

DRIVING WHILE DISQUALIFIED OR SUSPENDED UNDER S 30 OF THE *ROAD SAFETY ACT 1986 (VIC)*: ABOLITION OF THE MANDATORY SENTENCING PROVISION?

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[In an earlier article in 2001, Edney and Bagaric argued that the mandatory sentencing of persons to imprisonment pursuant to s 30 of the Road Safety Act 1986 (Vic) for second or subsequent offences of Driving While Disqualified or Suspended cannot be justified and that reform is required. Since then the topic of mandatory sentencing for Driving While Disqualified or Suspended has assumed even greater importance having regard to (a) an increase in the number of administrative ways a person can now have their licence cancelled or disqualified; (b) the availability of recent empirical data demonstrating the number of persons sentenced to imprisonment for this offence; (c) the results of a major review of Victorian sentencing law and (d) an increase in the different ways a sentence of imprisonment can in fact (and in law) be served. In view of these developments, this article re-examines the use of mandatory sentencing for Driving While Disqualified or Suspended and argues that the arguments put forward by Edney and Bagaric are even more compelling five years down the track.]

I INTRODUCTION

Victorian traffic law is a discrete and complex body of law governed by the *Road Safety Act 1986 (Vic)* and an overwhelming set of regulations. The law has grown over the decades to deal with new issues and problems associated with the use of motor vehicles. As the cars that are driven have become more complex and technologically advanced, so too has the law, arming law enforcement officers

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with the tools needed to licence and control the motoring public. Speeding and drink driving have often been topics focused on by the legislature and Parliament has tended to introduce tough laws and penalties in an attempt to combat the ever increasing road toll.

Driving While Disqualified or Suspended has been a motoring offence in Victoria for almost a century and carries one of the harshest penalties in the *Road Safety Act 1986* (Vic). The offence itself is triable summarily and is contained within s 30:

- (1) A person must not drive a motor vehicle on a highway while the authorisation granted to him or her to do so under this Part is suspended or during a period of disqualification from obtaining such an authorisation.
Penalty: For a first offence, 30 penalty units or imprisonment for 4 months;
For a subsequent offence, imprisonment of not less than 1 month and not more than 2 years.
- (2) S 49 of the Sentencing Act 1991 does not apply with respect to proceedings for an offence against sub-section (1).

The effect of the penalty section and sub-s 2 is that a person charged with a second or subsequent offence of Driving While Disqualified or Suspended *must* receive a sentence of imprisonment for at least one month. In effect, the sentencing provision carries a mandatory term of imprisonment for every person found guilty of a second or further breach of s 30.

Driving While Disqualified or Suspended is the *only* offence in the *Road Safety Act 1986* (Vic) to carry a mandatory term of imprisonment.¹ It is a harsh and draconian provision that is structurally inappropriate, offends against the principle of proportionality and results in substantive and procedural unfairness.

¹ The use of any form of mandatory sentencing has been widely criticised at the international and domestic level on the basis that removal of the judicial discretion in sentencing can lead to an unjust sentence. See, eg, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/14 (2005); Commonwealth, *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999*, Senate Legal and Constitutional References Committee, Report 38/00, (2000); Commonwealth, *Human Rights (Mandatory Sentencing for Property Offences) Bill 2000*, Senate Legal and Constitutional References Committee, Report 33/02, (2002); Neil Morgan, 'Going Overboard? Debates and Developments in Mandatory Sentencing, June 2000 to June 2002' 26(5) *Criminal Law Journal* 293; Neil Morgan, 'Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?' 24(3) *Criminal Law Journal* 164.

Accordingly, one of the questions which this article has attempted to answer is why mandatory imprisonment has been used for this particular offence and whether its continued use can be justified.

Advances in technology in law enforcement have resulted in expanding administrative sanctions that were never anticipated by the legislature at the time of the introduction of the mandatory sentencing provision. It will be argued that the justifications (to the extent that they can be identified) for the harsh sentence in s 30 can no longer be sustained.

II LEGISLATIVE HISTORY OF S 30 OF THE ROAD SAFETY ACT 1986 (VIC)

This section provides an overview of the major legislative reforms to the offence of Driving While Disqualified or Suspended provided for in s 30 of the *Road Safety Act 1986* (Vic). A number of significant amendments have been made to the section over the years, and presumably, these have been made to reflect changes in social attitudes to car offences. However, a search of the relevant parliamentary debates and other literature has failed to reveal any clear basis or rationale for the changes in policy. It seems that the major alterations to s 30 have been introduced as a result of government reactions to official reports or recommendations. While there has been fierce debate over other traffic law amendments, there has been a distinct lack of discussion or discourse in the parliamentary chambers regarding s 30. This is surprising, given that s 30 is the only Victorian traffic offence to carry a mandatory term of imprisonment.

A Early History

Legislation relating to conventional motor vehicles was first introduced in Victoria in the *Motor Car Act 1910* (Vic). Prior to this, the only Victorian legislation dealing with motor vehicles was the *Victorian Railways Motor Car Act 1905* (Vic), which dealt with motor carriages or cars for passenger traffic. Section 6 of the *Motor Car Act 1910* (Vic) set out an offence of driving unlicensed: 'no person shall drive a motor car upon any public highway without being licensed for that purpose'. Under s 8(3), suspended and disqualified licences had no effect, thereby rendering the holder legally unlicensed. No special penalty was provided for in either s 6 or s 8. However, under s 20, a person who acted in contravention of the Act was guilty of an offence and liable upon summary conviction to a penalty not exceeding ten pounds. In the case of a second or subsequent conviction, the person was liable to a penalty not exceeding 25 pounds or to imprisonment for a period not exceeding three months. Importantly, the discretion

was left to the court as to whether imprisonment should be imposed. The highest penalty listed in the 1910 Act was a penalty of 50 pounds.²

The *Motor Car Act 1915* (Vic) retained s 6 and s 8(3) but introduced an amendment to s 20. In the case of a second or subsequent conviction, the court was given the discretion to imprison *with or without hard labour* for a term of not more than three months as an alternate to the monetary penalty.

The *Motor Car Act 1928* (Vic) retained s 6 and s 8(3) and the penalty section was reproduced as s 25.

In 1949 the specific and distinct offence of Driving While Disqualified or Suspended was inserted into the *Motor Car Act 1928* (Vic).³ Section 9(1) stated:

Any person who drives a motor car during the period of any suspension of his licence, or after his licence has been cancelled or during any period of disqualification for obtaining a licence shall be guilty of an offence.

The specific offence of Driving While Disqualified or Suspended was inserted into the Act to assist police to detect and apprehend offenders who disobeyed court suspension or disqualification orders:

Clause 8 is new. It provides a penalty of imprisonment for driving a motor car during a period of disqualification, or after cancellation or during suspension of a licence, and gives power to arrest without warrant for any such offence. The police advise us that, although a licence may be cancelled or suspended, they experience difficulty in dealing with individuals who keep on driving. Apart from legal difficulty in proving suspension, there is further difficulty in collecting the penalty imposed. The offence is a serious one and *it is considered that, where a person wilfully disobeys the order of the court, power to arrest should be given and the penalty of imprisonment provided.*⁴

² This penalty was for contravening *Motor Car Act 1910* (Vic) s14(1), eg, for failing to stop and render assistance, or for failing to give name and address or for failing to report to police after an accident (causing injury to a person, horse or vehicle) has occurred. As a comparison, a person in 1910 was liable to a penalty of imprisonment not exceeding three months or a fine not exceeding ten pounds for common assault (*Crimes Act 1890* (Vic) s38), liable to imprisonment not exceeding 5 years for theft (*Crimes Act 1890* (Vic) s66), liable to imprisonment not exceeding 15 years for burglary (*Crimes Act 1890* (Vic) s121) and liable to suffer death as a felon for murder (*Crimes Act 1890* (Vic) s3).

³ The offence was inserted via the *Motor Car (Amendment) Act 1949* (Vic).

⁴ Victoria, *Parliamentary Debates*, Legislative Assembly, 28 September 1949, 2391-92 (Lieutenant Colonel Leggatt) (emphasis added).

The section contained a penalty provision. For a first offence, the defendant was liable to be imprisoned for a maximum of one month and for second or subsequent offences, the defendant was liable to imprisonment for a minimum of one month and a maximum of three months. Although prima facie this seemed to be a mandatory sentencing provision, it is important to note that the court was able to fine an offender in lieu of imprisonment pursuant to the *Justices Act 1915* (Vic) s 71, whether they were a first or subsequent offender.⁵

The offence and penalty were reproduced without amendment in the *Motor Car Act 1951* (Vic) s 27(1) and subsequently in the *Motor Car Act 1958* (Vic) s 28(1).

In 1961 a minor amendment was made pursuant to the *Motor Car (Amendment) Act 1961* (Vic) s 8 to insert the words ‘to drive a motor car’ after the word ‘licence’ to emphasise that the offence related to licences to drive motor cars.

The penalty for a first offence of Driving While Disqualified or Suspended was increased in 1963 to a maximum of three months imprisonment for a first offence and a minimum of one month and maximum of six months imprisonment for subsequent offences.⁶ In his Second Reading Speech, the Minister indicated that there were ‘grave dangers involved in persons driving their cars after their licence has been suspended’ and indicated that increasing the penalty would deter drivers from making ‘a mockery of one of the most important safety provisions existing in our law.’⁷ Importantly, the discretion to fine first and subsequent offenders in lieu of imprisonment was still open to the court pursuant to the *Justices Act 1958* (Vic) s 74(1).

B *The Introduction of the Mandatory Sentencing Provision*

In 1967, s 28(3) was inserted into the *Motor Car Act 1967* (Vic).⁸ This had the effect of removing the discretion to fine in lieu of imprisonment for either a first or subsequent breach of s 28. As a result, the term of imprisonment for an offence

⁵ The *Justices Act 1915* (Vic) s71 states:

Except where otherwise expressly enacted when a court of petty sessions has authority under this or under any other Act now or hereinafter in force to impose imprisonment for an offence punishable on summary conviction and has not authority to impose a penalty for that offence the court when adjudicating on such offence may notwithstanding if it thinks that the justice of the case will be better met by a penalty than by imprisonment impose a penalty of not more than Twenty-five pounds.

⁶ Amendment via *Motor Car Act 1963* (Vic) s9.

⁷ Victoria, *Parliamentary Debates*, Legislative Assembly, 1 May 1963, 3263 (Rylah).

⁸ The section was inserted via *Motor Car Act 1967* (Vic) s10.

of Driving While Disqualified or Suspended became mandatory. The amendment was introduced as a result of a recommendation made by the Road Toll Committee:

In many instances, courts have imposed monetary penalties in lieu of terms of imprisonment by invoking the provisions of s 74 of the *Justices Act 1958* which allows a court to impose a monetary penalty of not more than \$200 if it thinks that the justice of the case will be better met by a penalty rather than by imprisonment. The committee is of the opinion, and the Government agrees, that a person charged with driving a motor vehicle during a period of suspension or disqualification or after cancellation of his licence should be in no doubt that, if convicted, he will not be given the opportunity of paying a fine.⁹

The Road Toll Committee was convened to make recommendations on how the road toll could be reduced.¹⁰ The Committee was of the belief that the community 'expects the Courts to severely punish persons convicted of serious driving offences' and that 'if the details of penalties imposed for serious offences against road traffic laws were published in the daily press this would act as a deterrent to others'.¹¹ These beliefs led to a recommendation that 'Section 28(1) of the Act be amended to specifically exclude the operation of the provisions of S 74 of the *Justices Act*'.¹² At the time the amendment was made, suspended sentences were not available (discussed further below) and this meant that the defendant actually served the term of imprisonment that was imposed by the court.¹³ This could be described as the high water mark of the history of mandatory imprisonment for the offence of Driving While Disqualified or Suspended.

