

2021

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**ROAD TRANSPORT (SAFETY AND TRAFFIC MANAGEMENT)
AMENDMENT BILL 2021 (NO 2)**

EXPLANATORY STATEMENT

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Road Transport (Safety and Traffic Management) Amendment Bill 2021 (No 2)

This explanatory statement relates to the Road Transport (Safety and Traffic Management) Amendment Bill 2021 (No 2) (the Bill) as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

The Statement must be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. 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 Bill

The purpose of the Road Transport (Safety and Traffic Management) Amendment Bill 2021 (No 2) is to improve road safety and, where Vulnerable Road Users (people outside of a car) are harmed, to bring penalties closer to meeting community expectations.

The Bill introduces a new offence for negligent driving that causes harm to a Vulnerable Road User with a maximum penalty of 50 penalty units. The Bill also introduces a traffic infringement notice penalty for this offence of \$1600 plus the loss of three licence points.

The Bill aims to address conduct that has inflicted actual harm to a person. This is in response to frequent reports where Vulnerable Road Users suffer injuries and the driver involved receives either no penalty or a traffic infringement notice involving a \$393 fine and three demerit points.

Consultation showed that applying no penalty or applying a low penalty does not meet community expectations where negligent driving has injured another person. It also does not recognise the responsibility involved in driving a motor vehicle or the protective hierarchy in which motor vehicle drivers should take care of Vulnerable Road Users.

The Bill forms part of a long-running government program of legislative reform, community education and road safety measures such as Slower Streets and Vision Zero that aim to protect Vulnerable Road Users. It is consistent with the existing recognition that some road users are more vulnerable than others and require greater protection (for instance, speeding in a school zone attracts higher penalties than speeding outside a school zone). It supports ACT goals of increasing active travel, reducing transport emissions and aiming for zero road deaths and injuries.

Any road collision that involves a Vulnerable Road User is much more likely to lead to serious injury or death than a road collision that involves two cars. This is due to the increased safety standards of modern motor vehicles, their size, their weight and their ability to travel at higher speeds. A person driving a car is surrounded by armour. A person walking, riding a bike or motorcycle or operating a wheelchair is surrounded by air.

The 2019 data on traffic fatalities from the Federal Office of Road Safety indicates that 13.4% of road fatalities were pedestrians, 17.7% were motorbike riders and 3.3% were bike riders. The 2017 data on serious injuries are even more concerning. Those showed that pedestrians suffered 6.9% of serious injuries, motorbike riders suffered 22.2% of serious injuries and bike riders suffered 18% of serious injuries. Almost half of the serious injuries and more than one-third of fatalities are suffered by Vulnerable Road Users. Vulnerable Road Users experience serious injury and death at a disproportionately high rate.

As well as suffering physical injuries from a collision with a car, Vulnerable Road Users often suffer significant psychological injuries. PTSD, ongoing trauma and an inability to return to active travel are common. Canberra hospitals treating Vulnerable Road Users often brief their patients about the likelihood of ongoing psychological impacts. Vulnerable Road Users are by their nature vulnerable. They require a higher level of protection than other road users.

The Bill bridges the gap between existing low-tier offences and existing high-tier offences in the *Road Transport (Safety and Traffic Management) Act 1999*. The Bill provides a reasonable mid-tier offence to address and reduce real harm.

Community expectations are not being met

Consistent and complete data about incidents involving Vulnerable Road Users is difficult to obtain. However, stakeholder and victim consultation and media reports indicate that incidents are frequent and penalties do not meet community expectations.

One recent high-profile case occurred in October 2020 on William Hovel Drive when a car driver towing a trailer knocked a person off their bike. The Vulnerable Road User was treated by paramedics at the scene and taken to hospital. Dashcam footage clearly showed the collision.

Comments made by the public included that the driver was in charge of a 'lethal weapon' and that the incident was 'negligent or even malice', 'attempted manslaughter', 'aggravated assault' or 'vehicular homicide/violence'.

The driver subsequently received a \$393 fine and 3 demerit points. Commentary 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.'ⁱ

Existing low-tier offence – 20 penalty units

Existing section 6(1)(c) of the *Road Transport (Safety and Traffic Management) Act 1999* prohibits negligent driving that falls short of causing death or grievous bodily harm (maximum penalty of 20 penalty units).

This is consistent with existing offences that attract 20 penalty units and do not require proof of harm to a person, such as performing a burnout or handbrake turn (s 5B), driving negligently without causing harm (s 6(1)(c)), using a speed camera avoidance device (s 9), or driving on a temporarily closed road (s 30).

Similarly, existing regulations provide that using a mobile phone while driving incurs a fine of between \$480 and \$589 (Schedule 1 of the Road Transport (Road Rules) Regulation 2017).

These are antisocial and potentially dangerous behaviours, but there are no immediate victims.

