program as a sentencing option. Historically, diversionary programs first emerged in this last form as a ‘court ordered’ alternative to traditional penalties such as fines and imprisonment. This taxonomy is important when considering and evaluating diversionary programs. Post-sentencing programs, often directly linked to the sentencing laws, are enforced with penalties for noncompliance. There exists a compulsion to undertake the program backed by the threat of more traditional penalties. In pre-sentencing court-appointed and non-court-appointed programs, the consequences are more diffuse, emerging from the chance that non-participation will lead to entering the formal criminal justice system through being charged with an offence or sentenced by the mainstream criminal court. These non-court or pre-sentencing programs involve a degree of active choice and engagement by participants. In the context of examining the capacity of existing diversionary programs to provide licensing support for First Nations people, four categories of programs were identified: generic traffic offender programs, specialist First Nations people’s courts, other offender diversionary programs and pre-court alternatives, particularly in relation to work and development orders (WDOs) in lieu of fine recovery.

Generic Traffic Offender Programs

In relation to diversionary programs that specifically focus on transport offenders, the NSW Traffic Offender Intervention Program (TOIP) seems to be the most comprehensive in scope and evaluation (Faulks, Siskind and Sheehan 2018). The NSW TOIP is a post-sentencing scheme (a recognised scheme under the *Criminal Procedure Act 1986* (NSW) ch 7, pt IV; *Criminal Procedure Regulation 2017* (NSW) r 96) for traffic offenders, including persons who have pleaded guilty to licensing related offences (e.g., driving unlicensed, suspended, disqualified, cancelled, or having never held a licence). To enter this TOIP, there must be a conviction for an offence under the *Road Transport Act 2013* (NSW), the offender must agree to participate, and the sentencing Local Court must consider the program to be appropriate for the offender and the circumstances of the offence (*Criminal Procedure Regulation 2017* (NSW) r 99). The NSW TOIP is driver awareness in focus. The enabling regulations explain the objective of the program is to provide a ‘community-based road safety educational program’ to ‘provide the offenders with the information and skills necessary to develop positive attitudes to driving’ and ‘to develop safer driving behaviour in the offenders’ (*Criminal Procedure Regulation 2017* (NSW) r 100). TOIP is available to all traffic offenders throughout NSW where there is an available TOIP provider. The phrase ‘community’ in the regulation should be understood as non-government nor corrective services run service, although formally, the TOIP is administered by Communities and Justice NSW (NSW Department of Justice 2017: 4).

The NSW TOIP involves a series of prescribed modules (NSW Department of Justice 2017: 6) delivered by ‘approved TOIP’ providers (New South Wales Department of Justice 2017: 12). Offenders participate together in each program cycle, irrespective of their specific offences, but are encouraged to personalise the program through reflective exercises and homework activities between sessions. There is no inherent focus on First Nations people. As of June 2022, none of the approved providers are First Nations people’s organisations (Local Court New South Wales 2022b), and none seem to offer First Nations people targeted or culturally safe programs (as of 22 June 2022, the providers were Police Citizen and Youth Club (NSW), Blacktown TOP, SAVE Traffic, Road Sense, Aspire Traffic Offender Course, Traffic Offenders Rehabilitation Program). Further, TOIP is about individuals’ attitudes towards driving rather than being facilitative of remedying deficiencies in licensing. While, in 2021, TOIP had 20,229 successful completions (Local Court New South Wales 2022a: 42), it seems predominantly oriented towards speeding offenders (32% of successful participants in 2021; Local Court New South Wales 2022a: 42) and is focused on safe driving (Faulks, Siskind and Sheehan 2018). Finally, it is a paid course, which might be prohibitive for First Nations people. Therefore, it does not practically address systemic barriers First Nations people face regarding becoming licensed, such as access to vehicles, supervisors and financial support. Nonetheless, the NSW TOIP provides a precedent showing that traffic-specific diversionary programs can become an established feature of how traffic offenders are addressed by the criminal justice system.