In 1978, major changes were made to the penalty for Driving While Disqualified or Suspended.¹⁴ Mandatory imprisonment for a first offence was removed and the court was given the discretion to impose either a penalty of not more than \$1000

⁹ Rylah, above n 7, 714.

¹⁰ Road Toll Committee, Parliament of Victoria, *Report by Committee Convened to Make Recommendations on Means by which the Road Toll Could be Reduced* (1967).

¹¹ *Ibid* 2-3.

¹² *Ibid* 17.

¹³ Suspended sentences were available as a sentencing option pursuant to the *Crimes Act 1915* (Vic) s532 up until the introduction of the *Crimes Act 1958* (Vic) when the section was abolished. A conditional suspended sentence was introduced via s 13 of the *Alcoholics and Drug Dependant Persons Act 1968* (Vic) for offenders who satisfied the court that they 'habitually used alcohol or drugs to excess'. The general suspended sentence was reintroduced in Victoria in 1986 via the *Penalties and Sentences Act 1985* (Vic) ss20-22 and was reproduced with amendment via the *Sentencing Act 1991* (Vic) s28.

¹⁴ Changes were introduced via the *Motor Car Act 1978* (Vic) s6.

or imprisonment for a maximum of six months. For a second or subsequent offence, the penalty was changed to a minimum term of imprisonment of one month and not more than two years. At the time of the Second Reading Speech, the Minister distributed an Explanatory Paper which was not included in Hansard and it is not clear why the changes to the penalty were made.¹⁵ It is reasonable to assume that the amendments were made due to protests regarding the severity of the previous sentencing provision.

In 1980 the scope of the offence was widened to include holders of suspended or disqualified motor vehicle learner's permits and motorcycle learner's permits.¹⁶ No change to the penalty was made.

In 1982, the penalty for a first offence was reduced to 'not more than 20 penalty units or imprisonment for not more than four months'.¹⁷ This amendment was introduced after a review was conducted of the penalties in the *Motor Car Act 1958* (Vic). In his Second Reading Speech the Minister stated:

The review examined every offence in the Act and determined fresh penalties, largely independently of the historical bases which were originally established, to reflect the relative severity of the offences as perceived in the present day, to ensure that the amount of the monetary penalty is commensurate with the costs of prosecution, to relate the penalties for certain offences to the penalties prescribed for similar types of legislation ...and to relate the imprisonment penalties...to the monetary penalties to achieve uniformity.¹⁸

In 1986 the *Road Safety Act 1986* (Vic) was introduced to replace the *Motor Car Act 1958* (Vic). The old *Motor Car Act* had been amended by 'some 120 subsequent Acts', was supplemented by approximately 250 pages of regulations

¹⁵ Victoria, *Parliamentary Debates*, Legislative Assembly, 8 March 1977, 6113 (Wilkes). A search of the relevant debates did not indicate where a copy of the explanatory paper could be located. Further inquiries with the State library and Parliamentary library did not assist.

¹⁶ Amended by *Motor Car (Miscellaneous Provisions) Act 1980* (Vic) s8.

¹⁷ Amended by *Motor Car (Penalties) Act 1982* (Vic) s19.

¹⁸ Victoria, *Parliamentary Debates*, Legislative Assembly, 21 October 1982, 1368 (Matthews). It is interesting that here the Minister is referring to the 'relative' severity of penalty by placing the specific penalty for Driving While Disqualified or Suspended within the broader sentencing context. A similar type of 'relativist' exercise was conducted in Victoria by the Victorian Sentencing Committee in 1988 which led to the restructuring of sentences for all crimes listed in the *Crimes Act 1958* (Vic). See Richard Fox and Arie Freiberg, *Sentencing Task Force Review of Statutory Maximum Penalties in Victoria: Report to the Attorney-General*, (1989).

and had never been consolidated.¹⁹ The new Act was a major consolidation of Victorian road traffic law. Whilst it re-enacted the legislation, it was designed to be in a form which the average motorist could understand.²⁰

The offence of Driving While Disqualified or Suspended was retained under s 30(1):

A person must not drive a motor vehicle on a highway while the authorisation [eg, driver's licence] granted to him or her to do so under this part is suspended or during a period of disqualification from obtaining such an authorisation.

The penalty for a first offence was increased to 30 penalty units or imprisonment for a maximum of four months. The justification for the increase was to eliminate anti-social behaviour, thereby ensuring 'safe, efficient and equitable road use'.²¹ Interestingly, in an article discussing s 30, Bagaric and Edney have suggested that increasing penalty levels does not actually result in a reduction in crime.²² Increasing sentences/sanctions and the deterrent effect on target conduct is problematic and is discussed below. The penalty of a minimum of one month and a maximum of two years imprisonment for a subsequent offence did not change, and under s 30(2) the court was prevented from fining an offender in lieu of imprisonment.²³

Section 49 of the Sentencing Act 1991 does not apply with respect to proceedings for an offence against sub-s (1).

C *Recent Legislative Changes*

The most recent amendment to the offence of Driving While Disqualified or Suspended was s 30A which was inserted into the *Road Safety Act 1986* (Vic) in 2004.²⁴

¹⁹ Victoria, *Parliamentary Debates*, Legislative Assembly, 11 September 1986, 227 (Roper).

²⁰ *Ibid.*

²¹ *Ibid* 228.

²² Mirko Bagaric and Richard Edney, 'Imprisonment For Driving while Disqualified: Disproportionate Punishment or Sound Public Policy?' (2001) 25(1) *Criminal Law Journal* 7, 16.

²³ *Sentencing Act 1991* (Vic) s49(1) states that if a person is found guilty of an offence the court may, subject to any specific provision relating to the offence, fine the offender in addition to or instead of any other sentence to which the offender may be liable.

²⁴ The section was inserted by *Transport Legislation (Amendment) Act 2004* (Vic).

- (1) This section applies if a person is found not guilty of an offence against section 30 on the grounds that he or she was not aware at the relevant time –
 - (a) that his or her authorisation had been suspended; or
 - (b) that he or she was disqualified from obtaining an authorisation.
- (2) The court hearing the matter may order that the person serve a period of suspension or disqualification that is in substitution for any of the period of suspension or disqualification that applied to the person at the relevant time during which the person was not aware of the suspension or disqualification.
- (3) The maximum period that the court may impose under sub-section (2) is a period equal to the period between –
 - (a) when the person's authorisation was suspended, or when the period of disqualification started; and
 - (b) when the person was made aware of the suspension or disqualification, or the period of suspension or disqualification ended, whichever is the earlier.
- (4) For the purposes of appeal or review, any period of suspension or disqualification imposed under sub-section (2) is to be treated as if it had been imposed for the same reason that the original period of suspension or disqualification was imposed.

This amendment gives the court the power to order that a defendant who has been successful in defending a charge of Driving While Disqualified or Suspended on the basis of an 'honest and reasonable belief',²⁵ serve a period of suspension or disqualification that is in substitution for the original period of suspension or disqualification. As a result, the 'successful' defendant can no longer be said to be completely victorious. This amendment is important because it recognises the defence of 'honest and reasonable belief' but also ensures that the defendant serves out the original suspension or disqualification period.

It would be reasonable to hypothesise that this section has been inserted as a result of recognition by the government that drivers may be unaware that their licence has been interfered with. However, an examination of the relevant extrinsic material fails to support this contention. One would assume that such a significant amendment would have resulted in at least some discussion in Parliament. Surprisingly, in the Second Reading Speech and subsequent debates, no mention is made of the amending provision at all. The Minister merely stated 'the bill also

²⁵ In order to successfully defend a charge of Driving While Disqualified or Suspended on the basis of 'an honest and reasonable belief', the defendant must prove, on the balance of probabilities, that he or she believed, and had reasonable grounds for believing, that he or she was licensed to drive at the time of the alleged offence: *Kidd v Reeves* [1972] VR 563, 567.

makes a number of other *minor and technical amendments* to the provisions of the *Road Safety Act* dealing with alcohol interlocks, admissibility of evidence regarding demerit points, driving while suspended or disqualified, and parking infringement notices.²⁶

D Comparison with other Road Safety Act 1986 (Vic) Provisions

It is arguable that the mandatory sentencing provision in s 30 is the harshest sentence provided for in the *Road Safety Act 1986* (Vic). For example:

- (i) A person found guilty of Driving in a Dangerous Manner under s 64 of the Act is liable on a first or subsequent offence to a fine not exceeding 240 penalty units or to imprisonment for not more than two years or both.²⁷ The court is *not* prevented from fining an offender in lieu of imprisonment under s 49(1) of the *Sentencing Act 1991* (Vic) and the court has the discretion to consider sentencing options other than imprisonment.²⁸
- (ii) A person found guilty of a drink driving or drug driving offence under any of s 49(1)(b) - (g) of the Act is liable on a first offence to a fine of not more than 12 penalty units;²⁹ and in the case of a subsequent offence, to imprisonment for a term of not more than 3 months.³⁰ Again, the court is not prevented from fining an offender in lieu of imprisonment under s 49(1) of the *Sentencing Act 1991* (Vic) and can consider alternative sentencing options for second and subsequent offenders.³¹
- (iii) A person found guilty of Driving under the Influence of Intoxicating Liquor or any Drug under s 49(1)(a) of the Act is liable on a first offence to a fine of not more than 25 penalty units or to imprisonment for a term of not more than three months;³² and in the case of a subsequent

²⁶ Victoria, *Parliamentary Debates*, Legislative Assembly, 18 November 2004, 1736 (Batchelor) (emphasis added).

²⁷ *Road Safety Act 1986* (Vic) s64(2).

²⁸ Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999) 653-654.

²⁹ *Road Safety Act 1986* (Vic) s 49(3)(a).

³⁰ *Road Safety Act 1986* (Vic) s49(3)(b).

³¹ Fox and Freiberg, above n 28, 653-654.

³² *Road Safety Act 1986* (Vic) s49(2)(a).

offence, to imprisonment for a term of not more than 12 months.³³ However, unlike s 30(2), the court is *not* prevented from fining an offender in lieu of imprisonment³⁴ and given that there is no minimum term of imprisonment set, the court has the discretion to consider sentencing options other than imprisonment.³⁵

- (iv) A person found guilty of Leaving the Scene of an Accident, Failing to Report or Failing to Supply his or her Name and Address where a Person has been Killed or Seriously Injured under s 61(1) of the Act is liable for a first offence to a fine of not more than 20 penalty units or to imprisonment for a term of not more than four months; and in the case of a subsequent offence, to a fine of not more than 40 penalty units or to imprisonment for a term of not less than four months and more than 12 months.³⁶ The court is *not* prevented from fining an offender in lieu of imprisonment under s 49(1) of the *Sentencing Act 1991* (Vic).
- (v) A person found guilty of Unlicensed Driving under s 18 of the Act is liable on a first *or subsequent offence* to a penalty not exceeding 25 penalty units or to imprisonment for not more than three months.³⁷

E Comparative State and Territory Provisions

Every State and Territory in Australia legislates against Driving While Disqualified or Suspended.³⁸ At first glance it seems that Western Australia, South Australia and the Northern Territory are the only other jurisdictions to carry mandatory imprisonment terms for Driving While Disqualified or Suspended.³⁹ All other State and Territory provisions retain a discretion to fine in lieu of

³³ *Road Safety Act 1986* (Vic) s49(2)(b).

³⁴ *Sentencing Act 1991* (Vic) s49(1) states that if a person is found guilty of an offence the court may, subject to any specific provision relating to the offence, fine the offender in addition to or instead of any other sentence to which the offender may be liable.

³⁵ Fox and Freiberg, above n 28, 653-654.

³⁶ *Road Safety Act 1986* (Vic) s61(4)(a).