20 penalty units or a low fine is not appropriate where there is a victim who has been harmed. It is even less appropriate when the person who has suffered harm is a Vulnerable Road User who needs protection. A low penalty is not in line with community expectations in this instance. It is not seen as a deterrent. It is not likely to support our road safety culture or to reinforce the fact that motorised road users must take care of Vulnerable Road Users.

Existing high-tier offences – 100 penalty units or more and/or imprisonment

Existing sections 6(1)(a) and (b) prohibit negligent driving that causes death or grievous bodily harm (maximum penalty of 100 to 200 penalty units or imprisonment or both). These offences will not apply in the majority of non-fatal collisions that occur. Most accidents in which a pedestrian or cyclist is injured do not involve grievous bodily harm or death. That does not mean the consequences aren't significant. They typically are severe, long-term and sometimes lifelong. But they fall short of grievous bodily harm.

Existing sections 7 and 8 prohibit furious, reckless or dangerous driving and menacing driving (maximum penalty of 100 to 300 penalty units or imprisonment or both). These offences involve a high threshold of culpability on the part of the driver. They are not appropriate in the majority of non-fatal collisions that occur where a driver is simply driving negligently and failing to take appropriate care. It is appropriate that the existing high-tier offences with a high degree of intentionality require a high degree of evidentiary proof. However, that level of evidentiary proof is not necessary for a mid-tier offence where most elements of the offence are clearly defined.

Proposed mid-tier offence – 50 penalty units + 3 points, traffic infringement notice

This Bill provides the clear mid-tier gap. The majority of Vulnerable Road Users harmed on the roads involves this mid-tier. The pedestrian or cyclist is not killed but they are harmed. The harm and conduct are clear. This proposed amendment will give police a simple traffic infringement notice to apply in these situations where harm has occurred, the conduct is clear and a higher penalty is warranted, but imprisonment and a requirement for full criminal prosecution are not warranted.

Consultation

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 and ACTCOSS.

Input was also received from Vulnerable Road Users who had recently been in a collision with a car and their families. In order to protect their privacy and prevent further trauma, these victims will remain unnamed.

Consistency with Human Rights

During the development of the Bill, due regard was given to its interaction with human rights as set out in the *Human Rights Act 2004* (the HRA). The Bill engages and supports the right to life (s 9) and engages and limits rights in criminal proceedings (s 22).

The right to life – engaged and supported

Section 9 of the HRA provides that everyone has the right to life. This requires that governments take positive steps to, where it is within their power, put in place protections for people's lives. While there is already a high-range offence for negligent driving causing death, conduct that only causes harm could just as easily cause death.

It is therefore important to ensure that there is an appropriate and proportionate array of offences to recognise and discourage negligent driving, especially when this is around a Vulnerable Road User. By drawing further attention to the vulnerability of certain road users and recognising their need for a special category of protection, this Bill assists in discouraging the kind of driving that can easily cause death. It therefore supports the right described in s 9 of the HRA.

Rights in criminal proceedings – engaged and limited

Section 22 of the HRA describes a number of rights relating to accused people in criminal proceedings. 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 in two respects:

- The application of strict liability to certain elements of the offence.
- The availability of a traffic infringement notice in relation to the offence.

The application of strict liability to some elements of the offence limits the right to be presumed innocent, because the prosecution is not required to prove fault elements in respect of the physical elements identified. This reduces the burden on the prosecution to a small extent.

The availability of infringement notices engages and minimally limits this right, because it allows a person to be penalised without being tried. However, they are at law not deemed guilty of an offence. Additionally, this availability supports the principle behind the right described in s 22(2)(c), wherein an accused person must be tried without unreasonable delay. A person issued an infringement notice is not required to engage in any extended or arduous criminal proceedings. Given this minimal limitation, most of the below discussion will focus on evaluating the strict liability parts of the Bill.

Section 28 of the HRA provides that human rights may be subject to reasonable limits.

Legitimate purpose of the limitation

These provisions are proportional and legitimate.

The legitimate purpose of creating this new offence is to afford necessary protections for vulnerable road users in a way that current legislation fails to do. Vulnerable Road Users are a distinctly at-risk group of road users who need additional protections and rights when they share the road with motor vehicle users. Vulnerable Road Users are a distinct class of road user whose rights to safety and amplified risk of harm from motor vehicles is clear. Vulnerable Road Users are at risk of serious and lifelong injury with any collision involving a car. The consequences are completely different from 'minor' collisions involving two cars. Existing offences and penalties do not recognise the unique status of Vulnerable Road Users nor the serious consequences that can occur.

Motor vehicle users already understand their duty of care for other road users. The use of a motor vehicle requires a licensing scheme in which those permitted to drive are taught road rules and this duty of care. It is appropriate to ensure that those taking on the significant responsibility of driving a motorised vehicle are undertaking this with sufficient care and, where they do not take care and cause harm to a vulnerable group, there are appropriate penalties. It is also a clear signal that shows the severity of this type of negligent driving and it is more in line with community expectations for causing injury to another person.