Versions of TOIP-style programs are available in other jurisdictions by private providers (e.g., in the Northern Territory and Queensland; see also Road Sense Australia 2023b, 2023a). These programs are connected to the administrative cancellation and reapplication for licences arising from the demerit point system, where a completed TOIP certificate is required for the

reinstatement of licensing (Road Sense Australia 2023c). However, they are not formally integrated into the criminal justice system as a sentencing option. Further, there do not appear to be culturally safe iterations of the program for First Nations peoples, and they incur fees.

In Queensland, there is an additional private traffic offender program sponsored by a consortium of defendant-focused law firms (Queensland Traffic Offender Program 2023). Unlike the NSW TOIP, it is not formally linked to the criminal justice system as a sentencing option; rather, it is a course for offenders to complete to show a sentencing court a willingness to accept responsibility and change offending behaviour (AW Drink Driving Lawyers 2021). All traffic offenders join in groups regardless of their specific offence, with the three sessions of the program focused on (1) Drug and Alcohol Counselling, (2) Grief and Victim Impact and (3) Driver Safety, Road Trauma and Fatigue (Queensland Traffic Offender Program 2023). However, due to its generalist focus and status as a paid course, it faces the same problems for First Nations people as those identified with the NSW TOIP.

The Northern Territory 'Back on Track' drink and drug driving program is a dedicated TOIP-style program connected to relicensing after licence cancellation for drink and drug driving offences (Northern Territory Government 2021). Like other TOIP-style courses, there is a fee, and it is provided by private providers. The one strength of this program is that First Nations organisations in some Northern Territory regions are accredited providers, and explicit support is made available for participants who are not strong English speakers (Northern Territory Government 2021). This program demonstrates the potential for TOIP-style courses to be more appropriately targeted to First Nations people. However, this program is highly specific: meeting the requirements for relicensing after cancellation. It is only accessible if the participant originally had a licence and is not directed towards securing licensing in the first instance. Further, like all TOIP-style programs outside NSW, it is not officially a diversionary program directly connected with the criminal justice system.

The NSW TOIP shows that education and behaviour change programs can be connected to the criminal justice system as sentencing options. However, the current NSW TOIP does not directly focus on becoming licensed and does not seem particularly targeted to the needs of First Nations participants. The TOIPs in other states and territories are less formally connected to the criminal justice system as direct sentencing options and exist in a grey space between the criminal justice system and the executive administration of licences. The Northern Territory's 'Back on Track' program for drink and drug driving offenders is a specific example of these relicensing TOIPs that seems more adapted to some of the needs of First Nation participants. However, as is common across the TOIP courses, the current focus is on maintaining a licence or becoming relicensed rather than becoming licensed in the first place. TOIPs show the potential for interventions aimed at addressing the 'offending behaviour' of traffic offenders as formal pathways connected to the criminal justice system and that these can be more tailored to First Nations people. However, current programs do not address the institutional and resource barriers that lead to First Nations people driving unlicensed.

First Nations People's Sentencing Courts

In the context of First Nations people, a further pathway to consider is specific First Nations people's sentencing courts. These courts emerged in many of states and territories in response to the Royal Commission into Aboriginal Deaths in Custody as a way of diverting First Nations people away from traditional criminal justice sentencing; they involve Elders and community leaders in the sentencing process (Auty 2018: 210; Marchetti 2019: 61). The South Australian Nunga Court was the first of these specialist diversionary programs for First Nations people and has become the national model (Marchetti 2019: 61–62).

The Nunga Court is now established under the *Sentencing Act 2017* (SA). To be diverted to the Court, the offender must be recognised as a First Nations person and have pleaded guilty to an offence that can be dealt with in the Magistrate Court (Courts Administration Authority of South Australia 2023). The offences for unlicensed, under licensed or driving while disqualified under s 74 of the *Motor Vehicles Act 1959* (SA) are within the Magistrate Court's jurisdiction; thus, formally, a First Nations person who has pleaded guilty to one of these offences could be diverted to the Nunga Court. The Court comprises a panel of Elders and respected community members who sit with the Magistrate (Courts Administration Authority of South Australia 2023). Their role is to inform the Magistrate of cultural factors and contexts to be considered in sentencing and to support the offender in accessing services. The Court does not have any resources to provide tailored programs for offenders. It could order an offender to undertake proactive steps to become licensed (see Anthony and Blagg 2012). However, without accessible and appropriate licensing programs for First Nations people, such a sentence could be counterproductive via reinforcing the transport injustices that lead to interactions with the criminal justice system.