³⁷ *Road Safety Act 1986* (Vic) s18(1)(c).

³⁸ A summary of all relevant comparative provisions is provided in Appendix A.

³⁹ In the Northern Territory only drivers that are disqualified are subject to a 'mandatory' term of imprisonment; judicial officers are given the discretion in the sentencing provision to either fine or imprison suspended drivers: see *Traffic Act 2004* (NT) ss31-32; *Road Traffic Act 1974* (WA) s49; *Motor Vehicles Act 1959* (SA) s 91(5).

imprisonment.⁴⁰ Examining the Western Australian, South Australian and Northern Territory provisions, it seems that they are even more severe than Victoria's provision, as all of these jurisdictions specify a term of imprisonment for first offenders.⁴¹ However, none of these provisions specify a minimum period of imprisonment and the court has a discretion to fix an alternative penalty.⁴² In all three States, where a term of imprisonment is imposed, it may be suspended (See below for more discussion about 'suspended sentences').⁴³ In reality, the *only* State to mandate imprisonment for 'Driving While Disqualified or Suspended' is Victoria.

It is important to note that the Australian Capital Territory, Queensland, Western Australia and Tasmania allow a person that has been either suspended or disqualified from driving a motor vehicle to apply to the court for a 'restricted' or 'extraordinary' driver's licence.⁴⁴ If granted, the restricted or extraordinary licence allows the person to continue driving in certain circumstances. For example, a tradesperson may be granted a restricted licence allowing him or her to drive a motor vehicle for the purposes of carrying on his or her trade between the hours of 7am and 6pm on weekdays. The legislation allows the court to impose any restrictions that it considers necessary in the circumstances.⁴⁵ At present, restricted or extraordinary licences are not available in Victoria.

III DISQUALIFICATION/SUSPENSION MECHANISMS

There are many mechanisms which give the courts and other authorities the ability to interfere with a driver's licence. These include legislative provisions which subscribe a *mandatory* period of licence disqualification or suspension and legislative provisions which give authorising officers and courts a *discretion* to

⁴⁰ *Road Transport (Driver Licensing) Act 1998* (NSW) s25A; *Road Transport (Driver Licensing) Act 1999* (ACT) s32; *Transport Operations (Road Use Management) Act 1995* (Qld) s78; *Vehicle & Traffic Act 1999* (Tas) s 9.

⁴¹ *Traffic Act 2004* (NT) ss31-33; *Motor Vehicles Act 1959* (SA) s91(5).

⁴² Fox and Freiberg, above n 28, 54-55. See also *Sentencing Act 1995* (WA) s9.

⁴³ *Sentencing Act 2005* (NT) s 40; *Sentencing Act 1995* (WA) ss 39 and 42; *Police v Cadd* (1997) 69 SASR 150. In South Australia, the court also has the power to suspend the sentence on the condition that the defendant enters into a bond: See *Criminal Law (Sentencing) Act 1988* (SA) s38.

⁴⁴ *Road Transport (Driver Licensing) Regulations 2000* (ACT) rules 45-51; *Transport Operations (Road Use Management) Act 1995* (Qld) s87(1); *Road Traffic Act 1974* (WA) s76(3); *Vehicle & Traffic Act 1999* (Tas) s18.

⁴⁵ *Road Transport (Driver Licensing) Regulations 2000* (ACT) rule 48(4); *Transport Operations (Road Use Management) Act 1995* (Qld) s87(4); *Road Traffic Act 1974* (WA) s76(5); *Vehicle & Traffic Act 1999* (Tas) ss18(1) and (5).

interfere with licences.⁴⁶ A mandatory statutory suspension or disqualification provision demands strict compliance: the judicial officer or administrative body is given no other option but to interfere with the offender's licence.⁴⁷

A Mandatory Administrative Suspension or Disqualification

1 Traffic Infringement Notices

Under the *Road Safety Act 1986* (Vic) a member of the police force, an authorised municipal council staff member, an authorised employee of the Department of Infrastructure, or an authorised officer of the Roads Corporation may issue traffic infringement notices to drivers for a range of prescribed offences.⁴⁸ In addition, a presiding officer of the Legislative Council or the Legislative Assembly may issue an infringement notice where the offence occurs on the Parliamentary reserve,⁴⁹ a Protective Services Officer appointed under Part VIA of the *Police Regulation Act 1958* (Vic) may issue a notice where the offence occurs on specific areas of land,⁵⁰ and an authorised officer of a public authority may issue an infringement notice where the offence occurs on land or premises under the control of the public authority.⁵¹

In some circumstances the issuing officer *must* suspend a driver's licence or disqualify a person from obtaining a licence or permit. Whether the licence is suspended or disqualified will be determined by objective statutory criteria. For example:

⁴⁶ A suspended licence is a licence that has no effect during the period of suspension but automatically resumes validity at the end of the suspension period: See *Road Safety Act 1986* (Vic) s28A. The suspended driver is treated as disqualified from driving during the period of suspension, however, once the suspension period is over, the person may resume driving without having to make an application to the court or the Roads Corporation. A disqualified driver is usually a driver who has had his/her licence or permit cancelled and who is prohibited from applying for any licence or permit during the period of disqualification: See *Road Safety Act 1986* (Vic) s28B; *Road Safety (Drivers) Regulations 1999* (Vic) reg 201. Once the period of disqualification has expired, the driver is unlicensed and must apply to the court or to the Roads Corporation to have his/her licence renewed: for example, see *Road Safety Act 1986* (Vic) ss50(3)-(6).

⁴⁷ *Butterworths Concise Australian Legal Dictionary* (Nygh & Butt ed, 1999) 282.

⁴⁸ See *Road Safety Act 1986* (Vic) ss77(2) & 88(1).

⁴⁹ See *Road Safety Act 1986* (Vic) s77(2)(da).

⁵⁰ See *Road Safety Act 1986* (Vic) s 77(2)(ab)(i)-(ii).

⁵¹ See *Road Safety Act 1986* (Vic) s77(2)(e).

- (i) Where a traffic infringement notice has been issued under s 89C of the Act for drink driving (under s 49 of the Act) the offending driver's licence will be disqualified for a minimum period of six months.⁵²
- (ii) Where a traffic infringement notice has been issued under s 89D of the Act for excessive speeding under Rule 20 of the *Road Rules 1999* (Vic), the offending driver's licence will be suspended for a minimum of one month.⁵³

2 Demerit Points

The *Road Safety Act 1986* (Vic) makes provision for a Demerit Points Register and the Roads Corporation is responsible for recording demerit points incurred by drivers.⁵⁴ There are numerous traffic offences that incur demerit points.⁵⁵ Once a person has incurred a prescribed number of demerit points, the Roads Corporation must serve a notice informing the person that they have exceeded the prescribed limit.⁵⁶ Where a person does not elect to extend their demerit point period, the Roads Corporation *must* suspend the licence or permit for a prescribed period.⁵⁷ Where a person elects to extend their demerit point period but subsequently incurs additional points, the Roads Corporation *must* suspend a licence or permit for a prescribed period.⁵⁸

In addition, the Roads Corporation *must* suspend or cancel a person's licence or permit if the person has been disqualified from driving in another jurisdiction or the person's licence has been cancelled due to a judgment, order or decision made under the law of that jurisdiction.⁵⁹

⁵² Schedule 1 of the *Road Safety Act 1986* (Vic) lists the minimum disqualification periods for drink driving offences.

⁵³ Schedule 5 of the *Road Safety Act 1986* (Vic) lists the minimum suspension periods for excessive speed.

⁵⁴ *Road Safety Act 1986* (Vic) s25.

⁵⁵ See Column 1 of Table 1 of the *Road Safety (Drivers) Regulations 1999* (Vic).

⁵⁶ See *Road Safety Act 1986* (Vic) s25(3). See *Road Safety (Drivers) Regulations 1999* (Vic) reg 302 for the prescribed particulars of a notice. The prescribed number of demerit points for a full licence holder is 12 or more points in a 3-year period: *Road Safety Act 1986* (Vic) s25(3)(a). The prescribed number of demerit points for a learner permit or probationary licence holder is 5 or more points in one year or 12 or more points in any 3 year period: *Road Safety Act 1986* (Vic) s25(3)(b).

⁵⁷ See *Road Safety Act 1986* (Vic) s25(3D).

⁵⁸ See *Road Safety Act 1986* (Vic) s25(3B).

⁵⁹ *Road Safety (Drivers) Regulations 1999* (Vic) reg 303(2). It is not known what factors will be taken into account by the Corporation in determining whether to suspend or disqualify under this section as nothing is specified in the Act or Regulations.

3 *Mandatory Suspension or Disqualification by a Court*

The court must either suspend a driver's licence or disqualify a person from obtaining a licence or permit in circumstances where a serious offence involving a motor vehicle has occurred. Whether the licence is suspended or disqualified and the length of the suspension or disqualification will be determined by the relevant statutory provision. Mandatory suspension or disqualification periods are attached to numerous offences.⁶⁰

In addition to the mandatory provisions discussed above, the following legislation gives authorising officers and courts a discretion whether to interfere with drivers' licences by way of either suspension or disqualification in certain circumstances.

4 *Discretionary Administrative Suspension or Disqualification*

S 51 Notices: Under s 51(1) of the *Road Safety Act 1986* (Vic) a member of the police force or an authorised Roads Corporation officer may issue a notice of suspension to certain persons charged with an offence under sections 49(1)(b), (c), (d), (f) or (g).⁶¹ The notice has the effect of immediately suspending the licence of the defendant until the charge has been determined.

Although on its face the provision is discretionary, police policy states that where s 51 applies, the police officer *must* suspend the offending driver's licence

⁶⁰ A list of these offences is provided in Appendix B. There were once a large number of offences relating to probationary drivers for which mandatory suspension was imposed by a court. However, *Road Safety (Drivers) Regulations 1999* (Vic) rule 218 & Schedule 1 were repealed in December 2003 by *Road Safety (Drivers) (Demerit Points) Regulations 2003* (Vic) rules 5 & 7 and demerit points are now administratively recorded for these offences.

⁶¹ A notice can only be issued to persons in the following categories: charged with an offence where the blood or breath analysis is 0.15 or more for a full licence holder, charged with an offence where the blood or breath analysis is 0.07 or more for a probationary or learner driver, charged with refusing to undergo a preliminary breath test, charged with refusing or failing to stop at a preliminary breath testing station, charged with refusing to undergo a blood analysis test, charged with refusing to supply a blood sample, charged with driving under the influence of a drug, charged with refusing to undergo or comply with a drug impairment assessment, charged with refusing to give a blood or urine sample after undergoing a drug impairment assessment or where the person has been previously found guilty or convicted of an offence involving alcohol. See further *Road Safety Act 1986* (Vic) ss51(a), (b), (c), 51(1A) and 51(1B).

‘unless [the] particular circumstances warrant otherwise.’⁶² Where the licence is not suspended, the officer must prepare a report for superior officers justifying the reasons for not applying s 51.⁶³

S 24 Notices: Under s 24 of the *Road Safety Act 1986* (Vic), the Roads Corporation has the power to suspend, in a broad range of circumstances, a driver’s licence or permit for any time it thinks fit.⁶⁴

5 *Discretionary Suspension or Disqualification by a Court*

Under s 28(1) of the *Road Safety Act 1986* (Vic) any Victorian court has a general discretionary power to suspend or cancel a licence or permit:

If a court convicts a person of, or is satisfied that a person is guilty of, an offence against this Act or of any other offence in connection with the driving of a motor vehicle, the court –

- (b) ...may suspend for such time as it thinks fit or cancel all driver licences and permits held by that person and, whether or not that person holds a driver licence, disqualify him or her from obtaining one for such time (if any) as the court thinks fit.

