LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON PLANNING, TRANSPORT AND CITY SERVICES

(Reference: Inquiry into Road Transport (Safety and Traffic Management) Amendment Bill 2021 (No 2) and Road Transport Legislation Amendment Bill 2021)

Members:

MS J CLAY (Chair)
MS S ORR (Deputy Chair)
MR M PARTON

PROOF TRANSCRIPT OF EVIDENCE

CANBERRA

THURSDAY, 4 NOVEMBER 2021

This is a **PROOF TRANSCRIPT** that is subject to suggested corrections by members and witnesses. The **FINAL TRANSCRIPT** will replace this transcript within 20 working days from the hearing date, subject to the receipt of corrections from members and witnesses.

Acting Secretary to the committee:
Ms J Rafferty (Ph: 620 50557)

By authority of the Legislative Assembly for the Australian Capital Territory

WITNESSES

Privilege statement

The Assembly has authorised the recording, broadcasting and re-broadcasting of these proceedings.

All witnesses making submissions or giving evidence to committees of the Legislative Assembly for the ACT are protected by parliamentary privilege.

"Parliamentary privilege" means the special rights and immunities which belong to the Assembly, its committees and its members. These rights and immunities enable committees to operate effectively, and enable those involved in committee processes to do so without obstruction, or fear of prosecution.

Witnesses must tell the truth: giving false or misleading evidence will be treated as a serious matter, and may be considered a contempt of the Assembly.

While the committee prefers to hear all evidence in public, it may take evidence in-camera if requested. Confidential evidence will be recorded and kept securely. It is within the power of the committee at a later date to publish or present all or part of that evidence to the Assembly; but any decision to publish or present in-camera evidence will not be taken without consulting with the person who gave the evidence.

Amended 20 May 2013

The committee met at 10.11 am.

ROSS, MR IAN, Chief Executive Officer, Pedal Power ACT
HODGE, MR STEPHEN, Director, National Advocacy, We Ride Australia

THE ACTING CHAIR (Ms Orr): Good morning, everyone. Welcome to the public hearing for the committee's inquiry into the Road Transport (Safety and Traffic Management) Amendment Bill 2021 (No 2) and the Road Transport Legislation Amendment Bill 2021.

The committee wishes to acknowledge the traditional custodians of the land that we are meeting on, the Ngunnawal people, and pay our respects to their elders past, present and emerging. We respect their contribution to the continuing culture of this country. We would also like to acknowledge and welcome other Aboriginal and Torres Strait Islander people who may be attending today's event or listening online.

Today we will hear from the minister and his officials, and witnesses from organisations and the community. The first time that you speak, could you indicate that you have read and understood the privilege statement that has been forwarded to you by the secretary? It is also on the pink card on the table in front of you.

Today's hearing will be recorded and transcribed, and witnesses will receive a copy of the proof transcript for comment. If anyone takes questions on notice, please provide answers within five days of the secretary providing you with the uncorrected proof transcript, with day one being the first full day after receipt.

We will now hear from our witnesses in the first session, Mr Stephen Hodge, Director of National Advocacy for We Ride Australia, and Mr Ian Ross, CEO of Pedal Power ACT. Does anyone have a very brief opening statement that they wish to make before we go to questions?

Mr Ross: We were told that we would not be able to make opening statements.

THE ACTING CHAIR: That message did not make it to me. You can make a one-minute statement; I am sure we can indulge that. We will then go to questions.

Mr Ross: I have read the privilege statement, and I accept it. Thank you for the opportunity to appear. Pedal Power welcomes both bills. We feel that both bills can be enacted together. Together, they will improve the safety of all people on our roads.

Pedal Power intensely campaigned for improvements to our road transport legislation after a bike rider was injured last year. The at-fault driver was charged, and we saw a relatively small fine of $393. After that incident, the whole issue of negligent driving became much more of an issue for us and we began to receive people's stories about their experiences of car accidents, car crashes, negligence and the outcomes from that. We found significant gaps.

We are keen to see both pieces of legislation enacted. However, of the two pieces of legislation, we believe that Ms Clay's legislation will be the one that has the most

impact on the cycling community and will most benefit behaviour change on our roads.

Mr Hodge: I have read and agree to abide by the privilege statement that was provided to me.

THE ACTING CHAIR: Mr Ross, you made reference to a particular incident that has led to a lot of advocacy from your organisation, Pedal Power. That goes to the key issue within Ms Clay's bill. Can you run us through your understanding of that accident and why it has motivated you to support the outcomes here?

Mr Ross: We saw a video that was posted, where two riders were riding down Coulter Drive towards William Hovell Drive. They had crossed the road and were in the off-lane when a vehicle approached from behind, appeared to try to pass them, went over the white median strip and re-entered the lane. The car had a trailer at the back, and that trailer struck the rider in front.

The car passed over the median line and passed to the rider's left. The car did not strike the rider but struck the rider in front, knocking him off his bike, and causing significant injuries to that rider. Pedal Power was quite concerned about it, as was the whole cycling community. We have seen many accidents occur over the last few years, and we have been involved in many discussions around accidents, but that one really struck a chord in the cycling community and caused our community to ask, "What's happening here?"

When the penalty was finally handed down, it was a $393 fine. I think the community was quite outraged that it was quite a low fine and a low penalty. My understanding is that there were significant outcomes for the rider. Certainly, we understand that, under the current legislation, if there is actual bodily harm, that can have quite significant impacts. The only penalty, at this point in time, that can be levied through a TIN is this $393 fine.

THE ACTING CHAIR: You say it is through a TIN; my understanding is that there are other avenues if there is bodily harm.

Mr Ross: Yes.

THE ACTING CHAIR: But it is just within the TIN process.

Mr Ross: Yes.

THE ACTING CHAIR: It is not that this is the only avenue; there are other avenues. But this is through the TIN.

Mr Ross: Correct.

MR PARTON: So much of the focus has been on the incident that you mentioned, Mr Ross, on video. How much of this is about negligence? Is any of it about intent?

Mr Ross: Intent is not an issue for us. We have no view about whether there was

intent or not, in that incident; it does not matter. When people are in charge of a vehicle, travelling in a significant steel shell and heading down the road, there is an additional expectation that those people will take extra care when they are on the road. It is about not taking risks, attempting to cut corners or whatever. In the incident that we saw, we saw someone cutting across a white median strip and passing to the left. Both of those things are problematic, obviously, and caused an accident. If that person had not taken that action, that rider would not have been injured.

Mr Hodge: There are two parts to this. One is due care and one is providing clear guidance about what is expected of drivers around vulnerable road users. The reason why safe passing legislation has been passed nationally is that it provides clear guidance about leaving sufficient distance when you are passing vulnerable road users, exactly to avoid this kind of accident.

The other part about due care is that clearly defined vulnerable road user traffic infringement information or approaches alert drivers who can be a danger to vulnerable road users to what the expectation is for them to take care when they are passing vulnerable road users. We have talked a lot about this; nationally, that is why there has been an agreement, broadly, to adopt a safe passing distance.

The other problem is that it needs to be immediate. The impact of causing an accident to a vulnerable road user is much more effective if there is an immediate response for enforcement and the result of an infringement that confirms that they have not taken due care.

MR PARTON: When I looked at that incident in particular, I thought, "This person doesn't drive a trailer very often." I thought they had forgotten that they had a trailer on the back. They had got into an automatic mode of "I'm clear." When I look at the intent in that incident, I would like to believe that there could not possibly be any. I have always wrestled with this, along the lines of: if, in that incident, there was no intent, what difference do we get if there is a heavier penalty?

Mr Ross: There was risk-taking behaviour. I am reluctant to tie this too much to a single incident, but that person did cross over the island and did pass the two riders. Actions were taken that did not accord with the road rules, and the driver made a decision to do those things. I do not know whether the driver had any intent. Nothing leads me to believe that that was the case. That is irrelevant. There was an intent to cross over that island, though; so the road rules were broken and, as a result, somebody got hurt.

Mr Hodge: In a more general sense, however—because that is where this has to go; this has to be a rule that applies generally—you are responsible. You cannot make the rider responsible for a driver who is unused to driving a trailer and drives in a way that ends up costing vulnerable road users their liberty and causes injury and harm. You cannot have a situation where the rider is responsible for a driver who is unused to driving a trailer and then drives in a way that harms them.

MS CLAY: We have two different bills. One has a scale of offences, most of which would end up in court—they are at the serious end of the scale—and a traffic infringement notice, which would be for negligent driving, which is not really an

intent offence. Usually, there is not intent; that is the point with negligent driving. The fine would be $598, so it is slightly higher than the $393, but it is still in the same ballpark. The other bill, at the lower end of the traffic infringement notice, has a penalty of $1,600.

I am interested to know, as there was a lot of community outrage about the scale of the $393 penalty, whether you think a $598 penalty would be seen to be enough, with respect to actual harm, or whether $1,600 is better. Also, for offences which are not causing grievous bodily harm or death, but negligent driving that causes harm which is—I do not want to say low level because no accident is minor for the victim—at the lower end of the scale, do you think that is a good thing to be able to do via a traffic infringement notice, rather than requiring that it must go to court? I note that, when somebody gets a TIN, they can always dispute it in court, so it may end up there anyway. Those two things are probably the two biggest differences in those two bills.

Mr Ross: 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: 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.

I think that both have a place. I will leave it to Pedal Power to say what their preference is, but the issue of an immediate response, an enforcement response, issued through an infringement, is appropriate and will achieve good outcomes.

MS CLAY: For the behaviour change that we want, what else would you like to see introduced along with whichever legislative reform we have, to make sure that we get that behaviour change?

Mr Ross: It is really important that we see some targeted education campaigns occurring as a result of the legislation and that it specifically encourages people to take extra care around vulnerable road users.

THE ACTING CHAIR: In the Pedal Power submission, you say that community expectations are not being met. What did "community" stand for in this context? Is it

the cycling community? Is it your membership?