The nature, extent, importance and purpose of the limitation

Making some elements of this new offence strict liability is necessary to give efficacy to the purpose of the provisions. To provide an offence capable of filling the current 'missing middle' in our traffic offences, it is important that the new offence is in a state that is not so overly complex that it will not be enforced. Furthermore, the conduct where culpability is most important – the negligent driving – does not attract strict liability. This is in recognition of the fact that the strict liability elements – causing harm to a vulnerable road user – are matters about which a driver should be on such high alert that there does not need to be proof that they intended to or averted their mind to the possibility of harm. This is a matter that should always be in front of mind for a driver.

The extent of the limitation is such that the whole offence is not rendered strict liability, in recognition of the fact that the driver's state of mind when driving negligently is still something that rightly requires evaluation and proof.

Are less restrictive means available?

The existing low-tier and high-tier offences do not cover the conduct that is occurring. They do not prevent harm to Vulnerable Road Users. They do not contribute to a culture of safety. A new offence is needed to perform these roles.

The low-tier offences are in use and easily proven by police in incidents, but the penalties are insufficient where there is harm. The high-tier offences do not apply to the majority of incidents that are occurring.

Strict liability was applied to the minimum elements of the offence where no intention is involved. It does not apply to the negligent driving element of the offence, only to the harm element.

A higher penalty and imprisonment was considered and dismissed as too onerous for the overall provision. However, it is noted that imprisonment applies to other offences that cause harm.

Some element of police discretion will be involved in issuing infringement notices. This is seen to be justified given our increasing population of drivers and Vulnerable Road Users, the need to protect people from harm and the need to move to a culture of safety as quickly as possible.

A recipient of a traffic infringement notice can either pay the fine and accept the demerit points or they can appear in court. This provides them with adequate means to protect their rights if they feel that discretion has been inappropriately applied.

CLAUSE NOTES

CLAUSE 1 NAME OF ACT

This clause states that the name of the Act is the *Road Transport (Safety and Traffic Management Act) Amendment Bill 2021 (No 2)*.

CLAUSE 2 COMMENCEMENT

This clause states the Act will commence the day after it is notified.

CLAUSE 3 LEGISLATION AMENDED

This clause states the legislation being amended, namely the *Road Transport (Safety and Traffic Management) Act 1999*.

The note to the clause states that schedule 1 to the Bill amends other legislation, namely the *Road Transport (Offences) Regulation 2005*.

CLAUSE 4 SECTION 5AA, NOTE 1

This clause amends the list of sections set out in note 1 to section 5AA of the *Road Transport (Safety and Traffic Management) Act 1999* that are subject to the Criminal Code to include new section 5D (as inserted by the Bill).

CLAUSE 5 NEW SECTION 5D

Clause 5 of the Bill sets out a new offence under the *Road Transport (Safety and Traffic Management) Act 1999* of causing harm to a Vulnerable Road User by driving negligently. This offence attracts a maximum penalty of 50 penalty units.

Clause 5 of the Bill uses the existing definition of harm in the *Criminal Code*. This is a well-established definition in common use. It includes physical harm. It also includes harm to a person's mental health including psychological harm, but it does not include mere ordinary emotional reactions and it does not include being subjected to any force or impact that is within the limits of what is acceptable as incidental to social interaction or to life in the community.

CLAUSE 6 SECTION 7A (4), DEFINITION OF VULNERABLE ROAD USER

The term 'vulnerable road user' is currently only used in section 7A of the *Road Transport (Safety and Traffic Management) Act 1999*, therefore the definition of that term is currently defined for that section only.

Clause 6 of the Bill relocates the existing definition of 'vulnerable road user' and the examples from section 7A (4) to the dictionary so that the definition of that term will also apply to the use of the term in new section 5D.

The definition of *vulnerable road user* is a well-established definition and is defined as a 'road user other than the driver of, or passenger in, an enclosed motor vehicle.' Examples of Vulnerable Road Users include pedestrians, cyclists, motorcyclists and users of motorised scooters.

SCHEDULE 1 ROAD TRANSPORT (OFFENCES) REGULATION 2005

Schedule 1 of the Bill sets out a consequential amendment to the *Road Transport (Offences) Regulation 2005* which provides for a traffic infringement notice for the offence. The traffic infringement notice penalty is \$1600 plus 3 demerit points.

ⁱ <https://www.canberratimes.com.au/story/6953593/video-shows-cyclist-hit-by-car-on-william-hovell-drive/>
<https://www.facebook.com/watch/?v=338793430904839>
<https://www.canberratimes.com.au/story/7120141/driver-who-hit-cyclist-off-bike-is-fined-393/>