This section allows a court to suspend a driver’s licence or permit or disqualify a person from obtaining a licence or permit where that person is found guilty of *any* summary or indictable offence where the driving of a motor vehicle is ‘substantially tied to the offence in question’.⁶⁵

⁶² Victoria Police Learning Resource Development Unit, *Victoria Police Reference Guide* (2005) 275.

⁶³ *Ibid.*

⁶⁴ Circumstances include where a person has failed or refused to submit to a test to determine fitness to drive under s 27 of the *Road Safety Act 1986* (Vic); where it would be dangerous for the person to drive because of illness, bodily infirmity, defect or incapacity; where the person does not have sufficient knowledge of road law or driving ability; where the person is not suitable to hold a licence or permit; where the person has not paid a fine, penalty costs or restitution ordered by a court; where the person is no longer eligible for a licence or permit; where a licence or permit was issued in error; where a cheque submitted to the Corporation as payment for a fee has been dishonoured; where the person has been convicted in another State, Territory or country of an offence which would have suspended or cancelled the person’s licence or permit had they been licensed to drive in that State, Territory or country; where the person has failed to comply with a condition of their licence or permit; and where the person has surrendered their licence or permit to the Roads Corporation or other licensing authority for cancellation. See *Safety (Drivers) Regulations 1999* (Vic) reg 303(1).

⁶⁵ Fox and Freiberg, above n 28, 534; see for example *Murdoch v Simmonds* [1971] VR 887 where an assault by kicking by one driver of another was held to be insufficiently

In addition, even where a court has not recorded a conviction,⁶⁶ the court is given a discretionary power to suspend a driver's licence or permit in a number of circumstances.⁶⁷

6 *The Defendant's Awareness of the Licence Interference*

Due to the processes by which licences may be suspended or disqualified, it is entirely possible that a person appearing in court for a second offence of Driving While Disqualified or Suspended may not have been to court previously for that offence.

7 *The Process of Administrative Suspension or Disqualification*

A traffic infringement notice, s 51 notice or a Roads Corporation notice issued under the *Road Safety Act 1986* (Vic) may be served by delivering the notice personally, by leaving it at the usual or *last known* place of residence or business of the person, by sending it by post addressed to the person at the usual or *last known* place of residence or business or by sending the notice to any other address that has been registered at the Roads Corporation.⁶⁸ The consequence of this is that a driver incurring a suspension or disqualification by way of a traffic infringement or Roads Corporation notice may not receive the notice at all and may continue to drive due to lack of awareness.

8 *Suspension or Disqualification via Court Process*

It is also possible for a driver's licence to be suspended or disqualified by a court in the absence of the defendant. Most of the traffic offences discussed above are triable summarily and, as such, will usually be dealt with in the Magistrates' Court

connected to the driving of the vehicle and *Rochow v Pupovac* [1989] VR 73 where the defendant's driver's licence was suspended because he drove his car to the scene of the theft.

⁶⁶ See *Sentencing Act 1991* (Vic) ss7 & 8 for information regarding conviction and non-conviction.

⁶⁷ See Appendix C.

⁶⁸ *Road Safety (General) Procedures Regulations 1999* (Vic) reg 602; *Road Safety Act 1986* (Vic) s93 (emphasis added).

of Victoria.⁶⁹ A Charge and Summons document may be issued by a member of the police force⁷⁰ and may be served by either:⁷¹

- Delivering a copy to the defendant personally, or
- By leaving a copy at the defendant's last or most usual place of residence or business, or
- By post addressed to the person at their *last known* place of residence or business.

The police informant issuing and serving the charge has the option of serving on the defendant a brief of evidence setting out all of the evidence that the police will utilise to prove the charge.⁷² A brief of evidence is served in the same manner as a charge and summons.⁷³ This is significant because where a defendant does not appear in court to answer a charge and the court is satisfied that the charge and brief of evidence have been served in the prescribed manner, the evidence contained in the brief will be admissible and the court may determine the charge and sentence the defendant in his or her absence.⁷⁴ This is commonly known as an *ex parte* hearing. The *Magistrates' Court Act 1989* (Vic) also sets out a procedure whereby the court may determine a charge by accepting sworn oral evidence from the police informant in the defendant's absence.⁷⁵ This is also known as an *ex parte* hearing. A driver who fails to attend court to answer a summons may thus have had his or her licence disqualified or suspended *ex parte* and may continue to drive due to lack of awareness. Even in circumstances where the driver knew that he or she had lost their licence, it is extremely likely that the driver was not aware of the penalty for a breach of s 30 (discussed further below).⁷⁶

If the defendant is convicted of a suspending or disqualifying offence pursuant to an *ex parte* hearing, the defendant may apply to the court to have the matter re-

⁶⁹ The County and Supreme Courts may determine a summary offence where it is part of a package of more serious offences: *Crimes Act 1958* (Vic) s359AA; R Fox, *Victorian Criminal Procedure* (2005) 83.

⁷⁰ *Magistrates' Court Act 1989* (Vic) s30.

⁷¹ *Magistrates' Court Act 1989* (Vic) ss34 & 36.

⁷² *Magistrates' Court Act 1989* (Vic) s37.

⁷³ *Magistrates' Court Act 1989* (Vic) s37.

⁷⁴ *Magistrates' Court Act 1989* (Vic) s41.

⁷⁵ *Magistrates' Court Act 1989* (Vic) Sch 2, cl 5(3).

⁷⁶ B Watson, *The Psychological Characteristics and On-road Behaviour of Unlicensed Drivers*, (PhD Philosophy Thesis, Queensland University of Technology, 2004) 160.

heard.⁷⁷ The defendant will be automatically entitled to a re-hearing where the charge sheet was served by post and the court is satisfied that the defendant was not aware of the charge prior to the hearing.⁷⁸

Where the defendant does attend court to answer the charge, he or she will have the choice of entering a plea of guilty or not guilty.⁷⁹ In both situations, where the charge is proven the defendant will usually be present in court to hear the sentence imposed. In these circumstances it will be extremely difficult for a defendant to prove at a subsequent hearing that he or she was not aware that their licence was suspended or disqualified.

IV THE SENTENCE

As outlined previously, the penalty for a second or subsequent offence of Driving While Disqualified or Suspended is a mandatory term of imprisonment for not less than one month and not more than two years.⁸⁰ However, this does not necessarily mean that the defendant will automatically be incarcerated. The order made by the court must be a 'custodial order', that is, a direction 'that the offender be held in the custody of the State'.⁸¹ 'Custody' in this sense is different from incarceration or confinement, in that the order of the court will define 'the period during which the State may intervene in the individual's daily life' within society.⁸² The *Sentencing Act 1991* (Vic) provides for a number of alternative custodial orders, allowing for different degrees of physical restraint and control over an offender.⁸³ These will be examined below.

⁷⁷ *Magistrates' Court Act 1989* (Vic) s93.

⁷⁸ *Magistrates' Court Act 1989* (Vic) s95.

⁷⁹ *Magistrates' Court Act 1989* (Vic) s51; Sch 2, cl 2.

⁸⁰ *Road Safety Act 1986* (Vic) s30(1).

⁸¹ Fox and Freiberg, above n 28, 637.

⁸² *Ibid* 638.

⁸³ *Ibid* 637.

A *Alternative Sentencing Options*⁸⁴

Presumably, there will be cases where an actual term of imprisonment is appropriate and proportionate, for example, where a person has been found guilty of breaching s 30 on multiple occasions and is clearly a recalcitrant and recidivist offender. However, immediate imprisonment is not appropriate for the majority of s 30 offenders. In Victoria, an adult defendant sentenced to a term of imprisonment for Driving While Disqualified or Suspended may serve that term in one of the following ways.

1 *Immediate term of imprisonment*

An immediate term of imprisonment involves the actual confinement of the offender in a State facility for a fixed term.⁸⁵ According to Fox and Freiberg, immediate imprisonment is a 'little used sanction in Victoria' and accounts for only 5 per cent of sentences in the Magistrates' Court.⁸⁶ The number of Victorian offenders in fact imprisoned for traffic offences is slight. A statistical profile of the Victorian Prison System published in 2002 revealed that the number of offenders actually imprisoned for licence and registration offences relating to motor vehicles dropped from 4.3% of the total prison population to 1.7% of the population over a seven year period.⁸⁷ The percentage of persons imprisoned specifically for breaches of s 30 of the *Road Safety Act 1986* (Vic) is likely to be lower than this figure because the published statistics do not discern between the varying licence and registration offences.⁸⁸ It is however significant to note that in some States more people are imprisoned for Driving While Disqualified or Suspended than for *any other single offence* committed.⁸⁹

⁸⁴ In addition to the sentencing options outlined above, two pilot programs are currently underway in Victoria that may be applicable to s 30 offenders: Drug Treatment Orders and Home Detention Orders. No statistical data dealing with these pilot programs and their relationship with s 30 offenders is available at this time. Research has been unable to reveal whether any drug treatment or home detention orders have been handed down to s 30 offenders. The legislation dealing with these orders is complex and will not be discussed further: see *Sentencing Act 1991* (Vic) ss7, 5(4A) & 5(4B).

⁸⁵ *Sentencing Act 1991* (Vic) ss7(a), 9-18P.

⁸⁶ Fox and Freiberg, above n 28, 644.

⁸⁷ Office of the Correctional Services Minister, *Statistical Profile: The Victorian Prison System 1995-96 to 2000-2001*, (2001) 28.

⁸⁸ The statistical profile does not specifically list the number of persons imprisoned for s 30 breaches.

⁸⁹ Bagaric and Edney, above n 22, 8.

In most cases the power to imprison is discretionary, and even where the statute creates an offence punishable by imprisonment, s 49(1) of the *Sentencing Act 1991* (Vic) allows the judicial officer to substitute a fine for imprisonment.⁹⁰ However, this option is not available for the offence of Driving While Disqualified or Suspended due to the provision in s 30(2) of the *Road Safety Act 1986* (Vic). Judicial officers who are loath to immediately imprison a person found guilty of a second or subsequent offence of Driving While Disqualified or Suspended *must* give effect to the imprisonment provision stated in the Act. Hence, the judicial officer will often choose one of the other options below.

2 Combined Custody and Treatment Order

A court that is considering imposing a sentence of imprisonment of not more than 12 months may make a Combined Custody and Treatment Order (CCTO) if it is satisfied that there is a causal link between the offender's drunkenness or drug addiction and the commission of the offence.⁹¹ The order cannot be made without the judicial officer having received a drug and alcohol assessment report.⁹² Where such an order is made, the defendant serves six months in custody, and the balance of the sentence is served within the community under close supervision while undergoing treatment for alcohol or drugs.⁹³ If at any time during the operation of the order, the offender commits another offence punishable by imprisonment, the court must order the offender to serve in custody the whole part of the order that was to be served in the community unless exceptional circumstances exist.⁹⁴ In addition, the order may be confirmed or the offender may be returned to custody if he or she fails to comply with any of the conditions of the order.⁹⁵ A breach of a CCTO is a separate offence under the *Sentencing Act 1991* (Vic).⁹⁶

⁹⁰ Fox and Freiberg, above n 28, 646. S 49(1) of the *Sentencing Act 1991* (Vic) states 'if a person is found guilty of an offence the court may, subject to any specific provision relating to the offence, fine the offender in addition to or instead of any other sentence to which the offender may be liable.'

⁹¹ *Sentencing Act 1991* (Vic) s18Q(1); Fox & Freiberg, above n 28, 673.

⁹² *Sentencing Act 1991* (Vic) s18Q(1)(c).

⁹³ *Sentencing Act 1991* (Vic) ss18Q(1), 18R.

⁹⁴ *Sentencing Act 1991* (Vic) ss 18W(1), 18W(5) & 18W(6).

⁹⁵ *Sentencing Act 1991* (Vic) s18W(5).