Mr Ross: I would say it is much broader. This is not a cycling issue. We are all vulnerable road users at some point in time. When you get out of your car, you are a vulnerable road user. When you are walking your kids to school, you are a vulnerable road user. We have people using motorbikes; they are vulnerable road users. The community wants to see those people protected.

THE ACTING CHAIR: The question I am getting to is: in providing the evidence in your submission regarding the broader community—I am not disputing the fact that everyone wants to be safe; we can take that—what is the community that you are referring to? What are the parameters that you—

Mr Ross: Certainly, within our own cycling community, there has been a high level of concern. As I said at the beginning, it is probably one of the highest concerning issues within the cycling community. We have certainly talked to Living Streets and the walking community. We have talked to the Motorcycle Riders Association. We have not found any community groups that are not concerned. We talked to the NRMA recently. They are also concerned that this is something that they would like to see enacted.

Mr Hodge: Can I add a national perspective to this? The work on the future national road safety strategy clearly indicates that the only two groups in our community that are suffering worse rates of traffic accidents, trauma and death are vulnerable road users—cyclists and pedestrians—and, in particular, cyclists. Nationally, this is a group of concern. It includes motorbike riders, who have the worst road safety records. But vulnerable road users, pedestrians and cyclists, are of particular concern in the national debate around road safety.

THE ACTING CHAIR: You said that you would like to see an education campaign. If this legislative change is made that imposes a higher infringement penalty, in isolation, without anything else, do you think it would be effective?

Mr Ross: If there is an increased penalty?

THE ACTING CHAIR: If Ms Clay's bill goes forward and the penalty is changed, and that is the sole action that comes out of this, would you see this as being effective?

Mr Ross: Yes.

THE ACTING CHAIR: Would you see it as being more effective if it was in a suite of measures?

Mr Ross: Enacted alongside Minister Steel's measures?

THE ACTING CHAIR: The point I am getting to here is that, within all of the submissions, we have heard about a lot of work that has been done over the years to improve the safety of vulnerable road users—separated cycle lanes, passing laws, and a suite of actions which go to improving—

Mr Ross: For sure.

THE ACTING CHAIR: The point I am trying to drill down on and the point I am trying to get to is: if we do one thing in isolation, is that the silver bullet or is it actually a case of there being a larger piece—

Mr Ross: No, this is not a silver bullet. This is another measure that is going to protect people. Of course we need separated cycle lanes; we need a whole range of measures. But when you are riding on the road—and we need to ride on the roads regularly in the ACT—the law is the primary protection that applies to people. We need people who are driving past people who are cycling or walking to take care.

THE ACTING CHAIR: We are out of time. I would like to thank Mr Ross and Mr Hodge for appearing today. We will now move on to our next session.

CARUANA, MR ALEX, President, Australian Federal Police Association
ROBERTS, MR TROY, Media and Government Relations Manager, Australian Federal Police Association

THE ACTING CHAIR: I welcome Mr Roberts and Mr Caruana from the AFPA. When you first speak, can you please indicate that you have read the privilege statement, which I believe the secretary forwarded to you before the committee; there is also a copy on the pink cards at the table.

Today's hearings will be recorded and transcribed. Witnesses will receive a proof transcript for comment. If anyone takes questions on notice, please provide answers within five days of the secretary providing you with the uncorrected proof transcript, with day one being the first full day after receipt of that transcript.

We will now move to questions. Even though we told you that you could not have opening statements, I am changing that process as we go. I am more than happy for you to make a quick one-minute statement if you want to; otherwise we will jump straight into questions.

Mr Caruana: We are happy to jump straight into questions. I have read the privilege statement. Thank you for involving us; we think it is really important that the association is involved in these types of decisions.

THE ACTING CHAIR: Mr Parton, do you want to take the first question?

MR PARTON: I am happy to. In regard to the passing laws that are in place now, how do your members feel about the enforcement of those? I know that sometimes it is problematic.

Mr Caruana: They do sometimes come across with comments about it being difficult and unclear. However, the importance of creating this new legislation is to make it very clear, abundantly clear, to road users—both vulnerable road users and non-vulnerable road users, and police officers—that this is what the expectations are, this is what the fine is going to be and this is what the options are for the police officer enforcing the new legislation. Troy, as a police officer, did you—

Mr Roberts: Yes. In relation to enforcement, it can be quite difficult at times. Sometimes it is in the eye of the beholder as to what is a near miss or what is close. Measuring that one metre or 1.5 metres can be difficult. You need to take both sides of the story when you are doing an investigation. Is it 0.9 metres? Is it 1.1 metres? We have a lot of middle grey in our legislation.

MR PARTON: Irrespective of those problems, Mr Caruana, you are of the belief that it has sent the right message and achieved what it was supposed to achieve? That is what I am trying to get to.

Mr Caruana: Yes, certainly. The feedback that we are getting is that, yes, it has. Police officers have mentioned that they would enjoy greater powers to also be able to give a traffic infringement notice to vulnerable road users, because sometimes the

vulnerable road users are the people at fault and it is more difficult to give them a traffic infringement notice when they could be a pedestrian or a cyclist.

THE ACTING CHAIR: Mr Roberts, can you acknowledge the privilege statement, please?

Mr Roberts: Sorry; I acknowledge that I have read the privilege statement.

THE ACTING CHAIR: I just needed to get that on the record. Mr Caruana, sorry; I cut you off. Would you like to finish?

Mr Caruana: Yes. Essentially, because it is so grey, it is about the ability for them to give an infringement notice or to make it abundantly clear, to them and to the community, that they have the ability to give these infringement notices both ways. An example is that often cyclists are riding well and truly five or six abreast, blocking the road. It would be really good to send a message to the community that they are making it really difficult for a non-vulnerable road user. How do police officers enforce that without politely pulling them over if they are recidivist offenders et cetera?

THE ACTING CHAIR: So there are all kinds of shades of grey in enforcing these measures? Is that what you are saying.

Mr Caruana: That is right.

THE ACTING CHAIR: It is not just as simple as there being a fine that gets applied?

Mr Caruana: That is right. And I will be clear: our members are also vulnerable road users. We have bike patrol police. We have horse patrol police, though not so often; that is mostly ceremonial. We also have motorbike police. We have vulnerable road users in our membership as well and they are expressing their concerns both ways.

MS CLAY: I have a question on a similar theme, but bringing it back to the bills we have before us. We have two bills, and there are key differences between those two bills. One of them has a whole range of court prosecutable offences, the bottom end being a $598 fine for neg driving. That can be a TIN, but the rest will need to go to court. The other bill involves a TIN for causing actual bodily harm, so it does not involve so much grey. There is not all that much discretion over a safe passing distance rule; it is that somebody has been harmed. That bill has a $1,600 fine by TIN. If you received that TIN and disagreed, you could challenge it in court.

Whatever ends up in legislation, do you think there is a need for an actual bodily harm neg driving offence, where there has been actual harm, with that higher end of penalty of $1,600 that the police can do, rather than forcing everything to go through the courts?

Mr Caruana: Yes. We feel, and our members feel, that there is definitely a gap between a standard neg driving charge and the neg driving crime or offence that causes actual bodily harm. 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.

We think that both bills—Troy, you can correct me if I am wrong here—are very good. We would like to see them come together and be put up as one piece of legislation. It would probably be a cleaner option to take the good bits out of each of them. However, to answer your question directly: yes, definitely we see that there is a gap in the market, so to say, for that piece of legislation to slot in.

MS CLAY: Do your members often find that with a traffic matter there might be a number of offences that could apply and they have to decide which offence is the most appropriate? Is that something that they are familiar with, and are they able to pick the right offence if there is a set of circumstances that might fit two or three different offences?

Mr Caruana: I will throw that one to Troy.

Mr Roberts: Yes. Especially in the neg drive space, it is so broad an interpretation that seeing some guidelines and offences which simplify that process would be great for the members on the road and give them a bit of direction as to what they can issue a TIN for.

The beauty about the TIN, for us, is that the matter can be resolved—or not resolved, but there is an outcome on the spot. As you said in your question, 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.

THE ACTING CHAIR: Going to the penalties, there is the proportionality principle within the law: that the penalty should be proportionate to the crime per se. That brings us back to intent. In putting forward the TINs, there is a certain amount of proportionality that takes away from the intent and the burden of proof, and it works with the presumption of innocence until proven guilty in applying those.

The penalty that is before us in Ms Clay's bill is quite significantly higher. I think that that is the intent of putting it there. What complications does that put in place, if any, for the enforcement of this? It sets quite a high bar and starts to bring into question the proportionality. How does that go to actually applying that legislation?

Mr Caruana: That is a really good question. I do not know how to answer that, save to say that police officers will use their discretion and they will use it with the information they have on the scene. Seeing something happen in a traffic accident, for instance, they will use what they have seen, smelt, tasted et cetera at the time to make their decision.

I do not think that police officers think about the fine or the ramifications of the fine when they are dealing the penalty, save to say that if that is challenged in court it might become a grey area: "Why did you make this decision? Why did you give this fine?" I guess that is something that will come up during that process.

Mr Roberts: At the end of the day, the penalty is what the AutoCITE machine prints out. As a police officer, the penalty is the last thing on my mind. I know they have committed an offence. I can clear that via a TIN; I can clear it by summons; I can clear it by arrest. I choose to clear it via a TIN, so I put the offence into the AutoCITE machine and out spits a TIN at the end. "There is your ticket." And then off you go.

MR PARTON: Can I take that to mean that the AFPA's position is that you do not really have a view as to whether the $1,600 amount is too high or too low? You are not really presenting a view on that aspect of these bills?

Mr Roberts: I think the penalty needs to be something which is recognised by the community. I will use the assault police legislation as a good reference. An assault against a police officer used to be common assault. Does that really cover the seriousness of the offence of assaulting a first responder? No. From the good work of the government we saw the new assault police legislation—first responder legislation—come in, which addressed those concerns. The penalty needs to show the seriousness of the offence.