This difficulty with the South Australian Nunga Court as a vector for First Nations people's licensing is reflected in the other First Nations people's courts. In Queensland, the Murri Court set up under the *Penalties and Sentences Act 1992* ((Qld) s 9(2)) is similar in scope and operation to the Nunga Court (Marchetti 2019: 62; Harris 2004), including the possibility of being a diversionary pathway for First Nations people who plead guilty to a licensing offence under s 78 of the *Transport Operations (Road Use Management) Act 1995* (Qld). However, much like the South Australian Nunga Court, while the Murri Court could

sentence a First Nations person to undertake activities to support licensing, there are limited programs able to be taken up beyond the generic traffic offender (which, as discussed, is not currently directed to facilitating licensing), and a dedicated First Nations people's licensing diversionary pathway would be desirable. This is also the situation for the Victorian Koori Courts (*Magistrates' Court Act 1989* (Vic) ss 4E, 4F) and the Australian Capital Territory's Galambany (adults) and Warrumbul (children's) Courts (*Magistrates Court Act 1930* (ACT) ss 291N, 291GB).

Therefore, the First Nations people's sentencing courts are structures that could be utilised to address licensing. They form an intervention inside the criminal justice system that should be oriented towards reconciling the differences between concepts of automobility that exist for First Nations people and the establishment (see Anthony and Tranter 2018). Orders relating to facilitating affordable licensing, documentation and alternate ways to discharge fines would be appropriate, proactive and empowering. Conversely, orders without substantive, culturally safe programs and support would be empty. First Nations courts can identify First Nation persons who are brought into the criminal justice system through driving offences and provide a mechanism to connect them to appropriate support and training services. However, there are very few services that offer appropriate and culturally safe licensing support and training for First Nations people, currently limiting what First Nations courts could do to facilitate licensing of First Nations people.

Other Offender Programs

This assessment is the same for other potential diversionary sentencing programs. Several states provide diversion sentencing schemes for offenders with a mental impairment (see e.g., *Sentencing Act 2017* (SA) s 30(1)(ii)) and convicted of drug-related offending (see e.g., *Sentencing Act 1997* (Tas) s 27A). It is conceivable that these could be utilised to provide support for offenders to gain licensing—as an embedded motivation, achievement and tool to redirect to alternative, non-criminogenic lifestyles (Ward 2002). However, currently, this would be marginal compared to the major focus of these schemes, which is facilitating health and primary care for offenders (Lim and Day 2014; Schaefer and Beriman 2019). Some of the diversion schemes for children are less adaptable. In Victoria, the *Children, Youth and Families Act 2005* (Vic) explicitly excludes driver licensing offenders from the diversion scheme for child offenders (s 356B). This exclusion of the licensing offences is also present in the police and pre-sentencing diversionary programs provided under the Northern Territory *Youth Justice Act 2005* (NT) (s 38(b)). This suggests a particular challenge given the Northern Territory's record of imprisoning First Nations young people for traffic and licensing offences (Anthony 2018: 45). Notwithstanding this statutory exclusion, it does seem possible for First Nations youths who have entered the diversionary program (due to non-traffic offences) to participate in the DriveSafe Remote NT program (DriveSafe NT 2023). This shows that diversionary programs can connect with licensing support schemes. However, this appears not to be a formalised pathway in the Northern Territory; rather, it is being facilitated by proactive engagement by youth diversion case managers working for Territory Families. In other jurisdictions, there remain two challenges: (1) the specific focus of the specialist diversionary schemes and (2) the existence of other First Nations people-focused driver licensing schemes like DriveSafe Remote NT.