⁹⁶ *Sentencing Act 1991* (Vic) s18W(1).

Combined custody and treatment orders were specifically introduced to assist in sentencing offenders who suffer from alcohol or drug addiction.⁹⁷ Such orders are treated as more severe than Intensive Corrections Orders (see below) and judicial officers are precluded from imposing a CCTO unless the relevant purposes of the punishment cannot be achieved by an Intensive Corrections Order or a Drug Treatment Order (see below).⁹⁸

No statistical data on the number of combined custody and treatment orders handed down to s 30 offenders is available at this time

3 *Intensive Correction Order*

An Intensive Correction Order (ICO) allows an offender to discharge a sentence of imprisonment of up to 12 months wholly by service in the community under close supervision while engaging in unpaid community work and other rehabilitative programs.⁹⁹ It is effectively a prison sentence served in the community.¹⁰⁰ If at any time during the operation of the order, the offender commits another offence punishable by imprisonment, the court must cancel the order and commit the offender to prison for the unexpired portion unless exceptional circumstances exist.¹⁰¹ The order may be varied, confirmed or cancelled if the offender fails to comply with any of the terms of the order.¹⁰² A breach of an ICO is a separate offence under the *Sentencing Act 1991* (Vic).¹⁰³ According to Richards, the ICO 'is the highest level sanction available that still avoids the disruptive effects of immediate imprisonment on the offender and his or her family'.¹⁰⁴

No statistical data on the number of intensive correction orders handed down to s 30 offenders is available at this time, however, it is likely that this penalty is less popular than a suspended sentence, given that the conditions of an intensive

⁹⁷ Fox and Freiberg, above n 28, 671-673.

⁹⁸ *Sentencing Act 1991* (Vic) ss7, 5(4A) and 5(4B). In a recent sentencing review conducted for the Victorian government, Freiberg recommended that CCTO's be abolished: see also Arie Freiberg, *Pathways to Justice: Sentencing Review*, (2002) 5-6.

⁹⁹ *Sentencing Act 1991* (Vic) ss19-26.

¹⁰⁰ Sentencing Advisory Council, *Suspended Sentences Discussion Paper*, 15 (2005).

¹⁰¹ *Sentencing Act 1991* (Vic) ss26(1), 26(3A) & 26(3B).

¹⁰² *Sentencing Act 1991* (Vic) ss26(1) & 26(3A).

¹⁰³ *Sentencing Act 1991* (Vic) s26(1).

¹⁰⁴ D Richards, *The Intensive Correction Order* in University of Melbourne and Leo Cussen Institute Seminar, *The Sentencing Act 1991*, Melbourne (1991) 4.3 quoted in Fox and Freiberg, above n 28, 567.

correction order are often onerous. The ICO is considered to be a harsher penalty than a suspended sentence (see below) due to its position above the suspended sentence in the hierarchical listing of sentencing options found in s 7 of the *Sentencing Act 1991* (Vic).¹⁰⁵

4 *Suspended Sentence of Imprisonment*

A suspended sentence is a sentence of imprisonment imposed on a person that is not activated.¹⁰⁶ Under s 27 of the *Sentencing Act 1991* (Vic), a judicial officer may impose a sentence of imprisonment and then order that the sentence be suspended in whole for a specified period (eg, the offender does not serve any time in gaol) or in part (eg, the offender serves part of the sentence in gaol and is then released - the rest of the gaol term is held in suspense for a specified period).¹⁰⁷ The maximum period that the sentence may be suspended for in the Magistrates' Court is two years.¹⁰⁸ If at any time during the period of suspension, the offender commits another offence punishable by imprisonment, the court must restore the sentence and order the offender to serve it unless exceptional circumstances exist.¹⁰⁹ A breach of a suspended sentence order is a separate offence under the *Sentencing Act 1991* (Vic).¹¹⁰

The courts have insisted that the suspended sentence must be regarded as a sentence of imprisonment, and is a very significant punishment rather than a soft option.¹¹¹ In *Elliot v Harris (No 2)*¹¹² Bray CJ remarked:

[F]ar from being no punishment at all, a suspended sentence is a sentence of imprisonment with all the consequences such a sentence involves on the defendant's record...and it is one which can be called...into effect on the slightest breach of [its] terms...during its currency. A liability...to serve an automatic term of imprisonment as a consequence of any proved misbehaviour in the legal sense, no matter how slight, can hardly be described as no punishment.

¹⁰⁵ Fox and Freiberg, above n 28, 567. In a recent sentencing review conducted for the Victorian government, Freiberg recommended that changes be made to ICO's: see also Freiberg, above n 100, 12-15.

¹⁰⁶ Sentencing Advisory Council, above n 98, 13.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Sentencing Act 1991* (Vic) s27(2).

¹⁰⁹ *Sentencing Act 1991* (Vic) s31(1), 31(5) & 31(5A); *Kent v Wilson* [2000] VSC 98; *R v Stevens* [1999] VSCA 173; *R v McLachlan* [1999] 2 VR 665; *R v Tran* [2000] VSCA 95.

¹¹⁰ *Sentencing Act 1991* (Vic) s31(1).

¹¹¹ *R v McConkey (No 2)* [2004] VSCA 26 per Eames JA; *DPP v David* [2003] VSCA 202; *DPP v Buhagiar & Heathcote* [1998] 4 VR 540; *R v Whitmall* (1993) 42 FCR 512.

¹¹² (1976) 13 SASR 516, 527.

The overwhelming majority of second and subsequent offenders who drive while disqualified or suspended receive suspended terms of imprisonment and it has been suggested that this as a direct result of the mandatory imprisonment requirement in s 30.¹¹³ In the Magistrates' Court of Victoria in 2003-2004, the most common offences for which a suspended sentence was imposed was for Driving While Disqualified (14 per cent) and Driving While Suspended (11 per cent): a total of 25 per cent of *all* orders imposing suspended sentences.¹¹⁴ The next highest category of offence for which a suspended sentence was handed down was for 'Shopstealing' (9.6 per cent).¹¹⁵

Table 1: Number of Suspended Sentences for Breach of S 30 of the *Road Safety Act 1986 (Vic)*¹¹⁶

Year	Driving While Disqualified	Driving While Suspended	Total
1 July 1999 - 30 June 2000	228	109	337
1 July 2000 - 30 June 2001	184	128	312
1 July 2001 – 30 June 2002	220	146	366
1 July 2002 – 30 June 2003	341	199	540
1 July 2003 – 30 June 2004	474	355	829

Suspended sentences for Driving While Disqualified or Suspended have continued to rise since 2001. In the financial year ending 30 June 2001, 184 suspended sentences were imposed upon defendants for Driving While Disqualified and 128 suspended sentences were imposed for Driving While Suspended. These figures rose in the financial year ending 30 June 2002 to 220 and 146 respectively, then rose again in the financial year ending 30 June 2003 to 341 and 199. The figures rose dramatically in the following year to 474 for Driving While Disqualified and 355 for Driving While Suspended. The rise in suspended sentences for breaches of s 30 corresponds with a rise in the number of citizens found guilty of breaches of s 30¹¹⁷ (these figures are discussed below).

¹¹³ Sentencing Advisory Council, above n 100, 85.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid* 86, 168.

¹¹⁶ *Ibid* 172.

¹¹⁷ Figures obtained from Court Services, Victorian Department of Justice by the author via Freedom of Information on 15 August 2005.

Bagaric and Edney have suggested that by imposing suspended sentences for breaches of s 30 of the *Road Safety Act 1986* (Vic), the courts are remaining formally but not substantively true to the edict of Parliament.¹¹⁸ According to Fox and Freiberg, the guidelines in the *Sentencing Act 1991* (Vic) make it clear that suspended sentences are preferred over other custodial orders.¹¹⁹

5 Further Interference with the Offender's Driver's Licence

As already outlined above, any Victorian court has a general discretionary power to suspend or cancel a driver's licence under s 28(2) of the *Road Safety Act 1986* (Vic) where that person is found guilty of any summary or indictable offence where the driving of a motor vehicle is 'substantially tied to the offence in question'.¹²⁰ In addition to the actual custodial order, this section gives the court discretion to further suspend a driver's licence or disqualify a person from obtaining a licence or permit where they have committed an offence of Driving While Disqualified or Suspended. Therefore a person in breach of s 30 could receive a term of imprisonment coupled with a further loss of licence.

V ABOLISH THE MANDATORY SENTENCING PROVISION?

The words of King CJ in *Yardley v Betts* (1979) 22 SASR 108 are particularly relevant with respect to the imprisonment of offenders for breaches of s 30:

a term of imprisonment may turn a usefully employed person into a frustrated unemployed person, may deprive the offender of the best and most stabilising influences of his life by disrupting a good family situation, and may increase a propensity to crime by placing him in the company of criminals.¹²¹

A second or subsequent breach of s 30 is simply a summary traffic offence, yet the provision carries the harshest penalty that the State has the capacity to inflict. As Bagaric and Edney point out, it is possible for people convicted of serious offences such as manslaughter, armed robbery or aggravated burglary to escape imprisonment, yet a second or subsequent offender driving on the road

¹¹⁸ Bagaric and Edney, above n 22, 11.

¹¹⁹ Fox and Freiberg, above n 28, 682. See *Sentencing Act 1991* (Vic) ss 5(4),7(a),7(ab), 7(b) and 7(c).

¹²⁰ Fox and Freiberg, above n 28, 534; see, eg, *Murdoch v Simmonds* [1971] VR 887 where an assault by kicking by one driver of another was held to be insufficiently connected to the driving of the vehicle and *Rochow v Pupavac* [1989] VR 73 where the defendant's driver's licence was suspended because he drove his car to the scene of the theft.

¹²¹ *Yardley v Betts* (1979) 22 SASR 108, 113.

while suspended or disqualified must be sentenced to imprisonment.¹²² Is there any justification for retaining such a harsh sentencing provision? It is strongly argued that if there ever was any justification for the mandatory sentencing provision, there is no longer any valid reason for imprisoning citizens for Driving While Disqualified or Suspended.

VI ARGUMENTS FOR REFORM OF S 30 OF THE ROAD SAFETY ACT 1986 (VIC)

A *Violation of Proportionality Principle*

The underlying principle of the *Sentencing Act 1991* (Vic) is the principle of proportionality, that is, judicial officers should impose a sentence that is proportionate or appropriate to the offence.¹²³ In the famous High Court decision of *Veen v R (No 2)*, the majority stated:

The principle of proportionality is now firmly established in this country. It was the unanimous view of the court in *Veen (No 1)* that a sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the offender.¹²⁴

It has been argued that the decision of *Veen (No 2)* went as far as pronouncing the principle of proportionality as the primary aim in sentencing in Australia.¹²⁵

The mandatory sentencing provision in s 30 violates the proportionality principle because the punishment far outweighs the objective seriousness of the offence.¹²⁶ According to Bagaric and Edney, the direct consequences of Driving While Disqualified or Suspended causes no harm to others and ‘does not relate to any issue of public safety’,¹²⁷ yet judicial officers are precluded from taking into account the particular mitigating personal circumstances of each individual case, other than to determine the length of imprisonment to be imposed. Sentencers are forced to apply a harsh and unrelenting sentencing provision to a number of

¹²² Bagaric and Edney, above n 22, 7.

¹²³ *Sentencing Act 1991* (Vic) s5(3); Freiberg, above n 96, 37.

¹²⁴ *Veen v R (No 2)* (1988) 77 ALR 385, 390 per Mason CJ, Brennan, Dawson and Toohey JJ.

¹²⁵ Bagaric and Edney, above n 22, 9.

¹²⁶ *Ibid.* However, this does not mean that imprisonment will *never* be appropriate. There may be rare circumstances in which a judicial officer in his or her discretion may decide to impose imprisonment for a breach of s 30.

