THE EVOLUTION OF IMPAIRED DRIVER LAW - VICTORIA

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Paper presented at the History of Crime, Policing and Punishment Conference
convened by the Australian Institute of Criminology
in conjunction with Charles Sturt University
and held in Canberra, 9-10 December 1999
Introduction

This paper explores the evolution of the law in Victoria to combat the recognised threat to public safety by persons driving motor vehicles while impaired by alcohol and other drugs. The evolutionary process has spanned almost ninety years. The law in this area has been continuously challenged in the courts over this period. The purpose of this paper is to objectively examine the evolution of this law and the relationship between the making of the law and its application. The paper will illustrate the progressive enactment of the laws that limit the legal rights of the individual in favour of the rights of the majority has challenged the common law principles used to administer the law.

Examination

Victoria saw the introduction of motor vehicles as a means of transport in the first years of the twentieth century. Victoria embraced the motor car immediately hosting Australia’s first legal motor car race at Sandown Park on the outskirts of Melbourne in March 1904 and the first motor car reliability trial over a course from Ballarat to Melbourne and return in February 1905. Initially the use of motor vehicles was confined to the wealthy. It did not take long before the number of motor vehicles being used for private and commercial transport grew to a significant level. The mixture of pedestrians, bicyclists, horses, horse drawn vehicles and motor vehicles using the roads presented a serious public safety issue. The law at this time was not framed to regulate motor vehicle use. The provisions were of a general nature such as, any person who “furiously or negligently drives through any public place” was guilty of an offence and liable to a penalty of a fine up to five pounds.

The first law in Victoria to specifically regulate the use of motor vehicles was the Motor Car Act 1909. The provisions covered the registration of motor vehicles, licencing of drivers, requirement for safety equipment such as, lights and warning devices, speed restrictions, and reckless and negligent driving. A specific provision to prohibit driving a motor car while under the influence of alcohol was included, “Any driver of a motor car or motor cycle proved to have been under the influence of intoxicating liquor whilst in charge of such motor car or motor cycle shall be guilty of an offence under this Act.” This was the first drive under the influence (DUI) offence enacted in Australia. The penalty for this offence was severe, a fine not more than ten pounds for a first offence and a fine not more than twenty-five pounds or not more than three months imprisonment for a subsequent offence. The maxim that it is not a right but a privilege to drive on the roads was also recognised by giving the court authority to cancel a driver licence for a period at the discretion of the court. It is interesting to note that this provision was not modeled on English law. English law did not deal with this issue until 1925 when the offence to drive while drunk was enacted. English law did not have a drive under the influence provision until 1930. It was from this point that Victoria embarked on a long and complex journey of law making to combat the public safety problem presented by impaired driving of motor vehicles.

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2 Police Offences Act 1890, Section 5.
3 Motor Car Act 1909, Section 25
4 Ibid. Section 8.
5 Criminal Justice Act 1925 (UK), Section 40
6 Road Traffic Act 1930 (UK), Section 15
In 1914 the Motor Car Act 1909 was amended to give police the authority to arrest a person they believed on reasonable grounds to have committed a DUI offence and drive or convey the vehicle involved to any police station until the hearing of the matter. The penalty was increased and the discretion of the court in cancelling a licence was removed. A licence could not be restored without an order by the court.\(^7\) In 1915 the Motor Car Act 1909 was repealed and replaced by the Motor Car Act 1915.\(^8\) The DUI provisions were amended removing reference to being in charge of the vehicle and the penalty increased.\(^9\) The provisions were amended again addressing penalty in 1928\(^10\) and 1930\(^11\). The particular attention to penalty is believed to be a demonstration of the legislators concern and an attempt to deter offenders as the incidence of death and injury resulting for impaired driving began to rise in proportion to the increased number of motor vehicles.

