

Driving While Disqualified or Suspended: Report



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Contributors

Authors	Stephen Farrow Adrian Hoel Felicity Stewart
Data Analysis	Nick Turner
Sentencing Advisory Council	
Chair	Arie Freiberg
Deputy-Chair	Thérèse McCarthy
Council Members	Carmel Arthur David Grace QC Rudolph Kirby Andrea Lott Jenny Morgan Simon Overland APM Barbara Rozenes Gavin Silbert SC Lisa Ward David Ware
Chief Executive Officer	Stephen Farrow

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Glossary

BAC	Blood or breath alcohol concentration.
Cancellation	A person's licence to drive may be cancelled for a range of reasons, which are set out in more detail in Chapter 2 of this report. If the licence is cancelled, ordinarily the driver will be disqualified from obtaining a new licence for a specified period.
Disqualification	When a driver is disqualified, that driver must surrender his or her licence, if he or she has one, to VicRoads and is disqualified from obtaining a new licence for a specified period. In contrast to suspension (see below), the driver is not automatically entitled to the return of his or her licence at the end of the disqualification period but must apply for a new licence. Before making that application, he or she may need to satisfy certain requirements, such as undertaking an education course.
Infringement	The infringements scheme provides a quick and cost-effective way of enforcing minor criminal offences, without the need to go to court. On detecting a person committing an offence, police may serve the person with an infringement notice, which specifies the applicable fine. If the person wishes to contest the alleged offence, he or she may elect to have it dealt with by a court.
Licence	In this report, unless it is otherwise clear from the context, 'licence' refers to a driver licence, a probationary driver licence or a learner's permit.
Suspension	When a licence is suspended, the suspension operates for a specified period, and the driver is required to surrender his or her licence to VicRoads. At the end of the suspension period, VicRoads must return the licence to the driver, at which point the driver is allowed to resume driving.
Suspended sentence	If a sentence of imprisonment is up to three years in the higher courts, or two years in the Magistrates' Court, the court may order that the sentence be wholly or partially suspended for a specified period, known as the operational period. For example, if the court sentences a person to a term of imprisonment of 12 months, the court could suspend the sentence for an operational period of 18 months, on the condition that the offender does not commit any further offences during the operational period. If the offender complies with that condition, he or she will not have to serve any time in prison (if it is wholly suspended), or will have to serve only a portion of the sentence in prison (if it is partially suspended).

Executive summary

Background

Over the past decade, the prevalence of the offence of driving while disqualified or suspended has increased significantly. By 2007–08, it was the most common principal proven offence in the Magistrates' Court.

Driving while disqualified or suspended has a mandatory minimum penalty of one month's imprisonment if the offender has previously been found guilty of the offence. In a recent review of suspended sentences, the Council identified this mandatory minimum penalty for driving while disqualified or suspended as one of the major factors that has led to the high use of suspended sentences of imprisonment in the Magistrates' Court. The suspended sentences for that one offence constituted almost one fifth of all suspended sentences imposed in the Magistrates' Court.

As outlined in Part 2 of the Council's final report on suspended sentences, a majority of the Council considered the mandatory minimum penalty for driving while disqualified or suspended to be anomalous and recommended that it should be abolished. A minority of the Council was of the view that any reforms to the offence should be deferred until additional research had been undertaken and more effective sentencing responses had been identified. The Council was unanimous in its view that further research was required to develop more effective responses to this form of criminal behaviour. This led to the current project.

Abolition of the mandatory minimum penalty

When the offence of driving while disqualified or suspended was first introduced in Victoria in 1949, traffic offences were prosecuted in court and most licence suspensions and disqualifications were ordered by a court. This meant that driving while disqualified or suspended was a form of contempt of court.

Since the early 1990s, the character of the offence has been changing as a result of two important developments:

- First, there has been a significant increase in the proportion of people having a licence suspended by VicRoads due to an excess of demerit points, compared to those losing their licence in other ways.
- Second, there has been an increased use of the infringements system for traffic offences, with the overwhelming majority of driving offences now being dealt with by an infringement notice. Under this system, licences are automatically cancelled (with a disqualification period) or suspended for certain offences.

These changes mean that most instances of driving while disqualified or suspended can no longer be characterised as a form of contempt of court and that the original justification for the mandatory minimum penalty no longer applies. In addition, the mandatory minimum penalty raises a number of other concerns.

The Council's research and consultation has led to the conclusion that the mandatory minimum penalty:

- Is not effective in protecting the community from future offences.
- Is contributing to sentencing outcomes that cannot directly facilitate the offender's rehabilitation, for example, in cases where alcohol problems have contributed to the offence.
- Is resulting in sentences that have limited capacity to prevent the offender from reoffending in the medium to long term. At most, offenders are incarcerated briefly, which means that they are only incapacitated temporarily.
- Can result in penalties for driving while disqualified or suspended that are disproportionately high compared to other related offences.
- Is causing strains on the criminal justice system.

For these reasons, the Council recommends that the mandatory minimum penalty of imprisonment for second and subsequent offences of driving while disqualified or suspended should be repealed (**Recommendation I**). The offence should continue to carry a maximum penalty of two years' imprisonment.

More effective alternatives

The Council has examined a range of options for dealing more effectively with this form of criminal behaviour, by addressing deterrence, incapacitation and rehabilitation.

Deterring offending by increasing detection

The Council's research and consultation shows that a significant reason why people drive while disqualified or suspended is that they consider the risk of being detected to be small.

The Council considers that the most important factors in deterring people from committing this offence are an increased likelihood of being caught and an increased awareness of that likelihood.

A potential method of addressing both of these factors is to improve the targeting of—and increase the frequency of—licence checks. The Council takes the view that there is great potential for automated number plate recognition technology (ANPR) to help police target those who drive while disqualified or suspended. ANPR technology is used to monitor moving cars and identify any that are registered to a banned driver or an associate of a banned driver (such as a family member). If there is a match, police can intercept the vehicle and ask the driver to show his or her licence. Victoria Police are currently trialling this technology and are confident that it will substantially increase the likelihood of detecting individuals who drive while disqualified or suspended.

The Council supports the expansion of the use of this technology to increase the detection of disqualified and suspended drivers (**Recommendation 2(a)**). However, the Council recommends that in increasing the number of licence checks through use of this technology, care should be taken to minimise the risk of sections of the community feeling unfairly targeted (**Recommendation 2(c)**).

The Council also recommends that the expansion of the use of this technology should be widely publicised to maximise its deterrent effect (**Recommendation 2(b)**).

Impoundment, immobilisation and forfeiture of vehicles

An alternative to imprisonment as a means of removing the capacity of an offender to reoffend is the removal of his or her vehicle. For many people who are banned from driving, having a car sitting in the driveway provides an opportunity, and a strong temptation, to continue to drive.

It is currently possible for police to briefly impound or immobilise a vehicle that has been driven by a person who is disqualified or suspended. In limited situations, it is possible to apply to a court for a longer period of impoundment or immobilisation or, in some cases, forfeiture of the vehicle.

The Council recommends a series of changes to that scheme to provide greater flexibility in the use of impoundment and immobilisation (**Recommendation 3**).

Earlier intervention for drink drivers

A significant number of people who commit the offence of driving while disqualified or suspended have underlying problems with alcohol dependency or misuse.

Currently, if a person is found guilty of drink driving, the court will impose a sentence (frequently a fine), cancel the person's licence and disqualify the person from obtaining a new licence for a prescribed period. At the end of the disqualification period, the person can obtain a new licence, subject to the condition that he or she only drives a car with an alcohol interlock installed.

The Council has found that many drink drivers continue to drive during the disqualification period and because of the cost and complexity of the relicensing process, many do not undertake it but simply continue to drive without a licence, and hence without an alcohol interlock.

Based on research and consultation, the Council has proposed a new pathway (**Recommendations 4 to 9**) for such offenders so that, in appropriate cases, it is possible:

- to require offenders to confront and address an underlying problem with alcohol at an early stage; and
- to increase the likelihood that offenders will return to the licensing scheme and as a consequence will be subject to an alcohol interlock condition.

A specialist list for driving offences

The Magistrates' Court currently has a range of specialist courts, divisions and lists. These initiatives have been adopted to allow magistrates and practitioners to develop greater expertise in relation to particular types of case that typically involve complex health and social issues. Specialist courts, divisions and lists also enable the courts to adopt a problem-solving approach that involves a more intensive, ongoing supervisory and therapeutic role than is the case with a conventional criminal court.

Therefore, the Council recommends (**Recommendation 10**) that the Magistrates' Court consider establishing an opt-in list for cases involving defendants for whom the traditional interventions have failed and who are willing to plead guilty and undergo more focussed and intensive programs. Such a list could provide a specialised process that may be particularly useful in cases involving repeat drink driving offenders who have not been responsive to previous court orders and who pose a significant danger to the community if they continue to drive in breach of licence sanctions and court orders.

List of Recommendations

Abolition of mandatory minimum penalty

Recommendation 1

Section 30 of the *Road Safety Act 1986* (Vic) should be amended to remove the mandatory minimum penalty of one month's imprisonment for a second or subsequent offence of driving while disqualified or suspended. The offence should continue to carry a maximum penalty of two years' imprisonment.

Increased detection (through automated number plate recognition)

Recommendation 2

- (a) Subject to obtaining sufficient resources, Victoria Police should expand its use of automated number plate recognition technology to increase the detection of driving while disqualified or suspended.
- (b) The expansion of the use of this technology should be widely publicised to maximise its deterrent effect.
- (c) In expanding the number of licence checks through the use of this technology, care should be taken to work with sections of the community to minimise the risk of drivers feeling unfairly targeted.

Impoundment, immobilisation and forfeiture

Recommendation 3

- (a) If a person is charged with driving while disqualified or suspended and the person has been found guilty of that offence in the previous three years, police should be able to apply to the relevant court for an impoundment or immobilisation order.
- (b) The court should be able to order that the vehicle or a substituted vehicle be impounded or immobilised for any period up to the remainder of the period for which the person's licence is suspended or for which the person is disqualified from obtaining a licence, or three months, whichever is longer.

Earlier intervention, rehabilitation and education (for high-level drink drivers)

Recommendation 4

- (a) The Council reiterates Recommendation 13 of *Suspended Sentences Final Report—Part 2* that the current restriction of deferred sentencing to offenders under the age of 25 should be removed, so that deferred sentencing can be used in relation to offenders of any age.
- (b) The government should ensure that appropriate drink-driving programs are available to be used in conjunction with deferred sentencing, as well as with orders such as community-based orders.

Recommendation 5

- (a) A person who is disqualified from obtaining a licence because of drink driving should be permitted to apply to the Magistrates' Court at any time for an order as to the issue of a restricted licence or permit.
- (b) The person should be required to give notice of the application to the Magistrates' Court and to Victoria Police; however, the court should have the power to waive this requirement in appropriate cases.
- (c) The Magistrates' Court should be able to grant the order prior to the end of the disqualification period if:
 - the applicant satisfies the court that he or she has completed an approved course; and
 - the court directs that VicRoads can only grant the offender a licence or permit subject to a condition that the offender must only drive a vehicle with an approved alcohol interlock device.

Recommendation 6

- (a) The duration of the interlock condition (referred to in Recommendation 5(c)) should be at least as long as the relevant current minimum disqualification period.
- (b) At the end of this period, the offender should be able to apply to the court for an order to remove the interlock condition (the process should be similar to that in section 50AAB of the *Road Safety Act 1986* (Vic)).

Recommendation 7

The maximum penalty for driving a vehicle in breach of an alcohol interlock condition should be increased from three months' imprisonment or a fine of 25 penalty units to two years' imprisonment or a fine of 240 penalty units.

Early intervention for mid-level drink drivers

Recommendation 8

The *Road Safety Act 1986* should be amended so that:

- (a) a person who is issued with an infringement notice for drink driving and whose licence is automatically cancelled and who is disqualified from obtaining a new licence for a specified period; and
- (b) a person whose licence is suspended by a court for drink driving or whose licence is cancelled and who is disqualified by a court from obtaining a new licence for a specified period—

may apply to the court at any time for an order as to the issue of a new licence. Recommendations 5(b)–(c), 6 and 7 above should also apply to these cases.

Reform to the way that demerit points are accrued

Recommendation 9

(a) The *Road Safety Act 1986* should be amended so that:

- (i) if a demerit point suspension has been stayed due to the cancellation or suspension of an offender's licence for drink driving; and
- (ii) a court makes an order as to the issuing of a licence with an interlock condition under Recommendations 7 and 8—

the court ordering the conditional licence may cancel the demerit point suspension if the period of the suspension is added to the period for which the interlock condition is attached to the offender's licence.

- (b) If the offender breaches the conditional licence or the conditions of the relevant sentence, the court may reinstate the demerit point suspension.

Specialist list

Recommendation 10

The Magistrates' Court should consider establishing a specialist list to hear cases involving driving offences where the defendant intends to plead guilty and acknowledges a need for rehabilitation.

Chapter 1: Introduction

Background

- 1.1 In August 2004, the Attorney-General asked the Sentencing Advisory Council to advise on the use of suspended sentences of imprisonment and whether reported community concerns about their operation indicated a need for reform.
- 1.2 In response to the Attorney-General's request, the Council conducted a major review of suspended sentences and intermediate sentencing orders. The Council found that suspended sentences developed as an important way to divert offenders from prison at a time when the courts had few other options. However, the Council noted that they pose many conceptual and practical concerns and concluded that suspended sentences were being used in inappropriate cases.
- 1.3 In its final report to the Attorney-General, which was published in two parts,¹ the Council made 65 recommendations for a wide range of reforms to suspended sentences and intermediate sentencing orders.
- 1.4 The Council identified the mandatory minimum penalty of one month's imprisonment that applies under section 30 of the *Road Safety Act 1986* (Vic) to second and subsequent offences of driving while disqualified or suspended as a major factor that has led to the high use of suspended sentences in the Magistrates' Court. In 2006–07, nearly a quarter of the people found guilty of that offence received a suspended sentence. The suspended sentences for that one offence constituted almost one fifth of all suspended sentences imposed in the Magistrates' Court. The overwhelming majority of these sentences were wholly rather than partially suspended.²
- 1.5 Issues relating to the offence of driving while disqualified or suspended were examined by the Council in its review of suspended sentences.³ All members of the Council had concerns about the effectiveness of the mandatory minimum penalty and its contribution to the high numbers of suspended sentences in Victoria.
- 1.6 A majority of the Council considered the mandatory minimum penalty to be anomalous and recommended that it should be abolished.⁴ However, a minority of the Council took the view that any reforms to the offence should be deferred until additional research had been undertaken and more effective sentencing responses had been identified.⁵
- 1.7 The Council was unanimous in its view that further research was required to develop more effective responses to this form of criminal behaviour.⁶

1 Sentencing Advisory Council, *Suspended Sentences: Final Report—Part 1* (Sentencing Advisory Council, May 2006); *Suspended Sentences and Intermediate Sentencing Orders: Suspended Sentences Final Report—Part 2* (Sentencing Advisory Council, April 2008).

2 Sentencing Advisory Council (2008), above n 1, [2.51]. These figures relate to cases heard in the Magistrates' Court in which driving while disqualified or suspended was the principal proven offence sentenced. Often defendants will be charged and sentenced for multiple offences arising at the same hearing. The term 'principal proven offence' means the most serious offence for which the defendant is found guilty and sentenced. Where this occurs, a total effective sentence will be imposed, which will largely be determined in relation to the principal proven offence.

3 Sentencing Advisory Council (2008), above n 1, [2.51]–[2.79].

4 *Ibid* [2.77].

5 *Ibid* [2.78].

6 *Ibid* [2.79].

- 1.8 This has led to the current project, which examines the offence of driving while disqualified or suspended in greater detail. In the course of this project, the Council has published an information paper and a discussion paper.⁷ The Council has also analysed a large amount of statistical data from VicRoads and from the courts, and held focus groups with offenders to obtain qualitative information. Views have been sought from a broad range of stakeholders through roundtables and a call for submissions.
- 1.9 This research has led to a greater understanding of some of the reasons why people commit the offence of driving while disqualified or suspended and why the number of prosecutions for this offence has been increasing. This has enabled the Council to assess the effect of the mandatory minimum penalty and to anticipate the likely consequences if it were to be abolished. It has also enabled the Council to develop a set of approaches that may be more effective in responding to this offending behaviour.
- 1.10 A major concern about changing or removing the mandatory minimum penalty is what effect, if any, this might have on road safety. Before looking in detail at the options for dealing with driving while disqualified or suspended, it is necessary to examine the broader context of road safety.

Road safety

- 1.11 Victoria's road toll has decreased from a peak of 24 deaths per 100,000 of the population in the 1970s to fewer than six deaths per 100,000 in 2008.⁸ If the road toll had remained at the same number of deaths per 100,000 as in 1975, over 1,200 people would have died from road accidents in 2008. The actual number of road deaths in 2008 was 303.⁹
- 1.12 Although there has been a decrease in road deaths in most developed countries, the decrease in Victoria has been particularly dramatic (see Figure 1).
- 1.13 A study conducted in 2006 found that Victoria's road toll was among the lowest in the developed world (see Figure 2).¹⁰ Since then, Victoria's road toll has decreased even further.
- 1.14 This dramatic reduction over recent decades has been achieved through a combination of social changes (such as greater acceptance of the need to wear seatbelts), graphic media campaigns, improved car technology (for example, the introduction of air bags) and law enforcement (such as the use of speed cameras and random breath testing).

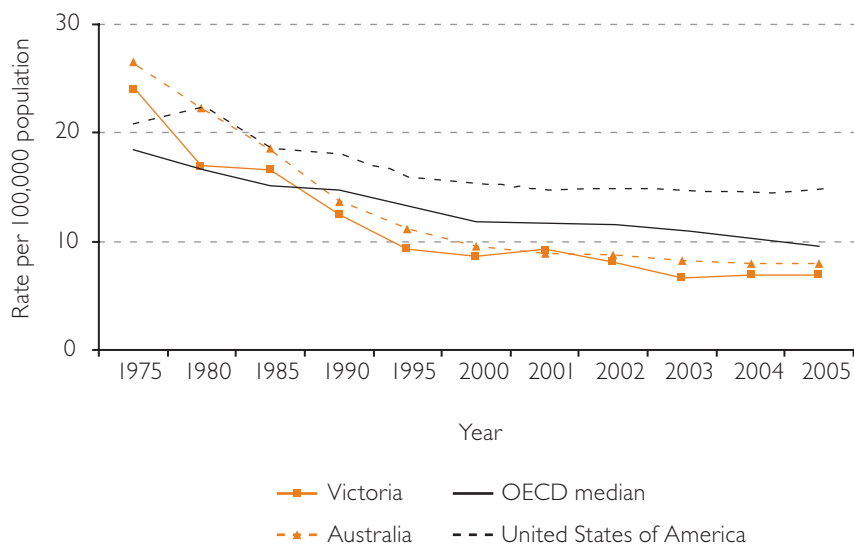
7 Sentencing Advisory Council, *Driving While Disqualified or Suspended: Information Paper* (Sentencing Advisory Council, December 2007); Sentencing Advisory Council, *Driving while Disqualified or Suspended: Discussion Paper* (Sentencing Advisory Council, May 2008).

8 In 2008, the Victorian road toll was 5.74 deaths per 100,000 of population. This figure is based on the 303 deaths reported by VicRoads' Arrive Alive <www.arrivealive.vic.gov.au/daily_toll> at 11 March 2009, and the Australian Bureau of Statistics' estimate for Victoria's 2008 resident population of 5,297,600, Australian Bureau of Statistics, 1367.2 – State and Regional Indicators, Victoria, Dec 2008 <www.abs.gov.au/ausstats/abs@.nsf/Products/9328A92FD849B18ECA2575620013DF03?open=document> at 6 April 2009.

9 VicRoads, Arrive Alive <www.arrivealive.vic.gov.au/daily_toll> at 11 March 2009.

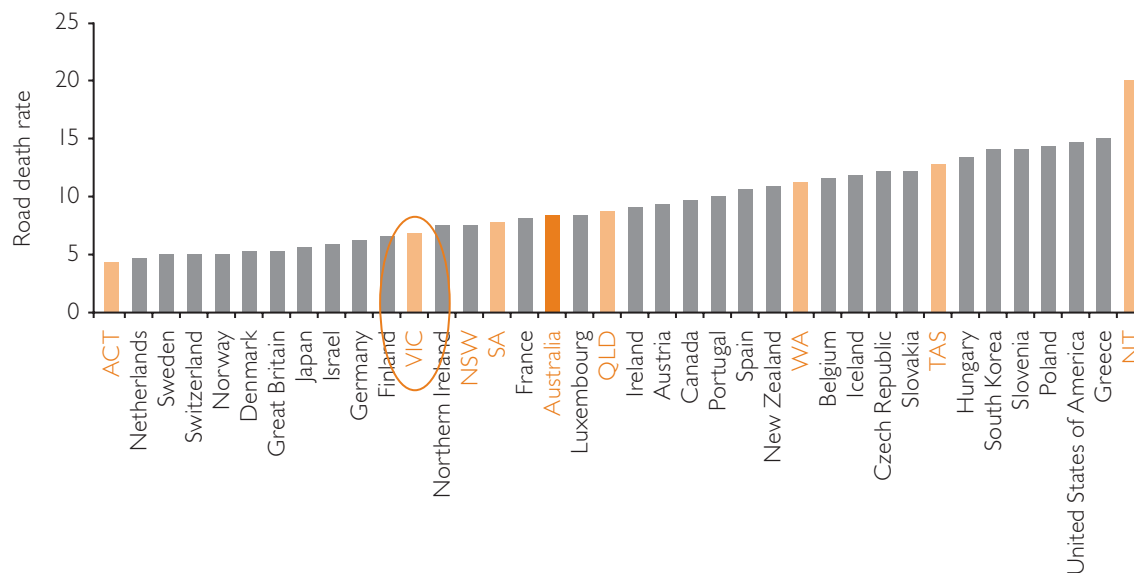
10 Department of Infrastructure, Transport, Regional Development and Local Government, *International Road Safety Comparisons: The 2006 Report* (Department of Infrastructure, Transport, Regional Development and Local Government, 2008) [2.2] (Figure 1).

Figure 1: International comparison of road deaths per 100,000 population, 1975 to 2005



Source: Australian Transport Safety Bureau, *International Road Safety Comparisons: the 2005 report* (Australian Transport Safety Bureau, May 2007), 5 (Table 2).

Figure 2: Road deaths per 100,000 people for OECD nations and Australian states and territories, 2006



Source: Department of Infrastructure, Transport, Regional Development and Local Government, *International Road Safety Comparisons: The 2006 Report*, Figure 1.