Mr Caruana: To answer your question directly, Mr Parton, there needs to be a penalty there and it needs to be representative of the offence. However, the dollar figure, in our opinion, is up to the lawmakers.

THE ACTING CHAIR: Okay. So it is more about having an offence for that mid-range gap, but is it fair to say, then, that the AFPA would support that being proportionate, within the hierarchy of what is already there, so that when it goes to legal appeal, if it does, it is not overturned and the bar is not so high that it cannot be prosecuted?

Mr Caruana: That is exactly right. It does need to be high enough to be a deterrent, but it also needs to be low enough so that it does not get challenged or is not thrown out if it is challenged.

THE ACTING CHAIR: Mr Caruana, I have been pronouncing your name incorrectly. My apologies. I want to pick up on what you were saying about also having the ability to fine vulnerable road users for negligent driving. Can you please elaborate on what you mean by that, making reference to experiences where you have seen that being an issue?

Mr Caruana: Yes. To be clear, I am not a police officer, so I have never had to issue a TIN. Troy is my expert in that field. However, members have expressed concerns that sometimes there are vulnerable road users—I will use a lay term—"playing chicken" in the middle of the road, and they speak about having the ability to fine them or give them some type of penalty to dissuade them from doing silly things in that sense.

Troy, correct me if I am wrong, but there is a penalty that they can give, though it is not proportionate to the possible outcome that could come from that. Whether that is a cyclist riding in the opposite direction purposely, playing chicken and then swerving in the opposite direction, or a pedestrian standing in the middle of the road and waiting till the last minute to jump out of the road, there needs to be some proportionality or there needs to be an option for a police officer to use their discretion and provide them with something.

How do they do it? There is no requirement to carry a drivers licence, riders licence, pedestrian licence et cetera. That is all open for discussion. However, there is some concern around the fairness. If someone is racing through a zebra crossing on a pushbike, for instance, and they get hit, who is at fault there?

The non-vulnerable road user is generally the person that gets the bill, because they are in a bigger vehicle, so they must give way. However, if you do not see someone and they just come blaring through, going faster than you expect, who really is to blame? Is it shared blame? The police officer often does not have the option to use their discretion; it automatically defaults to the non-vulnerable road user. Troy, I do not know if you want to add something?

Mr Roberts: Yes. Let me give another example. I will use Cotter Road as an example. It is quite popular with cyclists. There are a lot of blind corners along that road where people can get quite a lot of speed up and a cyclist may drift across or try to cut the corner. If a vehicle is coming the other way, the vehicle may swerve and crash into a tree. Obviously, that crash was caused by the vulnerable road user being on the incorrect side of the road, driving towards the car. The car has had to take evasive action and has come off worst in that incident.

It needs to go both ways. In fairness, there need to be mechanisms to prove the offence, and you have to interview both sides and both parties, but the ability to issue a similar type of offence to the one a non-vulnerable road user would get is important.

MS CLAY: The national stats show that, in terms of bad outcomes, fatalities and injuries, vulnerable road users are disproportionately affected. I agree that anybody using the roads should be using the roads in an appropriate manner. I think that is a social responsibility and a legal responsibility already. But in terms of the actual consequences, we can think of hypotheticals where a car might swerve into a tree, and that would be terrible, but what is happening with the actual numbers? Where there is an incident between a vulnerable road user and a car, does the person in the car usually come off worse or is it usually that vulnerable road user is—

Mr Caruana: If there is interaction between the two?

MS CLAY: Yes.

Mr Roberts: Yes.

Mr Caruana: Obviously, the heavier, more robust vehicle is going to win in that instance, for want of a better term. However, there is currently no mechanism for that vulnerable road user to even stop. In the example that Troy gave, that vulnerable road

user could continue riding up Cotter Road without even having to stop, without even having to pass on any details. There is no mechanism. If my dash cam footage shows a person on a pushbike in front of my car and then I swerve to miss them, the police would have to do an investigation to find that person. Then what do they do? What options does a police officer have, and what is the deterrent?

We think it is important for the vulnerable road user to be safe; we also think it is important that they have a responsibility to provide other road users with safety and not to put themselves in harm's way. That comes back to that example I gave about playing chicken. I am not suggesting that many people do it, but in that particular instance, what does the non-vulnerable road user do? If they pull up, they might get someone rear-ending them. With all these things that go through that person's brain in a split second when they are trying to stop an accident from occurring—which may occur and which may create other accidents—the police need to be able to take that into account and say, "Troy pumped his brakes here because he saw something happening, so that person was being negligent, not the non-vulnerable road user." That will go as a deterrent to keep everybody safe.

THE ACTING CHAIR: In applying a TIN, there is still a lot of consideration that goes on as to what the intent was—whether there was malice, whether it was along those lines. It is not just a case where there was an accident that resulted in this outcome and therefore—

Mr Caruana: That is right. To be clear, we want everybody to be safe. We just think that we need to give our police officers more options to be able to divvy that up.

THE ACTING CHAIR: We are a bit over time, but I am going to ask one more question: can you please define what you mean by "vulnerable road user"?

Mr Caruana: A vulnerable road user would be anybody not in a traditional car, bus, truck et cetera. It is a motorcyclist, cyclist, pedestrian, mobility aid user—someone using those sorts of devices as opposed to a traditional motor vehicle.

Mr Roberts: Including our members when they are doing traffic stops. We saw that incident out near the Arboretum. At the moment that that happened, they were vulnerable road users.

THE ACTING CHAIR: I am very sorry, but I will have to cut Ms Clay off; I know she is very passionate about this.

Thank you for appearing today; for being very kind about my mispronunciation of your surname, Mr Caruana; and for your patience at the beginning while we got the cleaning done. You will be sent the transcripts and so forth. If you have any other questions, just ask the secretary.

KUKULIES-SMITH, MR MICHAEL, Chair, Criminal Law Committee, ACT Law Society

THE ACTING CHAIR: We will kick off with our next bit of the hearing.

Mr Kukulies-Smith: I will just do the formalities.

MR PARTON: Yes, do it.

Mr Kukulies-Smith: I have read and understand the privilege statement that has been provided to me.

MR PARTON: One of the things that were communicated by the AFPA—and it has come through from a number of people in this whole process—is that if issues can be progressed simply as traffic infringement notices and they do not end up going to court it becomes a cleaner process and it does not take up as many resources. My question to you is: if indeed we are working on a $1,600 penalty for a traffic infringement notice, do you think that that would make it more likely for people to contest it in court than if it was a $598 penalty?

Mr Kukulies-Smith: Yes.

MR PARTON: Much more likely?

Mr Kukulies-Smith: I think it comes down to a cost-benefit analysis rather than a legal question in that. But it is definitely a factor. I practise in private practice. The penalties to a client are a significant factor in whether we see them in relation to traffic infringement notices or not. The penalties are obviously twofold. One is the financial penalty; the other is whether or not there is an automatic disqualification that goes along with the situation.

If it is demerit points, it depends on where the person is with their demerit points. If it is not automatic but it is, for example, four points—and I generally do not see many people who have no points accrued on their licence and have just accrued a four—they generally do not come and see a lawyer. Someone who has nine points on their licence in terms of penalties already is highly likely to come and see me in relation to the final four-point offence because that is the one that tips them over the threshold in terms of whether or not they can drive.

There are those two penalties and, as you increase either, you definitely increase the likelihood. I would suggest that anything over about $1,200 to $1,500 is probably at that level. That is probably partly reflective of where the cost-benefit analysis comes in as well, in simple economics.

MR PARTON: Is it your belief then—I think it is, based on that answer—that at the level of $1,600, as a traffic infringement notice for this offence, it is inevitable that it would increase the traffic in the court system?

Mr Kukulies-Smith: I think it is inevitable that it will increase the number of people

going to lawyers. I do not know that it is necessarily inevitable that it goes through because—

MR PARTON: It depends on their advice, doesn't it?

Mr Kukulies-Smith: Exactly. Infringement notice offences have other advantages for clients which lawyers would make them aware of in terms of: of course if you take it to court it appears on a criminal history afterwards or you run the risk that it appears on your criminal history if you are not successful in your challenge. An infringement notice does not.

In this town there is a reality that we have a greater concern for criminal histories in our community, in my experience, and that is partly because of large public service employment. There is more awareness, more checks et cetera done in our community than there perhaps are as a general percentage in cities where the public service is not such a significant employer.

Yes, they will definitely go and see lawyers more often. It does not necessarily flow on—particularly if we are talking about negligent driving and the threshold for that breach, the threshold for the departure from the ordinary standard of driving, is not as significant. Where it is challenged in this area tends to be more in the more significant offences, the culpable drives and the dangerous drives. And that is because the deviation that those tests, or the thresholds that are necessary to meet dangerous or culpable, are higher and that means that there is probably more scope to argue over whether the threshold is being met.

Negligent driving often—not in all cases but often—comes down to a bit of a res ipsa loquitur. There has been an accident and you clearly were not paying attention when you went through an intersection. There was a car or bike that had the right of way. A person has gone through that intersection, failing to stop at either a stop sign or a give way sign. In those examples—and they are the typical examples of negligent driving—it is almost a slam dunk in terms of the prosecution's case against them. I am not sure, for that reason, about just the nature of the test. Negligent driving automatically will have an effect, but I do not think it will be significant.

MS CLAY: You understand the bills. This is marvellous. We are speaking to a criminal lawyer. This is excellent. We have got one bill that has a neg driving TIN with a $598 fine that would presumably, from everything you have said, not cause any burden on the courts in the ordinary course of things. In that bill, if there is negligent driving that causes actual harm, the only option is to take it to court. That is in one bill.

We have another bill that has neg driving that causes harm. It has a $1,600 fine. I take your point that when you get past $1,200 to $1,500 people might start to challenge; so that should be considered. But that is actually a TIN and the only time that would affect the court system is when somebody challenges it.

In one bill everything goes to court if it is actual bodily harm. In the other bill some things go to court if it is actual bodily harm and only if somebody wishes to challenge it. On that basis, which bill do you think is more likely to cause a burden on the courts with these lower level actual bodily harm offences?