Pre-Court Alternatives: Fine Enforcement Regimes

The NSW TOIP, First Nations people's sentencing courts and other diversionary programs discussed only provide intervention once a person has progressed through the criminal justice system to the point of a guilty plea. However, most traffic offences, including unlicensed driving, belong to the category of offences that are often termed 'regulatory' (Picinali 2017: 684). Primarily, these offences result in fines rather than charges and court hearings. Indeed, unless there have been additional more serious offences (e.g., dangerous driving), in most Australian jurisdictions, a first driving unlicensed offence would only be met with a fine.

However, fines compound. Research on the Queensland State Penalties and Enforcement Registry (SPER) identified that First Nations people are particularly likely to have large outstanding fines (Tang 2017; Wood 2020). Both driving and non-driving offences can lead to fines in many jurisdictions, and unpaid fines can lead to further interactions with the criminal justice system. Historically, unpaid fines were often a vector for the imprisonment of First Nations people. This was emphasised by the coroner investigation into the death in custody of First Nations woman Julieka Dhu who was imprisoned under the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) for four days due to unpaid fines of \$3,622.34 (Western Australia State Coroner 2016: 11). The Coroner explicitly recommended that imprisonment not be an option for fine defaulters. Subsequently, reforms in Western Australia and other states and territories have reduced the likelihood of imprisonment for fine defaulters. The Western Australian changes did not exclude imprisonment in default (Klippmark and Crawley 2018: 699) but provided for a new sentence of 'suspended fines' that would not automatically lead to imprisonment if not paid (*Sentencing Act 1995* (WA) pt VIIIA). In NSW, imprisonment for fine default has been abolished (*Fines Act 1996* (NSW) s 125). However, failure to pay a fine can lead to cancellation of the driver licence and motor vehicle registration. (*Fines Act 1996* (NSW) pt IV div III). The Australian Law Reform Commission identified that the cancelling of driver licences and vehicle registrations was a common fine default penalty across the states and territories (Australian Law Reform Commission 2018: 403; see e.g., *Fines*

Enforcement and Debt Recovery Act 2017 (SA) ss 38–39); *Fines Reform Act 2014* (Vic) s 197). Therefore, fines can often be a mechanism for First Nations people to lose licensing or be a barrier to becoming licensed.

There are avenues within state and territory fine enforcement regimes for possible licensing interventions. For example, in Queensland, there is a diversionary scheme where a portion of the fine amount can be discharged by a Work and Development Order (WDO) (*State Penalties and Enforcement Act 1999* (Qld) s 32G). Access to a WDO is not a right; rather, an ‘enforcement debtor’ must fall within the list of categories. In the context of a First Nations person who is unable to pay accrued fines, the ‘financial hardship’ entry category is probably the most relevant (*State Penalties and Enforcement Act 1999* (Qld) (SPER Act) s 32H(a)). The SPER Act specifically provides for First Nations people to undertake ‘culturally appropriate’ WDOs (*State Penalties and Enforcement Act 1999* (Qld) s 32G(1)(g)). It would seem possible that organisations that provide driver licensing support and road safety training, including First Nations community organisations, could become registered ‘hardship partners’ with SPER (State Penalties Enforcement Registry n.d.). However, one barrier to this is connected to the resources needed for community-based organisations to offer such a program. If adequately resourced, this could provide a pathway whereby community providers provide culturally appropriate and safe driver licensing support as a WDO. This would provide a double benefit to First Nations people: providing licensing and reducing their SPER debt while also addressing some of the causes of the debt. Other states and territories also provide similar WDO arrangements in their fine enforcement regime (see e.g., *Work and Development Order Guidelines 2017* (NSW); *Fines Reform Act 2014* (Vic) pt IIA), suggesting possibilities for First Nations organisations that provide licensing support to become registered in the scheme to allow First Nations people to access their programs. As many of the fines that First Nations people accumulate often relate to traffic offences, this would seem a significant advantage through reducing the debt of First Nations people and directly addressing one of the causes of fines accumulating.

Incorporating licensing as part of a WDO in relation to First Nations people could be an effective pathway, especially as traffic fines are often the entry vector for First Nations people into the state and territory fine enforcement regimes. However, to be effective, there would need to be organisations that provide licensing support and can work through the processes with the fine enforcement regime to become registered as WDO providers.

