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**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

ROAD TRANSPORT LEGISLATION AMENDMENT BILL 2021

SUPPLEMENTARY EXPLANATORY STATEMENT

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Road Transport Legislation Amendment Bill 2021

This explanatory statement relates to an amendment (the Clay Amendment) to the Road Transport Legislation Amendment Bill 2021 (the Government Bill).

The Clay Amendment will be presented to the Legislative Assembly during the debate on the Government Bill. This explanatory statement has been prepared in order to assist the reader of the Clay Amendment and to help inform debate. This explanatory statement does not form part of the Clay Amendment and has not been endorsed by the Assembly. It is not, and is not meant to be, a comprehensive description of the Clay Amendment. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

Overview of the Clay Amendment

The Clay Amendment and the Government Bill both aim to improve road safety. Where people are harmed as a result of negligent driving, both bills aim to bring penalties closer to meeting community expectations. The Government Bill introduces a fine and up to 6 months imprisonment, which requires a court prosecution for enforcement. The Clay Amendment removes imprisonment and instead introduces an on-the-spot Traffic Infringement Notice and 3 demerit points, which do not require a court prosecution for enforcement.

Why is the Government Bill needed?

Section 6 in the current *Road Transport (Safety and Traffic Management) Act 1999* sets out three existing offences.

- Section 6(1)(a) makes it an offence to drive a motor vehicle negligently if the driving causes death. This offence must be prosecuted through the court and the maximum penalty is 200 penalty units (currently a fine of \$32,000), imprisonment for 2 years or both.
- Section 6(1)(b) makes it an offence to drive a motor vehicle negligently if the driving causes grievous bodily harm. This offence must be prosecuted through the court and the maximum penalty is 100 penalty units (currently a fine of \$16,000), imprisonment for 2 years or both.
- Section 6(1)(c) makes it an offence to drive a motor vehicle negligently in any other case. The maximum penalty for this is 20 penalty units. However, as provided for under the *Road Transport (Offences) Regulation 2005*, police can issue an on-the-spot fine (a traffic infringement notice) for \$398 and 3 demerit points. They do not need to prosecute this offence through the courts.

The existing offences leave a gap. There is nothing in between a fine for negligent driving that causes no harm and a full court prosecution for negligent driving that causes grievous bodily harm. Grievous bodily harm is a high threshold to reach and includes injuries like facial fractures and bone deformities requiring major surgery (*Haoui v R* (2008) [188 A Crim R 331]) or severe traumatic life-threatening injuries to brain, face, kidneys and chest requiring lengthy hospitalisation and lifetime care (*Swan v R* [2016] [NSWCCA 79]).

The Government Bill assists in addressing this gap by introducing an offence of negligent driving that causes harm with a maximum penalty of 50 penalty units (currently \$8,000), six months imprisonment or both. Enforcement requires a court prosecution.

Why is the Clay Amendment needed?

The Government Bill provides examples of ‘actual harm’, such as cuts, bruises or a sprained ankle. This description of ‘actual harm’ is a good way to plug the existing gap and covers many of the most common incidents that occur on our roads between cars and those who are walking, riding, scooting, skating or in wheelchairs. But an incident leading to this level of actual harm is not likely to lead to enforcement if it requires prosecution in court. It is not a good use of ACT resources for the Director of Public Prosecutions and the Australian Federal Police to mount a full court prosecution for an incident involving cuts, bruises or a sprained ankle. It is important that conduct leading to such a result is addressed, but resource-intensive prosecutions are, rightly, more likely to be prioritised for more serious offending. If the police were provided with the ability to issue an on-the-spot Traffic Infringement Notice, the offence is more likely to see more widespread application and use and driver behaviour is more likely to change.

An on-the-spot Traffic Infringement Notice sits well with the existing offence of negligent driving in the Act, which also attracts an on-the-spot Traffic Infringement Notice. Any determination of ‘negligent driving’ involves a degree of police discretion but police are extremely familiar with the current negligent driving provision. They have been using it for over two decades and it is one of the most common enforcement tools in the road safety space. It is natural to extend it.

An on-the-spot Traffic Infringement Notice matches the ACT’s usual police enforcement method for roads offences. For instance, Division 14.3 of the *Road Transport (Road Rules) Regulation 2017* contains twelve rules about scooters. These are all punishable with an on-the-spot Traffic Infringement Notice as an alternative to court prosecution.