The removal of the reference to being in charge of a vehicle in the 1915 amendment resulted in one of the first interpretations of the scope of the law in 1923. The case involved a person believed by police to be under the influence of alcohol and observed to enter and start the vehicle intending to drive. The police prevented the person from driving off. The person was charged with driving under the influence. The court found the person was not driving therefore no offence was committed.\(^12\)

In 1949 the legislators again debated the issue of impaired driving. When speaking on the Bill, Lieutenant Colonel Leggett, Chief Secretary, said, “Every member of the community is concerned about the road toll in Victoria.”\(^13\) Concern was expressed about the inconsistent application of the law. Mr Stoneham, Member for Midlands, cited an example of the inconsistency where a person was fined five pounds for a parking offence and another person charged with negligently driving causing a death that employed a Kings Counsel was also fined five pounds.\(^14\) He went on to say, “The instances I am quoting are by no means exceptional, and probably other members could refer to incidents where the present courts are providing a disgraceful spectacle so far as a principle of quality of justice is concerned. In my view, everything is not going as well as it should in the administration of justice in respect to traffic offences.”\(^15\) It was suggested that a special central traffic court should be established and constituted by legal persons with particular expertise in traffic matters. The suggestion was not adopted. Amending legislation was enacted which broadened the scope of the offence and penalty.\(^16\) Being under the influence of a drug other than alcohol was included in the DUI offence\(^17\). A person convicted of the offence could not obtain an order from the court to be re-licensed for twelve months from the date of conviction.\(^18\) An offence being in charge of a motor car under the influence was introduced which carried a lessor penalty than the driving offence. Definitions for the terms “drug” and “in charge” were provided.\(^19\) The inclusion of an “in charge” offence answered the situation in the previously mentioned 1923 case.

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\(^{7}\) Motor Car (Amendment) Act 1914, Section 7  
\(^{8}\) Motor Car Act 1915, Section 2, Schedule 1  
\(^{9}\) Ibid. Section 21  
\(^{10}\) Motor Car Act 1928, Section 23  
\(^{11}\) Motor Car Act 1930, Section 23  
\(^{12}\) Doyle v Harvey 1923 VLR 271  
\(^{13}\) Hansard, Vol. 230, p. 2389  
\(^{14}\) Ibid. p. 2973  
\(^{15}\) Ibid. p. 2974 -5  
\(^{16}\) Motor Car (Amendment) Act 1949, Section 18  
\(^{17}\) Ibid. Section 18 (a)  
\(^{18}\) Ibid. Section 18 (b)  
\(^{19}\) Ibid. Section 18 (c)
1951 saw a rewriting of the provisions consolidating the motor car law contained in twenty Acts enacted from 1928 to 1951. The substance of the impaired driving provisions remained relatively unchanged. Once again the penalties were modified to reflect the legislators concerns for the seriousness of the offence.

By 1955 the legislators were so concerned about the threat to public safety by impaired drivers that they considered it necessary to enact law to classify the offence as one of the most serious. In the second reading of the Bill, Mr G. S. McArthur, said “Because of the constantly increasing seriousness of the results of these offences, however, the proposal is this Bill is to make them indictable, that is to say, of a more serious kind that is primarily triable by a jury in the Supreme Court or Court of General Sessions.” There was some opposition to the proposal. Mr J.W. Galbally, a Member of the House of Representatives and a prominent lawyer of the day said, “This Government will, if it persists with this Bill, become known as the Government that laid the golden egg for lawyers because, under this measure, every traffic offender will be guilty of a misdemeanour and liable to two years imprisonment.” The Bill was passed transferring the drive under the influence provisions into the Crimes Act 1928. In the transfer a new element to the offence was added. To be guilty of the offence a person had to be under the influence to such an extent as to be incapable of proper control of a motor car. The in charge under the influence offence also contained the new element but remained in the Motor Car Act 1951.

This move by the legislators placed the determination of DUI offence squarely in the jurisdiction of criminal law and the complexities associated with the administration of that law. The legislators acted to assist in the process by setting some guidelines for the admissibility of evidence in these cases. Provisions were enacted for the admissibility of evidence on the quantity of alcohol in a blood sample taken under certain conditions. Evidence of the percentage of alcohol found present in a blood sample taken by a medical practitioner within eight hours of the offence is admissible. Where the court or jury accepted the opinion of the analyst that the blood alcohol concentration (BAC) at the time of the offence was .05 per cent or less, it was prima facie that the person was not under the influence. Where the opinion was that the BAC more than .05 per cent, at the time of the offence, the opinion was to be accepted as evidence together other relevant and admissible evidence in determining the offence.