Mr Kukulies-Smith: It will partly depend on policing practice in terms of ABH. One of the issues—and I should indicate that the Law Society accept that there is a gap currently between the offence simpliciter and grievous bodily harm, and we also accept that it is common in other areas of the law—is assault provisions. They are the obvious example where we fill that gap in with the concept of actual bodily harm.

Really where that question will be determined is: how often will police charge negligent driving occasioning actual bodily harm? It is a relatively low threshold, actual bodily harm. Where we are talking about motor vehicle accidents—obviously, if it is negligence occasioning actual bodily harm there must be some form of accident that has occurred or some form of collision that has occurred—you would expect that.

Therefore, I can imagine that it would be open, in a lot of circumstances, for police to make that discretionary choice whether they prefer the negligence offence simpliciter or prefer the offence occasioning actual bodily harm. The injuries probably quite often will exist; so it will come down to police discretion, I think. Whether or not almost completely, in cases where there are collisions—and obviously it is really only those where there are collisions, where the injury can flow—obviously there will still be a place even in that example for the offence simpliciter because there are plenty of near misses et cetera that occur where a person can be charged with the negligent drive simpliciter.

THE ACTING CHAIR: We went to the proportionality. We have got the two proposals there. One is significantly higher than the other and is a further reason why, from my perspective, I seek your advice on whether the much higher fee, which sits outside proportional hierarchy, is actually, under the bill, something that creates issues or is not proportional. How does it impact proportion, the principle of proportionality, in five minutes or less?

Mr Kukulies-Smith: It serves as a guidepost in itself. It is not the ultimate guidepost. The maximum penalty is the ultimate guidepost if the matter goes to court. When a court looks at the penalty to impose, it would have regard to an infringement notice and the magistrates would usually ask a prosecutor to indicate to them what the infringement notice amount is so that they are aware of that when they are imposing sentence. But in a strict sentencing exercise their guidepost is that which the common law points to, which is the maximum penalty for the offence, and then you situate the offence.

In terms of if it comes to court, proportionality et cetera is a factor for the court to determine. It will have some regard to the traffic infringement notice, but it is in no way determinative and in a strict sense does not have a great role to play.

In terms of the question: is that proportional? That ultimately is a matter for the Assembly to determine where it thinks the penalty should be. There are the pros that I have mentioned in terms of consequences that do not flow, such as no criminal history. So some members of our community are probably prepared to pay extra, if you like, for that outcome, rather than end up with a lower fine but have gone through a court process and have the other. Whether it is proportional or not, really that question becomes one of looking at what are all the other infringement notice amounts

and situating this in where we think it sits relative to those other amounts. Actually, the proportionality question really cannot be dealt with in the abstract; it has to be dealt with by saying, "What other offences carry $1,500 infringement notices?" And then, "Is this more or less serious than those?" That is really the question of proportionality in terms of determining whether a traffic infringement notice is—

THE ACTING CHAIR: In answering those questions, how important is intent, given that we have heard evidence this morning and received it in submissions where some people have said, "We do not care what the intent is; we are just focused on the outcome," whereas others have said intent is something that should be taken into account in applying a penalty?

Mr Kukulies-Smith: Negligent driving is regarded as the lowest. There are two, as I indicated before, bases on which we increase liability in the driving offences presently. One lever by which we say you made an offence more serious is the degree to which you depart from the appropriate standards and operation of motor vehicles. And they graduate up. Negligence is the smallest deviation from the appropriate standard, then dangerous driving, then culpable drive. As you graduate up through those, the penalty increases.

We have, at the moment, three levels. We have the offence simpliciter, the offence where it causes GBH and the offence where it causes death. And each side pushes up. Obviously, those where it is based on outcome have no relationship to intent and neither do they in the lower tiers in relation to assaults. The same is true of the difference between common assault and assault occasioning actual bodily harm. There is, indeed, the offence which sits at the same level in terms of maximum penalty but has caused grievous bodily harm.

Those offences are purely based on the differences between them and the differences in the maximum penalty are purely based on the outcome. Assault occasioning actual bodily harm and a common assault are the same physical acts in terms of what is required with this. It just is that the additional element is purely whether harm flowed.

There is no concept in an assault occasioning actual bodily harm—the person turned their mind even to the possibility; it does not matter—and in that sense this is just mirroring that reality that we already have in the criminal law and, indeed, we already have it, it has to be said, in the transport legislation as it exists now.

We have three tiers: we have the simpliciter, grievous bodily harm, death. Really, we are not changing the rationale, if this is adopted, for liability. You are just introducing an additional tier within the existing rationale.

THE ACTING CHAIR: The law is comfortable with the idea of introducing the additional tier; it just becomes a question of making sure it is proportionate within—

Mr Kukulies-Smith: Yes. As I say, it clearly exists already in, most obviously, the assault legislation. That is the easiest analogy to draw because it uses the same language.

MR PARTON: Let us both try and be brief here. I think this will be a simple answer.

What is your definition of the lowest level of actual bodily harm? I am taking up your suggestion that this is all going to get down to how often the police determine that there has been actual bodily harm. From a legal perspective, what does the lowest level of actual bodily harm look like?

Mr Kukulies-Smith: Bruises, cuts; they are the obvious answers. Bruises and cuts would be the lowest level that we would usually see, and that would usually be prosecuted. One of the reasons for that is that that evidentially it is easier for a police officer to document because you can take the photographs et cetera.

There is an element in this where there will definitely be some matters which currently would be charged as a simpliciter offence which could now be charged as a more serious negligent drive occasioning actual bodily harm. I suspect there will equally be some matters that are currently charged as GBH that will be charged as ABH, going forward, because of the evidential realities.

The grievous bodily harm invariably involves police engaging in a process of getting a doctor or other medical expert to provide evidence, reports et cetera. That has a cost and resources for the police. If it is at the margin, it may be easier to just take some photographs that show there is a bruise without having to get the X-rays and the expert report that says there is actually a break of the leg underneath or something of that nature.

MS CLAY: My question will be the same one I have asked a few witnesses. With this change of the law, we are obviously trying to reflect community standards, shape community standards, change behaviour, as well as simply have penalties. How important do you think education is? What other measures do you think need to be introduced with whatever is passed to make sure that it achieves what we want it to achieve?

Mr Kukulies-Smith: Education is always important. I do not think I am really qualified as to how to achieve the education. I have no qualification. From the perspective I am here in, I have no expertise to add in terms of that. But I would say that lawyers are always very wary of simply raising the maximum penalty et cetera and saying that criminal law is a deterrent, because the evidence is overwhelmingly that most people do not set out to be breaking the law—that is, most.

Therefore, because they are not setting out to break it, they are not actually turning their mind specifically at the time to: am I breaking the law in doing this? Particularly with an offence of negligent driving, really what it is criminalising is momentary inattention. That is the most common scenario that gives rise.

As I said before, it is most commonly things like fail to stop at a stop sign or fail to give way. If it is charged at a negligent level, it is not the motorist who is driving at 120 in a 40 zone, just to hell with what the other traffic is doing—they are going straight ahead no matter what. That would be a dangerous or a culpable drive.

A negligent drive is the road user who, perhaps their mobile phone is ringing or they get a text message, looks down at the seat next to them as they roll through the intersection or perhaps their child in the back seat is making noise and they turn to

attend to the child instead of keeping their focus on the road. Those are the sorts of things.

It is more about making road users aware of risk; that is going to be more significant than that the criminal law is going to come in afterwards. But it is probably not going to change a great deal of behaviour in a preventative sense—that is the truth—particularly where we are talking about an offence that criminalises momentary inattention, not really any deliberate acts. If they are deliberate acts to fragrantly disregard the road rules, it would be dangerous drive, or culpable drive, that would be more appropriate charges.

THE ACTING CHAIR: My last quick question is: the Road Transport Act—and I would like to thank Ms Clay for her handy swooping on this one—defines a motor vehicle as a vehicle built to be propelled by a motor that forms part of the vehicle but does not include a personal mobility device. Am I right in my understanding then that, in your legal opinion, that would also include motorcycles?

Mr Kukulies-Smith: Yes. Motor vehicles would include what we would say is the traditional fare on the road, and it is for that reason that, for example, the electric scooters would be included but for the fact that they have been specifically defined in legislation as personal mobility devices. Because of that carve-out, they therefore are not.

But a petrol-powered scooter, for example, would, ordinarily. And historically, we used to see some offences like that. I cannot think of one in the ACT, but there was a case interstate in relatively recent times that got a bit of publicity where someone was riding an esky on a road and found to be in breach of, effectively, the same provision as exists in the ACT. They were using a motor vehicle. It was an esky that they had modified with motor, wheels et cetera.

THE ACTING CHAIR: Therefore, the testimony we heard from the AFPA, who said that it was about cars and it was about the size of the vehicle and so forth, needs to be taken into consideration. I do not know if you heard the evidence that, under the legal definition, it is far more nuanced than that and this is not just cars against vulnerable users. You could have a scenario where a motorbike hits a motorbike.

Mr Kukulies-Smith: Yes, absolutely, you can have motorbikes hitting motorbikes or trucks hitting trucks.

THE ACTING CHAIR: Or a motorised esky hitting a pedestrian. That answers my question. I would like to thank you very much for your indulgence in staying back past time. I think that brings us to the end of the first session.

COOPER, MR TOM, General Manager, Beam Mobility
DALE, MR EDWARD, City Lead, Beam Canberra

THE ACTING CHAIR: Welcome back to the public hearing of the committee's inquiry into the Road Transport (Safety and Traffic Management) Amendment Bill 2021 (No 2) and the Road Transport Legislation Amendment Bill 2021.

Appearing in this session via telephone link will be Mr Tom Cooper and Mr Edward Dale, from Beam. When you first speak, can you indicate that you have read and understood the privilege statement, which should have been forward to you by the secretary?