A term of imprisonment is suitable for certain kinds of traffic offences, such as negligent driving that causes grievous bodily harm (S 6(1)b)) or furious, reckless or dangerous driving that puts at risk the safety of a vulnerable road user (S 7A(1)(vi)). But it is disproportionate for negligent driving that leads to the types of harm set out in the Government Bill such as cuts, bruises or a sprained ankle. Furthermore, the term of imprisonment needs to be removed for reason of consistency with the limitation on infringement notice offences in s 23(1) of the *Road Transport (General) Act 1999*. The purpose of providing accountability through increased enforcement via Transport Infringement Notices is more important than the marginal deterrent effect that a possible penalty of imprisonment may provide.

Roads Committee Inquiry

The Planning, Transport and City Services Committee held an inquiry into this Government Bill and another bill (lapsed) designed to protect vulnerable road users. In the hearing, most vulnerable road users and other witnesses argued strongly in favour of on-the-spot Traffic Infringement Notices (TINs).

Cyclists and road users Mr Budd, Mr Watson and Mr Ibbotson said that TINs were preferable to court enforcement. Mr Ibbotson said that “A TIN is preferable to a court proceeding. In my working life I know how difficult it is to get matters through the court system. There are a whole constellation of stars that would have to align for a successful prosecution.”

Mr Ross, Chief Executive Officer for Pedal Power ACT, said that “My understanding is that there is substantial research that supports the argument that if a penalty is swift and significant it will create behaviour change. Ultimately, what we want to do is to create behaviour change on our roads. We want people to take greater care. I think the answer to both of those things is that we want a swift and significant penalty to follow. A larger penalty is certainly something that we would favour, and something that can be resolved by a TIN would provide an immediate resolution both for the person who was at fault and for the person who was a victim of that offence.”

Mr Hodge, Director for National Advocacy for We Ride Australia, said that “I would agree that we should try to get this behaviour change without burdening, in an unnecessary way, the judicial system. Police undertake all sorts of efforts to enforce rules that keep our community safe. The ability to issue an infringement for something that has endangered vulnerable road users seems absolutely to be the best first step for a community to keep its people safe. It does not deny someone who is issued with an infringement, as you have noted, the ability to challenge it. What we have seen in other jurisdictions, especially in the West Midlands in the UK, is that those sorts of infringements issued for unsafe passing have been very rarely challenged, they have been effective and they have actually changed the safety outcomes for local road users.”

Mr Caruana, President of the Australian Federal Police Association said that “The ability for the police officer to make a decision on the spot to give a TIN will free up the courts. We definitely see that that is an important factor to have... if someone wishes to appeal that TIN, there is a process already in place to do that. They can have their day in court; they can explain their circumstances. On the other side of it, if someone says, “Yes, I am at fault. I caused this issue. I will pay the fine; I will pay the TIN. I will lose my demerit points, but I will get on with life so that I do not have to go back to court for mentions and hearings,” it is a little less work for the courts. We are very supportive of anything which can be done on the ground by members as an immediate penalty.”

Ms Corey, Acting Commander Operations, ACT Policing, said that “TINs are a very useful mechanism, as I said before, particularly for the lower tier offences, where it is a very streamlined process. But it does give that person who has been issued with a TIN the option of going to court if they feel strongly that they should dispute that TIN, whatever the reason may be. That affords them that right. It is always important, I believe, that people have options and have those rights that they can exercise. So that does give them that right to do that. Equally, if it is a higher tier offence and they go to court, they also have that right to defend their position in court. I think that either way their rights are assured, whether it is through the acknowledgement of the strict and absolute—they pay the TIN—or, if they wish to dispute it, they have that option of going to court and having their day in court, as it were.”

Is \$900 the right penalty for this Traffic Infringement Notice?

The Clay Amendment poses a maximum fine of \$900 for an on-the-spot Traffic Infringement Notice. This fine is based on evidence given during the Roads committee inquiry that those suffering actual harm from negligent driving found the existing penalty of \$398 grossly inadequate. This echoed community sentiment from a high-profile case in October 2020 on William Hovel Drive when a car driver towing a trailer knocked a person off their bike and the driver received a \$393 fine and 3 demerit points. Commentary at the time said that the penalty sent the message “that in the ACT you can nearly kill a bike rider riding lawfully on our roads and only receive a relatively light fine.”¹

Further evidence in the Roads committee inquiry showed that fines above \$1,200 tend to lead to more court challenges.