¹²⁷ *Ibid.* 10.

different offending circumstances, the result being that ‘unequal offenders’ could receive the same sentence.¹²⁸

Mandatory sentencing has been described as ‘facially neutral’ in that it allows ‘for no differentiation or prejudice according to race, sex or age’.¹²⁹ In practice, however, the mandatory sentence in s 30 can impact disproportionately on those that use their motor vehicle often, particularly in the course of their work. Ordinary citizens that require the use of their vehicle in order to maintain employment face a choice between driving in breach of s 30 and loss of income for the duration of the suspension or disqualification period and perhaps beyond.¹³⁰

The mandatory sentencing provision in s 30 does not allow judicial officers to make allowances for the particular circumstances associated with the breach in question, and it is argued that ‘just sentencing requires an assessment of the special circumstances of each case that only a judge is in a position to make.’¹³¹

B *Lack of Clear Basis or Rationale Underlying the Provision*

Earlier it was shown that there has not been any clear basis or rationale for the changes made over the years to the sentencing provision in s 30. The legislature has tended to make broad statements about ‘contempt’, ‘danger’ and ‘deterrence’. It is likely that the changes made to the provision have been made in response to community pressure and expectations.

1 *Contempt of Court*

In 1949, the legislature introduced the specific offence of Driving While Disqualified or Suspended to provide the penalty of imprisonment for those that

¹²⁸ D Roche, ‘Mandatory Sentencing’ (1999) 138 *Trends & Issues in Crime and Criminal Justice: Australian Institute of Criminology*, 5.

¹²⁹ Morgan, above n 1, 182. Morgan was arguing this point in the context of the WA and Northern Territory mandatory sentencing provisions which unfairly discriminate against young male aboriginal offenders.

¹³⁰ According to Watson’s study, drivers that offend against s 30 do not represent a ‘homogeneous group’ and there is ‘a range of differences...between...offenders in terms of their psychosocial characteristics.’ Watson, above n 76, 222.

¹³¹ Roche, above n 128, 4-5.

wilfully disobeyed an order of the court.¹³² This rationale may have been justified at that time, as the only manner in which a driver could have his or her licence interfered with was by order of a court. As has been shown in earlier, there are a number of administrative processes that are now available to either suspend or disqualify a driver, either with or without his or her knowledge. 'Contempt of court' can no longer be relied upon as a legitimate reason for the mandatory sentencing provision in s 30, given the variety of ways in which the defendant may have his or her licence interfered with.

2 *Grave Danger*

The rationale for the increase in penalty to the provision in 1963 was that there were 'grave dangers involved in persons driving their cars after their licence has been suspended'.¹³³ However, Driving While Disqualified or Suspended *per se* causes no harm or threat to other road users or members of the public, and the course of conduct that makes up the offence is simply the act of driving on a highway without the appropriate authorisation.¹³⁴

3 *Deterrence*

The legislature in 1963 indicated that by increasing the penalty for s 30 it would 'deter drivers'.¹³⁵ Later, in 1967 the legislature relied upon a Road Toll Committee report that was of the belief that publishing the details of serious penalties imposed for s 30 breaches in the daily press would also bring about general deterrence.¹³⁶ In 1986, the justification for the increase in penalty was to eliminate anti-social behaviour.¹³⁷

In reality, the harsh sentencing provision has *not* deterred people from continuing to offend against s 30. As the table below shows, breaches of s 30 are continuing to rise significantly.

¹³² Victoria (*Parliamentary Debates*) Legislative Assembly, 28 September 1949, 2391-92 (Lieutenant Colonel Leggatt).

¹³³ Victoria (*Parliamentary Debates*) Legislative Assembly, 1 May 1963 (Rylah) 3263.

¹³⁴ Bagaric and Edney, above n 22, 18.

¹³⁵ Victoria (*Parliamentary Debates*) Legislative Assembly, 1 May 1963 (Rylah) 3263.

¹³⁶ Chief Secretary's Department, above n 10, 2-3.

¹³⁷ Victoria (*Parliamentary Debates*) Legislative Assembly, 11 September 1986, 228 (Roper).

Table 2: Number of Persons Found Guilty for Breach of S 30 of the Road Safety Act 1986 (Vic)¹³⁸

Year	Driving While Disqualified	Driving While Suspended	Total
1 July 1999 - 30 June 2000	3087	2192	5279
1 July 2000 – 30 June 2001	2858	2207	5065
1 July 2001 – 30 June 2002	2912	2092	5004
1 July 2002 – 30 June 2003	4235	2661	6896
1 July 2003 – 30 June 2004	5172	4145	9317

In the financial year ending 30 June 2001, the number of people found guilty of Driving While Disqualified fell 7 per cent to 2858 from 3087 the year prior. The figure increased slightly the following year by 2 per cent to 2912. In the financial year ending 30 June 2003, the figure increased dramatically by 45 per cent to 4235, then increased again in the following year by 22 per cent to 5172.

The number of people found guilty of Driving While Suspended in the Magistrates' Court in the financial year ending 30 June 2001 increased by 1 per cent to 2207 from 2192 the year prior. The figure decreased slightly the following year by 5 per cent to 2092. In the financial year ending 30 June 2003, the figure increased dramatically by 27 per cent to 2661, then increased again the following year by 56 per cent to 4145.

According to Davies and Raymond, statistical evidence, other evidence and logic shows that 'contrary to popular belief encouraged by media and politicians, that the prospect of a gaol sentence if caught and convicted...is not an effective general deterrent, or for the most part an effective specific deterrent.'¹³⁹

A study by Watson in 2004 showed that current penalties for unlicensed driving (including penalties for Driving While Disqualified or Suspended) 'appear to have a minimal deterrent impact on offenders.'¹⁴⁰ His study showed that people who are unlicensed (including those who have had their licence suspended or disqualified)

¹³⁸ Figures obtained from Court Services, Victorian Department of Justice by the author via Freedom of Information on 15 August 2005.

¹³⁹ G Davies and K Raymond, 'Do Current Sentencing Practices Work?' (2000) 24(4) *The Criminal Law Journal* 236, 241.

¹⁴⁰ Watson, above n 75, 232.

tend to continue to drive after detection, particularly for work purposes.¹⁴¹ A prior conviction for Unlicensed Driving or Driving While Disqualified or Suspended did not appear to have any significant impact on either subsequent offending or a future intention to offend.¹⁴² More importantly, his study showed that only *14 per cent* of the participants in the study knew what the penalties for Unlicensed Driving or Driving While Disqualified or Suspended were prior to being detected.¹⁴³

Both Watson's findings and the statistics above indicate that the deterrent function of the sentencing provision in s 30 is questionable. Citizens are unlikely to be deterred generally, given that most people are ignorant about the penalties for Driving While Disqualified or Suspended; and Watson's study shows that even where people are convicted of a breach of s 30 and become aware of the consequences of a second breach, they continue to drive while suspended or disqualified. Bagaric and Edney are correct in stating that 'it is simply time for the legislature to devise a more effective sanction'.¹⁴⁴

4 *The Rise of Administrative Sanctions*

It is reasonable to assume that the current range of administrative licence sanctions was never envisaged by the legislature when the mandatory provision was first introduced.

No longer does the motoring offender need to attend court to have an order made against his or her licence. Administrative sanctions such as traffic infringement notices, demerit points, s 51 notices and s 24 notices may affect a person's licence, whether or not that person has knowledge of the administrative process. For example, there are currently approximately 101 traffic related infringement notices that may result in licence cancellation, licence suspension or demerit points for the person deemed to be the driver.¹⁴⁵

The rise in administrative mechanisms by which a person may have their licence suspended correlates with the recent substantial rise in people being found guilty

¹⁴¹ Ibid 214. Watson's study confirms results obtained from a questionnaire by Smith and Maisey in Western Australia in 1990: see Smith and Maisey, *Survey of Driving by Disqualified and Suspended Drivers in Western Australia* (1990).

¹⁴² Watson, above n 76, 233.

¹⁴³ Ibid 160.

¹⁴⁴ Bagaric and Edney, above n 22, 18.

¹⁴⁵ Victoria Police Traffic Support Division's Legal & Agency Liaison Unit, *Infringement Notice Offences, Penalties & Codes* (2005).

of Driving While Suspended. For example, in the year ending 30 June 2004, the number of people found guilty of Driving While Suspended rose by 56 per cent from the previous year. It is reasonable to assume that as the use of administrative sanctions increases, so does the amount of people found guilty of breaches of s 30.¹⁴⁶

There is no doubt that the growing reliance on administrative processes to detect and punish motoring offenders presents problems for the criminal justice system in terms of due process and procedural fairness.

5 *Lack of Procedural Fairness*

Due to administrative processes and court *ex parte* procedures, it is possible for a person to be convicted or found guilty of Driving While Disqualified or Suspended without ever having attended court. Recent amendments made to s 30 via s 30A of the *Road Safety Act 1986* (Vic) tend to acknowledge that the legislature is aware that people may be driving without knowing that they are breaching s 30. The question arises as to whether it is fair to continue to allow a sentencing provision that obliges sentencers to impose a custodial order against a defendant even when that person had no real knowledge that such a sentence would be imposed.

Fair procedure is essential in the criminal justice process.¹⁴⁷ It is 'relevant to preserving the cooperation and goodwill of the public in law enforcement matters.'¹⁴⁸ According to American studies, crucial elements of procedural fairness include neutrality of the decision-maker, polite treatment of the defendant and respect for the defendant's rights.¹⁴⁹ An opportunity for the defendant to state his or her case is also important.¹⁵⁰

Fox has highlighted that administrative sanctions such as the infringement notice system do 'not allow for the individualisation of treatment, the calling of criminal records, or differential penalties.'¹⁵¹ He argues that:

¹⁴⁶ It is conceded that some other factors such as an increase in the population, an increase in proactive policing or an increase in police numbers. More research is required.

¹⁴⁷ *R v Barton* (1980) 147 CLR 75; *Jago v District Court of NSW* (1989) 168 CLR 23; *R v Dietrich* (1992) 177 CLR 292.

¹⁴⁸ Richard Fox, 'Criminal Justice on the Spot: Infringement Penalties in Victoria' (1995) 233 *Australian Institute of Criminology*.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid* 238.

[Administrative sanctions] carry the risk that they will produce an inappropriate escalation of penalties without procedural protections normally regarded as essential and which, in aggregate, may produce levels of punishment which are far more onerous than a proportionate response would warrant.¹⁵²

The Victorian infringement notice system is unfair in that it relies in part on vicarious liability: the owner of the motor vehicle is responsible for rebutting the presumption that he or she was the driver at the time of the alleged offence.¹⁵³ The system essentially holds people accountable for conduct for which they may have no moral culpability. According to Fox, few people elect to go to a Magistrates' Court for a hearing on liability and/ or penalty, even though infringement notices carry harsh sanctions such as demerit points, suspension and disqualification.¹⁵⁴ The administrative system may result in the person accumulating demerit points that they are not responsible for, and may ultimately lead to the suspension of their licence. Procedural unfairness is heightened by the fact that a demerit points suspension notice under s 25 of the *Road Safety Act 1986* (Vic) that is sent to the last known address registered with the Roads Corporation is *prima facie* taken to be served on the person.¹⁵⁵

Even where a defendant has been personally detected by police, the defendant may not be aware that he or she has received a penalty notice, a notice of suspension under s 51 or has been summoned to attend court, due to the fact that notices and summonses may be posted to the person's last known place of business or residence.¹⁵⁶

Some may argue that administrative procedural unfairness is eliminated by the process of re-hearings.¹⁵⁷ However, it is argued that where imprisonment is the ultimate sanction, procedural fairness should be built into related administrative enforcement processes, to ensure that the system is fair and just. Sentencing a defendant to a custodial sentence in circumstances where that person was not sufficiently aware of the consequences of Driving While Disqualified or Suspended is abhorrently unfair.