Today's hearings will be recorded and transcribed, and witnesses will receive a copy of the proof transcript for comment. If anyone takes questions on notice, please provide answers within five days of the secretary providing you with the uncorrected proof transcript, with day one being the first full day after receipt.

If there is anything that you would like to say, in one minute or less, to begin with, please feel free to do so; otherwise we will go straight to questions.

Mr Cooper: We are happy to proceed to questions.

MR PARTON: How much consultation was there with Beam on the construction of the bill—the one that specifically involves laws around scooters?

Mr Cooper: I have read the statement that was sent to us. There were a number of consultations. It started almost 2½ years ago. Minister Rattenbury ran a session to which all interested parties were invited. It was held at the Legislative Assembly for a couple of hours, and we discussed issues. They kept us up to date with how the changes to legislation were proceeding and the ability for a trial of shared micro-mobility to come to the ACT. That happened over probably a 12-month period. Obviously, COVID was in the middle of that, so the initial time frames slowed down. We were consulted along the way and it was a very well run process.

MR PARTON: Let us cut to the chase: are you, broadly speaking, happy with where the bill has landed?

Mr Cooper: Yes, we are.

THE ACTING CHAIR: Is that the government bill that we are referring to?

MR PARTON: Yes.

THE ACTING CHAIR: I just wanted to make sure I understood correctly.

MS CLAY: Thank you for appearing today. There has been a lot of community support for the shared scooters. We got some quite positive responses from the government survey that was conducted. There has been a lot of mixed comment in other forums about that. What are your accident statistics showing you, what have you

been doing to improve safety, and do you think that this bill will assist with that general safety concern, which strikes me as the only really contentious concern that has been raised so far?

Mr Cooper: We have focused pretty heavily on education. We worked closely with Minister Steel and his team to roll out a campaign for operators of shared mobility. That has been widely well received. Within our own apps, we are constantly educating people to make sure that they wear a helmet and that they understand the road rules.

We run safety days. We have run three safety days in Canberra, where we invite people to come along and do a defensive driving course. We explain more about how scooters can be ridden safely. We have done this using a number of different education tools—social media, website and contacting existing users. We also have a team on the street who are constantly educating riders about how to safely use an e-scooter, not just for themselves but for those around them.

MS CLAY: I have completed one of your safety days. It was a lot of fun, actually; it was excellent training. I noticed in your submission that you have quite a lot of innovative ideas about how to work on this ongoing issue of making sure that we are using these safely. There was mention of alcohol-detecting technology. You are obviously looking constantly at both technology and education when it comes to improving safety?

Mr Cooper: Yes, we are. The amount of technology that we have in our vehicles is constantly improving. The ability to test whether people are more controlled, when people accelerate really fast and brake, will be something that we will release early next year.

THE ACTING CHAIR: With the government bill, you said you are supportive of that. The other bill that is before us is Ms Clay's bill. Can I get your feedback on Ms Clay's bill?

Mr Cooper: Sorry, I missed that.

THE ACTING CHAIR: Through Mr Parton's line of questioning, you said that you are supportive of the government bill. I want to get your feedback on the other bill that is before the committee.

Mr Cooper: We are very supportive of it. Just to clarify, this is the amendment bill to improve road safety by strengthening the territory's regulatory enforcement framework?

MS CLAY: We have two bills. There is one bill that does a number of road safety things, including dealing with some specific scooter-related provisions. There is a second bill that only looks at vulnerable road users, which would include scooter users, and just has one traffic infringement notice offence. So there are two separate bills.

THE ACTING CHAIR: Because we have both bills before us, it was more a case of

asking whether you have any comment to make on the second bill or whether you are predominantly focused on the bill that covers e-scooters.

Mr Cooper: We are predominantly focused on the one that covers e-scooters.

MR PARTON: Gentlemen, how many jurisdictions do you operate in at the moment?

Mr Dale: I have read the link that was submitted. We currently operate within the inner north and inner south of Canberra, as well as Belconnen.

MR PARTON: No, my question is: how many jurisdictions do you operate in on the planet?

Mr Dale: I think we are in almost 40 now, across the APAC region.

MR PARTON: There are obviously different levels of compliance generally in those 40 cities. Where does the ACT sit in regard to level of compliance?

Mr Dale: It is in the higher levels. In a lot of markets, users are not required to wear helmets. They can ride across footpaths and roads. The ACT, like a lot of other Australian and New Zealand cities that we operate in, is at the very much higher end of compliance.

MR PARTON: Would you have suggested that the types of incidents that are covered off in this bill are quite rare occurrences here in the ACT when it comes to Beam scooters?

Mr Dale: At some stages it happens across markets, and the ACT is not unique in terms of the incidents that occur.

MR PARTON: I am trying to establish—and I am not tipping that you will say it is the case—whether we are talking about rampant activity of this nature, involving drunkenness on scooters, or whether it is very much a rare occurrence.

Mr Dale: I think it is a rarer occurrence.

MS CLAY: I was interested in your latest source of data on the number of scooters, your uptake in usage, and your reported accidents. Do you have a data source on that?

Mr Dale: Yes. We have had seven involving serious injuries to riders, and four minor injuries in the last 13 months since we have been operating. We have well over 100,000 users that have signed up to use Beam in the ACT.

THE ACTING CHAIR: If there are no further questions, Mr Cooper and Mr Dale, I would like to thank you for participating in today's hearing. A copy of the transcript will be sent to you.

DE CASTELLA MACKAY, MS CLARE
BUDD, MR CHRISTOPHER
WATSON, MR MICHAEL
IBBOTSON, MR JEFF

THE ACTING CHAIR: We will now hear from a panel of community members—Ms Clare de Castella Mackay, Mr Christopher Budd, Mr Michael Watson, and Mr Jeff Ibbotson. When you first speak, could you indicate that you have read and understood the privilege statement, which should have been forwarded to you by the secretary? It is also on the pink card on the table.

Today's hearing will be recorded and transcribed, and witnesses will receive a copy of the proof transcript for comment. If anyone takes questions on notice, please provide answers within five days of the secretary providing you with the uncorrected proof transcript, with day one being the first full day after receipt.

We have received your submissions. We will go straight to questions. I also note that Mr Budd has provided an opening statement to be tabled, so we will formally accept that as having been tabled.

MS CLAY: Clare, I was interested in your submission about your accident; I am really sorry to hear about that. I was interested in why you thought it showed that vulnerable road users needed better protection and how you felt, as a result of that accident. How did that accident affect you and, with the $700 fine, did you feel that that matched up?

Ms de Castella Mackay: It was a hit and run, as well as being hit. The feeling of being left lying on the road by a car that had just hit me was a real shock to me. Most people would not treat an animal like that. The penalty, a $700 penalty, for somebody who had hit me seemed quite inadequate.

When I spoke to the person who came forward who had hit me, she was really focused on financial damages. She was very apologetic but she did not seem to understand this concept that it was actually about hitting a person. She was not actually hitting a piece of property. Luckily, my injuries were not serious, but the whole experience was quite dehumanising.

As a result, I found out there was a $700 fine, which seemed quite inadequate. It has also since raised questions for me about the way that we are educating drivers about cyclists. In my submission I talked about cycling education and educating cyclists. But since then I have thought about it. I thought that many people would have got their driving licence 30 years ago. How much are they being reminded about treating cyclists with respect, and the one-metre rule? I know there were four signs in the lead-up to my accident saying, "Cyclists have priority here", yet this driver still cut in front of me, knocked me over and seemed to have no real recognition or awareness of what she had actually done.

THE ACTING CHAIR: Ms de Castella Mackay, could I ask you to acknowledge the privilege statement?

Ms de Castella Mackay: Yes, I acknowledge the statement.

MR PARTON: It is fascinating to hear that firsthand from you. The six of us are all regular cyclists. I wonder how much of this bill is connected to when we see those Facebook posts that enrage people, and we see how polarising the concept of cyclists being on the road can be to some people. Is that as much what this bill is about? How dismayed are you when you guys see that narrative out there of the people that say, "There shouldn't be any bikes on the road at all"? Is that a part of what this bill is about?

Ms de Castella Mackay: That is probably more a question for the people who drafted the bill. I think there needs to be a change in social norms around the way that we see cyclists in Canberra. If the bill starts to contribute to that change in social norms, then that is a really positive thing. I think there also needs to be a whole range of other actions in terms of trying to change those social norms towards people's perception of cyclists.

MR PARTON: Does anyone else on the panel have a view on that?

Mr Budd: I have read and accept the privilege statement. I think you are exactly right. My opening statement went more to the—

MR PARTON: Infrastructure.

Mr Budd: Yes, to that problem about what is going on. On one hand, they are right; there should not be riders on the roads because you should have proper, separate infrastructure, and that is the long-term solution.

The context is the power dynamic. The road infrastructure—which includes not only physical but also cultural and legal infrastructure—has been built in the interests of motor vehicle users by people who are predominantly motor vehicle users, and for the benefit of motor vehicle users, over a long period of time—several decades. Motor vehicles hold all of the power in the system, and that power disparity is the underlying cause of harm to vulnerable road users. Until we really get at that, as an issue of cultural change, the issue will not be fixed.

The bills are a step in that direction because they acknowledge that vulnerable road users are not equal in the system, and that there should be higher duties towards them from people that are less vulnerable. That is the big, underlying question that needs to be addressed to solve this issue more broadly.

Mr Watson: I have read and understood the privilege statement. My background is that I had a close family relative who effectively should have died when she was hit at speed by a truck. What you are reflecting is very close to what I was saying; you almost took the words from my mouth. We have a situation where there is increasing diversity in the evolving environment, where we are going to have a wider variety of people who want to move around the city. It will not just be bikes versus cars; you will have electric scooters and an increasing diversity of ways that people get around. Who knows what will be introduced in the future?

We will enhance safety by getting more of a humanistic approach. When you are looking at the tariffs for people not having sufficient duty of care, being negligence, if the penalty or the social sanctions related to the human harm, compared to the cost of the damage to the armour plate that car drivers use, then you will reflect the set of social humanitarian values rather than more easily measured financial costs—the value of an expensive car.