Increases in licence suspensions and disqualifications

- I.15 Law-enforcement measures have played an important role in improving road safety. One consequence of this has been an increase in the number of people who are banned from driving as a result of committing traffic offences. For example, the demerit point system for drivers, introduced in Victoria in 1969, had a minimal impact on drivers until 1989 when, as part of a package of road safety measures, the government extended the system to apply to offences detected by speed cameras. This resulted in a large increase in the number of people whose licences were suspended for accruing the prescribed number of demerit points.¹¹ In 1990, approximately 300 licences were suspended for an excess of demerit points. In 2006–07, over 25,000 licences were suspended on this ground.¹²
- I.16 When a person is banned from driving as a consequence of committing an offence (whether through licence suspension or disqualification), the suspension or disqualification is not technically a sentence. However, it can operate as harshly as, or in many cases more harshly than, a sentence. Unlike a sentence, there is little or no discretion to take issues such as proportionality or hardship into account in relation to suspension or disqualification. This can lead to a sense of grievance on the part of the offender.
- I.17 As cars have become an integral part of life for many people, losing the ability to drive can lead to the loss of employment and create a significant strain on the person's family and social life.
- I.18 Theoretically, these consequences should have a powerful deterrent effect—people obey the road laws so that they do not lose their licence—and this may be reflected in the falling road toll. However, the large and increasing number of people prohibited from driving each year suggests that many people are not being deterred from committing traffic offences by the prospect of losing their licence.
- I.19 The potentially harsh consequences of losing a driver licence are minimised if a person simply continues to drive without a licence. Although it is a summary criminal offence to drive while disqualified or suspended, many Victorians who lose their licence continue to drive. In the current decade, the number of people found guilty of driving while disqualified or suspended has risen dramatically from fewer than 3,000 in 2000–01 to approximately 8,600 in 2006–07. In 2007–08, driving while disqualified or suspended was second only to theft as the most common offence found proven by the Magistrates' Court.¹³
- I.20 This dramatic increase in offending is not unique to Victoria. Between 2003–04 and 2007–08, the number of defendants adjudicated by Magistrates' Courts across Australia where the principal offence was a driving licence offence increased by nearly 61 per cent (from 52,326 to 84,121).¹⁴

11 Road Safety Committee, Parliament of Victoria, *Report upon the Inquiry into the Demerit Points Scheme* (The Committee, 1994) [4.2].

12 VicRoads, unpublished data.

13 Magistrates' Court of Victoria, *2007–2008 Annual Report* (Magistrates' Court of Victoria, 2008) 44.

14 Australian Bureau of Statistics, *Criminal Courts, Australia, 2007–08*, Cat. no. 4513.0 55 (Table 3.5).

The safety risks posed by disqualified and suspended drivers

- I.21 People who are detected driving while disqualified or suspended are predominantly male and in their early twenties. While young males, whether licensed or not, are considered a high road-safety risk generally, there is some evidence that those who drive while disqualified or suspended pose a significantly greater risk than licensed drivers.
- I.22 A study of over 26,000 drivers and motorcyclists involved in reported injury crashes in Victoria in 1994 found that disqualified or suspended drivers and riders were overrepresented in high-severity crashes and in seriously injured groups of road users.¹⁵ This study observed that the pattern of results indicates that disqualified or suspended drivers and riders:
 are likely to engage in drunk-driving behaviour and to drive in a way that increases their risk of serious or fatal injury in a crash. While this group is relatively small, it accounts for almost 5% of fatally injured drivers and therefore constitutes a significant road safety problem.¹⁶
- I.23 The results of the Victorian study are consistent with more recent studies in other jurisdictions. For example, a 2003 study commissioned by the United Kingdom Department of Transport found that the comparative crash risk of disqualified, suspended or unlicensed drivers was 2.7 to 9 times greater than for licensed drivers.¹⁷
- I.24 A Queensland study found that, from 1994 to 1998, a significantly higher proportion of crashes involving unlicensed drivers resulted in a fatality or hospitalisation (29.3%) compared to crashes involving licensed drivers (16.3%).¹⁸
- I.25 Surveys of people who drive while disqualified or suspended commonly find that such people report that they drive more safely to avoid detection. This was also reflected in offender focus groups conducted by the Council. Some studies suggest that a desire to avoid detection can lead such drivers to develop more appropriate driving skills and practices. However, some researchers have rejected this view, arguing that behaviour motivated by a desire to avoid detection is not necessarily safer.¹⁹ The figures cited above regarding the crash risk of disqualified and suspended drivers appear to support the latter view, as does the evidence that links driving while disqualified or suspended to other high-risk behaviours.²⁰

15 Warren Harrison, 'An Exploratory Investigation of the Crash Involvement of Disqualified Drivers and Motorcyclists' (1997) 28(2) *Journal of Safety Research* 105, 109.

16 Ibid 110.

17 Duncan Knox, Blair Turner and David Silcock, *Research into Unlicensed Driving: Final Report* (UK Department for Transport, 2003) [7.1.3].

18 Barry Watson, 'The Crash Involvement of Unlicensed Drivers', Abstract, 17th Congress of the International Association of Accident and Traffic Medicine (2000) 28 *Journal of Traffic Medicine* 21.

19 Barry Watson, *The Road Safety Implications of Unlicensed Driving: A Survey of Unlicensed Drivers* (Centre for Accident Research and Road Safety and Queensland University of Technology, 2003) 7, citing Duncan Knox, *Research into Unlicensed Driving: Literature Review* (Department for Transport, 2003).

20 Ibid 8, citing figures from Lindsay Griffin and Sandra DeLaZerda, *Unlicensed to Kill* (AAA Foundation for Traffic Safety, 2000) that 74.1 per cent of the revoked drivers involved in fatal car crashes had consumed alcohol compared to 19.9 per cent of the licensed drivers.

- 1.26 In a study of Californian drivers published in 2002, Gebers and DeYoung examined the characteristics and relative crash risk of disqualified and suspended drivers.²¹ They analysed the driving records of a sample of three groups of drivers. The first group was a sample of drivers who had been disqualified or whose licences had been suspended. The second was a random sample of Californian licensed drivers. The third group was a sample of licensed drivers who were chosen from a high-risk class of drivers: male and under 25 years of age. Gebers and DeYoung divided the sample of disqualified or suspended drivers by reference to the reason for the loss of licence. The categories included physical or mental impairment, lack of skill, negligent operators and loss of licence due to failure to pay moneys (similar to *Infringements Act 1999* (Vic) suspensions). Some of these categories tended to share demographic characteristics (for example, groups with physical or mental impairments tended to be older). Disqualified or suspended drivers were predominately male across the categories and tended to be younger. Gebers and DeYoung found that the risk profile of the various sub-categories of disqualified or suspended drivers varied significantly. All categories had higher crash and conviction rates than those of the validly licensed drivers generally and somewhat higher rates than those of validly licensed 25 year-old males. The validly licensed 25 year-old males were found to have a slightly higher risk profile than general drivers (they were found to be 1.37 times more likely to be involved in a fatal or serious crash) but were still found to have a substantially lower risk profile than disqualified or suspended drivers.²²
- 1.27 One of the more contentious causes of licence suspension is the accrual of excess demerit points. Some may regard such drivers as being less dangerous than drivers who are disqualified or suspended as a result of a single, more serious traffic offence. However, a 1997 Victorian study found a close correlation between driving history (whether by offence type, demerit points accrued, previous crash involvement or a combination of these variables) and future crash involvement. While the risk profiles may vary according to each of these factors, drivers whose licences are suspended for accrual of demerit points may have a greater crash risk than licensed drivers.²³

21 Michael Gebers and David DeYoung, *An Examination of the Characteristics and Traffic Risk of Drivers Suspended/Revoked for Different Reasons* (California Department of Motor Vehicles, 2002).

22 Clark and Bobevski note that the Gebers and DeYoung study had some methodological limitations because, despite including a group of licensed 25 year-old male drivers in the cohort, they did not control for age or gender among the disqualified/suspended drivers. See Belinda Clark and Irene Bobevski, *Disqualified Drivers in Victoria: Literature Review and In-Depth Focus Group Study* (Monash University Accident Research Centre, 2008) 17.

23 Kathy Diamantopoulou, Max Cameron, David Dyte and Warren Harrison, *The Relationship Between Demerit Points Accrual and Crash Involvement* (Monash University Accident Research Centre, 1997).

Sentencing for driving while disqualified or suspended

The offence

- I.28 The offence of driving while disqualified or suspended is contained in section 30 of the *Road Safety Act 1986* (Vic), which provides that:
- 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 units²⁴ or imprisonment for 4 months;
For a subsequent offence, imprisonment for not less than 1 month and not more than 2 years.
- I.29 As a summary offence, driving while disqualified or suspended is ordinarily dealt with in the Magistrates' Court.²⁵ Between July 2004 and June 2007, over 28,000 people were sentenced for at least one offence of driving while disqualified or suspended.²⁶ Of these, only 20 people (0.07%) were sentenced by the County Court and none was sentenced by the Supreme Court.
- I.30 The following sections examine the sentences imposed by the Magistrates' Court for people who had at least one offence of driving while disqualified or suspended during those three years.

Sentencing for a first offence

- I.31 An offence is treated as a first offence if at the time it was committed the offender had not previously been found guilty of driving while disqualified or suspended.
- I.32 If this is the case, the sentencing court can choose from the full range of sentencing options, including a community-based order or an adjourned undertaking.
- I.33 Between July 2004 and June 2007, the overwhelming majority of first offenders received a fine as their principal sentence (85.3%).

24 The value of a penalty unit changes each year. At the time of this report, 30 penalty units amounts to \$3402. Penalty unit values can be found in the Victorian Government Gazette and on the Office of the Chief Parliamentary Counsel website <www.ocpc.vic.gov.au>.

25 Under the *Crimes Act 1958* (Vic) s 359AA, it is possible for the offence to be dealt with in the County Court or the Supreme Court if the defendant is being tried by that court for an indictable offence, he or she consents to the summary offence being heard with the indictable offence and he or she indicates a willingness to plead guilty to those offences; however, this is very rare.

26 People are counted for each separate case in which they were sentenced.

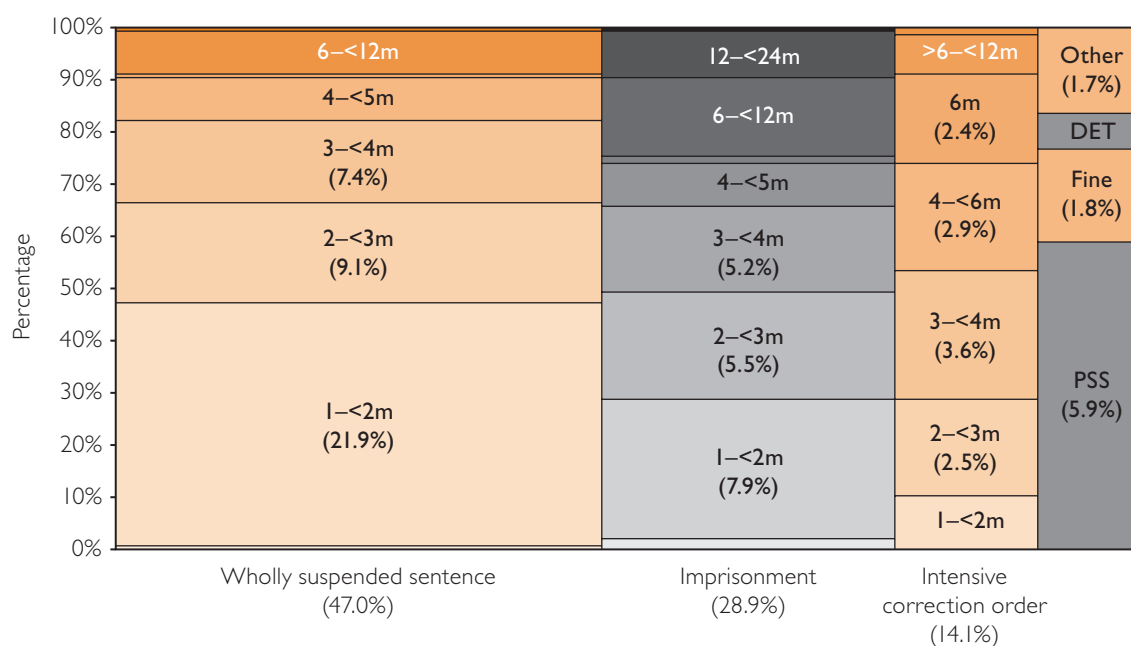
Sentencing for a repeat offence

- I.34 If at the time of committing the offence the offender had previously been found guilty of driving while disqualified or suspended, the court must impose a sentence of imprisonment of between one month and two years. Victoria is the only jurisdiction in Australia with a mandatory minimum penalty of imprisonment for this offence.
- I.35 Few other Victorian offences have a similar mandatory minimum sentence of imprisonment.²⁷ The provision prohibits courts from imposing a non-custodial sentence, such as a fine or community-based order; however, this does not mean that the person actually has to serve the sentence in prison.
- I.36 Under Victorian sentencing law:
- If the sentence of imprisonment is less than 12 months, the court may make:
 - a *home detention* order, enabling the offender to serve the sentence in his or her home subject to complying with various conditions, including the wearing of an electronic bracelet to monitor his or her movements; or
 - an *intensive correction* order, under which the offender serves the sentence 'by way of intensive correction' in the community. This means that the offender must comply with specified conditions, which can include submitting to supervision by Community Correctional Services, performing unpaid community work and attending rehabilitation programs.
 - If the sentence of imprisonment is up to three years in the higher courts, and two years in the Magistrates' Court, the court may place the offender on a wholly or partially *suspended sentence*. This involves the court suspending the operation of the sentence of imprisonment for a specified period, known as the operational period. For example, if the court sentences a person to a term of imprisonment of 12 months, the court can suspend the sentence for an operational period of 18 months, on the condition that the offender does not commit any further offences during the operational period. If the offender complies with that condition, he or she will not have to serve any time in prison (if the sentence is wholly suspended), or will have to serve only a portion of the sentence in prison (if the sentence is partially suspended).

²⁷ The only other examples in the *Road Safety Act 1986* (Vic) are ss 61(4), (5), which impose mandatory sentences of imprisonment for repeat incidents of failing to render assistance where a person suffers injury or death. On mandatory sentencing generally, see Adrian Hoel and Karen Gelb, *Sentencing Matters: Mandatory Sentencing* (Sentencing Advisory Council, 2008).

- I.37 The Sentencing Map in Figure 3 provides a representation of the most common sentencing outcomes for people sentenced by the Magistrates' Court for a second or subsequent offence of driving while disqualified. The first three columns show the most common sentencing orders. The width of each column relates to the percentage shown on the bottom axis. For example, 47.0 per cent of all people sentenced for a second or subsequent time received a wholly suspended sentence. The divisions within each column show the duration of the relevant orders. The left axis shows that nearly 50 per cent of the wholly suspended sentences were from one to two months. The area of each cell within the Sentencing Map is proportional to the percentage of offenders who received an order of that type and duration. The most common outcome (as shown in the lower left hand corner of the Sentencing Map) was a wholly suspended sentence of between one and two months: these comprised 21.9 per cent of all orders.
- I.38 The column on the right of the Sentencing Map shows the remaining, less common sentence types, without showing a breakdown of the duration or, in the case of fines, the amount.

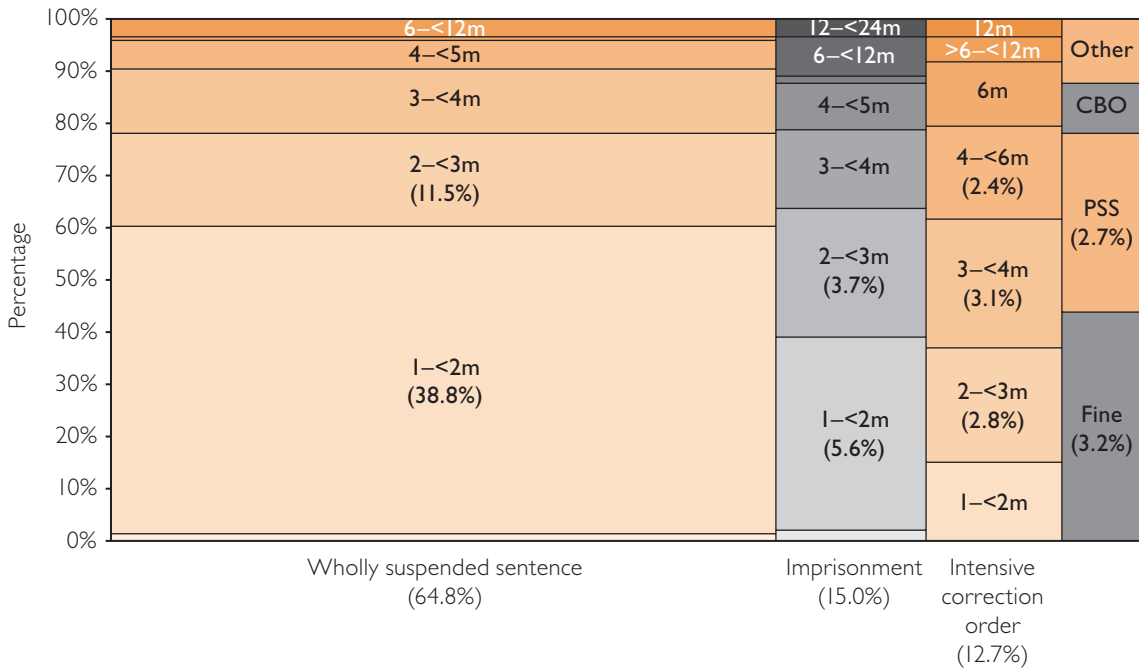
Figure 3: Sentencing Map: The percentage of people sentenced for driving while disqualified who had been previously sentenced for a drive while disqualified or suspended offence by sentencing outcomes and sentencing quanta, 2004–05 to 2006–07



Note: 'PSS' means partially suspended sentence, 'DET' means detention in a youth training centre or youth justice centre, and 'Other' includes community-based order, drug treatment order, home detention order, combined custody and treatment order and adjourned undertaking.

I.39 The Sentencing Map in Figure 4 provides a representation of sentencing outcomes for people sentenced for driving while suspended who, at the time of committing the offence, had previously been sentenced for driving while disqualified or suspended. It shows that, in comparison with driving while disqualified, a higher proportion received a wholly suspended sentence (64.8% compared to 47.0%), and that the suspended sentences tended to be shorter. For instance, approximately 60 per cent of wholly suspended sentences for driving while suspended were from one to two months, whereas less than 50 per cent of suspended sentences for driving while disqualified were of that duration. While the most common outcome in each Sentencing Map is a suspended sentence of between one and two months, this outcome comprised 38.8 per cent of all outcomes for relevant driving while suspended offences but only 21.9 per cent of outcomes for relevant driving while disqualified offences.

Figure 4: Sentencing Map: The percentage of people sentenced for driving while suspended who had been previously sentenced for a drive while disqualified or suspended offence by sentencing outcomes and sentencing quanta, 2004–05 to 2006–07



Note: 'PSS' means partially suspended sentence, 'CBO' means community-based order, and 'Other' includes home detention order; youth justice centre order; drug treatment order; combined custody and treatment order and adjourned undertaking.

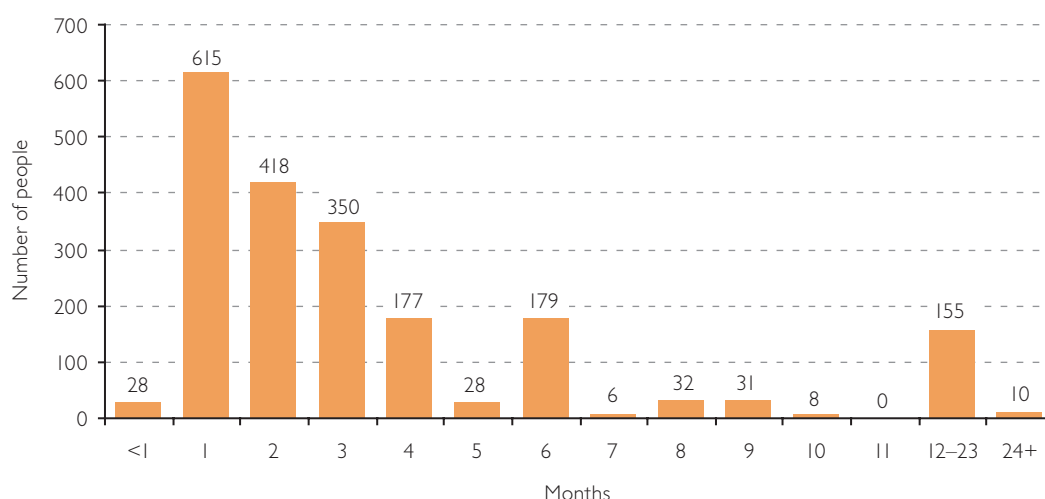
Suspended sentences

- I.40 Taking both forms of the offence together, over half (54.5%) of the people sentenced for a repeat offence of driving while disqualified or suspended received a wholly suspended sentence. The majority of the operational periods of these suspended sentences were 12 months (59.3%), followed by six months (12.5%) and 24 months (10.8%).²⁸ The length of suspended imprisonment terms ranged from one day to two years. However, most suspended imprisonment lengths were short, with over half at one month (51.3%) and a further 18.5 per cent at two months and 14.2 per cent at three months. Only 1.5 per cent were longer than six months.
- I.41 Of the people who received a wholly suspended sentence for a repeat offence of driving while disqualified or suspended in 2004–05, over three quarters (77.2%) did not breach that sentence.²⁹

Imprisonment

- I.42 Nearly one quarter of people sentenced for a repeat offence of driving while disqualified or suspended received an immediate sentence of imprisonment. As shown in Figures 3 and 4, most imprisonment terms were six months or shorter (approximately 90% for driving while disqualified and over 95% for driving while suspended).
- I.43 Figure 5 provides a more detailed breakdown of lengths of imprisonment for driving while disqualified or suspended.