The evidentiary provisions were added to in 1957 to further simplify the process of determining whether a person was under the influence. The use of certificates to put matters before the court was introduced. Provided certain preconditions relating to consent being given for the taking the blood sample and service of a copy of the documents were satisfied, evidence of the medical practitioner taking a blood sample and evidence of the analysis result could be tendered by certificate. The form of the certificates were prescribed in Schedule 1 of the Act. This step was the first in a long line of provisions to be enacted to simplify the common law process for admissibility of evidence.

20 Motor Car Act 1951  
21 Hansard, Vol. 247, p. 1861  
22 Ibid. p. 2295  
23 Crimes (Driver Offences) Act 1955, Section 3  
24 Ibid. Section 6  
25 Crimes (Amendment) Act 1957, Section 4
In 1961 the legislators took the landmark step of enacting law to allow evidence of a BAC determined by the analysis of a breath sample for alcohol.\(^{26}\) The provisions set out a procedure for obtaining such evidence and set conditions for it to be admissible. The analysis was to be conducted by a person authorised by the Chief Commissioner of Police (CCP).\(^{27}\) A certificate of the analysis result was to be delivered to the person tested.\(^{28}\) A certificate signed by the CCP was admissible as evidence of the authority to conduct breath analysis tests. Evidence by an authorised person of compliance with the requirements of the section was prima facie evidence of that compliance.\(^{29}\) A person was required to provide a breath sample within two hours of the offence at the place of the offence or at the nearest police station.\(^{30}\) It was an offence to refuse unless there was a reason of substantial character other than to provide self-incriminating evidence or a blood sample had been taken in accordance the blood sampling provisions.\(^{31}\) The breath analysis instrument for use under the provisions was authorised by order of the Governor in Council.\(^{32}\) The Breathalyzer ®, the apparatus registered at the Patent Office of the United States of America on 25 February 1958 under the reference 2824789, was the device contemplated by the legislators and subsequently authorised.

The provisions were enacted to provide law to overcome some of the common law principles for the admissibility of evidence in criminal law. The application of common law principles was restricting the aim of the legislators.\(^{33}\) The legislators also challenged the common law principle of the right against self-incrimination. The provisions were enacted despite concern expressed by the legal fraternity. In the second reading of the Bill, Mr L.H.S. Thompson, made reference to a document submitted by the Bar Council and Law Institute of Victoria on the proposed provisions. The passage read, “The dangers consequent upon the Bill’s enactment are grave; for if it is once conceded that compulsory self incrimination is a proper method of obtaining evidence for the purpose of making out that these offences or crimes have been committed, an exception to the principle has been established so radical that the principle itself is immeasurably weakened if not utterly destroyed.”\(^{34}\) Mr Thompson concluded his address on the Bill by saying, “I suggest that if we can save just one life or one person from being maimed the legislation is justified. Furthermore, I believe that the legislation will provide the court with something nearer the whole story, and in so doing it will enable the innocent to be acquitted and the guilty to be treated with due desert. Indeed, it will not only help to ensure that justice is carried out but also that it appears to be carried out.”\(^{35}\)

The legislators continued to make ground breaking law by introducing a new type of offence in 1965. Victoria was the first State in Australia to introduce law that made it an offence to have a blood alcohol concentration exceeding a certain level. The level set was .05 per cent.\(^{36}\) The new offence was enacted in response to the recommendation of Mr P.D. Phillips QC, Royal Commissioner, appointed to consider the sale, supply, disposal or consumption of

\(^{26}\) Crimes (Breath Test Evidence) Act 1961, Section 2  
\(^{27}\) Crimes Act 1958, Section 408A (1)  
\(^{28}\) Ibid. Section 408A (2)  
\(^{29}\) Ibid. Section 408A (3)  
\(^{30}\) Ibid. Section 408A (4)  
\(^{31}\) Ibid. Section 408A (5)  
\(^{32}\) Ibid. Section 408A (6)  
\(^{33}\) Porter v Kolodziej (1960) VR 75  
\(^{34}\) Hansard, Vol. 265, p. 1130  
\(^{35}\) Ibid. p. 1135  
\(^{36}\) Motor Car (Driving Offences) Act 1965
liquor in the State of Victoria. In reading the Bill a second time, Mr Rylah, Chief Secretary, referred to page 32 of the Royal Commissioner’s report, “In my opinion establishment of the standards indicated should in due course be translated into law and enforced with appropriate penalty. This involves the creation of a legal offence of driving a motor car with a blood alcohol concentration exceeding .05 per cent.”