Prison Licensing Programs

Diversionary programs ultimately aim to divert offenders away from prison. However, once imprisoned, there is the capacity for licensing support to be provided in conjunction with prison authorities. There have been some examples of prison-supported licensing programs for First Nations people. In 2005, a Northern Territory university-led driving training and licensing trial was conducted by a First Nations community organisation for First Nations inmates at the Alice Springs and Darwin Correctional Facilities (Somssich 2008). The program not only addressed accessing learner permits but also facilitated on-road supervision of driving. Preliminary evaluation of the trial ‘showed that out of 46 inmates that participated in driver training and licensing courses only 3 were reported as coming back into the system in a 12-month span so reducing the rate of recidivism’ (Somssich 2008: 353). Reportedly, conflicts in perceived cultural leadership and safety in securing ongoing government funding for the initiative resulted in the program not being sustained, with an understanding of community and cultural dynamics considered pivotal to the program’s success (Somssich 2008).

The need to be viewed as community-led and community-delivered is likely essential for meaningful success. In Queensland, a 2010 Indigenous Driver Licensing Court Deferral Program trial in the remote discrete community of Doomadgee was reported to reduce the number of new unlicensed driving offenders by 94%, yet inexplicably did not continue (Queensland Government 2022). In contrast, their trial in the same year to deliver learner licence education and testing within one remote area correctional centre (Edmonston and Rumble et al. 2003: 362) continued following a demonstrated ‘drop in traffic court cases’ (Williamson, Thompson and Tedmanson 2011: 32). This results in prisoners being learner licence-ready on release but falls short of supporting the transition to an independent driver licence.

Alternatively, Western Australia recently introduced an initiative that allows supervised driving and practical driving assessments to be undertaken by minimum security prisoners and has demonstrated success in achieving licensing for the first four participants (Government of Western Australia 2021). The intensive program is delivered in just seven weeks, which overcomes one challenge faced by the Northern Territory prison program (Edmonston and Rumble et al. 2003): ensuring access to the same individuals regardless of short sentences or transfers.

These programs show that it is possible to support First Nations people to gain licences within prison contexts. However, the fact that some have not endured or are limited in content and locations (notwithstanding positive preliminary evaluations) highlights potential hurdles. A licensing program for inmates would need to address both the theoretical and practical sides of licensing. While the theory components of learning and then taking the licensing knowledge test are conceivably compatible with prison training and education models, allowing inmates into the community to undertake supervised driving hours conflicts with the intensification of the carceral mentality that has been in ascendance within the Australian criminal justice system for

the past two decades (Anthony 2020). The suggestion that a state or territory corrections facility would let First Nations inmates, especially those with records of traffic offences, into the community to drive on public roads supervised by other First Nations people could be seen as untenable within this mentality.

In the Northern Territory and Western Australia models, prison staff have been trained as supervisory drivers. While this seems like a positive aspect, there are also significant concerns. Prisons and prison staff are unlikely to provide a culturally safe learning and mentoring environment for First Nations people. The carceral history of the settler state and the generational trauma associated with prisons for First Nations people (Anthony and Blagg 2021) suggests that contexts that place First Nations people in close proximity to prison officers for driver training would not have a high participation or success rate. The rollout of such a model across the country would require more than just trained staff to be driving supervisors, including significant design to address the institutional context and to make the experience more culturally safe for First Nations people. Another model that has been suggested is the use of immersive driving simulations inside prisons to meet practical driving hour requirements (Farley 2018: 4). This would require improved evidence of learning outcomes from simulations (Martín-delos Reyes and Eladio Jiménez-Mejías et al. 2019) and a substantial change in the existing requirements. Nonetheless, such an initiative would be worthy of exploration to at least allow a reduction of the high number of practical driving hours mandated in some states as applies to other driver education programs (e.g., New South Wales Government 2023).