Figure 5: The number of people who received a term of imprisonment for a second or subsequent offence of driving while disqualified or suspended by the length of the imprisonment term, 2004–05 to 2006–07³⁰



28 The length of the operational period was unknown for 4 people sentenced.

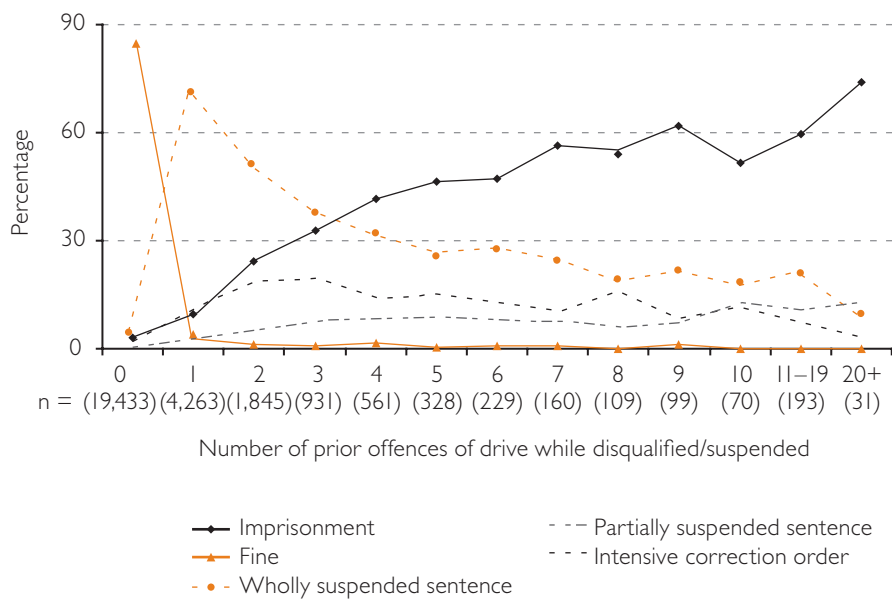
29 This breach rate is calculated by tracking people for up to 30 months after their original sentence was imposed.

30 This figure includes all people sentenced during 2004–05 to 2006–07 for at least one offence of driving while disqualified or suspended and for whom driving-offence histories were known. There were 24 individuals for whom driving-offence histories were unknown.

Relationship between sentencing outcomes and the number of prior offences of driving while disqualified or suspended

- I.44 The previous two sections examined sentencing practices for a first offence (in which case the full range of sentencing options is available) and sentencing practices for a second or subsequent offence (in which case the court must impose a sentence of imprisonment—which can include orders such as a suspended sentence or an intensive correction order).
- I.45 Figure 6 shows the sentencing outcomes for all people sentenced by the Magistrates' Court for driving while disqualified or suspended (the index offence) by the number of times that they had been sentenced for that offence prior to committing the index offence.

Figure 6: The percentage of people sentenced for driving while disqualified or suspended by sentencing outcome and the number of prior offences of driving while disqualified or suspended for which they had been previously sentenced, 2004–05 to 2006–07



Note: Some orders are not included in this graph. These include community-based orders (2.9%), adjourned undertakings (1.7%), youth detention orders (0.3%), home detention orders (0.1%), drug treatment orders (0.1%), combined custody and treatment orders (0.1%), convicted and discharged (0.05%) and dismissed (0.04%).

- I.46 As Figure 6 shows, the majority of people who had not been previously sentenced for driving while disqualified or suspended received a fine (85.3%).
- I.47 Figure 6 also indicates the effect of the mandatory minimum penalty on sentencing for this offence. This is demonstrated by the dramatic change in sentencing patterns between a first and a subsequent offence. Once offenders have one prior sentence for the offence, the most common sentencing dispositions for a new offence are suspended sentences, immediate imprisonment and intensive correction orders. By the time offenders have four prior sentences for driving while disqualified or suspended, they are most likely to receive a sentence of immediate imprisonment.
- I.48 Figure 6 should not be interpreted as suggesting that, for example, the 57 offenders with ten or more prior offences who received a wholly suspended sentence for this offence had never served an immediate sentence of imprisonment for driving while suspended or disqualified.
- I.49 Participants in a roundtable discussion with legal experts³¹ conducted by the Council noted that it is likely for offenders with multiple prior offences who escaped an immediate custodial sentence to have previously served multiple prison sentences. They observed that the type of case in which someone with over ten prior offences might receive a suspended sentence would be where the offence was committed before the offender received a prison sentence for other offences, and the offender only came to be sentenced for the old charge after being released from prison. Victoria Legal Aid provided the following example of an offender with three prior sentences for driving while disqualified or suspended who was sentenced to an intensive correction order for three new offences of driving while suspended.
- I.50 The offender pleaded guilty in the Magistrates' Court to three offences of driving while suspended. He had no lawful reason for driving on any of the three occasions. His licence had been suspended by the courts for two previous charges of driving while suspended. He had three prior convictions for the same offence and had served a sentence of one month's imprisonment in relation to one of these. In the sentencing hearing, a number of mitigating factors were raised, including:
- he suffered from depression;
 - he was his mother's carer and she was highly dependent on him (for social and medical reasons);
 - he had the support of his mother, brother, sister and religious leaders in the community (who attended court with him);
 - he had completed a road trauma awareness course; and
 - he had a written offer of employment.
- I.51 The offender received a four month intensive correction order. This included a number of conditions, such as 12 hours of contact with Community Corrections per week and participation in unpaid community work and programs to address his offending. His licence was also cancelled, and he was disqualified from driving for a further nine-month period.

31 Legal Experts' Roundtable (12 February 2009).

The Council's approach

- I.52 The recommendations in this report are based on the Council's statistical analysis, consultations and review of the relevant literature.

Statistical analysis

- I.53 In producing this report the Council has relied upon a range of data. Some, such as the comparative road safety data in paragraphs [1.11]–[1.14], are taken from previously published sources.
- I.54 The sentencing data in paragraphs [1.29]–[1.46] were obtained by the Council from the criminal component of the Magistrates' Court case management system (Courtlink). The Council receives regular extracts from this system and using these extracts has built a database of all sentences imposed for all charges in the Magistrates' Court from 1 July 2004.
- I.55 The Courtlink data do not distinguish between first and repeat offences of driving while disqualified or suspended. As different sentencing provisions apply to these two situations, the Council acquired additional data from VicRoads in order to distinguish between the sentences imposed for first offences and those imposed for second or subsequent offences. This involved taking the Courtlink data for approximately 28,000 people³² sentenced by the Magistrates' Court between July 2004 and June 2007 for at least one offence of driving while disqualified or suspended and matching them with the corresponding VicRoads driving records for each of those people.
- I.56 For the examination of deterrence in paragraphs [2.87]–[2.95] only the offenders who were sentenced by the Magistrates' Court for an offence of driving while disqualified or suspended between July 2004 and June 2005 (the index offence) were included. The Council examined whether those offenders were sentenced for any further offences of driving while disqualified or suspended committed in the two or more years since they were sentenced for the index offence.

Consultations

- I.57 On 21 December 2007, the Council released an information paper about the offence of driving while disqualified or suspended. The information paper provided the foundation for roundtable discussions with a range of organisations that have expertise in relation to the offence. The organisations included VicRoads, Victoria Police, the Royal Automobile Club of Victoria (RACV), the Transport Accident Commission (TAC), the Monash University Accident Research Centre (MUARC), the Victorian Association of Drink and Drug Driver Services, the Infringements Court and the Infringement Management and Enforcement Services Unit of the Department of Justice.
- I.58 Drawing on the feedback provided in these discussions, the Council published a more detailed discussion paper in June 2008,³³ seeking submissions from the public about options to deal with the offence. The Council received 18 written submissions in response to the discussion paper (see further Appendix D).

32 People are counted for each separate case in which they were sentenced.

33 Sentencing Advisory Council (2008), above n 7.

- I.59 The Council invited a wide range of stakeholders (including legal practitioners, police, road safety experts and victims of crime) to a series of roundtable discussions and meetings (the organisations that participated in these roundtables and meetings are listed in Appendix D).
- I.60 In addition, the Council ran three focus groups with people who had been banned from driving. The aim of these focus groups was to get a sense of how people view licence sanctions in terms of their effect on drivers and to gauge participants' knowledge of the applicable sanctions for driving while disqualified or suspended. The focus groups also attempted to assess other issues, such as participants' views of the chances of being detected for driving while disqualified or suspended.
- I.61 The Council recruited participants for the focus groups by advertising in the *Herald Sun* and *MX* newspapers. The recruitment process received additional publicity through articles in the *Herald Sun* newspaper and coverage on television.
- I.62 Many more people than could attend the three focus groups contacted the Council. Those who were not selected to attend the focus groups were offered the opportunity to speak with Council staff over the telephone regarding their experiences of—and opinions on—licence suspension and disqualification.

Chapter 2: The mandatory minimum penalty

Changes to the offence

- 2.1 The offence of driving while disqualified or suspended was first introduced in Victoria in 1949,³⁴ when section 9(1) was inserted into the *Motor Car Act 1928* (Vic). Like the current offence, that offence had two penalties, depending on whether the offender had committed the offence previously:
- For a first offence, the maximum penalty was imprisonment for one month.
 - For a second or subsequent offence, the penalty was between one and three months' imprisonment.
- 2.2 At that time, disqualification or suspension was almost invariably imposed by court order. This meant that the offence of driving while disqualified or suspended was a form of contempt of court. As the second reading speech for the Bill introducing the provision explained:
- 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.³⁵
- 2.3 Although there was a penalty of between one and three months' imprisonment for a repeat offence under the 1949 provision, a separate provision enabled the court to impose a fine instead of imprisonment.³⁶
- 2.4 The courts retained this power until 1967, when the offence provision³⁷ was amended to provide that the general fine provision³⁸ no longer applied. For the first time, the court had no option other than to impose a sentence of imprisonment when sentencing a repeat offender.
- 2.5 At that time, the courts did not have the power to suspend a sentence of imprisonment. While they had been able to suspend a sentence of imprisonment in the early part of the twentieth century,³⁹ the power to do so was not included in the *Crimes Act 1958* (Vic). It was only reintroduced much later in sections 20 to 24 of the *Penalties and Sentencing Act 1985* (Vic).⁴⁰
- 2.6 Further changes were made to the offence in 1978. The maximum penalty for a first offence was increased to six months' imprisonment or a fine of \$1,000, and the maximum penalty for a second or subsequent offence was increased to two years' imprisonment.⁴¹

34 For a detailed examination of the history of the offence in Victoria, see Belinda Coleman, 'Driving While Disqualified or Suspended under s 30 of the *Road Safety Act 1986* (Vic): Abolition of the Mandatory Sentencing Provision' (2006) 24 *Deakin Law Review* 23, 25–32.

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

36 *Justices Act 1915* (Vic) s 71.

37 *Motor Car Act 1958* (Vic) s 28, which was the successor provision to *Motor Car Act 1928* (Vic) s 9.

38 *Justices Act 1958* (Vic) s 74, which was the successor provision to *Justices Act 1915* (Vic) s 71.

39 Under the *Crimes Act 1915* (Vic) s 532 and the *Crimes Act 1928* (Vic) s 532.

40 Sentencing Advisory Council (2006), above n 1, [2.12]–[2.16].

41 *Motor Car Act 1978* (Vic) s 6.

- 2.7 Four years later, the maximum penalty for a first offence was reduced to four months' imprisonment or a fine of 20 penalty units.⁴²
- 2.8 The provision was introduced in its current form when the *Road Safety Act 1986* (Vic) was enacted to replace the *Motor Car Act 1958* (Vic). The only change to the penalties at this time was the increase of the maximum fine for a first offence to 30 penalty units. The penalties have remained the same since then.
- 2.9 From 1949, when the offence was first introduced, until the early 1990s, the offence retained its character as a form of contempt of court, because most traffic offences were prosecuted in court and most suspensions and disqualifications were court ordered. Since then, there have been two important developments.

Increased use of the infringement system

- 2.10 The overwhelming majority of driving offences are now dealt with by infringement notice under Part 7 of the *Road Safety Act 1986* (Vic). The infringements scheme provides a quick and cost-effective way of enforcing minor criminal offences, without the need to go to court.⁴³ Unless the offender elects to have the offence dealt with by a court, a lower fine will usually apply.
- 2.11 For instance, it is an offence to proceed through a red traffic light.⁴⁴ The maximum penalty is a fine of five penalty units (\$567.10 in 2008–09). If the offence were dealt with by a court, the court would consider the circumstances of the case and could decide on a sentence up to that limit. This means that the court could impose any fine up to that amount or an adjourned undertaking requiring the offender to comply with certain conditions. If the offence is dealt with under the infringements scheme, the automatic penalty is two penalty units (\$226.84 in 2008–09), regardless of the circumstances of the case.⁴⁵
- 2.12 More importantly, licence sanctions can be imposed under the infringements system. For example, the licence of a driver caught speeding above a certain level is automatically suspended.⁴⁶ The licence of a driver caught drink driving above a certain blood or breath alcohol level is automatically cancelled, and the driver is disqualified from obtaining a new licence for a specified period.⁴⁷

⁴² *Motor Car (Penalties) Act 1982* (Vic) s 19.

⁴³ Infringement notices were first used in Victoria in the 1950s for parking offences. Their use was extended to driving offences in the 1960s. Since then, their use has grown dramatically. In 2003–04, Victoria Police issued approximately 1.9 million infringement notices in relation to road and traffic offences.

⁴⁴ *Road Rules – Victoria*, r 56(1), as incorporated by the *Road Safety (Road Rules) Regulations 1999*, r 201.

⁴⁵ See *Road Safety Act 1986* (Vic) s 88(5) and *Road Safety (General) Regulations 1999*, Schedule 4, code 2101.

⁴⁶ See further [2.28]–[2.29].

⁴⁷ See further [2.30]–[2.31].

- 2.13 The development of infringement suspension and disqualification has added another dimension to the offence of driving while disqualified or suspended. Drivers banned in this way do not have the benefit of a court-imposed sanction accompanied by a judicial warning about the gravity of breaching the sanction. The offence of driving while in breach of an infringement licence sanction cannot be characterised as a form of contempt of court. The Magistrates' Court raised this issue in its response to the Council's discussion paper, noting that:

A significant proportion of licence suspensions arise through the accrual of demerit points and do not require a court appearance. Many drivers plead guilty to a charge of driving while disqualified or suspended on the basis that they had an honest but not reasonable belief that they were permitted to drive: where, for example, they have failed to notify VicRoads of a change of address or did not understand the correspondence forwarded to them.⁴⁸

Increased proportion of suspensions compared to disqualifications

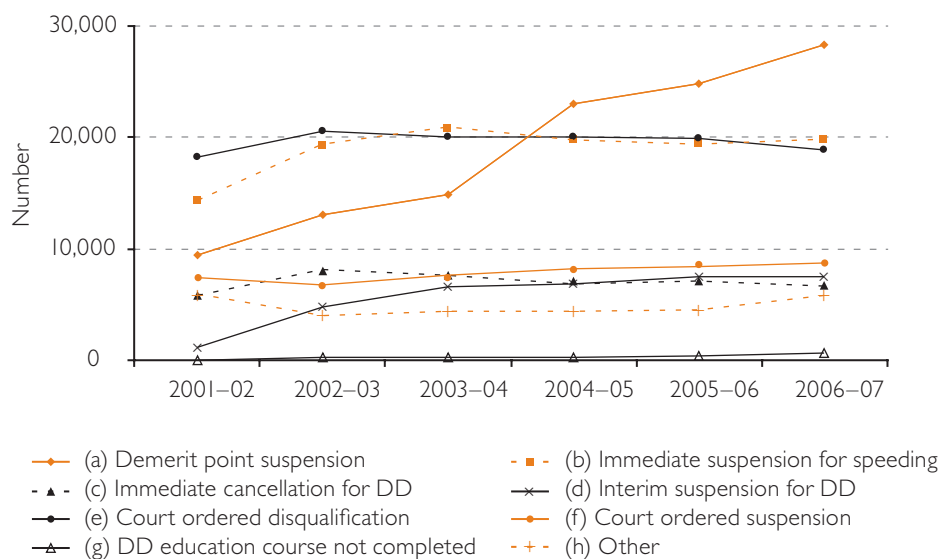
- 2.14 In recent years, there has also been a significant increase in the proportion of people whose licences are suspended, compared to people who are disqualified.
- 2.15 When a driver licence or permit is *suspended*, the suspension operates for a specified period and the driver is required to surrender his or her licence or permit to VicRoads. At the end of the suspension period, VicRoads must return the licence to the driver and the driver is allowed to resume driving.
- 2.16 When a driver is *disqualified*, his or her licence or permit (if he or she has one) is cancelled and the driver must surrender his or her licence or permit to VicRoads. The driver is disqualified from obtaining a new licence or permit for a specified period. In contrast to suspension, the driver is not automatically entitled to the return of his or her licence or permit at the end of the disqualification period. The driver must apply for a new licence, and before making an application, he or she may need to satisfy certain requirements, such as undertaking an education course.⁴⁹
- 2.17 There are eight basic categories of licence suspension and disqualification. It is important to consider each of these categories separately, because there are significant differences between them, and the appropriate responses to each can vary.
- 2.18 The eight basic categories are:
- (a) Demerit point suspension;
 - (b) Immediate suspension for speeding;
 - (c) Immediate disqualification for drink driving;
 - (d) Interim suspension for drink driving;
 - (e) Court-ordered disqualification;
 - (f) Court-ordered suspension;
 - (g) Failure to complete a drink driving course; and
 - (h) Other (suspension on medical grounds and disqualification pursuant to an interstate suspension or disqualification).

⁴⁸ Submission 18 (Magistrates' Court).

⁴⁹ If a driver who does not hold a driver licence is detected committing a traffic offence, that driver can be disqualified from obtaining a future licence, even though he or she does not have a licence that can be suspended or cancelled.

2.19 Figure 7 shows the number of people in each of the categories of suspension or disqualification for each year between 2001–02 and 2006–07. It shows that almost all of the categories increased significantly between 2001–02 and 2002–03, before steadying. Demerit point suspension stands out, because it continued to increase dramatically over the five-year period.

Figure 7: The number of new licence disqualifications or suspensions by method of disqualification or suspension, 2001–02 to 2006–07⁵⁰



Source: VicRoads (unpublished data).

2.20 It should be noted that:

- categories (a) to (d) do not involve a court hearing;
- categories (e) to (f) relate to more serious charges that are heard by a court; and
- category (g) is an administrative procedure that arises after a court proceeding.

2.21 Figure 7 demonstrates that the two highest categories of licence loss in 2006–07 (demerit point suspension and immediate suspension for speeding) did not involve a court order. This is a significant change from the context in which the offence of driving while disqualified or suspended was introduced, where the offence ordinarily involved a breach of a court order.

2.22 The following sections examine each of these categories in more detail.

50 Note that the data in Figure 7 incorporate new disqualifications and new suspensions imposed upon all licence categories (full license, probationary licence and learner driver) within the relevant period.

A. Demerit point suspension for a series of relatively minor offences

- 2.23 When police issue an infringement notice for a driving offence, the driver will automatically incur a standard number of demerit points in addition to the standard monetary penalty for the offence. For example, failure to wear a seatbelt incurs one demerit point and disobeying traffic lights incurs three demerit points. The highest number of points for a single offence is 10 demerit points for certain types of drink or drug driving.⁵¹
- 2.24 VicRoads is required to keep a register of incurred demerit points. People issued with a new licence have zero demerit points. Points remain on the register for three years from the date they are incurred. If a driver reaches a specified number of demerit points, VicRoads must automatically suspend his or her licence.⁵²
- 2.25 The suspension operates for three months, with an additional one month added for every four points over the demerit point limit for the person's class of licence.⁵³
- 2.26 At the time of receiving the demerit point suspension notice, the offender has two options:
- Option 1—the offender can keep his or her licence on the condition that he or she does not incur another demerit point during a 12 month period. If the offender incurs a demerit point in this period, the offender's licence is suspended for double the period of the original suspension (this is colloquially called the 'double or nothing' option).
 - Option 2—the offender accepts the immediate suspension.
- 2.27 The demerit point system was introduced in Victoria in 1969. The scheme had minimal impact on drivers until 1989, when, as part of a package of road safety measures, the government extended the demerit point scheme to offences detected by speed cameras. This resulted in a dramatic increase in the number of drivers whose licences were suspended for demerit points (from 300 in June 1990 to approximately 9,500 in March 1993).⁵⁴ Figure 7 shows that in recent years the numbers have increased further, reaching over 28,000 in 2006–07. Demerit point suspension is now by far the most common way for a person to lose his or her licence.

B. Immediate suspension for more serious speeding offences

- 2.28 If police issue an infringement notice for speeding above a certain limit, the offender's driver licence is automatically suspended for a specified period of between one month and 12 months, depending on the amount by which he or she exceeded the speed limit.⁵⁵
- 2.29 As Figure 7 shows, the number of licences suspended under this method increased significantly between 2001–02 and 2003–04 but has been relatively stable since then. It is currently the second most common method of licence suspension or disqualification.

51 See *Road Safety (Driver) Regulations 1999* (Vic), table 301. For further examples, see Appendix C.

52 For fully licensed drivers, the threshold is 12 or more demerit points over three years. For holders of a probationary licence or a learner's permit, the threshold is 5 or more demerit points within one year and 12 or more points over three years; *Road Safety Act 1986* (Vic) s 25.

53 *Road Safety Act 1986* (Vic) s 25.

54 Parliament of Victoria, Road Safety Committee, above n 11, [4.2].

55 *Road Safety Act 1986* (Vic) s 89D. See further Appendix B.

C. Immediate disqualification for drink driving

- 2.30 If police issue an infringement notice for drink driving above a certain BAC level, the offender's driver licence (if he or she has one) is automatically cancelled and the offender is disqualified from obtaining a new licence for a specified period of between six months and four years. The length of the mandatory minimum disqualification period generally relates to the BAC of the offender. For example, an offender with a BAC of 0.10 is liable to a minimum disqualification period of ten months for a first offence or 20 months for a subsequent offence.⁵⁶
- 2.31 Figure 7 shows that the number of licences cancelled by this method has been relatively stable over the five-year period.

D. Interim suspension for drink or drug driving

- 2.32 If a drink or drug driving offence is sufficiently serious for a law enforcement officer to charge a person (rather than issuing an infringement notice),⁵⁷ the law enforcement officer has the power to suspend the person's licence immediately until the charges are determined by a court.⁵⁸
- 2.33 If the court finds the offender guilty, that court is generally required to cancel the licence and to disqualify the offender from obtaining a new one for a specified period.⁵⁹ This means that many people shown in Figure 7 under the category '(d) Interim suspension for D[rink]D[riving]' will also be shown under '(e) Court ordered disqualification'. For the purpose of this report, it is important to show both methods, because the interim suspension can be lengthy. In addition, a person could be found guilty of the offence of driving while disqualified or suspended if he or she drives during the interim suspension.
- 2.34 It is possible for the interim suspension to relate to a charge of drug driving; however, such charges are much rarer than drink driving. For this reason, the overwhelming majority of interim suspensions are likely to relate to drink driving.
- 2.35 Figure 7 shows that the number of interim suspensions rose relatively steeply from a very low base in 2001–02 before steadying from 2003–4 onwards.