Mr Ibbotson: I have read and understood the privilege statement. Going to your question, Mr Parton, about whether this will make a difference, it certainly will. The private member's bill can be distinguished from the minister's bill because of that very purpose, in that it specifically addresses vulnerable road users.

I think it is very important that that bill sends the message to the public that the roads are for everybody, they are there to share and we all have our responsibilities. That is at the heart of the law of negligence: you have a duty to your neighbour on the road. I think that this bill sends that message.

MS CLAY: I have a question to the whole panel on this theme. There are some great phrases in here. We have got the cultural and legal infrastructure of the roads that have been built a certain way; but now we have a diversity of users using that. We need a humanistic approach. The roads are for everybody, and they are there to share. It is really interesting to me. I think it is important that some legislative change happens. I am just wondering what other measures you think that we need to make this environment human focused and safe for our vulnerable road users and everybody who is using it?

Mr Watson: I think separation is one of the very easy infrastructure issues, easy to build but easy to decide to do.

Ms de Castella McKay: I think separation is important. An accident happened to me when I was on a bike path. I was on a piece of infrastructure that was designed for and supposed to protect cyclists. I think we need to obviously look at a whole range of measures.

If you look at jurisdictions where cycling has significantly increased over time, then they tend to have a really holistic approach, which includes infrastructure but also public education. That is where I think there is a real opportunity for the ACT. There is very little education on cycling for the general population. At the moment, as a cyclist, it is easier to get lessons to teach you how to drive than it is to learn to cycle safely.

I do not know now if you are getting a driving licence, I assume that there is some education around cycling. But for the vast majority of road users who did their driving test many years ago, there would be nothing. Could we look at measures where, to get a renewal of your drivers licence, you have to actually have some education around considering cyclists and thinking about cyclists as people rather than as just an annoyance, which is clearly what some of the rhetoric is about?

Mr Budd: I think the other thing, which I talk to in my tabled submission, is really

about the police culture of issuing infringement notices. The laws are great, but if they are not enforced then they are fairly meaningless.

I watched the AFPA submission, and I was a little concerned that they fundamentally do not understand what I was saying before about the inequity in the system. They were like, "Yes, but we have got to be able to fine vulnerable road users too. And what if it is a car?" I do not think that a car has ever driven off the road and crashed into a tree on Cotter Drive. It is theoretically possible but it is not something that actually happens—certainly not caused by a cyclist. They are saying, "We have to treat those two road users the same" and they fail to understand that no, the cars have the power and the other road users are vulnerable. This is an attempt to have an equal share of the power of the road infrastructure, and you cannot get that if you give out one TIN to the car and to the bike in the situation.

Yes, there are a few things I mention about making police more culturally inclined to issue TINs but also they need the legislative backing to make them feel comfortable. It is easy to give TINs to motor vehicles because there are a heap of strict liability offences. There are none that apply to vulnerable road users.

Mr Watson: May I add on that? I think what my interpretation of that is: where there is an inequality, you can adjust the tariff to reflect the human harm—the bike or the pedestrian who gets splattered—but the person in the large car is not going to get harmed. Therefore the person who has the greater potential to harm should have a higher duty of care in the negligence context. That should be factored into the advice given to the people who are entitled to give TINs. That would reflect what I understand to be the social preference in the future to ensure that there is greater diversity in road use, including the vulnerable and invulnerable road users.

MR PARTON: Does that mean—and I am referring more to Mr Budd's statement—that the default position is that any incident involving a vulnerable road user is always completely the fault of the person in the powerful position?

Mr Budd: No, it is not always the case. But my understanding of the research is that it is overwhelmingly the case. Obviously establishing discretion is involved, as there should be.

I will tell you one of the stories I had. I was riding on the footpath; it was on Belconnen Way. A taxi driver was coming out of his house and drove straight across the footpath and I was just there. I went straight over the bonnet, ripped my knee open on the headpost. This was a few years ago. I went to hospital. Police attended. No fine.

They spoke to me later, and I really did not understand why at the time. I thought that they had given him a warning. It is fairly clear who was at fault. And I have gone to hospital for it. He was civilly liable. He paid damages for the knee and for the bike.

A couple of months later I went past there again and his hedge had been cut in half so that he could actually see the footpath. Apparently my testimony would not have been good enough. I thought, "You can be found guilty of pretty much the most serious sexual assaults there are on the uncorroborated testimony of one witness but you cannot get a negligent driving ticket." It seemed a bit strange.

In that instance, why did they not issue the TIN? I do not understand.

THE ACTING CHAIR: Mr Budd, if I am following correctly then, it is your argument that if there is a vulnerable road users TIN, it could have been applied in the situation you were in? Negligent driving also could have been proved?

Mr Budd: Both. By having one that specifically applies to vulnerable road users, it would send a clear signal to everyone, including the police, that that is the appropriate thing to issue in those circumstances and they would feel more comfortable to issue it.

I suppose the other point was that, if I had been in a collision in a car with another car and someone had gone to hospital, I am fairly sure that at least one of the people involved would have got a traffic ticket of some sort, and probably much more serious than neg driving.

THE ACTING CHAIR: Just so I have got my head around this, in the incident that you referred to, the driver could have been issued a negligent driving TIN but they just were not issued anything. It still comes down to this discretionary application.

Mr Budd: Yes, they could. There was probably a variety of offences they could have issued. A problem in that is which offence to use or the issue of the offence at all.

THE ACTING CHAIR: If I have understood your testimony correctly, is there a question whether that issue has actually been responded to and whether more work needs to be done around that?

Mr Budd: Yes, there is definitely more work that needs to be done, but the vulnerable road user bill in particular is very much of a benefit because it makes it clear that vulnerable road users are a thing to be specifically considered.

MR PARTON: But in your instance, police did have the ability to issue a TIN?

Mr Budd: They have the ability but they did not have the cultural inclination or confidence to issue it. If they had an offence that said "vulnerable road user", they would have just been like, "That applies here. It is fairly obvious. I will do that."

The other submission I went to is that it would really be nice to have a strict liability offence of some sort that they could just default to. It could be a very little one; $300 and one demerit point would be fine, just something that they feel more confident to issue. In other submissions I have seen, the police have been very worried about being able to prove it in court. But they do not seem so worried about that in motor vehicle collisions because they are used to doing that and they have done that a lot before.

THE ACTING CHAIR: Mr Budd, your position then is that it is important to have something that allows vulnerable road users to have a TIN not against them, but against someone who impacts them?

Mr Budd: Something, yes. The legal system, the statute book, should recognise them as being in a place of vulnerability and have an offence geared towards that.

MS CLAY: Everybody has probably had, unfortunately, some experiences like this or heard of them. We have a bill that has a whole lot of offences that can only be prosecuted through the court and one low-level neg driving that would be a TIN, and we have a bill that has a higher penalty with a TIN. Given your experience and given how difficult it is at the moment culturally to get the current TINs enforced, do you think that maybe sending all the offences for a court prosecution is likely to be enforced?

Mr Budd: No, I do not think it is.

Mr Watson: Definitely not.

Mr Budd: A TIN is increasingly very much more preferable.

MS CLAY: First of all, step one, is get the TINs issued; and step two is make sure that we have the appropriate tins to issue?

Mr Budd: Yes.

Mr Watson: I would agree but I would rather go to market testing because I am not an interested person. I am a vulnerable road user. I think they are right but I would not bet my bottom dollar on it.

Mr Ibbotson: I would say that it is definitely right. 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.

THE ACTING CHAIR: Ms de Castella Mackay, I have a question based on the information you have so far provided about your experience and the comment you made about how the driver came onto a cyclepath which they should not have been on.

Ms de Castella Mackay: It was a green strip across the road, so the cyclepath was—

THE ACTING CHAIR: So it was a lane.

Ms de Castella Mackay: And there was a side road. They were clearly turning off the main road into a side road, but there was a green strip, I believe, right across, and they cut across that directly in front of me. I was on separated infrastructure; it was just that it was crossed by a side street.

THE ACTING CHAIR: From what you have described, you had right of way?

Ms de Castella Mackay: I had complete right of way, yes.

THE ACTING CHAIR: My question is about having a TIN there with a higher penalty as a deterrent. Arguably, what the driver did was already illegal, not permissible, and it should not have happened, so is having an additional penalty in isolation enough to drive that behavioural change? If we put forward this TIN and

then set and forget, are we going to see that behavioural change, given that people are already breaking the rules that are in place?

Ms de Castella Mackay: I think that it is a step in the right direction, but there needs to be a whole package of other measures. There is no silver bullet for changing this kind of behaviour; it has to be a holistic approach with multiple levers.

THE ACTING CHAIR: I would be interested to hear from the whole panel on this. We have had a few things put forward in conversation for different measures to improve the safety of cyclists and, particularly, the behaviour of other road users towards cyclists. I think it is fair to say that we are talking very much about cyclists here. I know that we are all pedestrians in other forms, but it seems that we are very much coming from the cycling perspective. I will just throw the question out to the panel: what are the actions you feel could be taken that would see the greatest improvement to the culture of cyclists on our roads? That is a big question for you.

Mr Watson: Infrastructure, training and continued pressure. Think of the cycle danger present on Northbourne Avenue. To start with, the buses ignored it themselves. YouTube came in. There were misbehaving buses. You need a multifaceted, continuing approach towards road safety, as happens with other systems. It is not a set and forget system. If you are going to get a critical mass of diverse road users, you need to put sufficient resources into maintaining the cultural expectation that will create safety. That means ongoing effort by you, by us, by educators, by regulators—along with the infrastructure.

Mr Ibbotson: I think the infrastructure is key, because it raises the actual safety and the perception of safety. Perception is what gives people confidence to ride more; and with more people riding, the safety of numbers kicks in.

Mr Budd: I would say effectively separated infrastructure and more enforcement, even low-level enforcement. I might tell a second story to get at both those points, because the government has some ability to influence this directly.