In 1967 the offence of driving under the influence was removed from the Crimes Act and returned to the Motor Car Act. The offence was to be dealt with as a summary offence whilst the more serious offences involving death or serious injury remained in the Crimes Act to be dealt with by trial. The evidential provisions remained in the Crimes Act and were amended. A schedule prescribing the form of the certificate of analysis result was inserted. The evidential provisions were also amended to make the certificate prima facie proof of the facts and matters contained in it unless notice was given that the person giving the certificate was required to be called as a witness.

The introduction of the certificate provisions resulted in a substantial number of decisions in the Supreme Court. The language of the provisions was examined in great detail on the admissibility of certificate evidence in breath analysis cases. The first decision in June 1967 and then another in May 1968 resulted in the provisions being swiftly amended in December 1968 to give effect to the legislators’ intent. Returning to the issue again in April 1969, the court made comment that, “These considerations serve to support the construction of the language we have adopted, for we think that the amendment made by Act No. 7782 disclose a legislative intent to alter the state of the law as declared by the Full Court and facilitate proof of the percentage of alcohol indicated to be present in the blood by a breath analysing instrument.” Interpretation of the certificate provisions continued to receive the attention of the court throughout 1969 and into 1970.

The evidential provisions remained in the Crimes Act until repealed and inserted in to the Motor Car Act in 1971. The legislators made substantial changes to the impaired driving provisions at this time. The conduct of preliminary breath tests in certain circumstances was authorised. The provision concerning the location at which a breath analysis test could be conducted was amended to prevent persons escaping conviction on a technicality as to location. The conduct of breath analysis tests in hospitals was also authorised. The election by a person to submit to a blood test rather than to undergo a breath test was removed. It was

37 Hansard, Vol. 279, p. 858
38 Crimes (Driving Offences) Act 1967, Sections 5 and 7
39 Crimes Act 1967, Schedule 7A
40 Ibid. Section 408A (2A)
41 Smith v Furguson (1967) VR 757
42 Hanlon v Lynch (1968) VR 613
43 Crimes (Evidence Act) 1968, Section 4
44 White v Moloney (1969) VR 705
46 Motor Car (Driving Offences) Act 1971, Section 11
47 Ibid. Section 7
48 Hansard, Vol. 301, p. 4114, See Mintern-Lane v Kercher (1968) VR 552
made an offence to refuse to supply a breath sample. This had the affect of making the supply of a breath sample compulsory. It was made a requirement to arrange the taking of a blood sample after the conduct of a breath test when requested. For the avoidance of technical defenses the legislators were not prepared to make the breath test result inadmissible where reasonable steps had been taken to arrange the taking of a blood sample.\textsuperscript{49} A presumptive provision was introduced where within two hours of the offence a certain BAC was present is was to be presumed until the contrary is proved that not less than that concentration was present at the time of the offence.\textsuperscript{50} Minimum licence disqualification periods relevant to a particular BAC were specified. Authority for police to arrest persons committing .05 offences was provided.

Mr G O Reid, Chief Secretary, in reading the Bill a second time said, “Its main purpose is to strengthen the law as it relates to the person who drives a motor car whilst affected by intoxicating liquor. The provisions are mainly influenced by the recommendations of the Joint Select Committee on Road Safety in its fourth, fifth and six progress reports.”\textsuperscript{51}