E. Court-ordered disqualification

- 2.36 There are a number of circumstances in which courts have the power (and in some cases a duty) to cancel a person's licence and to order the person to be disqualified from obtaining a licence.
- 2.37 Drink driving is the most common reason for a court-ordered disqualification.⁶⁰
- 2.38 A court is required (under section 50 of the *Road Safety Act 1986* (Vic)) to cancel a person's licence and to disqualify the person from obtaining a new one if the court finds a person guilty of certain drink or drug driving offences (including offences where the offender refuses to undergo a breath

56 *Road Safety Act 1986* (Vic) s 89C. See further Appendix A.

57 In the case of a fully licensed driver, the relevant blood alcohol concentration is 0.15. For a person on a learner's permit or probationary licence, the relevant blood alcohol concentration is 0.07. See *Road Safety Act 1986* (Vic) s 51(1)(a).

58 *Road Safety Act 1986* (Vic) s 51. The law enforcement officer will usually be a member of Victoria Police; however, VicRoads officers also have this power in relation to commercial motor vehicles.

59 See [2.36]–[2.45].

60 The relevant drink driving offences are far more prevalent than the other offences that can result in court-ordered disqualification. These offences are listed in [2.41]–[2.42].

- or blood test). The minimum period for which the court must disqualify the person from obtaining a new licence ranges from six months to four years, depending on the offence and the offender's BAC.⁶¹
- 2.39 If the offence is a first offence and involves a BAC of less than 0.05, the court may cancel the person's licence and disqualify him or her for up to six months. The court retains the discretion not to cancel the offender's licence and disqualify him or her;⁶² if the court does not record a conviction and at the relevant time the offender's BAC was:
- less than 0.05—in the case of an offender previously found guilty of a relevant drink or drug driving offence; or
 - less than 0.07—in any other case (except where the offender was under the age of 26 years at the time the offence was committed).⁶³
- 2.40 Even if the court exercises the discretion not to order cancellation and disqualification, the offender will accrue demerit points as a result of the finding of guilt. This may cause the offender's licence to be suspended if the offender already has demerit points (see further paragraphs [3.80]–[3.83]).
- 2.41 While drink driving is the most common reason for a court-ordered disqualification, a court must⁶⁴ also cancel a person's licence (where relevant) and disqualify the person from obtaining a new licence if the court finds the person guilty of:
- manslaughter arising out of the use of a motor vehicle (minimum disqualification—two years);
 - negligently causing serious injury arising out of the use of a motor vehicle (minimum disqualification—two years);
 - culpable driving causing death (minimum disqualification—two years); or
 - dangerous driving causing death or serious injury (minimum disqualification—18 months).
- 2.42 In addition, a court may⁶⁵ disqualify a person in a range of other circumstances, including:
- where the person has committed any offence under the *Road Safety Act 1986* (Vic); and
 - where the person is found guilty of committing an offence in connection with the driving of a motor vehicle (for example, driving a getaway car in an armed robbery).⁶⁶
- 2.43 The court also has the power to *suspend* the person's licence in these circumstances (see further paragraph [2.47]).
- 2.44 Finally, section 89(4) of the *Sentencing Act 1991* (Vic) enables the court to disqualify a person (or *suspend* his or her licence—see further paragraph [2.50]) if the court finds the person guilty of stealing, or attempting to steal, a motor vehicle. The period of disqualification (or suspension) is at the court's discretion.
- 2.45 Figure 7 shows that the number of court-ordered disqualifications has been relatively stable over the five-year period.

61 See further Appendix A.

62 *Road Safety Act 1986* (Vic) s 50(1).

63 *Road Safety Act 1986* (Vic) s 50(1AB)(a).

64 *Sentencing Act 1991* (Vic) s 89(1).

65 *Road Safety Act 1986* (Vic) s 28.

66 See for example *Rochow v Pupavac* [1989] VR 59.

F. Court-ordered suspension

- 2.46 The courts also have the power (and sometimes the duty) to suspend a person's licence in certain circumstances.
- 2.47 Section 28 of the *Road Safety Act 1986* (Vic) gives the court the power to suspend a person's licence in a range of circumstances, including:
- where the person has committed any offence under the *Road Safety Act 1986* (Vic); and
 - where the person has committed an offence in connection with the driving of a motor vehicle (for example, driving the getaway car in an armed robbery).
- 2.48 Section 28 also gives the court general licence cancellation and disqualification powers (see further paragraph [2.42]). The general powers in section 28 are subject to specific provisions elsewhere in the Act concerning licence suspension and cancellation, for example, mandatory minimum periods for certain offences.⁶⁷
- 2.49 Under section 28, the court must suspend a person's licence for speeding where:
- the person was driving at a speed of 130 kilometres per hour or more; or
 - was driving at a speed of at least 25 kilometres per hour over the permitted speed.
- The mandatory minimum periods of licence suspension are set out in the Act.⁶⁸
- 2.50 Section 89(4) of the *Sentencing Act 1991* (Vic) enables the court to suspend a person's licence (or disqualify him or her) if the court finds the person guilty of stealing, or attempting to steal, a motor vehicle. The period of the suspension (or disqualification) is at the court's discretion.⁶⁹
- 2.51 Figure 7 shows that the number of court-ordered suspensions has been relatively stable over the five-year period.

G. Cancellation for failure to complete drink driving course

- 2.52 If a court finds a person guilty of certain drink driving offences but does not order the person's licence to be cancelled, VicRoads can require the person to complete a drink driving education course. This course must be completed within the three-month period following written notice from VicRoads. If the person does not complete the course, VicRoads must cancel the person's licence.⁷⁰
- 2.53 The number of licences cancelled by VicRoads for this reason is very low compared to other methods of licence cancellation or suspension (see Figure 7).

⁶⁷ *Road Safety Act 1986* (Vic) s 28(1A).

⁶⁸ *Road Safety Act 1986* (Vic) s 28(1)(a). See further Appendix B.

⁶⁹ See also [2.43].

⁷⁰ *Road Safety Act 1986* (Vic) s 50A(2).

Why do people drive while suspended or disqualified?

- 2.54 Before examining in detail the extent to which the mandatory minimum sentence of imprisonment for driving while disqualified or suspended is justified, it is useful to examine who commits the offence and why. This is particularly important in relation to assessing the effectiveness of the mandatory penalty in achieving deterrence and rehabilitation.
- 2.55 The previous section has shown that:
- The most common method by which a person is banned from driving is demerit point suspension (this comprised 29% of all suspensions and disqualifications in 2006–07). This category has been increasing rapidly in recent years, leading to an increase in the number of people sentenced for driving while suspended.
 - The second most common method is immediate suspension for high-level speeding (21% in 2006–07).
 - The third most common method is court-ordered cancellation of the person's licence (if the person has one) and disqualification from obtaining a new licence for a specified period (20% in 2006–07). This can occur for a variety of reasons, but the most common is high-level drink driving.
- 2.56 Like most offences, the offence of driving while disqualified or suspended is predominantly committed by young men in their twenties.
- 2.57 Almost everyone who is found guilty of driving while disqualified or suspended would have been disqualified or suspended as a result of previously committing at least one driving offence.⁷¹ The Council has examined data relating to 8,087 people who were sentenced for driving while disqualified or suspended in 2004–05.⁷² It was found that more than half of these offenders (51.8%) had committed a previous drink or drug driving offence and a substantial proportion (32.0%) had previously been found guilty of driving while disqualified or suspended.
- 2.58 The offence in section 30 of the *Road Safety Act 1986* (Vic) does not distinguish between those who drive while *disqualified* and those who drive while *suspended*. Nevertheless, people who drive while suspended tend to be younger (with a median age of 25),⁷³ less likely to have committed a drink driving offence and less likely to have previously been found guilty of the offence of driving while disqualified or suspended.
- 2.59 To find out why people drive while disqualified or suspended, the Council examined research conducted by other organisations, in particular, a recent Victorian study by the Monash University Accident Research Centre. The Council also conducted its own focus groups and discussions with offenders.⁷⁴
- 2.60 The research revealed that offenders drive in breach of licence bans for a number of (often overlapping) reasons.

71 A small percentage of drivers are banned from driving for other reasons, such as poor health; see categories of licence suspension and disqualification at paragraph [2.18].

72 People are counted for each separate case in which they were sentenced.

73 The median age for people sentenced for driving while disqualified was 29.

74 See [1.60]–[1.62].

Ignorance of disqualification or suspension

- 2.61 Some people drive while disqualified or suspended in the honest, but unreasonable, belief that they are permitted to drive. This may occur, for example, when a person does not receive notification of the licence ban after failing to notify VicRoads of a change of address or does not understand the correspondence sent to them.⁷⁵

Perceived necessity

- 2.62 Many offenders feel that it is necessary to continue to drive, because the consequences of not driving are too great and there is a lack of viable alternatives.
- 2.63 For example, this may be the case where not driving would cause job loss (many licence bans exceed the average period of annual leave) or would make it difficult to earn a living. Tradespeople commented on the necessity of being able to drive to jobs and transport tools and equipment. A number of focus group attendees indicated that, when their licence was suspended or cancelled, they had to find other employment that did not involve driving.
- 2.64 Not being able to drive can also have a major impact on family life by placing a burden on other family members. For example, people in the outer suburbs of Melbourne commented on the difficulties of relying on public transport.
- 2.65 The Magistrates' Court observed that:
- The loss of licence can have onerous consequences for individuals, giving rise to an impetus to continue driving during a period of suspension or disqualification. Commonly, the motivation of an offending driver is the need to get to work or the requirement for a parent, often single, to attend to the needs of his or her children.⁷⁶

Perception of detection

- 2.66 Many offenders also commented that they considered the risk of being caught to be very low, particularly if they took steps to avoid attracting attention, for example, by complying with the speed limit, by not using a mobile phone while driving and by driving a car that looked conservative. Offenders reported that, even if stopped at a police random breath testing station, they would not be asked to produce a licence if they were under the breath alcohol concentration limit.
- 2.67 This is consistent with a recent Victorian study by Clark and Bobevski involving focus groups with offenders. This study found that many offenders considered there to be a low risk of detection if they continued to drive while disqualified or suspended.⁷⁷

75 Submission 18 (Magistrates' Court).

76 Ibid.

77 Clark and Bobevski (2008), above n 22.

Opportunity and temptation

- 2.68 Having a car sitting in a driveway can be a strong temptation for people to drive, particularly when they perceive that it is necessary to drive and they are unlikely to be caught.

Minimising the gravity of the behaviour

- 2.69 Most offenders acknowledged that it was wrong to drive while disqualified or suspended. However, they also acknowledged that the factors of perceived necessity, perception of detection and opportunity and temptation could be sufficient to outweigh any moral concerns about committing the offence.
- 2.70 Many disqualified drivers expressed grievances about the length of their disqualification. People who had their licences suspended for excess demerit points or high-level speeding tended to minimise the gravity of the conduct that led to the suspension.⁷⁸
- 2.71 For some offenders, there was a degree of defiance in their actions. They considered the far-reaching effects of licence suspension to be disproportionate to penalties for other offences. For example, one member of the public argued that the consequences of disqualification were so great that:

you are better off assaulting someone as sanctions for it do not generally even compare to those imposed for traffic offences which [are] lesser criminal offences.

Ignorance of penalty

- 2.72 The power of the mandatory minimum penalty to deter banned people from driving is weakened if they are unaware of it.
- 2.73 It is clear from focus groups and conversations with members of the public that many who have lost their licence are not aware of the mandatory minimum penalty.⁷⁹ One focus group participant had been found guilty of driving while disqualified or suspended multiple times and only became aware of the mandatory prison sentence when facing sentencing under it.⁸⁰

Perception that imprisonment can be avoided

- 2.74 People who are aware of the mandatory penalty for a repeat offence of driving while disqualified or suspended may also be aware of the high rate of suspension of prison sentences. It is therefore possible that some will consider immediate imprisonment upon sentence unlikely, even where there is a perceived likelihood of being caught.

⁷⁸ This was also noted in Submission 16 (Belinda Clark and Kristie Young).

⁷⁹ Focus Group 1 (12 August 2008); Focus Group 2 (12 August 2008); Focus Group 3 (13 August 2008).

⁸⁰ Focus Group 1 (12 August 2008).

Underlying problems with alcohol

- 2.75 Many people who lose their licence through drink driving have an underlying problem with alcohol. This can lead to an absence of concern about the consequences of their actions, both for others and for themselves. This is indicated in statements by focus group participants reported in the Clark and Bobevski study:

Until you can actually recognise on your own that you know about ways to stop going down the same paths ... Until you get to that point in time that I've learnt. It's only two years of going through it and living through it and then eventually it gets wasted, not overnight waking up but it's just growing and maturing a lot and it seeing what's happening and that's really been my learning curve because all the stuff that you have told, that didn't teach me anything. I'd just even go harder the next time and how to avoid it and which road not to go down and you just hop in your car drinking ... I think it's a lot to do with maturity and what's upstairs, how you think.⁸¹

I didn't think about anybody else and that's the reason that happened and now I'm in a world where I do think of everyone else and I think that's the message. We've got to think of others. Which is your point before, I could have knocked someone over. I didn't even think of that. You don't even think of anybody else but yourself.⁸²

Deviance

- 2.76 The Council's research suggests that there is a degree of social deviance, involving a range of risk-taking antisocial behaviour, among some offenders. Where this is the case, driving while disqualified or suspended can be part of a wider pattern of criminal behaviour.
- 2.77 Often people prosecuted for a repeat offence of driving while disqualified or suspended face multiple charges, which are finalised at the same hearing.
- 2.78 Figure 8 shows the percentage of cases in which a repeat offence of driving while disqualified or suspended was the principal proven offence⁸³ according to the number of charges for which sentences were imposed.
- 2.79 The number of sentenced offences per case ranged from one to 169, while the median was three offences. There were only 1,815 cases (20.6%) in which a second or subsequent offence of driving while disqualified or suspended was the only offence for which a sentence was imposed. The average number of offences per case was five.
- 2.80 Table I indicates what the most common accompanying offences were. The first row indicates that all were sentenced for driving while disqualified or suspended and that many were sentenced for more than one charge for that offence in the same proceeding.
- 2.81 Table I also shows that, while many of the accompanying offences were driving-related, there were many cases in which the offender was also sentenced for other offences, including theft (13.4% of cases) and possession of a drug of dependence (5.6% of cases).

81 Clark and Bobevski (2008), above n 22, 82.

82 Ibid.

83 The principal proven offence is the most serious of all offences charged in terms of the penalty available and the penalties actually imposed.

2.82 Studies undertaken in other jurisdictions have also shown a relationship between driving while disqualified or suspended and other criminal activity. For example, in her 2003 study of Western Australian drivers, Ferrante noted that drivers with no criminal record and drivers without a repeat traffic offence were less likely to drive while disqualified or suspended than drivers who had a criminal record and who had no strong social attachments.⁸⁴

Figure 8: The percentage of cases where a second or subsequent offence of driving while disqualified or suspended was the principal offence by the number of offences where a sentence was imposed in that case, 2004–05 to 2006–07



Table 1: The number and percentage of people sentenced for a second or subsequent offence of driving while disqualified or suspended by the most common offences that were sentenced and the average number of those offences that were sentenced, 2004–05 to 2006–07

Offence	No.	%	Avg.
1 Drive while disqualified	8,819	100.0	1.51
2 Use an unregistered vehicle	2,776	31.5	1.51
3 Drink driving (s 49.1(f) RSA)	1,360	15.4	1.16
4 Theft	1,183	13.4	3.41
5 Drive at speed over the speed limit	1,142	12.9	1.13
6 Failing to appear on bail	1,095	12.4	1.62
7 Fraudulently alter identifying number	714	8.1	1.37
8 State false address when requested (RSA)	623	7.3	1.19
9 Careless driving	542	6.1	1.06
10 Possessing a drug of dependence	494	5.6	1.61
People sentenced	8,819	100.0	5.05

84 Anna Ferrante, *The Disqualified Driver Study: A Study of Factors Relevant to the Use of Licence Disqualification as an Effective Legal Sanction in Western Australia* (Crime Research Centre, University of Western Australia, 2003) 64.

Concerns about the mandatory minimum penalty

- 2.83 The majority of people who are sentenced for the offence of driving while disqualified or suspended have breached an automatic suspension of their licence, rather than a suspension or disqualification ordered by a court.
- 2.84 Given this change in the nature of the offence, the original justification for the penalty (that the offence constituted a form of contempt of court) no longer applies. In addition, the mandatory minimum penalty raises three major concerns:
- it is not effective in protecting the community from future offences;
 - it results in penalties for driving while disqualified or suspended that are disproportionately high compared to other related offences; and
 - it is causing strains on the criminal justice system.
- 2.85 The remainder of this Chapter examines these concerns in detail.

Lack of effectiveness

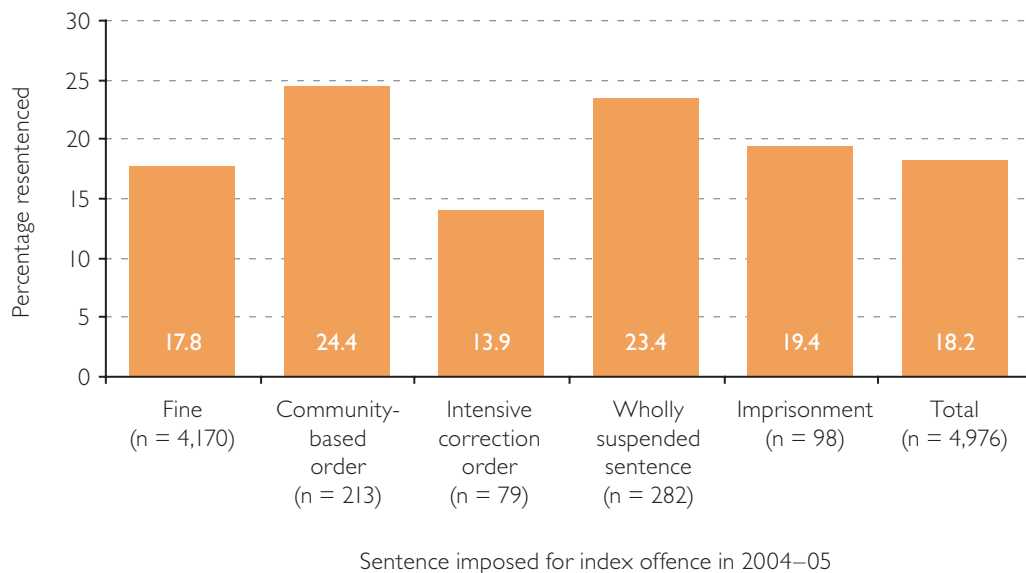
- 2.86 Sentences can have five basic purposes. Two of the purposes (*punishing* the offender and *denouncing* his or her conduct) focus simply on what the person has done. The remaining three purposes seek to protect the community in the future by achieving:
- *Deterrence*—by dissuading the offender, and also members of the public, from driving while disqualified or suspended in the future. Deterrence is particularly useful in situations where the offence is not highly impulsive but is committed after the offender considers the risks and benefits of committing the offence.
 - *Rehabilitation*—by addressing the underlying reasons why the person is committing the offence. This can increase long-term community protection.
 - *Incapacitation*—by restricting or completely removing the person's capacity to drive (for example, by impounding his or her car or by putting the person in prison). This is potentially the most powerful tool, and it can achieve punishment, denunciation and deterrence. However, its scope is limited by the proportionality principle and by the economic and social costs of incapacitation.

Deterrence

- 2.87 Deterrence is one of the major justifications for the mandatory minimum sentence of imprisonment. It is therefore important to examine whether the mandatory minimum sentence is in fact effective in deterring offenders.
- 2.88 The high and increasing number of people being sentenced each year for driving while disqualified or suspended suggests that it has only a limited deterrent effect. The reasons for offending set out in paragraphs [2.62]–[2.82] indicate why that is so.
- 2.89 It is difficult to use statistics on resentencing to test the deterrent effect of various types of sentence, particularly in relation to an offence such as driving while disqualified or suspended. This is because of the possibility that a person may have recommitted the offence but may not have been detected.

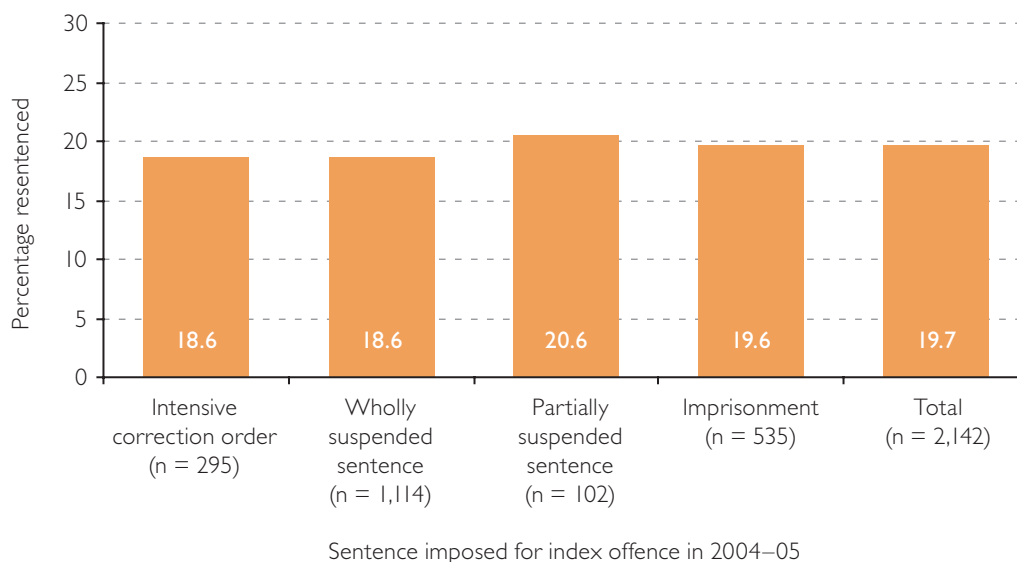
- 2.90 Despite the potentially low detection rate, the Council undertook a data-matching exercise to determine if people sentenced for driving while disqualified or suspended in 2004–05 were subsequently resentenced for the same offence. The Council examined driving records and sentencing data from up to two years after the 2004–05 offence for each person sentenced in 2004–05. The offence for which each person received his or her first sentence in 2004–05 is regarded as the ‘index offence’.
- 2.91 The Council split the offenders into two groups: those who had been sentenced for driving while disqualified or suspended prior to being sentenced for the index offence and those who had not.
- 2.92 Figure 9 shows only those who had *not* previously been sentenced for driving while disqualified or suspended, according to the sentence that they received for the ‘index offence’.
- 2.93 Figure 9 also shows that the overwhelming majority (4,170) of these offenders received a fine. Nearly one in five (17.8%) who received a fine for a first offence of driving while disqualified or suspended were sentenced again for the same offence within two years.