¹⁵² Ibid 191.

¹⁵³ Ibid 193.

¹⁵⁴ Richard Fox, 'Criminal Sanctions at the Other End' (Paper presented at the 3rd National Outlook Symposium on Crime in Australia, Canberra, 22-23 March 1999) 4.

¹⁵⁵ *Road Safety Act 1986* (Vic) s25(4A).

¹⁵⁶ *Road Safety Act 1986* (Vic) s93; *Magistrates' Court Act 1989* (Vic) ss35 & 36.

¹⁵⁷ *Magistrates' Court Act 1989* (Vic) s95.

VII SOLVING THE PROBLEM

In a recent sentencing review conducted for the Victorian government, Freiberg indicated that the law relating to s 30 of the *Road Safety Act 1986* (Vic) would need to be reviewed if other proposed changes to the *Sentencing Act 1991* (Vic) were adopted.¹⁵⁸ What then are the possible alternatives?

A *Return the Discretion to the Judicial Officer*

Bagaric and Edney argue that no person should be imprisoned for a breach of s 30.¹⁵⁹ However, one could envisage circumstances where it may be appropriate to sentence a recidivist s 30 offender to a custodial term. The most appropriate alternative to a mandatory term of imprisonment is to return discretion to the judicial officer. This could be done in either of two ways:

- (i) Erase the minimum term of imprisonment set out in s 30(1) of the *Road Safety Act 1986* (Vic) and erase s 30(2) of the *Road Safety Act 1986* (Vic), thereby allowing the court to fine a defendant in lieu of imprisonment; or
- (ii) Substitute the current penalty provision for an 'and/or' provision, for example, 'a fine not exceeding 30 penalty units or imprisonment for a term not exceeding 4 months'.

B *'Last Resort' Reform*

Given that the legislature has been extremely eager to imprison offenders for breaches of s 30 over the last nine decades, it is unlikely that the provision will be amended to return the discretion to judicial officers. Some thought has therefore been given to other alternatives. It is important to note that the author regards the following suggestions as 'last resort' options.

The following alternatives may return some legitimacy to the mandatory sentencing provision in s 30:

¹⁵⁸ Freiberg, above n 97, 217. The proposed change that directly affects s 30 is the recommendation that the Intensive Corrections Order should cease to be a term of imprisonment. If the nature of the ICO is changed in this way it will not be available as a sentencing option under s 30. Freiberg made a total of 50 recommendations in the sentencing review: Ibid 4-21.

¹⁵⁹ Bagaric and Edney, above n 22, 11.

1 *Restricted Licences*

One possible alternative is to introduce into Victorian traffic law ‘restricted’ or ‘extraordinary’ driver’s licences.¹⁶⁰ If modelled on the other State and Territory provisions, such licences would need to be applied for via the court and granted by a judicial officer. The court would be able to impose any conditions on the licence considered necessary in the circumstances. When granting an application, the judicial officer would be obliged to inform the applicant of the consequences of driving outside the conditions of the licence. Driving outside the conditions of the licence would attract a charge under s 30 and all of the consequences attached to such a breach. The holder of a restricted or extraordinary licence would be precluded from later arguing that he or she was unaware of the consequences of driving outside the terms of the licence. In essence, the ‘contempt of court’ justification for the mandatory sentencing provision would return to s 30.

2 *Reform the Procedure for Licence Interference*

Another way to return justification to the mandatory sentencing provision in s 30 would be to dramatically change the administrative procedures for suspending or disqualifying drivers’ licences. Administrators could be precluded from interfering with drivers’ licences, and instead would need to apply to the court for an order that the person’s licence be suspended or disqualified. Such an order would not be able to be granted in the absence of the defendant, and the judicial officer would be obliged to inform the defendant of the consequences of breaching the order, in a similar manner to the restricted or extraordinary licence procedure outlined above. Some legitimacy would return to the mandatory sentencing provision in s 30, as the defendant would be informed by the court of the consequences of driving while disqualified or suspended.

It is however unlikely that the legislature would remove the right of administrators to interfere with drivers’ licences, given the growth in the infringement notice system and the inability of the courts to cope with such large numbers of offenders.¹⁶¹

¹⁶⁰ See, eg, *Road Transport (Driver Licensing) Regulations 2000* (ACT) rules 45-51; *Transport Operations (Road Use Management) Act 1995* (Qld) s87(1); *Road Traffic Act 1974* (WA) s76(3); *Vehicle & Traffic Act 1999* (Tas) s18.

¹⁶¹ Fox, above n 154, 2.

3 *Abolish ex parte hearings on s 30*

A final alternative would be to abolish *ex parte* hearings on s 30, thereby giving the court the ability to explain to the defendant the seriousness of further offending. However, this alternative would not be of much assistance if the administrative ways of interfering with licences remained in place. It is also unlikely that the courts would be able to cope with the increase in hearings that would be required if such an alternative were to be introduced.

VIII CONCLUSION

This article has attempted to discover why mandatory imprisonment has been used for s 30 and whether its continued use can be justified. An examination of the Parliamentary Debates and other extrinsic material has not revealed any clear rationale for the introduction of mandatory sentencing, although it is assumed that Parliament considered specific deterrence, general deterrence and retribution to be important. Research has shown that there are now numerous administrative mechanisms for licence interference which would not have been envisaged by the legislature in 1967 when the provision was introduced. Statistics have revealed that there has been a dramatic increase in the amount of people found guilty of breaching s 30 over the preceding few years and it is quite possible that this increase is due to the growth in the use of administrative mechanisms for licence interference. The author does acknowledge that there may be other factors to explain the increase: further research is required to ascertain the cause for the rise in offending and to find alternative ways in which offending could be reduced. Research has also shown that it is possible to offend against s 30 without knowledge of the breach, giving rise to procedural fairness issues. Knowledge of the actual penalties for Driving While Disqualified or Suspended amongst motorists is also lacking.

In summary, the continued use of the mandatory sentencing provision in s 30 cannot be justified because:

- The provision violates the principle of proportionality contained in the *Sentencing Act 1991* (Vic);
- The harsh sentencing regime has not deterred motorists from offending against s 30;
- The rise in administrative ways of licence interference was never envisaged by the legislature when the provision was first introduced and gives rise to procedural fairness issues;

- A comparison with other offences contained in the *Road Safety Act 1986* (Vic) has revealed that the offence in s 30 is less serious but contains one of the harshest penalties. The mandatory sentencing provision is therefore structurally inappropriate.

It is strongly argued that the sentencing provision in s 30 should be abolished and the discretion to imprison should be returned to judicial officers. This view is supported by a recent Victorian sentencing review conducted by Freiberg for the State Government:

[T]he Review reaffirms a commitment to the common law principle of proportionality which it believes provides the appropriate foundation upon which sentencing should be built. This means, in effect, that sentences should be neither excessively severe nor excessively lenient. It *does not* mean, however, that each offence should carry with it a prescribed or pre-determined level of punishment. For that reason *it rejects mandatory or minimum penalties*.¹⁶²

It is strongly argued that the government should adopt the reasoning of Freiberg and abolish the mandatory sentencing provision in s 30.

¹⁶² Freiberg, above n 98, 33-34 (emphasis added).

APPENDIX A: STATE AND TERRITORY COMPARATIVE PROVISIONS

State/ Territory	Act/ Regulation	Offence	Penalty	Other
VIC	<i>Road Safety Act 1986</i> Section 30	Drive while disqualified or suspended	<p>First offence: 30 penalty units or imprisonment for four months and a period of disqualification if the court thinks fit (See Section 28 <i>Road safety Act 1986</i>)</p> <p>Subsequent offence: imprisonment for not less than one month and not more than 2 years and a period of disqualification if the court thinks fit (See Section 28 <i>Road Safety Act 1986</i>)</p>	<p>Under Section 30A <i>Road Safety Act 1986</i> the court may extend the suspension or disqualification period even if the person is found not guilty of Section 30 on the grounds that he or she was not aware of the disqualification or suspension at the time of driving to substitute the original period of suspension or disqualification</p>
NSW	<i>Road Transport (Driver Licensing) Act 1998</i> Section 25A(1)	Offences committed by disqualified drivers	<p>First offence: 30 penalty units or imprisonment for 18 months or both and a further period of disqualification upon conviction</p> <p>Subsequent offence: 50 penalty units or imprisonment for 2 years or both and a further period of disqualification upon conviction</p>	Nil
	<i>Road Transport (Driver Licensing) Act 1998</i> Section 25A(2)	Offences committed by drivers whose licences are suspended or cancelled	<p>First offence: 30 penalty units or imprisonment for 18 months or both and a period of disqualification upon conviction</p> <p>Subsequent offence: 50 penalty units or imprisonment for 2 years or both and a period of disqualification upon conviction</p>	

State/ Territory	Act/ Regulation	Offence	Penalty	Other
ACT	<p><i>Road Transport(Driver Licensing) Act 1999</i> Section 32(1)(a)</p>	<p>Offences committed by disqualified drivers</p>	<p>First offence: 50 penalty units, imprisonment for 6 months or both and a further period of disqualification upon conviction</p> <p>Subsequent offence: 100 penalty units, imprisonment for 1 year or both and a further period of disqualification upon conviction</p>	<p>May be eligible for restricted drivers licence under Rule 49 <i>Road transport (Driver Licensing) Regulation 2000</i></p> <p>1111May be eligible for restricted drivers licence under Rule 49 <i>Road transport (Driver Licensing) Regulation 2000</i></p>
	<p><i>Road Transport(Driver Licensing) Act 1999</i> Section 32(2)(a)</p>	<p>Offences committed by suspended drivers</p>	<p>First offence: 50 penalty units, imprisonment for 6 months or both and a further period of disqualification upon conviction</p> <p>Subsequent offence: 100 penalty units, imprisonment for 1 year or both and a further period of disqualification upon conviction</p>	<p>May be eligible for restricted drivers licence under Rule 49 <i>Road transport (Driver Licensing) Regulation 2000</i></p>
QLD	<p><i>Transport Operations (Road Use Management) Act 1995</i> Section 78(1)</p>	<p>Driving of a motor vehicle without a driver licence prohibited</p>	<p>If the person committed the offence while disqualified by a court order the maximum penalty is 60 penalty units or 18 months imprisonment; or otherwise 40 penalty unity or 1 year's imprisonment; the offender faces a period of disqualification under Section 78(3)</p>	<p>May be eligible for restricted drivers licence under Section 87(1) <i>Transport Operations (Road Use Management) Act 1995</i></p>

State/ Territory	Act/ Regulation	Offence	Penalty	Other
NT	<p><i>Traffic Act 2004</i> Section 31(1)</p> <p><i>Traffic Act 2004</i> Section 32(1)</p>	<p>Driving while disqualified</p> <p>Driving while not licensed (includes drivers whose licences are suspended: See Section 29A)</p>	<p>Imprisonment for 12 months and a further period of disqualification as the court thinks fit</p> <p>20 penalty units or imprisonment for 12 months (Section 52: General Penalties) and a period of disqualification as the court thinks fit</p>	<p>A sentence of imprisonment imposed for either offence may be suspended depending upon the circumstances: <i>Sentencing Act 2003</i> Section 40.</p> <p>A person may be eligible for a police caution under Section 33B <i>Traffic Act 2004</i> if the person's licence was suspended due to default of a fine and was unaware of the licence suspension</p>
WA	<p><i>Road Traffic Act 1974</i> Section 49(1)(a)</p>	<p>Drive whilst disqualified or suspended (as per circumstances set out in Section 49(2)(a)(i) and (iii))</p>	<p>First offence: a fine of not less than 8 penalty units or more than 40 penalty units and imprisonment for not more than 12 months and a further period of disqualification upon conviction</p> <p>Subsequent offence: a fine of not less than 20 penalty units or more than 80 penalty units and imprisonment for not more than 18 months and a further period of disqualification upon conviction</p>	<p>May be eligible for an extraordinary licence under Section 76(3) <i>Road Traffic Act 1974</i></p> <p>May be eligible for a caution under Section 49A(2) <i>Road Traffic Act 1974</i></p> <p>May be eligible for an extraordinary licence under Section 76(3) <i>Road Traffic Act 1974</i></p> <p>A sentence of imprisonment imposed for this offence may be suspended depending upon the circumstances: <i>Sentencing Act 1995</i> Sections 39 and 42.</p>
SA	<p><i>Motor Vehicles Act 1959</i> Section 91(5)</p>	<p>Drive whilst disqualified or suspended</p>	<p>First offence: imprisonment for 6 months</p> <p>Subsequent offence: imprisonment for 2 years</p>	<p>Nil</p> <p>A sentence of imprisonment imposed for this offence may be suspended depending upon the circumstances: <i>Criminal Law (Sentencing) Act 1988</i> Section 38.</p>