A fine at the higher end of this range of \$398 to \$1,200 was selected to reflect the severity of the consequences for the victim, conform with community expectations for on-the-spot fines and avoid frequent court challenges.

Consultation

During the preparation of this amendment and the Clay bill that preceded it (now lapsed), input was sought and received from various stakeholders and road user groups in the preparation of this Bill, including Pedal Power ACT, Motor Cycle Riders ACT, AFP Association, ACTCOSS and cyclists and pedestrians who had been in a collision with a car.

Human Rights Implications in the Clay Amendment

The Clay Amendment engages and supports the right to life in S 9 of the *Human Rights Act 2004*. This requires that governments, where it is within their power, take positive steps to put in place protections for people's lives. It is important to ensure that there is an appropriate and proportionate array of offences with enforced and enforceable penalties to recognise and discourage negligent driving.

The Clay Amendment engages and limits rights relating to accused people in criminal proceedings in S 22 of the Human Rights Act 2004. Most relevantly, subsection (1) provides that everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to law. The Bill limits this right by providing a Traffic Infringement Notice as a penalty. Without the ability to issue a Traffic Infringement Notice, the only option available to the police and Director of Public Prosecutions is to prosecute offences through the courts. This is a serious response, and this regulation provides a method to achieve the policy purpose that is less restrictive.

In Estimates hearings in October 2021, Mr Drumgold, the Director of Public Prosecutions, explained the human rights implications in issuing on-the-spot Traffic Infringement Notices versus court prosecution offences in the traffic and road safety context. Mr Drumgold said: "It is not all removal of rights. If a matter proceeds by way of infringement notice rather than by way of summons, the person has a right to pay it there and then. There are all sorts of ongoing benefits of that. You do not have to take a day off work and sit in a court list and wait for your name to be called, appear and probably adjourn it. You do not need a lawyer. But there is not an infringement notice that is issued in the territory that you do not have a right to dispute. So it is not a final situation. It is an interim situation. It is an option for someone who might have been speeding or, in fact, has been found with a small amount of cannabis, to admit guilt and pay an administrative fine. It is not necessarily small; many speeding fines are quite large. That gives you an ability to deal with it without having to interrupt your life. But, again, it is only if you acknowledge the guilt of it. If you do not acknowledge the guilt of it then you have a right to dispute it, the same as any other matter. It is not really a matter of rights. If a matter proceeds by way of infringement notice rather than by way of summons, the person has the right to pay it there and then. That means there are all sorts of ongoing benefits with that... particularly in traffic matters, because of the volume of them, they work quite well with the option of traffic infringement notice."

Adopting this reasoning, it could be argued that the shift to making available a Transport Infringement Notice does not engage the right to be presumed innocent at all. Given that paying an infringement notice amount does not, at law, amount to an admission of guilt, this should be the preferable view.

However, to the extent that providing for a Transport Infringement Notice does engage the right to be presumed innocent, it is a well-justified and minor limitation. The purpose of the Clay Amendment is to broaden the enforcement of an important offence to provide consequences for mid-level negligent driving, ultimately promoting public safety. The burden on the right is not substantial, given all rights afforded to an innocent person in ordinary proceedings are still present, the limitation only being that a person may not fully understand this, or may out of convenience pay the penalty where otherwise they would have contested it. There is no reasonably available alternative; the most apparent alternative is to provide only for court prosecution. However, as evident from presenting this amendment in the first place, that would not achieve the legitimate purpose of these amendments, which is to promote safety through broader enforcement and awareness of this new offence.

CLAUSE NOTES

CLAUSE 1 Section 6(1)

This clause omits the term of imprisonment for 6 months.

CLAUSE 2 Schedule 1, part 1.2

This clause inserts a Traffic Infringement Notice penalty of 50 penalty units, being \$900 and 3 demerit points.

ⁱ <https://www.canberratimes.com.au/story/6953593/video-shows-cyclist-hit-by-car-on-william-hovell-drive/>
<https://www.canberratimes.com.au/story/7120141/driver-who-hit-cyclist-off-bike-is-fined-393/>