This was not my collision; it was my wife's. She was going home from work on Marcus Clarke, on the lovely separate, raised green-painted infrastructure there. She was crossing Allsop Street; she was on the green path and had the green light. There is a sign just before that that says, "Give way to cyclists", with a left turn symbol. A bus turned left across her. She effectively jumped off the bike. The bike went under the back wheels of the bus, and the bus driver did not even notice she existed until he heard the tyres of her bike pop.

Often she would ride with a trailer with a child in it. She did not have it that day, but she would have died if it had been a different day of the week. As a result, she scraped her knee, I think. Her physical injuries were not that great, but she developed PTSD afterwards. She took two years to recover. TCCS's position was that they were not civilly liable, they had not done anything wrong. No criminal offences were issued. It still has not been resolved, but it looks as though her settlement will be in six figures if she does not have to go to court. The government's own people are trying to desperately find some way in the road rules to not be liable when it is pretty clear who was at fault.

The infrastructure was there; there was sort of separated infrastructure. It was not like the Sullivans Creek path, which is actually separate. But if something happens, if the infrastructure is good, that is prevention. If something happens, enforcement is what is appropriate. That did not happen.

THE ACTING CHAIR: When you say it did not happen—

Mr Budd: No criminal offence was issued.

THE ACTING CHAIR: Ms de Castella Mackay, do you have anything more to add?

Ms de Castella Mackay: Yes. I sort of covered that I think education and training are really important. Infrastructure is absolutely vital. I think that can have a real role in changing social norms and even making people think of vulnerable cyclists as people rather than just an annoyance. There is a lot of negativity. It is trying to humanise cyclists in people's eyes through that training and education.

MR PARTON: Hear, hear!

THE ACTING CHAIR: It does seem to me, as we sit here—and I made the observation to Mr Parton, too—that what looks like quite a simple proposition on the surface is very complex when you actually get down to it. There is a lot of nuancing in it.

The question in my mind is this: is there a silver bullet or is this a cultural change that is going to take a lot of time and a lot of different approaches in order to get that good outcome of improving safety for a lot of vulnerable road users, including cyclists?

Mr Budd: I think we know the answer to that question. From my point of view, it is separate infrastructure and enforcement. But there are definitely particular things that can be done more, and faster, to have that happen.

Northbourne is one. I note that Northbourne is about to be a car park for several years. There was a proposal—it was in the territory design a couple of years ago—to turn one of the Northbourne lanes in each direction into a proper, separated bikepath. That was taken out of the Territory Plan or whichever plan it was.

If Northbourne is going to be a car park, it is not going to make any difference to people whether they are waiting in three lanes of car park or two. Put up a temporary lane like they did for COVID in all the other places. Cars will sit there with a parade of cyclists going past them. You can put up a sign. There is the $15,000 interest-free loan, which, not necessarily by design, covers electric vehicles, including bikes if they cost more than two grand. Buy an electric bike and you can go down Northbourne without having to stop for anyone.

MR PARTON: What better advertisement.

Mr Budd: Then you note that there are cyclists, and that it is better, and easier. It is easy. There is your marketing piece to do all of those things in one hit.

THE ACTING CHAIR: Mr Budd, I look forward to you turning everyone in Canberra into a cyclist. Mr Watson, you looked as though you had something you wanted to add.

Mr Watson: No; I was just enthusiastically agreeing. I wish I could be as eloquent.

MR PARTON: Mr Ibbotson, I know that you have made some suggestions for potentially improving what is being considered by the Assembly in regard to these bills and you want to see more demerit points.

Mr Ibbotson: Yes.

MR PARTON: That lines up with what Mr Kukulies-Smith from the Law Society told us. He said that if we see people wishing to contest things regarding traffic fines, most of the time they have no points left; that is why they are contesting them. But Additionally, you are suggesting that we should have an offence for aggressive behaviour that frightens vulnerable road users even if it does not physically harm them?

Mr Ibbotson: Indeed. Look at the experience that Mr Budd relayed. There can be very little physical harm, but people can be put off. They say, "I am never going to ride on that street again." It is the scaring people off factor that needs to be taken into consideration as well.

Mr Budd: Yes. Bonnie will not ride on the road again. She now has an electric mountain bike and takes a much more extended trail way to get to work because she has no interest in going on the roads at all, let alone the bit where she nearly died.

MR PARTON: It is an unfortunate aspect of cycling in Canberra, is it not, that to some extent it does require courage. I ride on Monaro Highway from Theodore, but I accept that some courage is required. They are always utes, aren't they?

Mr Ibbotson: If we are going to get more families riding, more children riding to school, then their parents have to be confident that they are going to be safe. Even if the government is doing quite a bit to encourage kids to ride to school, when something like the incident which triggered this bill is made news, parents say, "Oh, it is that unsafe on the roads." That is why it is important. The extra point on the licence, that four points on the licence, does make a difference. In a town where many people can treat a fine as just a cost of doing business, it is the points that matter; it is the points on the licence that really count.

Mr Budd: I am thinking on my feet here, but I would suggest that you would make vulnerable road users an aggravating factor: for any of the existing offences, add one or two points if it involves a vulnerable road user.

Mr Ibbotson: That is already in some other sections of the legislation.

Mr Budd: Yes. The consequences of failing to give way and rear-ending someone are a lot less significant than failing to give way and turning left over a cyclist, which is

constant.

MS CLAY: We have it in one element of the act that is already in place, but it does not apply to these TINs. That is an interesting idea.

Ms de Castella Mackay: The other thing is this "look but don't see" phenomenon which has been documented in other parts of the world, and consciousness of that "look but don't see" phenomenon. I think we have all done it sometimes: you look, but because a cyclist is unexpected, you do not actually see them. I do not think that is well understood in the ACT. Again, we probably need some training and education around that.

THE ACTING CHAIR: Ms Clay, do you have a question?

MS CLAY: I am glad you touched on it, Mr Ibbotson. I was interested in talking a little about our vulnerable, vulnerable road users—our children riding around, parents with children and parents with trailers and a cargo of bikes, and the whole push to try and get kids to walk and ride to school. I was wondering how important you thought it was—and we have already covered it a little—that we have clear signals about who a vulnerable road user is, looking after human beings on our roads and clear penalties that we see enforced. Is that really important if we want to encourage that active travel for parents and kids?

Ms de Castella Mackay: Absolutely, yes. I would say absolutely because it is a deterrent at the moment for parents. I would totally support that. I think there is going to be a lot of resistance from parents for encouraging their children to ride on roads unless we have that.

Mr Budd: I think the infrastructure is much more important for the parent factor than the enforcement, because who cares what the enforcement is after your kid has been run over. It kind of does not matter at that point. I do a lot of that. I have a cargo bike. In fact, today I rode them down to their childcare centre and came back here on a cargo bike. I have done a lot of that.

From my house to their school there is a cut through and a bunch of circuits; so it is relatively low traffic and safe but even then they have to cross roads, which means they are not going to do it by themselves until they are at least 10. If you could cut and paste the wombat crossings into each of those circuits, I would be happy with that because it is a circuit. Drivers are not going around it fast. Wombat crossings are fairly big and they are a bump and they are lit up. If that was there with those painted marks "This is a walk-to-school route" or whatever, that is exactly what you need.

I do not know how the territory prioritises those things on the list because they are often small projects in bits and pieces of the community, but the bit that I need for my kids to walk to school or ride to school is that small bit between my house and the school, not a fancy path that connects this and that.

Mr Watson: I live on, effectively, the cyclepath that goes all the way from Dickson through O'Connor and out towards Bruce Ridge. During term time it is absolutely heaving with hundreds and hundreds of kids. It is evidence that infrastructure really

works well—kids running around Macarthur Avenue; big, open, safe, dual carriageway, multi-use with cars and bikes. It is just not used; they just use infrastructure. And it is not just that the kids are not the naturally obedient ones at high school, but they choose to use the safe infrastructure rather than go along the larger roads. It works. You built it; it works. And it is going to save lives.

MS CLAY: Mr Ibbotson?

Mr Ibbotson: I have nothing further to add to what you said.

THE ACTING CHAIR: Thank you to all our witnesses for coming along today; it is much appreciated. At 12.10 we will be hearing from the government.

Short suspension.

STEEL, MR CHRIS, Minister for Skills, Minister for Transport and City Services and Special Minister of State
HELDON, MS COREY, Acting Commander, Operations, ACT Policing
BOWDERY, MR JOHN, Executive Branch Manager, Strategic Policy and Customer, Transport Canberra and City Services Directorate

THE ACTING CHAIR: Appearing in the final session of this hearing is the Minister for Transport and City Services, Mr Chris Steel MLA, and officials.

When you first speak, can you please indicate that you have read and understood the privilege statement, which should have been forwarded to you by the secretary, and which is available on the pink cards on the tables.

If anyone takes questions on notice, please provide answers within five days of the secretary providing you with the uncorrected proof transcript, with day one being the first full day after receipt.

We note that you have provided some amendments which you would like to table and which you will be introducing. The committee accepts those.

We were planning to go straight to questions, but I have broken with my instructions and offered everyone a one-minute, very quick, opening statement, if they wish to make one.

Mr Steel: Yes. I will be quick. I acknowledge and have read the privilege statement on the table before me.

Thank you to the committee for inviting us here to give evidence on the Road Transport Legislation Amendment Bill and the private member's bill.

I am not going to repeat what was said in the introductory speech for the bill, which is quite comprehensive and explanatory. But I would just say that this is focused on making our roads safer.

I tabled some proposed amendments to our bill, which will be moved by the government in the Assembly. In the spirit of collaboration, I want to provide this to the committee to consider. I will also look at how we can provide that to the scrutiny committee ahead of time and make sure that they are able to look at it and provide their comments. The amendments are, of course, subject to cabinet approval processes before they go to the Assembly. That may see them being subject to change.

The consultation draft has been tabled. It is not the final amendment that will be provided to the Assembly, but it does provide an important lower-level rung for the hierarchy of road transport offences that are currently in the act. The amendments seek to introduce another tier of offence to the dangerous driving hierarchy related to due care, attention and reasonable consideration.