Figure 9: The percentage of people whose index offence in 2004–05 was their first offence and who were subsequently resentenced for the offence of driving while disqualified or suspended, by the type of sentence received for the index offence in the Magistrates’ Court of Victoria



- 2.94 Figure 10 shows the people sentenced in 2004–05 for driving while disqualified or suspended (the index offence) who *had* been sentenced previously for the same offence at least once, according to the sentence they received for the index offence. It shows remarkably little variation in the rate at which they were sentenced for any additional offence of driving while disqualified or suspended in the subsequent two years.
- 2.95 Figure 10 casts doubt on arguments that removing the power of the courts to suspend a sentence or place an offender on an intensive correction order, instead of immediate imprisonment, could enhance the deterrent effect of the mandatory penalty. The reoffending rates for those given intensive correction orders, wholly suspended sentences and partially suspended sentences were almost identical to the reoffending rates of those sentenced to immediate imprisonment.

Figure 10: The percentage of people whose index offence in 2004–05 was their second or subsequent offence of driving while disqualified or suspended and who were subsequently resentedenced for an offence of driving while disqualified or suspended, by the type of sentence received for their index offence in the Magistrates' Court of Victoria



2.96 People who commit the offence of driving while disqualified or suspended typically are not aware of the relevant penalties and give them little regard because they do not think that they will be caught.⁸⁵ This means that if the courts were no longer able to suspend a sentence of imprisonment for this offence, a very large number of people would go to prison. This is likely to have negative social implications and would have large financial implications for government. It would also dramatically increase existing concerns about the lack of proportionality between sentencing for this offence and sentencing for other comparable offences.

2.97 In their recent study of Victorian offenders, Clark and Bobevski noted that:

it appears unlikely that for many of the participants harsher penalties would significantly improve the deterrence effect of the sanction. The underlying negative attitudes towards the sanction, denial of the danger of one's driving behaviour, low perceived risk of detection and personal and vicarious experiences of punishment avoidance all served to undermine any existing motivations for these participants to change their driving behaviours in the future.⁸⁶

2.98 The most important factors in deterring potential offenders appear to be increasing the likelihood of being caught and increasing public awareness of the risk of being caught. Possible ways to address these two factors are considered in Chapter 3.

Rehabilitation

2.99 In some cases, it may be possible to address the problems underlying the offending behaviour through rehabilitation, for example, where the offender has a drinking problem and the disqualification or suspension was the result of drink driving.

⁸⁵ See [2.66]–[2.67] and [2.72]–[2.73].

⁸⁶ Clark and Bobevski (2008), above n 22, xiv.

- 2.100 Is the mandatory minimum penalty effective in protecting the community by establishing conditions that facilitate the rehabilitation of offenders?
- 2.101 Most repeat offenders receive a suspended sentence.⁸⁷ This sentence does not directly facilitate rehabilitation because it is not possible for the court to attach any relevant conditions, such as requiring the offender to attend a program that addresses the offending behaviour or the underlying problems that led to that behaviour.
- 2.102 A smaller number of repeat offenders are sentenced to an immediate term of imprisonment, typically of between one and three months.⁸⁸ While prisons provide a range of rehabilitative programs, such programs may not be available to this group of offenders. This is because offenders will often only have a relatively short period of imprisonment following subtraction of any pre-sentence detention from a sentence. Moreover, offenders are only assessed after sentencing. Therefore, there is generally insufficient time for participation in programs.
- 2.103 Only a very small number of repeat offenders receive an intensive correction order. Such orders can promote rehabilitation through conditions requiring the offender to undergo a treatment program. While there are programs that currently deal with issues such as drug and alcohol dependence, the Council is not aware of any programs attached to intensive correction orders that specifically address criminal behaviours such as drink driving. In its review of suspended sentences and intermediate sentencing orders, the Council examined in detail some of the general reasons for the low use of intensive correction orders.⁸⁹ The low level of use of intensive correction orders for the offence of driving while disqualified or suspended is partially explained by the need to ensure a degree of proportionality with sentencing for comparable offences.

Incapacitation

- 2.104 Is the mandatory minimum penalty effective in removing or restricting an offender's capacity to reoffend?
- 2.105 Only a small number of repeat offenders receive a sentence of immediate imprisonment—most receive a sentence that does not involve incapacitation.
- 2.106 The repeat offenders who are sentenced to an immediate term of imprisonment for driving while disqualified or suspended typically receive very short sentences. There is no power to impose conditions on the offender upon their release, because a period of parole cannot be imposed on such short sentences. This means that any protection for the community through incapacitation is only brief and ceases immediately once the offender is released from prison.
- 2.107 It would not be appropriate to increase the average lengths of imprisonment, because of the principle of proportionality.⁹⁰ However, there is scope to make greater use of alternative methods to restrict an offender's capacity to drive while disqualified or suspended in the future. In particular, greater use could be made of impoundment, immobilisation and forfeiture of the offender's vehicle. In addition, it is possible to increase the use of alcohol interlocks for drink drivers. These alternatives are examined in more detail in Chapter 3.

87 See [1.40]–[1.41].

88 See [1.42].

89 Sentencing Advisory Council (2008), above n 1, [6.1]–[6.65].

90 See [2.108]–[2.119].

Disproportionate sentences

- 2.108 A major concern with the mandatory minimum sentence of imprisonment is that it can result in penalties that are disproportionate to the penalties imposed for other offences.
- 2.109 One of the important functions of a maximum penalty is to indicate the gravity of an offence in relation to other offences.
- 2.110 For example, the maximum penalty for the offence of dangerous driving is two years' imprisonment,⁹¹ which is the same as the maximum penalty for repeat offences of driving while disqualified or suspended. This indicates that Parliament views the two offences as being of comparable gravity in terms of the overall hierarchy of offences. However, the existence of the mandatory minimum for repeat offences of driving while disqualified or suspended means that the sentencing patterns for the two offences are very different.⁹²
- 2.111 Three quarters of those sentenced for dangerous driving receive a fine. A total of 8.0 per cent receive a wholly suspended sentence, 6.0 per cent receive a community-based order and only 3.5 per cent receive an immediate sentence of imprisonment.⁹³
- 2.112 By contrast, a much higher number of repeat driving while disqualified or suspended offenders receive a suspended sentence, and a high number receive an immediate sentence of imprisonment. The repeat offenders cannot receive a fine or community-based order because of the mandatory minimum penalty of imprisonment.
- 2.113 Sentencing patterns for repeat offences of driving while disqualified or suspended can also be compared with those for offences that are close to the top of the offence hierarchy, such as aggravated burglary, which has a maximum penalty of 25 years' imprisonment. Nearly one in ten offenders sentenced for this offence (8.5%)⁹⁴ received a community-based order; however, a court cannot impose a community-based order on any repeat driving while disqualified or suspended offender.
- 2.114 It has been argued that the mandatory minimum penalty violates the principle of proportionality because the punishment 'far outweighs the objective seriousness of the offence' and 'can impact disproportionately on those [who] use their motor vehicle often, particularly in the course of their work'.⁹⁵
- 2.115 Two submissions noted that the mandatory minimum penalty can have a disproportionate effect on Indigenous Victorians.⁹⁶

91 *Road Safety Act 1986 (Vic)*, s 64.

92 Of course an important difference between these two groups of offenders is that repeat driving while disqualified or suspended offenders have committed the offence previously. No data are available on the number of dangerous driving offenders who have committed that offence previously. It can be assumed, however, that some would be first-time offenders. The fact that an offender has a prior criminal history is a relevant sentencing factor that can increase a sentence. But it is also important to note that, for dangerous driving, the offender will have put the safety of members of the public at risk, and this will not necessarily be the case for driving while disqualified or suspended.

93 Magistrates' Court, unpublished data, 2004–05 to 2007–08.

94 Sentencing Advisory Council, *Sentencing Snapshot No. 38: Sentencing trends for aggravated burglary in the higher courts of Victoria, 2002–03 to 2006–07* and *Sentencing Snapshot No. 58: Sentencing trends for aggravated burglary in the Magistrates' Court of Victoria, 2004–05 to 2007–08*.

95 Coleman (2006), above n 34, 48–9. See also Mirko Bagaric and Richard Edney, 'Imprisonment For Driving while Disqualified: Disproportionate Punishment or Sound Public Policy?' (2001) 25(1) *Criminal Law Journal*, 7, 9–13.

96 Submission 6 (Victorian Aboriginal Legal Service); Submission 13 (Victoria Legal Aid).

- 2.116 In 1991, the Royal Commission into Aboriginal Deaths in Custody highlighted the link between driving offences, particularly licence offences, and high rates of incarceration. The Royal Commission found that, while Indigenous Australians are slightly under-represented in general driving offences, they are twice as likely to be arrested for licence offences than other Australians.⁹⁷ In Recommendation 95, the Royal Commission's final report recommended that 'in jurisdictions where motor vehicle offences are a significant cause of Aboriginal imprisonment the factors relevant to such incidence be identified and ... programs be designed to reduce that incidence of offending'.⁹⁸
- 2.117 In 2005, the Victorian Government conducted a review of the implementation of the recommendations from the Royal Commission. The review reported that an examination of sentenced and unsentenced prisoners from 1995 to 2000 revealed low numbers of Indigenous prisoners for motor and traffic related offences (an average of 3% over that time), and that, as a consequence, the recommendation had little significance in Victoria.⁹⁹
- 2.118 This proportion appears to have remained relatively consistent in data published more recently by Corrections Victoria. Those data show that between 2003–04 and 2007–08, licence or registration offences (which include driving while disqualified or suspended, as well as unlicensed driving) were the most serious offence or charge for between five and nine Indigenous prisoners each year. This represents between 1.5 and 2.8 per cent of all Indigenous prisoner receptions (sentenced and unsentenced prisoners).¹⁰⁰
- 2.119 Of course, the mandatory minimum sentence can result in very large numbers of suspended sentences. Unfortunately, there are no reliable data on the number of Indigenous offenders who received a suspended sentence for driving while disqualified or suspended.¹⁰¹

Strains on the criminal justice system

- 2.120 A final concern about the mandatory minimum sentence of imprisonment is that it can impose a significant strain on the criminal justice system.
- 2.121 The number of people banned from driving each year continues to rise, as does the number of people charged with driving while disqualified or suspended. Implementation of improved methods for detecting people who drive while disqualified or suspended will mean that these numbers will most likely continue to increase.
- 2.122 Unlike many offences under the *Road Safety Act 1986* (Vic), driving while disqualified or suspended cannot be dealt with under the infringement system. These matters must be dealt with in court, and there is a large volume of work for police prosecutors in preparing and litigating these matters.

97 Commonwealth of Australia, Royal Commission into Aboriginal Deaths in Custody, *Final Report* (Commonwealth of Australia, 1991) Volume 3, Chapter 22. See also Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous Deaths in Custody 1989 to 1996* (Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, 1996), Chapter 4, and Submission 13 (Victoria Legal Aid).

98 Commonwealth of Australia (1991), above n 99, Recommendation 95.

99 Department of Justice, *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody: Review Report*, Volume 1, October 2005 (Department of Justice, 2005) 489–90.

100 Corrections Victoria, *Statistical Profile of the Victorian Prison System: 2003–04 to 2007–08* (Department of Justice – Corrections Victoria, 2009) 67.

101 Between 2004–05 and 2007–08, Indigenous status was unknown for 97.9 per cent of people sentenced for driving while disqualified and for 99.1 per cent of people sentenced for driving while suspended.

- 2.123 The large and increasing volume of these cases also places a strain on Victoria Legal Aid (VLA).
- 2.124 VLA provides duty lawyers to the Magistrates' Court to provide advice to defendants who do not have a private lawyer. VLA gives priority to serious cases, such as those involving people who are in custody or who are at risk of going into custody.¹⁰² The mandatory minimum penalty for repeat offences of driving while disqualified or suspended means that all defendants who are charged with a repeat offence and who are unable to afford a private lawyer will be seen by a duty lawyer upon request. In 2007–08, VLA recorded 4,969 instances of duty lawyer assistance for this offence (constituting 7.3% of all duty lawyer sessions).¹⁰³
- 2.125 In addition to providing legal advice to defendants who have been charged with an offence, VLA also provides legal representation to some defendants at their contest and sentencing hearings. The provision of legal representation is limited to defendants who qualify under a means test. Representation at a contest hearing (when the person pleads not guilty to the offence) is also limited to defendants who VLA assesses as having a reasonable prospect of acquittal. Representation at a sentencing hearing is limited to defendants who are facing a penalty such as immediate imprisonment, a suspended sentence, an intensive correction order or, in limited circumstances, a community-based order.¹⁰⁴ By virtue of the mandatory minimum penalty in section 30, all people charged with a repeat offence of driving while disqualified or suspended who satisfy the means test are eligible for legal representation. In 2007–08, VLA approved 1,636 grants of assistance for such defendants. This constituted 3.9 per cent of all grants of assistance.¹⁰⁵
- 2.126 The mandatory minimum penalty means that defendants often contest these charges and, even if they plead guilty, the defence and prosecution often make detailed submissions at the sentencing stage. This has an impact on the flow of cases in the Magistrates' Court, which affects court staff as well as magistrates and can take resources away from other types of cases.
- 2.127 The large number of driving while disqualified or suspended offences and the existence of the mandatory minimum penalty also impose a strain on the County Court and the Office of Public Prosecutions (OPP).
- 2.128 A person who is sentenced by a magistrate may appeal to a judge of the County Court. The judge, sitting without a jury, will hear the matter afresh. While in the Magistrates' Court the matter is prosecuted by a police prosecutor, the Office of Public Prosecutions takes over responsibility for the matter in the County Court.
- 2.129 Approximately half of the County Court appeals in which the OPP is involved relate to traffic matters.¹⁰⁶ A significant number of these relate to the offence of driving while disqualified or suspended and arise in situations where a magistrate imposes a sentence of immediate imprisonment and the offender appeals to the County Court seeking a suspended sentence. The large number of appeals is, at least in part, a result of the mandatory minimum sentence.

102 Victoria Legal Aid, Lawyers at Court <<http://www.vla.vic.gov.au/lawyeratcourt.htm>> at 29 September 2008.

103 Submission 13 (Victoria Legal Aid) and further unpublished data provided by Victoria Legal Aid.

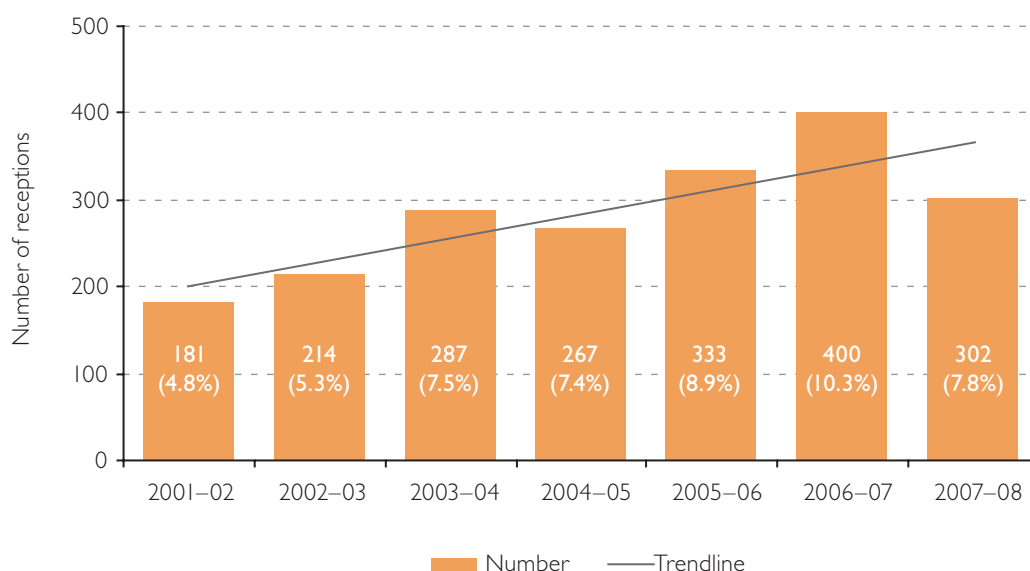
104 Victorian Legal Aid, *Grants Handbook*, Appendix 2C <http://www.vla.vic.gov.au/Handbook/gr.handbook_ch2.pdf> at 29 September 2008.

105 Submission 13 (Victoria Legal Aid) and further unpublished data provided by Victoria Legal Aid.

106 Submission 9 (Office of Public Prosecutions).

- 2.130 Figure 11 shows that the number of offenders received into Victorian prisons whose most serious offence was a driver licence or registration offence doubled in the six years between 2001–02 and 2006–07,¹⁰⁷ before declining slightly in 2007–08. The trendline demonstrates this consistent increase.
- 2.131 The average recurrent cost of imprisoning an offender in Victoria is approximately \$190 per day.¹⁰⁸ Offenders who do receive an immediate term of imprisonment typically receive a very short term. Short terms of imprisonment can be more expensive to administer per day than longer terms. For example, it can be more costly to process 12 offenders who are each imprisoned for one month than one prisoner for 12 months.

Figure 11: The number and percentage of sentenced prisoner receptions where the most serious offence was licence or registration offences, 2001–02 to 2007–08



¹⁰⁷ Corrections Victoria, *Statistical Profile of the Victorian Prison System: 2001–02 to 2005–06* (Corrections Victoria, 2007) 51 (Table 41) and *Statistical Profile of the Victorian Prison System: 2003–04 to 2007–08* (Corrections Victoria, 2009) 51 (Table 41). The offences that fall under the category 'license/registration offences' include offences other than driving while disqualified or suspended; however, because driving while disqualified or suspended is the most serious of these offences, most license/registration offences that lead to imprisonment will be the result of driving while disqualified or suspended.

¹⁰⁸ Australian Government Productivity Commission, *Report on Government Services 2009* (Commonwealth of Australia, 2009) Table 8A.35.

The Council's view

- 2.132 In its review of suspended sentences, the Council briefly canvassed concerns about sentencing for repeat offences of driving while disqualified or suspended. During consultation on that review, most stakeholders considered that the mandatory minimum penalty should be abolished. However, the Office of Public Prosecutions considered that other options for obtaining a more effective deterrent should be explored before removing the mandatory minimum penalty.
- 2.133 In Part 2 of the Council's final report on suspended sentences, a majority of Council members recommended that the mandatory minimum penalty for driving while disqualified or suspended should be abolished. A minority of the Council, while sharing concerns about the effectiveness of the mandatory penalty and its contribution to the high numbers of suspended sentences in Victoria, took the view that any reforms to the current provisions should be deferred until additional research has been undertaken and more effective sentencing responses have been identified.¹⁰⁹
- 2.134 Having researched, consulted on and analysed the issues, the Council has come to the unanimous view that the mandatory minimum penalty of imprisonment for the offence of driving while disqualified or suspended should be abolished for a number of reasons.
- 2.135 First, the mandatory minimum penalty is not effective. It:
- leads to sentences that do not directly facilitate the offender's rehabilitation;
 - provides, at most, only brief incapacitation of the offender; and
 - is not an effective deterrent.
- 2.136 Second, the mandatory minimum penalty leads to disproportionate sentences. In the Council's consultation for this report, the overwhelming majority of stakeholders supported abolishing the mandatory minimum penalty. Numerous stakeholders considered the mandatory minimum penalty to be anomalous, given that much more serious offences in Victoria do not have a mandatory minimum penalty. A common view expressed by stakeholders was that '[t]he economic, emotional and relationship ramifications of such sentences far outweigh the seriousness of the offence'.¹¹⁰ In its response to the Council's discussion paper, the Magistrates' Court of Victoria observed that the mandatory minimum penalty:
- offends the principle of proportionality, with many more serious criminal offences not being subject to mandatory sentencing and are often dealt with by way of a non-custodial disposition even for repeat offending.¹¹¹
- 2.137 The Council is of the view that the mandatory minimum penalty restricts the ability of the sentencing court to impose a sentence that is appropriate to the circumstances of a particular case. Even some supporters of the mandatory minimum penalty point to circumstances in which it may not be appropriate. For example, VicRoads opposed the abolition of the mandatory penalty, on the ground that there are some offenders (particularly those who had committed high-level drink or drug driving offences) for whom, in the absence of other suitable sanctions, mandatory imprisonment would be the only proper sanction. However, they noted that the mandatory

¹⁰⁹ Sentencing Advisory Council (2008), above n 1, [2.51]–[2.79].

¹¹⁰ Submission 1 (Andrew Banks).

¹¹¹ Submission 18 (Magistrates' Court).

minimum penalty is not appropriate for offenders who are suspended due to an accumulation of demerit points or for other administrative reasons, such as age or a medical condition. These exceptions demonstrate the problems with mandatory penalties, in that circumstances such as these cannot be taken into account in sentencing. In its response to the Council's discussion paper, the Magistrates' Court raised this issue, noting that:

A mandatory sentencing approach represents a 'one sentence fits all' approach and fails to take account of the individual factors relevant to each case.¹¹²

- 2.138 The Magistrates' Court provided examples of some of the factors that the court should be able to take into account in sentencing for driving while disqualified or suspended:
- currently, the person will accrue demerit points following the hearing of the charge in the Magistrates' Court, 'thus representing a further punishment for the one offence';
 - the motivation of some offenders 'is the need to get to work or the requirement for a parent, often single, to attend to the needs of his or her children';
 - many people plead guilty to a charge of driving while disqualified or suspended on the basis that they had an honest but not reasonable belief that they were permitted to drive, where, for example, they have failed to notify VicRoads of a change of address or did not understand the correspondence forwarded to them; and
 - disqualification and suspension can have a greater impact on some people than others (for example, people living in rural areas with long distances between services and little public transport).¹¹³
- 2.139 In relation to this last point, the Magistrates' Court observed that '[t]he disparate consequences of a loss of licence on people living in the country or outer suburban areas as distinct from the city should be a particularly relevant consideration in the sentencing process for driving while disqualified or suspended'.¹¹⁴
- 2.140 A further reason for repealing the mandatory minimum penalty is to reduce some pressures on the criminal justice system. For example, the number of County Court appeals would be likely to drop.¹¹⁵
- 2.141 In raising concerns about the effect of the mandatory minimum sentence, most stakeholders stressed that they did not seek to diminish the seriousness of the offence and that it must be dealt with through appropriately serious penalties.¹¹⁶ The Office of Public Prosecutions suggested that '[i]f mandatory imprisonment for subsequent offences is to be repealed then it must be replaced with penalties that have a strong general deterrent effect'.¹¹⁷
- 2.142 Some participants noted that the mandatory minimum penalty applies only to repeat offenders who presumably have had ample opportunity to consider their actions in driving and the consequences of it.¹¹⁸

112 Ibid.

113 Ibid.

114 Ibid.

115 Submission 9 (Office of Public Prosecutions).

116 Road Safety Experts' Roundtable (25 June 2008).

117 Submission 9 (Office of Public Prosecutions).

118 Meeting with Victoria Police (30 June 2008); Meeting with Working Against Culpable Driving (1 July 2008); Submission 12 (Working Against Culpable Driving).