The strength of the provisions promoted vigorous debate before being enacted. Mr F.N. Wilkes, Deputy Leader of the Opposition, spoke on the Bill’s intrusion on the common law rights of the individual; “The Opposition’s cardinal objection to the Bill in its present form is that it completely disregards the principle that no person should be compelled to incriminate himself.”\textsuperscript{52} He specifically addressed the enactment of the two hour presumptive provision saying, “Even under the Crimes Act, until proved otherwise, it cannot be presumed that a person is guilty. Apparently, the Government desires to change that ancient principle. Members of the Opposition have resisted such a proposed change in a number of instances over the past few years. In this case, to alter the onus of proof to that degree in a measure such as this is bordering on being criminal. I strongly suggest that under the forms of common law the courts of this State can determine the guilt or otherwise of a person proceeded against, even under this measure, and that there is no need for that principle to be written into the Bill.”\textsuperscript{53}

Mr W Jona, Member for Hawthorn, referred to the transcript of the evidence of Mr Bennett, Secretary, Council of Civil Liberties, Victoria, given before the Select Committee on Road Safety on the issue of self-incrimination and the encroachment on civil liberties, “I have nothing to say on the technical side, as to whether, in fact, the type of tests proposed would counter the danger that is apparently suggested they would. On the question as to whether such tests would infringe the liberty of the individual, quite obviously they would. This in itself, is not an insuperable argument against them, because I suppose, in a sense, traffic lights and laws against murder infringe the liberty of a particular individual, and it might be that compulsory blood tests would lead to a net gain in liberty, a reduction in the liberty of the particular person tested, but the maintenance of the liberty of people who are not involved in motor car accidents, so it is largely a question of balancing various interests.”\textsuperscript{54} Mr Jona went on the say, “The evidence indicates that if legislation which is designed as a counter measure to reduce the road toll will in fact substantially reduce the road toll, then it is not an encroachment upon the rights of members of the community.”\textsuperscript{55}

\textsuperscript{49} Ibid. p. 4116  
\textsuperscript{50} See Smith v Maddison (1967) VR 307 and De Kruiff V Smith (1971) VR 761  
\textsuperscript{51} Hansard, Vol. 301, p. 4111  
\textsuperscript{52} Ibid. p. 5192  
\textsuperscript{53} Ibid. p. 5200  
\textsuperscript{54} Ibid. p. 5210  
\textsuperscript{55} Ibid. p. 5211
Mr R J Hamer, Chief Secretary, also addressed the issue of self-incrimination and the encroachment on civil liberties, he said, “A great deal of discussion has taken place about the rights of the individual and in particular about the rule of law, common sense and justice. It has been said that no person should be compelled to incriminate himself without just cause. This rule of law has been somewhat misinterpreted in the past and present. There are many instances in the law where it has been justifiable to cause some evidence to be taken from a person who afterwards has been incriminated by it; but it must always be justified. In this case, any invasion of that general principle is amply justified by the prime intention of this type of amending legislation to try and tackle the road toll, and to preserve the liberty of other users of the road against the drunken driver.”

The amendments caused more detailed examination of the language used in the provisions by the courts. The evidentiary provisions and in particular the certificate evidence provisions received attention. The self-incrimination principle and its relationship to the breath sample provisions was also examined. The legislators did not rest. In 1973 provisions were enacted that further encroached on the rights of the individual against self-incrimination. It was made compulsory for a blood sample to be taken from a person taken to hospital after a motor vehicle accident. Doctors were made liable to penalty for non-compliance with the provisions. It was made an offence not to allow a doctor to take a sample. 1976 saw the introduction of provisions to allow authorised police to setup preliminary breath testing stations. It was made an offence to refuse to submit to a test as well as failing to stop at a testing station. Enacting these provisions again demonstrated the legislators’ willingness to override the principle against self-incrimination to deal with the impaired driver. The provisions continued to be modified by increasing penalties for subsequent offences in 1982 and the introduction of compulsory attendance at driver education courses before licence reissue in 1984.