State/ Territory	Act/ Regulation	Offence	Penalty	Other
TAS	<i>Vehicle & Traffic Act 1999</i> Section 9	Driving while subject to licence suspension	<p>In the case of a first offence: a fine not exceeding 30 penalty units or imprisonment for a term not exceeding 3 months</p> <p>Subsequent offence: a fine not exceeding 60 penalty units or imprisonment for a term not exceeding 6 months</p>	May be eligible for restricted drivers licence under Section 18 <i>Vehicle & Traffic Act 1999</i>
	<i>Vehicle & Traffic Act 1999</i> Section 13	Driving whilst disqualified	<p>First offence: a fine not exceeding 40 penalty units or imprisonment for a term not exceeding 6 months or both and a further period of disqualification</p> <p>Subsequent offence: a fine not exceeding 80 penalty units or imprisonment for a term not exceeding 12 months or both and a further period of disqualification</p>	May be eligible for restricted drivers licence under Section 18 <i>Vehicle & Traffic Act 1999</i>
	<i>Road Safety (Alcohol & Drugs) Act 1970</i> Section 19A	Driving whilst disqualified under this Act	<p>First offence: a fine not exceeding 40 penalty units or imprisonment for a term not exceeding 6 months or both and a further period of disqualification</p> <p>Subsequent offence: a fine not exceeding 80 penalty units or imprisonment for a term not exceeding 12 months or both and a further period of disqualification</p>	May be eligible for restricted drivers licence under Section 18 of the <i>Vehicle & Traffic Act 1999</i>
				May be eligible for restricted drivers licence under Section 18 <i>Vehicle & Traffic Act 1999</i>

APPENDIX B: OFFENCES FOR WHICH MANDATORY SUSPENSION OR DISQUALIFICATION ATTACHES

I OFFENCES INVOLVING INJURY OR DANGEROUS DRIVING

- Found guilty or convicted of manslaughter arising from driving a motor vehicle under common law;¹⁶³
- Found guilty or convicted of negligently causing serious injury arising out of the driving of a motor vehicle under the *Crimes Act 1958* (Vic) s 24;¹⁶⁴
- Found guilty or convicted of culpable driving causing death under the *Crimes Act 1958* (Vic) s 318;¹⁶⁵
- Found guilty or convicted of dangerous driving causing death under the *Crimes Act 1958* (Vic) s 319;¹⁶⁶
- Found guilty or convicted of dangerous driving causing serious injury under the *Crimes Act 1958* (Vic) s 319;¹⁶⁷
- Convicted of driving in a dangerous manner under the *Road Safety Act 1986* (Vic) s 64(2);
- Found guilty or convicted of driving at a speed of 130 kph or more under the *Road Safety Act 1986* (Vic) s 28(1)(a);
- Found guilty or convicted of driving 25 kph or more over the speed limit under the *Road Safety Act 1986* (Vic) s 28(1)(a).

II ALCOHOL AND DRUG OFFENCES

- Found guilty or convicted of driving under the influence of alcohol or drugs under the *Road Safety Act 1986* (Vic) s 49(1)(a);¹⁶⁸
- Found guilty or convicted of refusing to undergo a preliminary breath test under the *Road Safety Act 1986* (Vic) s 49(1)(c);¹⁶⁹
- Found guilty or convicted of refusing or failing to stop at a preliminary breath testing station under the *Road Safety Act 1986* (Vic) s 49(1)(d);¹⁷⁰

¹⁶³ See *Sentencing Act 1991* (Vic) s89(1).

¹⁶⁴ See *Sentencing Act 1991* (Vic) s89(1).

¹⁶⁵ See *Sentencing Act 1991* (Vic) s89(1).

¹⁶⁶ See *Sentencing Act 1991* (Vic) s89(1).

¹⁶⁷ See *Sentencing Act 1991* (Vic) s89(1).

¹⁶⁸ See *Road Safety Act 1986* (Vic) s50(1B).

¹⁶⁹ See *Road Safety Act 1986* (Vic) s50(1B).

- Found guilty or convicted of refusing to undergo a breath analysis test under the *Road Safety Act 1986* (Vic) s 49(1)(e);¹⁷¹
- Found guilty or convicted of refusing to supply a blood sample for analysis under the *Road Safety Act 1986* (Vic) s 49(1)(e);¹⁷²
- Found guilty or convicted of driving or being in charge of a motor vehicle while having a blood alcohol level above the prescribed limit (not less than 0.07 grams for a first offence or not less than 0.05 grams for a subsequent offence) under the *Road Safety Act 1986* (Vic) s 49(1)(b);¹⁷³
- Found guilty or convicted of furnishing a sample of breath showing a blood alcohol concentration above the prescribed limit (not less than 0.07 grams for a first offence or not less than 0.05 grams for a subsequent offence) within three hours of driving or being in charge of a motor vehicle under the *Road Safety Act 1986* (Vic) s 49(1)(f);¹⁷⁴
- Found guilty or convicted of driving or being in charge of a motor vehicle and furnishing a sample of blood showing a blood alcohol concentration above the prescribed limit (not less than 0.07 grams for a first offence or not less than 0.05 grams for a subsequent offence) within three hours under the *Road Safety Act 1986* (Vic) s 49(1)(g);¹⁷⁵
- Found guilty or convicted of refusing to undergo or comply with a drug impairment assessment under the *Road Safety Act 1986* (Vic) s 49(1)(ca);¹⁷⁶
- Found guilty or convicted of refusing to give a blood or urine sample after undergoing a drug impairment assessment under the *Road Safety Act 1986* (Vic) s 49(1)(ea).¹⁷⁷

III ACCIDENTS

- Convicted of failing to supply information to police to ascertain the actual driver of a motor vehicle under the *Road Safety Act 1986* (Vic) s 60(2);
- Convicted of failing to stop after an accident where a person is killed or seriously injured under the *Road Safety Act 1986* (Vic) s 61(6);
- Convicted of failing to render assistance after an accident where a person is killed or seriously injured under the *Road Safety Act 1986* (Vic) s 61(6);

¹⁷⁰ See *Road Safety Act 1986* (Vic) s50(1B).

¹⁷¹ See *Road Safety Act 1986* (Vic) s50(1B).

¹⁷² See *Road Safety Act 1986* (Vic) s50(1B).

¹⁷³ See *Road Safety Act 1986* (Vic) ss50(1), 50(1A) & 50(1AB).

¹⁷⁴ See *Road Safety Act 1986* (Vic) ss50(1), 50(1A) & 50(1AB).

¹⁷⁵ See *Road Safety Act 1986* (Vic) ss50(1), 50(1A) & 50(1AB).

¹⁷⁶ See *Road Safety Act 1986* (Vic) s50(1D).

¹⁷⁷ See *Road Safety Act 1986* (Vic) s50(1D).

- Convicted of failing to provide name, address and registration number of motor vehicle after an accident where a person is killed or seriously injured under the *Road Safety Act 1986* (Vic) s 61(6);
- Convicted of failing to report accident to police where a person is killed or seriously injured under the *Road Safety Act 1986* (Vic) s 61(6).

IV OTHER OFFENCES

- Convicted of theft or attempted theft of a motor car under the *Crimes Act 1958* (Vic) s 74.¹⁷⁸

¹⁷⁸ See *Sentencing Act 1991* (Vic) s89A(4).

APPENDIX C: DISCRETIONARY POWER TO SUSPEND A LICENCE OR PERMIT

The court is given a discretionary power to suspend a driver's licence or permit in the following circumstances:

- Where a person is found guilty of theft or attempted theft of a motor car under s 74 of the *Crimes Act 1958* (Vic);¹⁷⁹
- Where a person is found guilty of driving or being in charge of a motor vehicle while having a blood alcohol level above the prescribed limit (where the reading is less than 0.05 grams on a first offence and the person is a probationary or taxi driver) under s 49(1)(b) of the *Road Safety Act 1986* (Vic);¹⁸⁰
- Where a person is found guilty of furnishing a sample of breath showing a blood alcohol concentration above the prescribed limit (where the reading is less than 0.07grams on a first offence and the person is a probationary or taxi driver) within three hours of driving or being in charge of a motor vehicle under s 49(1)(f) of the *Road Safety Act 1986* (Vic);¹⁸¹
- Where a person is found guilty of driving or being in charge of a motor vehicle and furnished a sample of blood showing a blood alcohol concentration above the prescribed limit within three hours (where the reading is less than 0.07grams on a first offence or the person is subject to a zero blood or breath alcohol condition and the reading is less than 0.05 grams)¹⁸² under s 49(1)(g) of the *Road Safety Act 1986* (Vic);¹⁸³
- Where a person is found guilty of driving or being in charge of a motor vehicle while having a blood alcohol level above the prescribed limit (where the reading is less than 0.07grams on a first offence or the person is subject to a zero blood or breath alcohol condition and the reading is less than 0.05 grams)¹⁸⁴ under s 49(1)(b) of the *Road Safety Act 1986* (Vic);¹⁸⁵
- Where a person is found guilty of furnishing a sample of breath showing a blood alcohol concentration above the prescribed limit within three hours of

¹⁷⁹ See *Sentencing Act 1991* (Vic) s89A(4).

¹⁸⁰ See *Road Safety Act 1986* (Vic) ss50(1), 50(1A) & 50(1AB).

¹⁸¹ See *Road Safety Act 1986* (Vic) ss50(1), 50(1A) & 50(1AB).

¹⁸² See *Road Safety Act 1986* (Vic) s52.

¹⁸³ See *Road Safety Act 1986* (Vic) ss50(1), 50(1A) & 50(1AB).

¹⁸⁴ See *Road Safety Act 1986* (Vic) s52.

¹⁸⁵ See *Road Safety Act 1986* (Vic) ss50(1), 50(1A) & 50(1AB).

driving or being in charge of a motor vehicle (where the reading is less than 0.07grams on a first offence or the person is subject to a zero blood or breath alcohol condition and the reading is less than 0.05 grams)¹⁸⁶ under s 49(1)(f) of the *Road Safety Act 1986* (Vic);¹⁸⁷

- Where a person is found guilty of driving or being in charge of a motor vehicle and furnished a sample of blood showing a blood alcohol concentration above the prescribed limit (less than 0.07 grams for a first offence or less than 0.05 grams for a subsequent offence) within three hours under s 49(1)(g) of the *Road Safety Act 1986* (Vic).¹⁸⁸

¹⁸⁶ See *Road Safety Act 1986* (Vic) s52.

¹⁸⁷ See *Road Safety Act 1986* (Vic) ss50(1), 50(1A) & 50(1AB).

¹⁸⁸ See *Road Safety Act 1986* (Vic) ss50(1), 50(1A) & 50(1AB).