- 2.143 The concern was expressed that if there are not appropriate penalties backed up by credible deterrence, a culture of 'getting away with it' may become entrenched.¹¹⁹
- 2.144 However, it was also noted that, due to the current use of suspended sentences, there is a lack of inevitability surrounding imprisonment, which undermines deterrence.¹²⁰
- 2.145 While it is difficult to be certain about how sentencing practices may change if the mandatory minimum penalty were abolished, it is likely that:
- a large proportion of the people who currently receive a suspended sentence will instead receive a fine;
 - some who currently receive a suspended sentence will receive an adjourned undertaking or community-based order; and
 - some who currently receive a suspended sentence will continue to do so, and the numbers of people receiving imprisonment and intensive correction orders will remain stable.
- 2.146 The Council is of the view that it is unlikely that repealing the mandatory minimum penalty will impact negatively on road safety. The change in the first bullet point above will make little, if any, difference in terms of deterrence and no difference in terms of rehabilitation or incapacitation. The change in the second bullet point above will increase rehabilitation. The Council believes that recommendations in relation to increasing the risk of detection, impounding vehicles and early and effective rehabilitative measures are more likely to improve road safety than the current sentencing regime.
- 2.147 One practical issue that the Council consulted about was the possibility that abolishing the mandatory minimum penalty could lead to more defendants failing to appear at court. Participants at the Road Safety Experts' Roundtable noted that one effect of the mandatory minimum penalty is that the mandatory sentence of imprisonment requires offenders to attend court, and when an offender fails to attend, a warrant is issued for his or her arrest. Without a mandatory minimum penalty of imprisonment, it may become more common for offenders to fail to attend at court. In such cases, the Magistrates' Court can proceed to hear the case in the offender's absence; however, it cannot impose a custodial sentence (such as an intensive correction order) or an order involving an agreement or undertaking by the offender (such as a community-based order or an adjourned undertaking). If an offender fails to appear and the court considers it appropriate to impose such an order, the court would need to issue a warrant. Roundtable consultations with legal experts suggest that this should not cause significant problems. Therefore, this issue does not prevent the Council recommending the abolition of the mandatory minimum penalty for the offence.
- 2.148 Based on these reasons and the above analysis, the Council has come to the view that the mandatory minimum penalty of imprisonment for the offence of driving while disqualified or suspended should be repealed.

119 Road Safety Experts' Roundtable (25 June 2008); Submission 7 (Magistrate Brear).

120 Submission 8 (Federation of Community Legal Centres).

RECOMMENDATION: Abolition of mandatory minimum penalty

Recommendation 1

Section 30 of the *Road Safety Act 1986* (Vic) should be amended to remove the mandatory minimum penalty of one month's imprisonment for a second or subsequent offence of driving while disqualified or suspended. The offence should continue to carry a maximum penalty of two years' imprisonment.

Possible separation of driving while *disqualified* and driving while *suspended* into separate offences

- 2.149 In its discussion paper, the Council sought submissions on the appropriateness of splitting the existing offence in section 30 of the *Road Safety Act 1986* (Vic), so that driving while suspended would become a separate—and less serious—offence to driving while disqualified.¹²¹
- 2.150 Many stakeholders were in favour of treating driving while suspended separately, on the ground that licence suspension for excessive demerit points is seen to be in a different category of offence to licence cancellation and disqualification for offences such as high-level drink driving or high-level speeding.
- 2.151 Of particular concern is that people may not receive notice of suspension following a loss of licence for excessive demerit points. For example, a person may change address without updating his or her records with VicRoads. If a notice of suspension is sent to that person's former address and he or she does not receive it, he or she has no legal defence to the offence in section 30. However, that person's culpability is considered to be less than an offender whose licence was cancelled or suspended by a court with that offender present. Concerns were also raised about people who may not be able to understand a notice due to a lack of English.¹²²
- 2.152 However, the complexity of the different suspension, cancellation and disqualification provisions means that separating out the two offences could lead to undesirable outcomes. For instance, some suspensions result from court orders, and high-level drink driving can result in an interim suspension followed by licence cancellation and disqualification.
- 2.153 One submission noted this problem with seeking to distinguish between suspension and disqualification.¹²³ Distinguishing between court-ordered licence bans and bans that occurred administratively was suggested as a solution. However, if the mandatory minimum penalty were removed from section 30, the sentencing court would be able to determine the appropriate penalty, taking into account the nature of the licence ban (regardless of whether it is a cancellation and disqualification or a suspension) and the actual level of knowledge and culpability of the offender.¹²⁴ The Council considers that, if the mandatory minimum penalty were abolished, it would not be necessary to separate driving while disqualified and driving while suspended into different offences.

¹²¹ Sentencing Advisory Council (2008), above n 1, vii (Question 2).

¹²² Submission 8 (Federation of Community Legal Centres).

¹²³ Submission 15 (Law Institute of Victoria).

¹²⁴ Submission 9 (Office of Public Prosecutions) observed that, for this reason, separating the offence would be unnecessary.

Chapter 3:

More effective approaches

Introduction

- 3.1 Chapter 2 examined the types of offender who commit the offence of driving while disqualified or suspended and some of the reasons why some offenders commit the offence. Concerns about the current mandatory minimum penalty of imprisonment, particularly its ineffectiveness, were also discussed.
- 3.2 This chapter looks at whether there is scope to deal with these offenders more effectively by addressing some of the reasons for committing the offence identified in [2.62]–[2.82]. Options examined in this chapter include:
- addressing the perception of detection by increasing the risk of being caught and people's awareness of that risk;
 - minimising the opportunity and temptation to drive while disqualified or suspended by making greater use of immobilisation, impoundment and forfeiture of offenders' vehicles; and
 - addressing underlying problems with alcohol by improving rehabilitation pathways for drink drivers.
- 3.3 The Council has identified areas where there is scope to deal with offenders more effectively. Some areas relate directly to people who drive while disqualified or suspended, while others relate to intervention prior to the point at which suspension and disqualification occur.
- 3.4 As discussed at paragraph [2.87], two of the purposes of sentencing—punishment and denunciation—focus on what the offender has done. Three sentencing purposes—deterrence, rehabilitation and incapacitation—seek to protect the community in the future. Therefore, the effectiveness of a measure in protecting the community can be gauged by assessing its capacity to deter, rehabilitate or incapacitate an offender. It is also necessary to consider the social and economic costs of any sentencing outcome.

Increased detection

- 3.5 The most effective way to deter people from driving while disqualified or suspended is to increase:
- the likelihood that they will be caught; and
 - community awareness of the risk of being caught.
- 3.6 One way this could be achieved is to improve the targeting of licence checks and to increase their frequency. This should be accompanied by measures that raise community awareness about the increased likelihood of detection.

Automated number plate recognition

- 3.7 Council focus groups and discussions with offenders reveal that many offenders consider the risk of being detected driving while disqualified or suspended to be low.¹²⁵ This is particularly the case when offenders take steps to avoid attracting police attention, such as complying with the road rules and driving a conservative-looking car.

¹²⁵ See paragraphs [2.66]–[2.67].

- 3.8 At present, suspended and disqualified drivers are mainly detected when police perform a licence check after apprehending them for another offence. Random breath testing stations could provide an opportunity for police to check licences; however, there are legal and practical impediments to checking every licence. Drivers can be detained at such stations only for the purpose of checking a breath or blood alcohol level. It is also necessary to keep a flow of vehicles moving through the station.
- 3.9 There is great potential for automated number plate recognition technology (ANPR) to help police target suspended and disqualified drivers.
- 3.10 An ANPR camera can monitor moving cars and compare licence plates with a database of vehicles registered to suspended or disqualified drivers. The database can also record other associations; for example, it can identify a vehicle registered to a spouse. When a match is identified, police can intercept the vehicle and ask to see the driver's licence. One advantage of this technology is that police only need to check the licences of those driving intercepted vehicles.
- 3.11 Victoria Police are currently trialling this technology and in meetings with the Council have expressed great confidence that it will substantially increase the likelihood of detecting disqualified or suspended drivers.
- 3.12 Their trials of ANPR technology have demonstrated its capacity to scan between 600 and 700 number plates per hour. This results in an average of five matches prompting a licence check per hour. Of these, approximately two to three drivers will be disqualified or have a suspended licence.
- 3.13 During Council consultations, some stakeholders raised concerns about privacy and the impact of ANPR technology on some communities. In particular, it was noted that, currently, some drivers feel that they are targeted by police because of their appearance or background. Increasing the number of police checks could exacerbate feelings of being unfairly targeted. This may be the case not only for suspended and disqualified drivers, but also for family members who share the same vehicle.¹²⁶
- 3.14 This potential social cost is an important consideration. Despite this, some stakeholders were in favour of a targeted approach, such as that provided by ANPR technology.¹²⁷ Potential social costs must be balanced with the need to protect the community from high-risk drivers. The Council notes the evidence (at paragraphs [1.21]–[1.26]) that disqualified and suspended drivers pose a substantial road safety risk.
- 3.15 The implementation of ANPR technology could have substantial economic costs. At paragraphs [2.120]–[2.131] the Council noted the strains on the criminal justice system caused by large and increasing numbers of prosecutions for the offence of driving while disqualified or suspended. If the mandatory minimum penalty of one month's imprisonment is not abolished, the increased number of prosecutions resulting from ANPR use will strain the criminal justice system further.
- 3.16 In order to ensure that ANPR technology has a deterrent effect, it is vital that drivers are aware of the increased possibility of detection for driving while disqualified or suspended.

¹²⁶ Legal Expert's Roundtable (12 February 2009); Submission 8 (Federation of Community Legal Centres).

¹²⁷ Road Safety Experts' Roundtable (12 February 2009).

RECOMMENDATIONS: Increased detection (through automated number plate recognition)

Recommendation 2

- (a) Subject to obtaining sufficient resources, Victoria Police should expand its use of automated number plate recognition technology to increase the detection of driving while disqualified or suspended.
- (b) The expansion of the use of this technology should be widely publicised to maximise its deterrent effect.
- (c) In expanding the number of licence checks through the use of this technology, care should be taken to work with sections of the community to minimise the risk of drivers feeling unfairly targeted.

Police mobile data network

- 3.17 Simply increasing the volume and targeting of licence checks will not succeed in deterring potential offenders if it is still possible for a person to avoid detection. For example, a driver may pretend to forget his or her licence or falsely claim to be someone else.
- 3.18 Currently, it is an offence for a driver to fail to produce a driver licence when required by a member of the police force.¹²⁸ However, most drivers have a defence if they give a reasonable excuse for the failure, provide a specimen of their signature and produce a copy of their licence at a specified police station within seven days.¹²⁹
- 3.19 It is possible for a suspended or disqualified driver to avoid detection by not producing a licence and giving police the name of a valid licence holder, such as a friend or family member who is similar in age and appearance. The offender could forge that licence holder's signature and have him or her attend the police station in the offender's stead, hoping that the police do not realise that it is a different person.
- 3.20 The most promising way to prevent this from occurring is through expansion of the Victoria Police mobile data network. The network enables police to access electronically a wide range of information, including the VicRoads driver licence database, while on the road. The network currently enables police to access licence information, such as name, address and the status of the licence (for example, whether it is suspended or cancelled). Work is underway to expand the capability of the network and enable police to access licences visually. This would allow police to immediately compare the licence photograph with the person in front of them. This would significantly reduce the potential for identity fraud in licence checks.
- 3.21 The Council supports the expansion of the mobile data network.

¹²⁸ *Road Safety Act 1986 (Vic)* s 59.

¹²⁹ *Road Safety Act 1986 (Vic)* s 59(3).

Licence checks by employers

- 3.22 It is currently an offence for a person to 'employ, permit or allow a person to drive a motor vehicle on a highway ... if the driver does not hold a permit or licence which authorises him or her to drive such a motor vehicle'.¹³⁰ However, the person has a defence if he or she believed, after making all reasonable enquiries, that the driver held a permit or licence.¹³¹
- 3.23 Therefore, when an employer initially engages a person who will need to drive on the job, the employer must check that the person has a current licence. If the person's licence is subsequently suspended or cancelled, the person must notify the employer. He or she commits an offence if he or she fails to do so.¹³² It is not clear whether the employer has any ongoing obligation to check that the person's licence has not been suspended or cancelled.
- 3.24 A 2003 United Kingdom report on driving while unlicensed, disqualified or suspended recommended that an employer should be obliged to periodically check an employee's licence if driving is a part of that employee's job.¹³³ The Council sought submissions on whether Victoria should explore adopting such an approach.¹³⁴
- 3.25 Eleven submissions expressed a view on this issue.
- 3.26 Five submissions¹³⁵ indicated support for periodic checking of licences by employers if driving is part of the job. One of these submissions suggested conducting a trial of the proposal followed by an evaluation.¹³⁶ Another expressed support but with the proviso that only serious, serial offenders should lose their licence, and that licence suspension should not occur for an accumulation of demerit points.¹³⁷
- 3.27 Six submissions raised concerns about the administrative and financial costs to employers, as well as privacy and potential liability issues. These expressed the view that it is not appropriate for employers to be responsible for periodically verifying the licence status of employees who drive as part of their employment.¹³⁸
- 3.28 The Council notes these concerns and concludes that, while it is desirable that employers adopt procedures for periodic checking of the licence status of employees who drive as part of their employment, it would not be appropriate to extend the current legal obligations in the *Road Safety Act 1986 (Vic)*.

130 *Road Safety Act 1986 (Vic)* s 32(1).

131 *Road Safety Act 1986 (Vic)* s 32(2).

132 *Road Safety Act 1986 (Vic)* s 32(3).

133 Sentencing Advisory Council (2008), above n 1, [6.2.19], referring to Knox, Turner and Silcock (2003), above n 17, 119.

134 Sentencing Advisory Council (2008), above n 1, vii (Question 7).

135 Submission 1 (Andrew Banks); Submission 3 (Dianne Haddon); Submission 6 (Victorian Aboriginal Legal Service); Submission 12 (Working Against Culpable Driving); Submission 16 (Belinda Clark and Kristie Young).

136 Submission 3 (Dianne Haddon).

137 Submission 1 (Andrew Banks).

138 Submission 5 (Belinda Coleman); Submission 8 (Federation of Community Legal Centres); Submission 9 (Office of Public Prosecutions); Submission 10 (VicRoads); Submission 13 (Victoria Legal Aid); Submission 15 (Law Institute of Victoria).

Impoundment, immobilisation and forfeiture of vehicles

- 3.29 Imprisonment as a means of incapacitation was discussed at paragraphs [2.104]–[2.107]. There are limitations on the use of imprisonment for the offence of driving while disqualified or suspended because of the principle of proportionality and the social and economic costs. In any event, short periods of imprisonment only achieve short-term incapacitation. Further, they can have a detrimental effect on an offender's rehabilitation by disrupting positive factors such as employment, housing and social networks while failing to provide rehabilitation programs. In these cases, imprisonment is more about punishment, denunciation and deterrence than incapacitation.
- 3.30 An alternative to imprisonment as a way of limiting an offender's ability to reoffend is the removal of his or her vehicle.
- 3.31 For many who are banned from driving, having a car sitting in a driveway provides an opportunity, and a strong temptation, to continue to drive.
- 3.32 Since 2006, there has been legislation in Victoria that enables police to seize vehicles used in certain driving offences in the following circumstances:
- if police believe that a vehicle has been used in the commission of a relevant offence, that vehicle may be impounded or immobilised for 48 hours;
 - if the driver of a seized vehicle has committed another relevant offence in the previous three years, the police can apply for a court order impounding or immobilising the vehicle for up to three months; and
 - if that driver commits a further relevant offence within three years, the court can permanently forfeit the car to the Crown.
- 3.33 The scheme also applies to people who commit the offence of driving while disqualified or suspended; however, the scheme treats the *second* offence of driving while disqualified or suspended as the initial relevant offence. This means that police can apply for a three-month impoundment or immobilisation only when a person is detected driving while disqualified or suspended for a third time. This is in contrast to other offences, where the three-month impoundment is available at the second offence. Permanent forfeiture for driving while disqualified or suspended is only available at the fourth offence, rather than at the third.
- 3.34 Police data suggest that there is a low rate of reoffending following vehicle sanctions. Only four per cent of people whose vehicles have been impounded are detected committing subsequent vehicle impoundment offences. This suggests that even short (up to 48 hours) periods of impoundment and immobilisation can have a powerful psychological impact, particularly in relation to young males. Impoundment can also have a substantial financial impact, because the offender is liable for the cost of towing the vehicle. Depending on the location and the type of vehicle involved, this can cost up to \$800.
- 3.35 Victoria Police have advised the Council that in practice they seize vehicles for driving while disqualified, but not for driving while suspended. This is because of difficulties in proving that the suspended driver was actually aware that his or her licence was suspended. This can occur in situations where, for example, the person had moved house without informing VicRoads and the notification of suspension was sent to a previous address.

- 3.36 Between 1 July 2006, when the legislation came into force, and 31 December 2008, 245 vehicles had been impounded as a result of driving while disqualified or suspended offences. One of these impoundments was court-ordered. In addition, two vehicles have been forfeited as a result of driving while disqualified or suspended offences.¹³⁹
- 3.37 This issue was not directly raised in the Council's discussion paper; however, it was raised in five submissions. Four of those submissions were in favour of expanding the use of impoundment, or at least examining the possibility of expansion.¹⁴⁰
- 3.38 At the Road Safety Experts' Roundtable, there was some support for expanding the scheme. Some of the participants considered that impoundment, immobilisation and forfeiture could be particularly useful, because family members and others who rely on a vehicle have a powerful incentive to ensure that an offender does not use that vehicle.¹⁴¹
- 3.39 At the Legal Experts' Roundtable, several participants expressed strong concerns about the impact on family members and others of impoundment, immobilisation and forfeiture. Participants considered the importance of family dynamics. Whether for cultural reasons or because of the presence of family violence, many family members are not in a position to exercise a strong influence over an offender.¹⁴²
- 3.40 The Council notes these concerns. The effect of impoundment and forfeiture on third parties, such as finance companies who may have a security interest in a vehicle, is also noted. The Council considers these as matters that a court should take into account when considering an application for impoundment or forfeiture of a vehicle.
- 3.41 The Council considers that a court should have the flexibility to tailor the length of the impoundment to match the remaining period of suspension or disqualification. However, depending on the facts of the particular case, it may be inappropriate to order impoundment for the full period. For example, if there were two years of disqualification remaining, the cost of storage and insurance for a car may be relevant factors. If the suspension or disqualification period has already expired, or is close to expiring, at the time the court hears the application, the court should be able to order impoundment for a period of up to three months.
- 3.42 There is some risk that an offender may circumvent impoundment, immobilisation or forfeiture by buying another car or driving someone else's car. However, this risk does not necessarily undermine the benefits of the above measures, given the potential reluctance of family members and friends to lend a car to an offender and the financial burden of buying a new car.

139 Victoria Police, unpublished data.

140 Submission 1 (Andrew Banks); Submission 9 (Office of Public Prosecutions); Submission 12 (Working Against Culpable Driving); Submission 13 (Victoria Legal Aid). A letter from the Chief Magistrate dated 24 March 2009 noted that driving while disqualified or suspended does not pose the same immediate threat to public safety as other driving offences that trigger impoundment. Nevertheless, if impoundment is to ensure compliance with the initial period of suspension or disqualification, it may be an effective mechanism to achieve this, provided that the magistrate has a discretion in all of the circumstances of the case.

141 Road Safety Experts' Roundtable (12 February 2009).

142 Legal Experts' Roundtable (12 February 2009).

RECOMMENDATIONS: Impoundment, immobilisation and forfeiture

Recommendation 3

- (a) If a person is charged with driving while disqualified or suspended and the person has been found guilty of that offence in the previous three years, police should be able to apply to the relevant court for an impoundment or immobilisation order.
- (b) The court should be able to order that the vehicle or a substituted vehicle be impounded or immobilised for any period up to the remainder of the period for which the person's licence is suspended or for which the person is disqualified from obtaining a licence, or three months, whichever is longer.

Earlier intervention, rehabilitation and education

- 3.43 Several recent studies of suspended or disqualified drivers have made recommendations in favour of either conducting trials of rehabilitation programs or adopting such programs for at least some categories of people who drive while disqualified or suspended.¹⁴³
- 3.44 The Council has identified some support among stakeholder groups for improved rehabilitation measures, particularly where the offending has an identifiable cause such as alcohol misuse or addiction. There was less support for rehabilitation programs targeting other groups of people who drive while disqualified or suspended and whose licence ban results from other causes, such as speeding. Concerns were expressed that, for some offenders, driver education courses can be counterproductive and can 'teach the offender how to more effectively avoid detection'.¹⁴⁴
- 3.45 As noted, the mandatory minimum penalty currently results in sentences that have limited, if any, scope to protect the community by addressing the underlying causes of a repeat offender's behaviour.
- 3.46 In particular, offenders who receive a suspended sentence do not receive any formal rehabilitation as part of that sentence.
- 3.47 Offenders who are sentenced to more than six months' imprisonment will generally receive some form of rehabilitation in prison. However, most offenders who are sentenced to immediate imprisonment for driving while disqualified or suspended are not able to participate in such rehabilitation programs because they receive much shorter terms of imprisonment. In addition, as they are not eligible for release on parole under conditions, there is no scope to require them to attend rehabilitation programs after their release from prison.
- 3.48 For those offenders who would currently receive a sentence of less than 6 months' imprisonment, an intensive correction order or home detention would provide greater scope for rehabilitation.

¹⁴³ Including Clark and Bobevski (2008), above n 22, 110; Watson (2003), above n 19, 24; Knox, Turner and Silcock (2003), above n 17, 120.