A major review and consolidation of the motor car law took place in 1986. There had been 120 amending Acts since 1958. The operation of the statutory presumptions in favour of the accuracy of the Breathalyzer had become an issue in the courts. It was found that evidence as to the accuracy of the Breathalyzer was admissible to overcome the presumptions. Mr T Roper, Minister for Transport, outlined the purpose of the new provisions in the second reading of the Bill. The underlying purpose was to reduce the number of accidents caused by alcohol and other drugs, reduce the number of drivers whose driving is impaired by alcohol and other drugs, and to provide a simple and effective means of establishing a driver had more than the legal limit of alcohol in their blood. The provisions were designed to prevent technical defences against drink drive charges. Breathalyzers in general were to be taken to give accurate readings and not to be changed by subsequent evidence. A new offence of exceeding a reading on an approved breath analysis instrument was included. The only defence to this charge would be that the instrument was not properly operated or was

56 Ibid. p. 5225
58 King v McLellan (1974) VR 773
59 Motor Car (Amendment Act) 1973, Section 7
60 Motor Car (Breath Testing Stations) Act 1976, Section 2
61 Motor Car (General Amendment) Act 1982, Section 9
62 Motor Car (Amendment) Act 1984, Section 11
63 Motor Car Act 1958
64 Road Safety Act 1986
defective. Drinking after an accident but before the test could not be used to subvert the possibility of conviction. Persons doing so risked an increased penalty for a higher reading. The immediate suspension of a driver licence would take place for a reading of .15 and above. He said, “The seriousness of the offence of drink-driving is such that measures such as these are warranted.”

In debating the Bill, Mr T R Norris, Member for Dandenong, said, “Most strong measures taken by Government in the past have met with public outcry, but it is necessary to curb the excesses of road abuse, despite that protest. The boldest legislation in society must be legislation that adequately tackles drink driving, because one must overcome the great Aussie myth of, ‘How dare you imply I cannot hold my grog and drive my car?’”

The proposed legislation was the subject of comment in the newspapers and was brought to the attention of the legislators by Mr E.R. Smith, Member for Waverley. Mr Frank Galbally, a prominent lawyer, was reported in the Sun newspaper of 14 October 1986 to have said that the proposed law, “signaled a police state in Victoria. Another lawyer, Mr Michael O’Brien, was reported in the Age newspaper of 29 October 1986 to have said the proposed law was, “Outrageous”. The legislators were not deterred. The provisions were enacted.

It was not long before the new exceeding the reading on a breath analysis instrument offence was examined in the Supreme Court. Concern was expressed that an innocent person could be convicted of the offence in certain circumstances. The legislators acted to alleviate this concern in 1989. The offence and interpretative provisions were amended to provide a defence to the charge when it could be proved that a breath analysis instrument reading was due solely to the consumption of alcohol after driving. Provisions were also enacted at this time for first time drink driving offenders found to have BAC less the .15 per cent to be dealt with by a drink driving infringement notice issued by police. The notice imposed a fine, driver licence cancellation and disqualification period relevant to the breath analysis instrument reading. The penalty taking effect 28 days after issue of the notice unless an objection to the notice was lodged.

The admission of evidence by certificate remained an issue in the courts. On 13 November 1990 the Supreme Court decided that the terms of statute did not provide for a certificate to be admissible in an exceed the prescribed breath analysis instrument reading charge. The legislators acted swiftly to resolve the issue by passing an amendment to the provision on 30 November 1990, 17 days after the court’s decision. The amendment operated retrospectively from 1 March 1987, the date of the commencement of the original provision.

The provisions were amended twice in 1991. The first enactment was a major review of the compulsory blood sample provisions. The provisions were redesigned to remove the compulsion on doctors to take a sample in favour of the compulsion being on a person to provide a sample. An offence was created for not providing a sample. The certificate evidence provisions were also strengthened by limiting the circumstances when doctors and analysts

66 Hansard, Assembly, Vol. 383, p. 227-231
67 Hansard, Assembly, Vol. 384, p. 1651
68 Ibid. p.1657
69 McDonald v Bell (1988) 6 MRV 113
70 Road Safety (Miscellaneous Amendment) Act 1989
71 Bracken v O’Sullivan (1991) 2 VR 573
72 Road Safety (Certificates) Act 1990
73 Road Safety (Drivers) Act 1991
could be called to a hearing to give evidence. Police were also given authority to preliminary breath test occupants of vehicles in accidents where the identity of the driver was not established to the satisfaction of police. Attention was again given to resolving a breath analysis certificate admissibility issue identified by the courts. This amendment was given retrospective operation.\(^{74}\) The second enactment clarified the circumstances of what constituted a subsequent offence for the purpose of imposing penalty. A zero BAC limit for heavy vehicle and bus drivers was also introduced.\(^{75}\)