In the abstract, prison-based schemes have strengths. There are opportunities to run licensing programs in existing training and preparation for release schemes. Further, there are examples of in-prison licensing schemes. However, such schemes face significant obstacles. Prison-based schemes that lead to learner permits are conceptually the least problematic. Learner licensing is done through desk-based learning and testing; therefore, it can be facilitated inside existing prison education and training programs. Difficulties manifest in relation to facilitating the transition from learners to provisional licensing, which requires practical driving training and a practical driving test. This could involve prison inmates driving in the community, which challenges the current carceral mentality that prison is a punishment. Also, it could involve prison officers being driving supervisors, which could be culturally unsafe and a disincentive for First Nations people. A possible solution to these could be the use of advanced driving simulators. However, these would require changes to the licensing laws to be adopted.

Transport Justice for Community from Community

In summary, there can be identified many potential diversionary and in-custody pathways to support driver licensing for First Nations people within existing legal structures and systems. However, these remain only possibilities. The generic traffic offender diversion schemes do not have specific pathways and providers that focus on First Nations people's particular barriers to licensing. The First Nations people's courts could facilitate licensing; however, there would need to be appropriate and culturally safe programs available to support the First Nations driver to which the court could direct them. Other offender programs are less amendable or are oriented on health and wellbeing outcomes rather than transport barriers; some explicitly exclude traffic offenders from participating. The fine enforcement regimes offer a potential earlier intervention model. These benefit by being closely connected to traffic offences (often what has led to the fine), and some have alternative fine enforcement through WDOs. There is an opportunity for organisations that support First Nations people's licensing to be authorised providers under the WDO system. There is evidence of prison-based schemes being successful in facilitating First Nations people to achieve licensing; however, these have tended to be short-lived. There are opportunities for prison-based learner licensing support. However, there also exist significant challenges for prison schemes that support provisional licensing. Mimi Sheller has articulated that 'the struggle for mobility justice is a core political gradient or fault line encompassing social and political struggles over space, access, movement and the power relations that mobilities enable or disrupt' (2018: 25). Nowhere is this more evident than the politics and power surrounding how the Australian settler state has been responding to the issues of First Nations people's licensing. The rules around driver licensing emanate from the settler state and emerge from its concerns regarding transportation policing and safety in populated urban environments (Anthony and Tranter 2018). Indeed, the original legislation that introduced licensing requirements in Australia emanated from these concerns (Tranter 2005). The transposing and intense policing of these rules, especially on remote and regional First Nations people's country could be seen as furthering colonisation and control rather than a safety agenda (Anthony and Blagg 2013). In a nation of contested sovereignty (Anthony 2020), the struggle for transportation justice should extend to who is making the rules of the road and who benefits from their policing.

However, the intense surveillance and policing of First Nations people's road use by the settler state is unlikely to change in the immediate future. First Nations people and communities want safe transport and to comply with traffic and licensing laws (Johansen and Wilson et al. 2021). However, the dearth of accessible and available culturally safe licensing programs means that the under-licensing of First Nations people will endure.

The many and multiple examples of First Nations community-led licensing support schemes show that programs addressing transport injustice for and with First Nations communities achieve positive outcomes. Engagement of community has proven

effective in other policy areas where community participation not only promotes First Nations people's agency (Hunt 2013; Senserrick and Willams 2015) but also recognises First Nations people's sovereignty (Larkin and Galloway 2018; O'Neil 2021). The Australian Institute of Health and Welfare has stated that 'engagement involves Indigenous agency and decision making, a deliberative and negotiated process, not just information giving or consultation, and it starts early in the program or project development' (Hunt 2013: 2). Rockloff and Lockie have argued that 'establishment of a more inclusionary and participatory approach' for First Nations people at a local level reasserts a commitment to attaining consensus and more lasting outcomes' (2006: 263). It is recognised that First Nations communities are not homogenous and must be considered in their individual community context (Helps and Moller et al. 2008: 11). The tendency to treat First Nations people as a single group works to disadvantage First Nations people by denying cultural, historical and personal specificity (Rockloff and Lockie 2006: 260). Moreover, without 'an explicit strategy for democratization and capacity-building the notion of community participation is potentially meaningless and its application likely to mask decisions made in the interests of elite groups' (Rockloff and Lockie 2006: 251). This suggests that the success of programs dedicated to reducing First Nations people's transport injustice requires more than 'tokenistic' participation of community members in the process (Helps and Moller et al. 2008: 260–261). As an example, relating to the successful Drivesafe NT Remote program, Cullen and Clapham et al. (2017) have argued:

While DriveSafe is regarded as highly acceptable to remote communities and exhibits many indicators of long-term viability, increased Aboriginal involvement and leadership is recommended to promote inclusive partnerships with Aboriginal communities. (88)

In NSW, reporting on the Lismore Driver Education Program 'On The Road', (Clapham and Khavarpour et al. 2005) noted that several studies 'have recommended targeted and culturally appropriate programs, to address the third issue, the need to involve local communities in countermeasures' (950). The Australian Institute of Health and Welfare identified the following criteria for successful engagement with First Nations communities:

- an appreciation of—and the cultural competency to respond to—Indigenous history, cultures and contemporary social dynamics and to the diversity of Indigenous communities; valuing the cultural skills and knowledge of community organisations and Indigenous peoples
- clarity about the purpose and the relevant scale for engagement, which may call for multi-layered processes: engagement needs to relate to Indigenous concepts of wellbeing
- long-term relationships of trust, respect and honesty as well as accessible, ongoing communication and information
- effective governance and capacity within both the Indigenous community and governments themselves
- appropriate time frames (including for deliberation and responsive funding, where applicable; (Helps and Moller et al. 2008: 2).

Where transport-related programs have involved First Nations communities throughout the process, more lasting results appear to have been achieved (Cullen and Clapham et al. 2017; Cullen and Chevalier et al. 2017). According to Austroads, in Western Australia, 'the multi-agency approach to driver licensing issues has been extremely successful in regional areas' (Austroads 2017: 25).

Without ongoing funding, most of the programs aimed at addressing transport injustice are unsustainable. Yet, it has been clearly demonstrated that reducing incarceration of First Nations people to equivalent rates for non-First Nations Australians could save as much as \$18 bn by 2040 (PwC 2017), more than offsetting significant investment in prevention initiatives such as driver licensing. In Rajan's (2019) application of this modelling based on typical parameters in Australia, preventing one six-week incarceration pays for 21 licences and preventing just one death pays for 2,170 licences. Ultimately, the duration of funding has a significant impact on the likelihood of successful outcomes, and consideration must be given to the logistics of any funding application where the possibility of extended service provision exists. To maximise the impact of transport injustice-mitigating diversionary program pathways, extended service provision must be prioritised.

Conclusion

There is a need for a multi-targeted approach to address transport injustice inflicted upon First Nations people in Australia. Ideally, First Nations people should become licensed in community through accessible and culturally safe driver training and licensing programs. However, if a First Nations person enters the criminal justice system due to unlicensed driving, there should be programs focused on facilitating licensing. There are diversionary pathways that *could* be utilised to provide enhanced licensing support for First Nations people who become involved with the settler state's criminal justice system. However, this potential has yet to be developed. The NSW TOIP and similar schemes are driver safety diversion programs rather than licensing support programs. The First Nations sentencing courts and other pre-sentencing diversionary programs could be utilised to support a First Nations person in gaining licensing. However, this would depend on available, accessible and culturally appropriate community licensing programs, as opposed to the previous piecemeal attempts caught in precarious

funding cycles. These programs must be holistic rather than focused solely on licensing tests and requirements; they must also address underlying needs for improved social welfare and other supports that endure as a legacy of colonisation. Finally, should incarceration occur, delivering licensing programs directly to First Nations prison inmates is an avenue for decreasing First Nations people's further interaction with the criminal justice system through unlicensed driving. Some trial programs seem to have achieved this; however, such proactive and progressive approaches seem at loggerheads with the prevailing carceral mentality of the criminal justice system. Although the factors leading to transport injustice for First Nations people are intersectional and complex, breaking the nexus between driving unlicensed and criminalisation will be a substantial step towards transport justice in Australia.

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