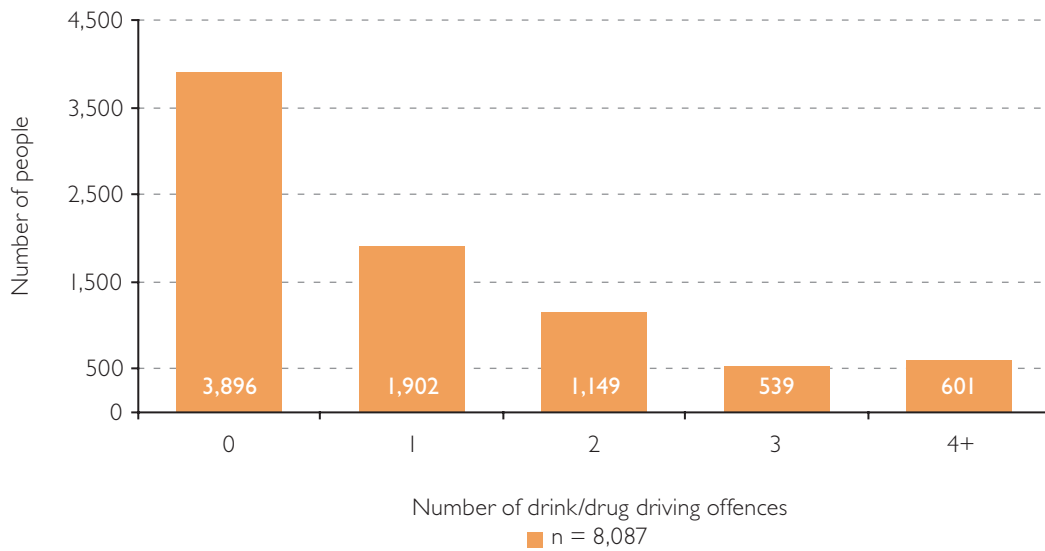
¹⁴⁴ Submission 9 (Office of Public Prosecutions).

Earlier intervention for drink drivers

3.49 It is not possible to determine the precise number of people who lose their licence because of a drink driving offence. However, examination of the different categories of suspension and disqualification set out in Figure 7 shows that a very substantial number of suspensions and disqualifications arise directly from drink driving.

3.50 In addition, the Council has examined the records of over 8,000 people who were sentenced for driving while disqualified or suspended in 2004–05. It was found that, as shown in Figure 12, over half (3,896 people or 48.7%) had a previous drink or drug driving offence. The overwhelming majority of these were for drink driving. Many had a series of prior drink driving offences (for example, 601 offenders, or 7.4%, had four or more prior drink or drug driving offences).

Figure 12: The number of people sentenced for driving while disqualified or suspended in 2004–05 by the number who had previously been found guilty of a drink or drug driving offence



3.51 Part 5 of the *Road Safety Act 1986* (Vic) contains a range of drink driving offences. For the purposes of this report, they can be divided into three broad groups, in descending levels of seriousness.

Table 2: Drink driving offences

	Offence category	Procedure and penalty	Licence cancellation or suspension
Group 1 (high-level)	<ul style="list-style-type: none"> High prescribed concentration of alcohol (>0.15) Refusal offence Driving under the influence 	Charge and court hearing Maximum penalty of \$6805 for first offence, up to 18 months' imprisonment for a third or subsequent offence	Interim suspension between the charge and the court hearing Mandatory cancellation and disqualification for a minimum of 15 to 24 months for a first-time offender and between 30 and 48 months for a repeat offender
Group 2 (mid-level)	<ul style="list-style-type: none"> Medium prescribed concentration of alcohol (0.10 to 0.15) Medium prescribed concentration of alcohol (0.07 to 0.10) 	Infringement notice (\$476 fine) Infringement notice (\$340 fine)	Immediate cancellation and disqualification for between 10 and 14 months, depending on alcohol concentration, or between 20 and 28 months for a repeat offender Immediate cancellation and disqualification for 6 months (or 14 to 18 months for a repeat offender)
Group 3	<ul style="list-style-type: none"> Low prescribed concentration of alcohol (0.05 to 0.07) 	Infringement notice (\$340 fine) and 10 demerit points	No suspension or cancellation, but the demerit points could lead to demerit point suspension

3.52 The following two sections examine problems with the current pathways for groups one and two, from when the offender is first apprehended and loses his or her licence to when the offender returns (or fails to return) to the licence system. A new approach is also proposed.

High-level drink driving

3.53 Currently, when police detect a person committing a serious drink driving offence (generally involving a breath or blood concentration of alcohol of 0.15 or more or an attempt to evade a breath test), they charge the person and suspend their licence until the matter is heard in court.

3.54 If the court finds the person guilty, it will sentence that person. The most common sentence is a fine, usually within the range of \$500 to \$1000.¹⁴⁵ In addition, the court will cancel the person's licence and disqualify him or her from obtaining a new one for a period specified by the court. The *Road Safety Act 1986* (Vic) mandates minimum disqualification periods that depend on the level of drink driving and the extent to which the person has committed drink driving offences previously (see Appendix A). The disqualification can be for a long period (over four years).

3.55 Once the disqualification expires, the person can apply to a court for an order enabling them to apply for a new licence. The new licence will typically be subject to a requirement that they have an alcohol interlock installed in their car to prevent them from driving if they have drunk alcohol.

¹⁴⁵ A total of 82.9 per cent of offenders sentenced for an offence against *Road Safety Act 1986* (Vic) s 49(1)(f) between 2004–05 and 2007–08 received a fine. Over 50 per cent of fines were in the range of \$500 to \$1000.

- 3.56 The process for obtaining a new licence once the disqualification expires is complex and expensive:
- To become relicensed, drink and drug drivers must complete an accredited eight-hour driver education program for which they are required to pay (the cost varies from provider to provider, but is generally around \$180).¹⁴⁶ The driver education programs used for drink and drug drivers in Victoria do not distinguish between recidivist offenders, high-level, first-time offenders and low-level offenders. These programs tend to focus mainly on providing information about the risks of these substances and their effect on driving; the premise is essentially that drivers engage in these behaviours due to a lack of knowledge and their poor decision-making arises out of this.¹⁴⁷ The provision of information is intended to assist the offender to avoid reoffending.¹⁴⁸ Drivers who are over the age of 25 years at the time of the offence, are first offenders and had a BAC of under 0.10 do not need to complete the program.¹⁴⁹
 - If a person is a serious offender (he or she is a repeat drink or drug driver offender, is a first-time offender with a BAC of 0.15 or more or has refused to render a sample), he or she must also present two assessments from alcohol or drug treatment professionals regarding his or her alcohol or drug use. One of these assessments needs to be completed 12 months prior to relicensing, while the other needs to be completed within 28 days of applying for the licence restoration order. The offender must pay for the assessments. The Council is advised that an assessment costs approximately \$170, although this varies from provider to provider.
 - The offender must attend the Magistrates' Court to apply for a licence restoration order.¹⁵⁰
 - If required, the offender must install an interlock device for a period specified by the court; this can range from 6 months to over four years.¹⁵¹ The offender is required to lease the interlock from an accredited supplier and pay the installation fee, ongoing lease and service fees and a removal fee.¹⁵² Suppliers may consolidate these into a single monthly fee, which is generally around \$140.
 - If the application for a licence restoration order is successful, the offender must attend at a VicRoads office with a copy of the licence restoration order and pay the normal licence fee. If the person has not held a licence for over five years, he or she will need to pass a licence test.¹⁵³
 - If the offender has an outstanding licence suspension for excess demerit points (see further paragraphs [3.80]–[3.83]), the offender will need to serve this suspension once he or she has been issued with a new licence after completing all of the above steps.
- 3.57 The cost and complexity of this process can provide a disincentive to becoming relicensed at the end of the disqualification period, particularly if the driver has continued to drive during that period and has avoided detection.

146 Victorian Association and Drink and Drug Driver Services, Fees (2004) <<http://www.vadds.asn.au/Fees.aspx>> at 8 September 2008.

147 Mary Sheehan, Barry Watson, Cynthia Schonfeld, Angela Wallace and Bradley Partridge, *Drink Driver Rehabilitation and Education in Victoria* (Royal Australian Automobile Club of Victoria, 2005) 44.

148 Ibid.

149 *Road Safety Act 1986* (Vic) s 50A.

150 *Road Safety Act 1986* (Vic) s 50.

151 *Road Safety Act 1986* (Vic) s 50AAB.

152 VicRoads, *Victoria's Alcohol Interlock Program: Information for Participating Drivers* (VicRoads, n.d.).

153 VicRoads, *Getting Your Licence Back: Information for Drink and Drug Driving Offenders* (VicRoads, 2008) 6.

- 3.58 Council research indicates that many people decide not to undertake the process and simply keep driving without a licence, and hence without an interlock.¹⁵⁴
- 3.59 Many people who commit serious drink driving offences have an underlying addiction to, or serious problem with, alcohol. Currently, the only formal mechanisms that seek to address such underlying problems occur at the relicensing stage, which many offenders do not undertake. In addition, the efficacy of these programs for recidivists and first time, serious offenders has been questioned in a 2005 report commissioned by the Royal Automobile Club of Victoria.¹⁵⁵
- 3.60 When these cases come to court for sentencing, some magistrates use deferred sentencing (which is available for defendants who are under 25 years of age), or the general power of adjournment (for older defendants), on the condition that the defendant attends a rehabilitation program. Ordinarily, if the defendant successfully undergoes a rehabilitation program prior to sentencing, the court can take that into account in deciding what sentence to impose. This can provide an incentive for defendants to take responsibility for addressing their problems. It can also enable the court to structure a sentence that encourages further progress towards rehabilitation. However, as noted above, in drink driving cases the usual sentence is a fine, and there is limited scope to adjust that sentence to take the person's rehabilitation into account. In these cases, the primary penalty is the long disqualification period but, as that is mandatory, the court has no scope to take into account the person's rehabilitation.
- 3.61 It is desirable to provide a new pathway for such offenders that maximises community protection, so that in appropriate cases it is possible to:
- require offenders to confront and address their underlying alcohol problem at an early stage; and
 - increase the likelihood that offenders will remain in the licensing scheme and as a consequence be subject to an alcohol interlock condition.
- 3.62 This is more likely to protect the community than the current pathway, which does not effectively encourage offenders to address any underlying alcohol problems and, in many cases, results in offenders continuing to drive outside of the licensing scheme and without an interlock.
- 3.63 The first step would be to extend deferred sentencing to all offenders.¹⁵⁶
- 3.64 The next issue is the availability of rehabilitation programs. In consultations, the Council has received positive information about some programs, however, there are questions about program availability and funding. Subject to an appropriate evaluation, the Victorian Government should ensure the availability of targeted and appropriate rehabilitation programs to be used in conjunction with deferred sentencing and community-based orders.
- 3.65 It is then necessary to address the process of cancellation, disqualification and relicensing.
- 3.66 At present, the court has little capacity to reward an offender who does well in a rehabilitation program. Therefore, there is little incentive for an offender to comply, because the same long disqualification will apply. Many offenders will continue to drive during the disqualification period and will not go through the relicensing process once the period of disqualification expires.

¹⁵⁴ This was also raised in Submission 12 (Working Against Culpable Driving).

¹⁵⁵ Sheehan *et al.* (2005), above n 147.

¹⁵⁶ This was recommended by the Council in Part 2 of its final report on suspended sentences; see Sentencing Advisory Council (2008), above n 1, 275 (Recommendation 13 and commentary).

- 3.67 The offender's licence will have been suspended while sentencing is adjourned and he or she is undertaking a rehabilitation program. If the offender does well in the rehabilitation program, the court should cancel the offender's licence but it should also have a discretionary power to waive the long disqualification period. The Court could then allow the offender to apply to VicRoads for a restricted licence, with a condition that the offender may only drive a motor vehicle with an approved alcohol interlock installed and maintained by an approved alcohol interlock supplier.
- 3.68 The long disqualification period provides a measure of punishment and denunciation. In the interests of addressing the offender's underlying problem with alcohol a court may decide to immediately impose an alcohol interlock condition on the offender's licence. In this situation, instead of imposing a fine as the primary sentence, the court should consider imposing a sentence that is higher in the sentencing hierarchy (for example, a community-based order requiring the offender to perform unpaid community work), in order to achieve the purposes of punishment and denunciation.
- 3.69 In order to ensure that such offenders comply with the interlock condition, the maximum penalty that should apply if a person is found driving a car without an interlock in breach of the restricted licence should be the same as the maximum penalty for driving while disqualified or suspended (2 years' imprisonment). The duration of the interlock condition should be at least as long as the relevant current minimum disqualification period. At the end of this period, the offender may apply to the court for an order to remove the interlock condition.
- 3.70 A further issue that will need to be addressed is the relationship between this proposed conditional licence scheme and the current system of demerit point licence suspension. Under the current system, if an offender who is disqualified or suspended for drink driving also has a demerit point suspension, that suspension is placed on hold until the disqualification or suspension period is served. The Council is aware that this may be an impediment to an early intervention scheme. An option for resolving this issue is discussed at paragraphs [3.80]–[3.83].
- 3.71 The proposed new pathway received strong support from a wide range of stakeholders at the Road Safety and Legal Experts' Roundtables.¹⁵⁷ In particular, there was broad support for the idea that the new pathway could provide a way for drink driving offenders to earn back the privilege to drive by undertaking rehabilitation and by being subject to (and having to pay for) an alcohol interlock device. It was seen as a more realistic and effective approach than the current pathway. In addition, intervention at the earliest opportunity after the commission of the offence was also strongly supported.
- 3.72 There was some concern about the cost of interlocks for disadvantaged offenders, and also about the sensitivity of the devices, which can result in a false positive reading if the driver is wearing certain types of perfume or has eaten certain spices.¹⁵⁸
- 3.73 VicRoads has indicated that interlock technology is becoming much more sophisticated and can now include a 'bio-marker' to ensure that the device can distinguish between users. This will address problems such as the offender asking a family member or friend to blow into the device. Developments in the technology mean that it will also be able to generate much better reports on the use of the device. This will be very useful to magistrates for assessing patterns of alcohol consumption when the offender applies to the court to have the interlock condition removed.¹⁵⁹

157 Legal Experts' Roundtable (12 February 2009); Road Safety Experts' Roundtable (12 February 2009). It was also supported in a letter from the Chief Magistrate dated 24 March 2009.

158 Submission 11 (St Kilda Legal Service).

159 Road Safety Experts' Roundtable (12 February 2009).

RECOMMENDATIONS: Earlier intervention, rehabilitation and education (for high-level drink drivers)

Recommendation 4

- (a) The Council reiterates Recommendation 13 of *Suspended Sentences Final Report—Part 2* that the current restriction of deferred sentencing to offenders under the age of 25 should be removed, so that deferred sentencing can be used in relation to offenders of any age.
- (b) The government should ensure that appropriate drink-driving programs are available to be used in conjunction with deferred sentencing, as well as with orders such as community-based orders.

Recommendation 5

- (a) A person who is disqualified from obtaining a licence because of drink driving should be permitted to apply to the Magistrates' Court at any time for an order as to the issue of a restricted licence or permit.
- (b) The person should be required to give notice of the application to the Magistrates' Court and to Victoria Police; however, the court should have the power to waive this requirement in appropriate cases.
- (c) The Magistrates' Court should be able to grant the order prior to the end of the disqualification period if:
 - the applicant satisfies the court that he or she has completed an approved course; and
 - the court directs that VicRoads can only grant the offender a licence or permit subject to a condition that the offender must only drive a vehicle with an approved alcohol interlock device.

Recommendation 6

- (a) The duration of the interlock condition (referred to in Recommendation 5(c)) should be at least as long as the relevant current minimum disqualification period.
- (b) At the end of this period, the offender should be able to apply to the court for an order to remove the interlock condition (the process should be similar to that in section 50AAB of the *Road Safety Act 1986 (Vic)*).

Recommendation 7

The maximum penalty for driving a vehicle in breach of an alcohol interlock condition should be increased from three months' imprisonment or a fine of 25 penalty units to two years' imprisonment or a fine of 240 penalty units.

Mid to low-level drink driving

- 3.74 A similar scheme is proposed for individuals who commit lower-level drink driving offences. Currently, when a member of the police force apprehends a person committing a mid-level drink driving offence (generally involving a breath or blood alcohol concentration of between 0.07 and 0.15), he or she will issue the person with an infringement notice. The person has 28 days to object to the notice. If they do object, the matter proceeds to court. This rarely occurs. If the offender does not object, he or she must pay the relevant fine (\$340 or \$476, depending on the concentration of alcohol). When the 28 day objection period expires, his or her licence is automatically cancelled and he or she is disqualified from obtaining another licence for a period specified in Schedule 1 of the *Road Safety Act 1986* (Vic). This period can vary from 6 months to 28 months, depending on the concentration of alcohol and whether or not the person has previously committed drink driving offences (see Appendix A).
- 3.75 As with high-level offenders, the offender may apply to a court for a new licence at the end of the disqualification period.
- 3.76 If the offender has an underlying problem with alcohol that led to the offence, the current pathway does not involve any rehabilitative measures until the offender seeks to obtain a new licence. As noted earlier, the cost and complexity of that process means that some offenders simply drive without a licence and do not seek to obtain a new one.
- 3.77 If such an offender is prepared to acknowledge and address his or her problem with alcohol, an alternative approach is to allow him or her to make an application to the court at any time from when he or she receives the infringement notice, or from when he or she has served a minimum portion of the disqualification. The court could permit the offender to retain his or her licence if he or she acknowledges his or her problem with alcohol, agrees to undergo treatment and agrees to the imposition of an interlock condition on his or her licence.
- 3.78 If the application is to a court, it could raise concerns about courts having to deal with an increased number of matters. However, in principle there should not be a net increase in the number of court hearings. This is because, in these cases, an offender would have had to apply to a court at a later stage to reacquire his or her licence. Therefore, it simply involves moving the court hearing to an earlier stage and changing the nature of the application.
- 3.79 As with high-level drink driving cases, the relationship between the proposed system of allowing conditional licences and the current system of demerit point licence suspension would need to be resolved. An option for resolution is discussed at paragraph [3.80]–[3.83].

RECOMMENDATIONS: Early intervention for mid-level drink drivers

Recommendation 8

The Road Safety Act 1986 should be amended so that:

- (a) a person who is issued with an infringement notice for drink driving and whose licence is automatically cancelled and who is disqualified from obtaining a new licence for a specified period; and
- (b) a person whose licence is suspended by a court for drink driving or whose licence is cancelled and who is disqualified by a court from obtaining a new licence for a specified period—

may apply to the court at any time for an order as to the issue of a new licence. Recommendations 5(b)–(c), 6 and 7 above should also apply to these cases.

Conditional licences and demerit point suspension

- 3.80 The early intervention reforms discussed at paragraphs [3.49]–[3.79] raise issues around the current relationship between suspension for excess demerit points and other forms of suspension and disqualification.¹⁶⁰
- 3.81 At present, if an offender serving (or liable to serve) a demerit point suspension has his or her licence cancelled or suspended for drink driving, the demerit point suspension is placed on hold while the offender serves the drink driving suspension or disqualification period. The point at which the outstanding demerit point suspension is served depends on whether the offender's licence was suspended or cancelled:
- If the offender's licence is *suspended* for a drink driving offence, the demerit point suspension will stop until the period of suspension for that drink driving offence is completed. Following this, the balance of the demerit point suspension will be served.
 - If the offender's licence is *cancelled* for a drink driving offence, the demerit point suspension will stop until the period of cancellation is completed. Following this, the offender will need to apply for a new driver licence, and the balance of the demerit point suspension will be served *immediately* following the issue of the new licence.¹⁶¹
- 3.82 For the alternate pathway described at paragraphs [3.61]–[3.79] to operate effectively, the court ordering the conditional licence must have the discretion to make appropriate orders about the demerit point suspension period. Under the current system, if a court orders that a disqualified driver should immediately be granted a conditional licence, the licence will be immediately suspended if there is an outstanding demerit point suspension. This might frustrate the purpose of the court order and jeopardise the rehabilitation process.
- 3.83 One option is for the court to cancel an outstanding demerit point suspension and add the outstanding period to the period of the conditional licence. The court could be given the option of reinstating the demerit point suspension period if the offender does not comply with rehabilitation or interlock licence conditions.

¹⁶⁰ For further information about demerit point suspension, see [2.23]–[2.27].

¹⁶¹ VicRoads, Demerit Points <<http://www.vicroads.vic.gov.au/Home/Licensing/LicencesPenalties/DemeritPoints.htm>> at 11 March 2009.

RECOMMENDATIONS: Reform to the way that demerit points are accrued

Recommendation 9

- (a) The *Road Safety Act 1986* should be amended so that:
- (i) if a demerit point suspension has been stayed due to the cancellation or suspension of an offender's licence for drink driving; and
 - (ii) a court makes an order as to the issuing of a licence with an interlock condition under Recommendations 7 and 8—
- the court ordering the conditional licence may cancel the demerit point suspension if the period of the suspension is added to the period for which the interlock condition is attached to the offender's licence.
- (b) If the offender breaches the conditional licence or the conditions of the relevant sentence, the court may reinstate the demerit point suspension.

Alternative approaches for drivers who speed or accrue excessive demerit points

- 3.84 While Figure 7 indicates that many suspensions and disqualifications arise directly from drink driving, it also shows that a large and growing number arise from other driving offences. In particular, the largest and most rapidly growing category is licence suspension due to accrual of excessive demerit points (see further paragraphs [2.23]–[2.27]). The second-largest category is immediate suspension for speeding.
- 3.85 In order to find more effective approaches, the Council conducted focus groups with offenders examining how licences were lost and attitudes to various driving issues.
- 3.86 Many of the people attending the focus groups had lost a licence through an accrual of excessive demerit points. They sought to distinguish people such as themselves from those who have a drinking problem. While the drink drivers in the focus groups tended to be remorseful and acknowledge that they had a problem that needed to be addressed, the demerit point offenders were less likely to accept responsibility for their actions. Many complained about the difficulty of complying with the road rules¹⁶² and expressed the view that the rules were more about revenue raising by government than road safety.¹⁶³

¹⁶² Submission 12 (*Working Against Culpable Driving*); Focus Group 1 (12 August 2008); Focus Group 2 (12 August 2008).

¹⁶³ Focus Group 1 (12 August 2008); Focus Group 2 (12 August 2008).