The mandatory driver licence cancellation for impaired driving offences was inadvertently affected by the review of sentencing practices in 1991.\(^{76}\) The legislators enacted provisions to ensure the penalty scheme for impaired drivers was not undermined reaffirming their desire for mandatory licence cancellation.\(^{77}\)

The provisions were again amended in 1994\(^{78}\) principally to introduce a new breath analysing instrument to replace the Breathalyzer that had been in use since 1961. The new instrument, the Alcotest 7110, was fully automated and produced a printed report of the result of the analysis. The whole structure of the provisions was modified to support the use of the new instrument. Provisions included a requirement for further breath samples to be provided when the analysis of the first sample was not completed. A blood sample could be required where the breath analysis instrument cannot complete an analysis. It was made an offence to refuse to comply with any of the requirements to provide a breath or blood ample. The certificate provisions provided for the instrument printout to be admissible as the certificate of analysis. It was made a requirement that notice must be given to police where expert evidence is to be called at a hearing and provide details of the evidence to be given. Mr A. Brown, Minister for Public Transport, reading the Bill a second time said, “In summary, the Bill will significantly improve Victoria’s capacity to deal appropriately with drink-driving and to maintain the lead of Victoria in this area over the rest of the world which is now generally acknowledged”\(^{79}\). The Bill was passed virtually unopposed.

The legislators amended the provision concerning the requirement to provide additional breath samples in 1995.\(^{80}\) The purpose of the amendment was to make the legislator’s intent clear that one or more breath samples may be required if necessary. Mr Coleman, Minister for Natural Resources, reading the Bill a second time said, “Legal advice has been received that it is open to interpretation that only two breath samples can be taken for the purpose of breath analysis. That was not Parliament’s intention, particularly since commonly it can take several attempts before a sufficient sample is obtained. This amendment will remove any doubt on this aspect.”\(^{81}\) The amendment was enacted to operate retrospectively from date of the original provision.

\(^{74}\) Curmi v Matthew, Appeal No. 90721, County Court Victoria  
\(^{75}\) Road Safety (Further Amendment) Act 1991  
\(^{76}\) Sentencing Act 1991  
\(^{77}\) Road Safety (Licence Cancellation) Act 1992  
\(^{78}\) Road Safety (Amendment) Act 1994  
\(^{79}\) Hansard, Legislative Assembly, 7 October 1993, p. 1026  
\(^{80}\) Road Safety (Miscellaneous Amendment) Act 1995  
\(^{81}\) Hansard, Legislative Assembly, 11 May 1995, p. 1512
The legislators were again called on to make their intent clear in respect to the admissibility of a breath analysis certificate in 1995 as a result of a decision in the Supreme Court. Addressing the issue in the second reading of the Bill, Mr A. Stockdale, Treasurer, said, “The prime amendment ensures the integrity of the use of certificate evidence in proving the blood alcohol level of an accused person from breath samples and for proving other matters. The amendment firmly establishes that the certificate issued by a breathalyser device is the same certificate able to be used by the prosecution for the purposes of section 58 of the Road Safety Act and in the corresponding provisions in the other acts. The bill also makes miscellaneous amendments relating to proof of service on accused persons of a copy of a certificate arising out of blood tests for alcohol level and establishing that a certificate under section 58(2)(f) and in the corresponding provisions in the other acts is proof of another identical certificate having been given to an accused person as soon as practicable after a sample of breath was analysed. Other minor machinery amendments are also made to the acts.” The amendment was again enacted to operate retrospectively from the date the original provision commenced.

The legislators continued to enact provisions to deal with impaired driving. In 1996 the zero BAC provisions for certain classes of drivers were amended. In 1998 the provisions were amended as part of the scheme to create uniform national road transport requirements. Provisions were also enacted in the same year for professional driving instructors to have a zero BAC while instructing. Undoubtedly the legislators’ work will continue.