Technological interventions

- 3.87 While it is not possible to identify the precise extent to which speeding contributes to the loss of demerit points resulting in licence suspension, it appears to be a very significant factor.
- 3.88 Some speeding offences are committed inadvertently, in the sense that the speeding is not intentional but is due to a lack of attention by a driver. For example, a driver may fail to notice the extent to which his or her vehicle has sped up while travelling down a hill or a change in speed limit from 60 to 50 kilometres per hour. The Council has examined the extent to which technology could help drivers avoid committing such offences, and hence avoid licence suspension.
- 3.89 There is now a range of devices that can be installed in a car and automatically detect the applicable speed limit, ordinarily through a global positioning system.
- 3.90 Some devices, which are commonly referred to as 'intelligent speed assist' devices, simply warn the driver if he or she exceeds the applicable speed limit. For example, if a driver is travelling along at the speed limit of 60 kilometres per hour and the speed limit changes to 50 kilometres per hour, the device will emit a sound if the driver fails to reduce his or her speed.
- 3.91 Provided that they are accurate, speed assist devices have the potential to help drivers comply with speed limits. This addresses concerns expressed in Council focus groups about the perceived difficulty of complying with changing speed limits.
- 3.92 While further refinement and testing of the technology is necessary, the Council notes that the Victorian Government's *Arrive Alive 2008–2017* road safety strategy aims to increase the voluntary adoption of intelligent speed assist technology. The creation of greater demand for the technology is likely to reduce its price and increase its availability.¹⁶⁴ The Council supports this initiative.
- 3.93 Other devices that detect the relevant speed limit have the capacity to physically inhibit ('voluntary' devices) or prevent ('mandatory' devices) a vehicle from exceeding the speed limit. These are commonly referred to as 'intelligent speed adaptation' devices.¹⁶⁵
- 3.94 Voluntary and mandatory systems may use a range of mechanisms to inhibit a vehicle's speed, including retardation of fuel flow or ignition, or activation of the vehicle's brakes. Some voluntary systems include a switch to disable the speed inhibiting measures. Others involve a 'haptic' throttle pedal, which becomes progressively stiffer when the vehicle exceeds the speed limit.¹⁶⁶
- 3.95 Various intelligent speed assistant and intelligent speed adaptation systems have been trialled in various countries, including France, Denmark, the United Kingdom, Holland, Finland, Sweden, Norway, Austria, China and Japan.¹⁶⁷ Some systems have also been tested in Victoria and Western Australia.¹⁶⁸

164 Government of Victoria, *Victoria's Road Safety Strategy: Arrive Alive 2008–2017*, 21 and 35 <www.arrivealive.vic.gov.au/files/pdf/road_safety_strategy.pdf> at 11 March 2009.

165 For a description of these devices, see Oliver Carsten and Fergus Tate, 'Intelligent Speed Adaptation: Accident Savings and Cost-Benefit Analysis' (2005) 37 *Accident Analysis and Prevention* 407.

166 *Ibid.*

167 Samantha Jamson, Oliver Carsten, Kathryn Chortlton and Mark Fowkes, *Intelligent Speed Adaptation: Literature Review and Scoping Study* (Transport for London, 2006) 6–9.

168 *Ibid.* 8.

- 3.96 Carsten and Tate's 2005 study¹⁶⁹ is the most comprehensive and widely cited evaluation undertaken to date.
- 3.97 The study has found that drivers who are most receptive to using intelligent speed adaptation as road safety mechanisms are those who have the least need to use it.¹⁷⁰ There is a risk that drivers who are most in need of such systems may resist the restrictions imposed by them in a way that poses road safety risks. For example, a driver's frustration may result in risky driving behaviours, such as rapidly accelerating to the speed limit, which an intelligent speed adaptation system cannot address.¹⁷¹ To date, the Council is not aware of any studies of intelligent speed adaptation systems that examine their use by problem drivers.
- 3.98 Although intelligent speed adaptation technology is developing quickly, the Council does not consider the technology to be sufficiently advanced for use by offenders with a record of committing speeding offences in a way that is analogous to the use of alcohol interlocks for offenders with a history of drink driving offences.

Redemption of demerit points by undertaking education or community service

- 3.99 Figure 7 shows the large and growing number of people whose licences are suspended each year due to the accumulation of excessive demerit points. In 2006–07, over 28,000 licences were suspended by this method.
- 3.100 In addition, as of 28 February 2009, over 41,000 drivers were just one demerit point away from licence suspension.¹⁷²
- 3.101 When launching the Victorian Government's *Arrive Alive 2008–2017* road safety strategy in February 2008, the Premier announced that it would include a new program to give drivers the opportunity to redeem demerit points by undertaking a comprehensive road safety program.¹⁷³
- 3.102 Comments made by participants in Council focus groups indicated that there may be a need for such education to address poor driving behaviours and attitudes. For example, some participants in these focus groups commented that it would be dangerous to keep to the speed limit because they would be watching the speedometer rather than the road, or they had to disobey a traffic light because it would have been too dangerous to stop.¹⁷⁴ An education program could also benefit people who persistently commit offences such as using a mobile phone while driving or failing to wear a seatbelt, by bringing home the risks of those behaviours. However, the Council also recognises the challenge of successfully redressing the simple inadvertence, carelessness and complacency that leads to the commission of many demerit point offences.

169 Carsten and Tate (2005), above n 165, 407.

170 Ibid 23.

171 Ibid 20.

172 VicRoads, unpublished data. This figure comprises 31,594 drivers who had 12 or more demerit points but had elected to retain their licence on the condition that if they accrued one more demerit point in the following 12 months, their licence would be suspended for double the period that it would originally have been suspended, and 9,950 drivers who had accumulated 11 demerit points.

173 Premier of Victoria, Media Release, *New Road Safety Strategy Arrive Alive 2008–2017*, 6 February 2008. A similar approach was supported by Submission 7 (Leonard Brear) and Submission 12 (Belinda Clark and Kristie Young).

174 Focus Group 2 (12 August 2008).

- 3.103 One submission proposed that people should have the opportunity to 'work off' their demerit points by undertaking some form of community service.¹⁷⁵ The Council recognises the impact that an accumulation of demerit points has on offenders and their families. However, the Council does not support this proposal, because, in contrast to education programs as discussed above, community service would not necessarily address the unsafe behaviour that led to the loss of licence. In addition, the Council notes that such a program presents potential practical difficulties. It would be necessary to identify appropriate community service. Significant administrative resources may be required to organise service for a particular offender and to ensure that the service is in fact undertaken.

A specialist list for driving offences

- 3.104 The Magistrates' Court currently has two specialist courts (the Drug Court and the Koori Court), as well as a range of specialist divisions and lists (including the Family Violence and Family Law Division, the Sexual Offences List and the Street Workers List).
- 3.105 These initiatives have been adopted to allow some magistrates and practitioners to develop greater expertise in relation to particular types of cases that typically involve complex health and social issues. Specialist courts, divisions and lists also enable the courts to adopt a problem-solving approach involving a more intensive, ongoing supervisory and therapeutic role than a conventional criminal court. In specialist courts, divisions and lists, magistrates and practitioners work closely with relevant service providers to ensure that factors that may be causing or contributing to the offender's criminal behaviour, such as alcohol or drug abuse, mental health problems, other health problems and homelessness, are addressed.
- 3.106 The Council's discussion paper asked for views on whether it would be desirable to establish a problem-oriented court or specialist list to hear driving while disqualified or suspended cases, or driving offence cases more broadly.
- 3.107 Six submissions expressed support for the idea.¹⁷⁶ Three submissions did not support it.¹⁷⁷ One submission expressed reservations about it,¹⁷⁸ on the basis that driving offences, and in particular the offence of driving while disqualified or suspended, comprise such a large proportion of the general work of the court.

¹⁷⁵ Submission 8 (Federation of Community Legal Services).

¹⁷⁶ Submission 1 (Andrew Banks); Submission 3 (Dianne Haddon); Submission 10 (VicRoads); Submission 11 (St Kilda Legal Service); Submission 12 (Belinda Clark and Kristie Young); Submission 13 (Victoria Legal Aid).

¹⁷⁷ Submission 8 (Federation of Community Legal Centres); Submission 9 (Office of Public Prosecutions); Submission 15 (Law Institute of Victoria).

¹⁷⁸ Letter from the Chief Magistrate dated 24 March 2009.

- 3.108 The data support this concern. Nearly a quarter (24.0%) of all offences sentenced in the Magistrates' Court are offences against the *Road Safety Act 1986* (Vic). Offences under that Act make up nearly a third (32.0%) of all principal proven offences sentenced in that court. The offence of driving while disqualified or suspended alone is the principal proven offence in ten per cent of Magistrates' Court cases. In 2007–08, it was the second most common principal proven offence after theft.¹⁷⁹ Further, in contrast to a list such as the Street Workers List, driving offences are distributed across the state and are frequently dealt with at all venues of the Magistrates' Court.
- 3.109 One submission proposed that the problem-oriented approach used in specialist courts or lists, such as rehabilitation courses and diversion programs, should be adopted into the existing court processes.¹⁸⁰ The Council considers the volume of cases to mean that there is little scope to achieve this to any meaningful degree. In addition, the Council considers that, in many cases, the resource-intensive, problem-oriented approach is not warranted.
- 3.110 The Chief Magistrate noted the high number of these cases and observed that there are different views within the court on the value and viability of a specialist list to deal with such matters. He commented that:
- There is always merit in a consideration of a court adopting listing practices which maximise the availability of magistrates with a particular, or particularly well developed, interest and/or expertise in certain areas of work. Although magistrates have a high level of general competence in this area, there will always be some people who are more 'specialist' than others and a number of magistrates have over the years developed a particular interest in the area of sentencing and road traffic/safety offences. In my opinion, no court should rule out altogether the option of some specialist listing/handling of these matters by magistrates with a highly developed interest in the area who are keen to take on a 'specialist' role. The benefits of applying judicial officers with a highly developed specialised knowledge and interest in a particular area (for example mental health) to appropriate cases is well known. The tension in [a] generalist high volume court such as this one, will always be between the efficient disposal of general lists (of which road traffic offences are a large part) and the listing and disposition of cases through specialist lists. Ultimately this is a matter of management and coordination—also a matter of resources.¹⁸¹
- 3.111 The Council considers that, subject to the above observations, it may be desirable to establish an opt-in list for difficult and complex driving cases. This is particularly so when cases involve repeat drink driving offenders who have multiple convictions, have not been responsive to previous court orders and present a significant danger to the community if they continue to drive in breach of court orders. An analogy may be drawn with the CREDIT bail program and the Drug Court. While many offences are committed under the influence of drugs or alcohol and can be—and are being—dealt with daily in the mainstream courts, it can also be argued that there is a place for a specialised process tailored to those for whom the traditional interventions have failed and who are willing to undergo more focussed and intensive programs.
- 3.112 One submission commented that removing such offences out of the mainstream criminal list could be seen as diminishing the gravity of those offences.¹⁸² The Council recognises the importance of ensuring that driving offences are not trivialised; however, it is not considered that an appropriately targeted list would diminish the gravity of the offences dealt with by that list.

179 Magistrates' Court of Victoria (2008), above n 13, 44.

180 Submission 15 (Law Institute of Victoria).

181 Letter from the Chief Magistrate dated 24 March 2009.

182 Submission 12 (Working Against Culpable Driving).

RECOMMENDATION: Specialist list

Recommendation 10

The Magistrates' Court should consider establishing a specialist list to hear cases involving driving offences where the defendant intends to plead guilty and acknowledges a need for rehabilitation.

Restricted licences

- 3.113 Recommendations 4 to 8 (regarding earlier intervention for drink drivers) deal with a restricted licence that is subject to a condition that the licence holder must drive a vehicle with an alcohol interlock device.
- 3.114 The alcohol interlock safeguards the community because it reduces the risk that the offender will drink and drive. By permitting the offender to drive, the restricted licence also enables the offender to maintain his or her employment and social contacts, and this can reduce pressure on other members of the offender's family. Maintaining employment, reducing family tensions and minimising the risk of social isolation in such cases can also help avoid exacerbating any underlying problems with alcohol.
- 3.115 In Council consultations, many stakeholders expressed the view that restricted licences should be available in Victoria as an alternative to an initial licence suspension (or cancellation and disqualification more broadly) in cases that do not involve drink driving. In particular, eight submissions specifically supported making restricted licences available to offenders where driving is a necessary part of employment or where there is no reasonable alternative for travel to and from work (such as public transport).¹⁸³
- 3.116 Victoria and the Northern Territory are the only Australian jurisdictions that do not provide for the issuing of restricted licences or other mechanisms to enable offenders who can establish various hardship grounds to drive on a conditional basis.

183 Submission 1 (Andrew Banks); Submission 3 (Dianne Haddon); Submission 5 (Leonard Brear); Submission 6 (Victorian Aboriginal Legal Service); Submission 8 (Federation of Community Legal Centres); Submission 13 (Victoria Legal Aid); Submission 15 (Law Institute of Victoria).

- 3.117 For example:
- Queensland legislation permits a restricted licence to be issued if disqualification meant that the offender was unable to maintain his or her employment.¹⁸⁴
 - The relevant ACT legislation is broader, referring to 'exceptional circumstances' and requiring the court to have regard to matters such as 'inconvenience or loss' to the driver or a dependant of the driver and the health of the driver or a dependant of the driver.¹⁸⁵
 - In Western Australia, disqualified drivers can apply to have an extraordinary licence issued.¹⁸⁶ The grounds for the issuing of extraordinary licences include the health of the driver or a family member, the continued employment of the driver or a family member or an undue financial burden on the driver or a family member.¹⁸⁷
 - Tasmanian legislation requires applicants to make out grounds of 'severe and unusual hardship' faced by them or their dependents and specifically requires an explanation of the inadequacy of available forms of transport.¹⁸⁸
- 3.118 One challenge is that there is currently no device analogous to an alcohol interlock that could be installed as a condition of a restricted licence for a low-level speeder and that addresses the offending itself.
- 3.119 The restrictions could also be difficult to enforce for the same reasons as disqualifications and suspensions (that is, there are relatively low levels of detection and deterrence). The restrictions themselves may be difficult to characterise, for example, where drivers are employed in shift work or have special needs.¹⁸⁹ Equally, if hardship were limited to employment, family or health needs, the provision could discriminate against unemployed people or those without families or health needs.
- 3.120 Concerns were expressed about the potential of restricted licences to discriminate against some offenders.¹⁹⁰ For example, if it were possible to obtain a restricted licence for work-related purposes, this would discriminate against unemployed offenders, who may be suffering from other forms of hardship because of the loss of their licence.

184 *Transport Operations (Road Use Management) Act 1995* (Qld) s 79(4).

185 *Road Transport (Driver Licensing) Regulation 2000* (ACT) r 47(2).

186 *Road Traffic Act 1974* (WA) s 76.

187 *Road Traffic Act 1974* (WA) s 76(3b).

188 *Vehicle and Traffic Act 1991* (Tas) s 18(3)(g).

189 Submission 12 (*Working Against Culpable Driving*).

190 *Ibid.*

- 3.121 A way to avoid this problem is to provide broad discretion, which could also cover driving for the purpose of seeking medical treatment, taking children to and from school or childcare or complying with court orders such as community-based orders and intensive correction orders.¹⁹¹ However, this raises a concern about how restrictions such as these would be drafted, recorded and enforced.¹⁹² There is also a risk that the offender will disregard the restrictions and drive at times and places in defiance of those restrictions.¹⁹³
- 3.122 The Council consulted extensively on this issue. While there is support in principle for restricted licences as a way to alleviate hardship, there were no suggestions on how any practical obstacles could be overcome. One participant commented that 'such licences are going into the world of fantasy in terms of enforcement. There are already so many different classes of licence. So many excuses are used'.¹⁹⁴ Another participant observed that they have been used in Victoria 'but even magistrates couldn't keep track of them so they were taken away for a reason'.¹⁹⁵ The Council therefore does not recommend the introduction of restricted licences at this time.

191 Submission 15 (Law Institute of Victoria).

192 Submission 9 (Office of Public Prosecutions); Submission 12 (Working Against Culpable Driving).

193 Submission 9 (Office of Public Prosecutions); Submission 12 (Working Against Culpable Driving).

194 Road Safety Experts' Roundtable (12 February 2009).

195 Ibid.

Appendices

Appendix A: Minimum disqualification periods in Victoria for drink driving offences¹⁹⁶

Level/Concentration	Minimum Disqualification First Offence	Minimum Disqualification Repeat Offender
Less than 0.07	6 months	12 months
0.07 or more but less than 0.08	6 months	14 months
0.08 or more but less than 0.09	6 months	16 months
0.09 or more but less than 0.10	6 months	18 months
0.10 or more but less than 0.11	10 months	20 months
0.11 or more but less than 0.12	11 months	22 months
0.12 or more but less than 0.13	12 months	24 months
0.13 or more but less than 0.14	13 months	26 months
0.14 or more but less than 0.15	14 months	28 months
0.15 or more but less than 0.16	15 months	30 months
0.16 or more but less than 0.17	16 months	32 months
0.17 or more but less than 0.18	17 months	34 months
0.18 or more but less than 0.19	18 months	36 months
0.19 or more but less than 0.20	19 months	38 months
0.20 or more but less than 0.21	20 months	40 months
0.21 or more but less than 0.22	21 months	42 months
0.22 or more but less than 0.23	22 months	44 months
0.23 or more but less than 0.24	23 months	46 months
0.24 or more	24 months	48 months

¹⁹⁶ *Road Safety Act 1986 (Vic)* s 50 (see also Schedule 1).

Appendix B: Minimum suspension periods in Victoria for excessive speeding offences¹⁹⁷

Speed of vehicle	Minimum Suspension
Exceed speed limit by 25 kilometres per hour or more, but less than 35 kilometres per hour	1 month
Exceed speed limit by 35 kilometres per hour or more, but less than 45 kilometres per hour	6 months
Exceed speed limit by 45 kilometres per hour or more	12 months
Any speed of 130 kilometres per hour or more that is not covered by item 1, 2 or 3	1 month

¹⁹⁷ Road Safety Act 1986 (Vic) column 2 of Schedule 5.

Appendix C: Offences and demerit points they incur¹⁹⁸

The following table gives some examples of the demerit points that certain offences incur:

Description of Offence	Statutory Reference	Demerit Points
Certain types of drink driving and drug driving under section 49 where the person's licence has not been cancelled ¹⁹⁹	<i>Road Safety Act 1986 (Vic) s 49</i>	10
A drink or drug driving infringement where the person's licence has not been cancelled ²⁰⁰	<i>Road Safety Act 1986 (Vic) ss 49, 89C.</i>	10
Exceeding the speed limit by 45 km/h or more	<i>Road Safety (Road Rules) Regulations 1999 (Vic), r 20</i>	8
Exceeding the speed limit by 35 km/h or more but less than 45 km	<i>Road Safety (Road Rules) Regulations 1999 (Vic), r 20</i>	6
Exceeding the speed limit by 25 km/h or more but less than 35 km	<i>Road Safety (Road Rules) Regulations 1999 (Vic), r 20</i>	4
Disobeying traffic lights, signs or traffic directions of a police officer/authorised person	<i>Road Safety (Road Rules) Regulations 1999 (Vic), various.</i>	3
Driving without a seatbelt	<i>Road Safety (Road Rules) Regulations 1999 (Vic), r 264(1)</i>	3
Using a hand held mobile phone	<i>Road Safety (Road Rules) Regulations 1999 (Vic), r 300(1)</i>	3
Driving insufficient distance behind a vehicle	<i>Road Safety (Road Rules) Regulations 1999 (Vic), r 126(1)</i>	1
Failure to dip headlights	<i>Road Safety (Road Rules) Regulations 1999 (Vic), r 218(1)</i>	1

198 *Road Safety (Drivers) Regulations 1999 (Vic) table 301.* Please note that this is an abbreviated list of the offences and their applicable demerit points. Please also note that the offence descriptions have been simplified.

199 *Road Safety Act 1986 (Vic) s 50* outlines the circumstances under which a court is not required to disqualify offenders' driver licences. Courts may (but are not required to) disqualify licences in the case of certain low level drink driving offences. These provisions exclude drivers under 26 years of age at the time of the offence.

200 Under *Road Safety Act 1986 (Vic) s 89C*, a licence will not be cancelled if the driver's BAC is less than 0.07 (or 0.05 if the driver is under 25 years of age).

Appendix D: Consultations

Meetings/Consultations/Visits

Date	Meeting
15 January 2008	Driving While Disqualified or Suspended Workshop (Transport Accident Commission; Monash University Accident Research Centre; Victorian Association of Drink and Drug Driver Services; Victoria Police; Royal Automobile Club of Victoria; VicRoads; Infringement Management and Enforcement Services, Department of Justice; Infringements Court)
24 June 2008	Roundtable with legal experts (Victoria Legal Aid; Victorian Bar Council; Office of Public Prosecutions; Brimbank Melton Community Legal Centre)
25 June 2008	Roundtable with road safety experts (Transport Accident Commission; Monash University Accident Research Centre; Victorian Association of Drink and Drug Driver Services; Royal Automobile Club of Victoria; VicRoads; Infringement Management and Enforcement Services, Department of Justice)
30 June 2008	Meeting with Victoria Police
1 July 2008	Meeting with Working Against Culpable Driving
22 August 2008	Meeting with Judge Thornton, County Court
9 September 2008	Meeting with Victoria Police
6 October 2008	Meeting with Corrections Victoria
14 January 2009	Meeting with VicRoads
10 February 2009	Meeting with Magistrates' Court
12 February 2009	Roundtable with legal experts (Victoria Legal Aid; Law Institute of Victoria; Office of Public Prosecutions; Springvale Monash Legal Service; Fitzroy Legal Service; Criminal Bar Association)
12 February 2009	Roundtable with road safety experts (Monash University Accident Research Centre; Victorian Association of Drink and Drug Driver Services; Royal Automobile Club of Victoria; VicRoads; Infringement Management and Enforcement Services, Department of Justice)

Submissions

Number	Date Received	Person / Organisation
1	14 July 2008	Andrew Banks
2	14 July 2008	Crime Victim Support Association
3	16 July 2008	Dianne Hadden
4	17 July 2008	Royal Australasian College of Surgeons
5	17 July 2008	Belinda Coleman
6	18 July 2008	Victorian Aboriginal Legal Service
7	18 July 2008	Leonard Brear
8	18 July 2008	Federation of Community Legal Centres
9	17 July 2008	Office of Public Prosecutions
10	17 July 2008	VicRoads
11	21 July 2008	St Kilda Legal Service
12	18 & 20 July 2008	Working Against Culpable Driving
13	22 July 2008	Victoria Legal Aid
14	22 July 2008	Springvale Monash Legal Service
15	23 July 2008	Law Institute Victoria
16	25 July 2008	Belinda Clark and Kristie Young
17	25 July 2008	Royal Automobile Club of Victoria
18	Undated	Magistrates' Court of Victoria
19	24 March 2009	Letter from the Chief Magistrate

Focus groups

Focus groups with people whose licences had been suspended or who had been disqualified were held on the dates set out below.

Focus group 1	12 August 2008
Focus group 2	12 August 2008
Focus group 3	13 August 2008

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