Discussion

The legislators have devoted considerable time in the process of governing the State to making laws to address the impaired driving issue. The intent and operation of these laws have been the subject of extensive debate in the courts. The examination of the evolution of impaired driving law clearly shows the legislators’ resolve to enact law to achieve their aim. They have shown they are prepared to limit the legal rights of the individual in favour of protecting the majority from the harm caused by impaired drivers. They have been prepared to abrogate traditional common law principles such as the right of an individual to self-incrimination. They have made evidence admissible such as evidence by certificate where it would not be admissible under traditional common law principles. The number of provisions and volume of words used by the legislators to make their intent clear has progressively grown. The actions of the legislators have resulted in an equally large number of court proceedings and volume of words interpreting what the legislators intended. It appears that one has been the catalyst for the other.

In the context of a common law environment such as in Victoria, common law principles are applied to the criminal law. Impaired driving law falls within the criminal law. It therefore follows that courts use the common law principles to interpret impaired driving law. The issue of statutory interpretation is a complex process. It is not intended to carry out a detailed analysis of the processes of interpretation but to make some relevant observations. In essence, the common law principle for interpretation calls for the courts to interpret provisions in accordance with the intent of the legislators. This observation is supported by the words of

82 Miscellaneous Acts (Omnibus Amendments) Act 1995
83 Jones v Purcell, Unreported, Victoria Supreme Court, 19 July 1995, Hansen J.
84 Hansard, Legislative Assembly, 26 October 1995, p. 890
85 Road Safety (Amendment) Act 1996
86 Road Safety (Amendment) Act 1998
87 Road Safety (Driving Instructors) Act 1998
Viscount Dilhorn, “…it has been recognised since the seventeenth century that it is the task of the judiciary in interpreting an Act to seek to interpret it according to the intent of them that made it.” The legislators have confirmed this view by enacting a provision for interpreting legislation, “…a construction that would promote the purpose or object underlying the Act …shall be preferred to a construction that would not promote that purpose or object…”

The interpretation of the law has other influencing factors such as the recognition of infringement on the common law rights of the individual. It is a fundamental principle of common law to protect the rights of the individual and the courts are reluctant to abrogate that principle. The High Court stated, “…that a statute will not be construed to take away a common law right unless the legislative intent to do so clearly emerges, whether by express words or by necessary implication.” Again in the High Court by Brennan J., “The law of this country is very jealous of any infringement of personal liberty (Cox v Hakes (1890) 15 App. Cas. 506, at p.527) and a statute or statutory instrument which purports to impair a right to personal liberty is interpreted, if possible, so as to respect that right: R v. Cannon Row Police Station (1922) 91 L.J.K.B. 98, at p.106.”

The impaired driving law clearly abrogates the rights of the individual to achieve its intent. The courts, however, by following the common law principles in interpreting the law, have difficulty in interpreting the law to give effect to the legislators’ intent. Support for this observation is found in the law text, Cross on Evidence, “Many modern statutes authorise officers to make inquiries or ask questions concerning certain subjects and further impose a penalty upon persons failing to furnish information…The courts have recognised the power of Parliament to abrogate the privilege, but generally speaking, they have been reluctant to construe the enactment in wide terms to authorise such abrogation.”

**Conclusion**

The examination of the evolution of impaired driving law in Victoria has revealed a long struggle by legislators to enact law to protect the community from the social evil of impaired driving. The laws enacted have been forceful and prepared to abrogate the legal rights of the individual in favour of the majority. The enactment of such law has not sat well in the common law scheme. The nature of impaired driving law challenges the traditional common law principles. The courts are asked to interpret the law in accordance with the legislators’ intent but use common law principles that are fundamentally opposed to the intention of the law enacted. This situation suggests that traditional common law principles do not facilitate the administration of contemporary impaired driver law.

A relatively simplistic approach has been taken on a very complex issue. However, the evidence speaks for itself. There is a strong argument for review of the legal process applied to impaired driver law.

88 Stock v Frank Jones (Tipton) Ltd. (1978) 1 All.E.R. 948 and 951
89 Interpretation of Legislation Act 1984, Section 35
91 Re Bolton; ex parte Beane (1987) 162 C.L.R. 514 at 523