The primary purpose of the new offence is to capture behaviour that does not meet the threshold of negligent driving or constitute a lack of proper control of a motor vehicle

but which still puts other road users at risk. This is designed to capture particular behaviours, which are effectively around driver distraction.

It could be things like writing a document while you are driving, for example, where the driver does not necessarily lose control of the vehicle and does not necessarily meet that fault element of negligence that is currently in the other offences. These behaviours pose a risk to other road users, and they may increase the risk of a person losing control of the vehicle or a personal mobility device.

The new offence will sit under the existing offence for lack of proper control of a motor vehicle and provide a preventative tool that will allow police to target dangerous driving behaviour before a person loses control of a vehicle or a personal mobility device.

These amendments are being developed with some consultation with stakeholders, but I am sure that others will have feedback on them now that they have been tabled.

I will leave it there and I am happy to take questions on both the amendments and the bill itself.

THE ACTING CHAIR: I will give the first question to Ms Clay.

MS CLAY: Thank you. Minister, we have heard from a range of witnesses today. We have asked them about TINs versus court offences in this context. There was a pretty strong preference for TINs—I do not think I am verballing the testimony on this—on the basis that they are easier to enforce and encourage greater use by the AFP. Also—and we teased this out quite a bit with the representative from the ACT Law Society—there is the fact that if you only have the court offence, you end up in court anyway, whereas if you have the TIN, you are quite likely not to end up in court. The representative from the ACT Law Society gave us an indication that he thought maybe $1,200 to $1,500 is the point at which people might start to challenge, but he was not quite sure. It was quite an interesting discussion.

Last week in estimates, I asked the DPP about the notion of in-road traffic contexts, TINs versus court offences. The DPP, interestingly, gave a very strong push for TINs. That is on the public record. He said that this was part of a growing movement to move more and more towards TINs. He said, "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."

I am wondering how you would explain that we have a number of court offences in your amendment but, at the bottom level, there is not a higher penalty TIN in your scale of amendments.

Mr Steel: I will hand over to Acting Commander Heldon to provide ACT Policing's perspective in a moment, but there are several differences in relation to the private member's bill, the amendments to the safety and traffic management act that have been proposed, and the road transport legislation amendment bill No 1. The key difference is that we are looking at ratcheting up the entire hierarchy of road traffic

offences, particularly for negligent driving occasioning various levels of harm.

Both bills have acknowledged that there is a gap in the current framework for particular instances where harm occurs that does not amount to grievous bodily harm. At the moment, there is a very low-level TIN available for negligence "in any other case", as it is known. The next tier up is way above grievous bodily harm. We are attempting to provide a level that is in between, that draws on the existing body of case law and the common law around actual bodily harm. We are also ratcheting up that lower level offence by increasing the TIN amount from around $300 upwards.

In addition to that, we are finding, at the lower level, through the amendment, the lowest level that will be below TIN to capture those behaviours that are not as serious and do not necessarily need to go to court.

We think that negligent driving occasioning actual bodily harm is a very serious offence. It deserves to be heard by a court. We do not think that it is appropriate for someone to get off with an infringement notice for that offence. And we certainly do not think that it is appropriate to apply an infringement notice to an offence that has so many subjective elements at a high level.

That has come at it from a human rights point of view. Acting Commander Heldon can talk a bit about what it means from an enforceability point of view.

There is the fault element of negligence that needs to be proved. There is also the extent of the harm. We think that those elements are best heard by a court, given the seriousness of the offence.

I appreciate that TINs are an easy way to churn through offences and that they are used widely in road traffic legislation and road rules enforcement. But where you have elements which are more subjective—fault elements or mental elements—we believe that those are best considered by the court.

THE ACTING CHAIR: Ms Heldon?

Ms Heldon: In relation to TINs versus going to court, the one thing I would say is that there is definitely a benefit to having the traffic infringement notice arrangement for lower tier offences. They are strict and absolute. You go through a red light; you get a TIN. There is nothing to be proven there. We do not need to take statements, et cetera. If it goes to court, it is those very basic elements that are produced in court—if the matter is required to go to court, if the person chooses not to pay the TIN, which of course they are entitled to.

For those other elements which have that subjectivity to them, in terms of trying to prove negligence, for example, there is arguably a requirement for the court to make those determinations, because it is based on behavioural aspects et cetera, as opposed to "strict and absolute" under the TIN arrangements.

There is value for some matters to go to court rather than have a TIN. But for the lower tier offences, TINs are a very valuable tool for the community, for the courts, and for ACT Policing.

THE ACTING CHAIR: Ms Heldon, can I get you to acknowledge the privilege statement?

Ms Heldon: My apologies. I acknowledge that I have read it and accept it.

MS CLAY: Thank you for that very clear explanation. We do have neg driving as a TIN already, and that will continue; so there is obviously an element of discretion there. I did put a specific issue to the AFPA and the Law Society and then, in a different context, the DPP, on the rights—whether part of the TIN is a breach of rights. We had quite an interesting discussion about proportionality, with no particularly clear answers. We got a lot of answers saying that this is probably a matter for the Assembly, that it is a political decision to decide proportionality.

We also had a very clear and practical answer from many of those players saying, "It is not a problem because if you issue a TIN and somebody disputes guilt, or finds it disproportionate, they will end up in court anyway." So, arguably, if you start with a court offence, you will end up in court. If you start with a TIN and it is for whatever reason not appropriate in the circumstance, it will end up in court. Starting with a TIN actually gives the perpetrator the benefit of being able to avoid that court process and the burden on the courts, but also the burden on them if they do not wish to dispute it. Did you have a response to those answers from those different players?

Ms Heldon: I am not sure that it is appropriate for the police to make a determination of proportionality and so forth—

MS CLAY: Sure.

Ms Heldon: so I will acknowledge 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.

MS CLAY: Thank you.

MR PARTON: Minister Steel, can I ask you very directly: do you see aspects of the private member's bill that are problematic? If so, what are they, and how problematic are they?

Mr Steel: There are a few differences between the two bills. I stress that I think both are well-intended pieces of legislation which aim to make our roads safer, and both try to close that gap to an extent. I think that they differ in the extent of the scope. The scope of the two bills is quite different. The private member's bill only applies where

negligent driving results in harm to a vulnerable road user. The government's bill applies when any road user has been harmed. Effectively, what we are trying to do here is target the behaviour rather than the class of persons that that behaviour is affecting.

Now, it just happens that it is likely to protect vulnerable road users as well by covering all road users. It is the baby in the back of a car that has been harmed as a result of negligent driving. They are the sorts of people that we are seeking to protect through the further extent of the scope in our piece of legislation. We believe that negligent driving endangers and risks the safety of all road users and any regulatory framework needs to ensure that all road users are protected from harm. That could be identical behaviour and we need to make sure that all people who are harmed are protected under the legislation.

Secondly, there are differences in the proposed penalties under the legislation, which I have touched upon. The private member's bill proposes 50 penalty units or, with the infringement notice, $1,600 and three demerit points. Under the government's bill, the maximum penalty is 50 penalty units, which will be court ordered, or six months imprisonment, or both. It has that imprisonment term associated with it which, again, goes to the culpability of the behaviour that we are talking about, which we believe is very serious.

Under our bill, the offences would be processed through the court system, which is appropriate given that seriousness and given that we have attached an imprisonment term to that offence as well. This is something that we think the court should look at. They may seek to impose an imprisonment term or not. They may use a non-conviction order if they determine that that is appropriate in the circumstances or, indeed, suspend someone's licence.

Thirdly, the private member's bill applies strict liability to two elements of the new offence, which is that harm is caused to a person and the person harmed is a vulnerable road user. In doing so, it engages and limits the right to be presumed innocent under the Human Rights Act. Strict liability should not be applied to elements of an offence that contain complex legal distinctions that require a higher degree of subjective judgement in their application. Instead, they should be progressed through the courts. The courts are best placed to determine what constitutes the fault element of negligence and the extent of harm, which may not manifest for some time, depending on what the harm is. It could be psychological harm resulting from negligent driving behaviour, for example. The court is best placed to assess that level of harm.

Fourthly, the private member's bill applies a criminal code to the new offence. The criminal code is not applied to the existing framework. As a result, unintentionally, the private member's bill may actually be introducing a higher standard of negligence than currently applies under the negligent driving offences. It may have the unintended consequence of making it harder for the police or the DPP to successfully prosecute someone for negligent driving. We are not applying the criminal code to the offence in the government's bill that has been presented.

Those elements are why we think that there are some issues with the private

member's bill going forward and why we think the approach that the government has put forward is far better in making sure that there is a hierarchy that reflects the seriousness of the offences and that there are enough rungs to that hierarchy to cover the full range of behaviour that is occurring on our roads and deter that behaviour, as well as making sure that there is the availability of traffic infringement notices for lower level offences.

THE ACTING CHAIR: That was quite a comprehensive answer.

MR PARTON: A wonderful answer.

THE ACTING CHAIR: We have heard from a number of witnesses today that they are supportive of both bills and would like to see them combined. Can you provide any testimony to the committee as to how it would be possible to combine the two or whether the two contradict each other to a point where it would not be possible?

Mr Steel: The government's bill, through introducing the new offence of negligent driving occasioning actual bodily harm, would apply to all road users. So it would be all-encompassing in terms of targeting the behaviour that may affect a broad range of people, including vulnerable road users. We acknowledge concerns amongst the cycling community in particular that there is an issue with vulnerable road user injuries and deaths.

I presented this evidence to a federal parliamentary inquiry just two weeks ago. Whilst the level of deaths and injuries for people on our roads has trended down over time, the number of vulnerable road users being injured and dying on our roads has remained relatively static over time, so we need to address this. But we do not think that singling them out and leaving a gap in legislation for other road users who are harmed on our roads is the way to do it.

We think that this more holistic bill will also support vulnerable road users, together with a suite of other things that we intend to do, such as running more campaigns to make sure that motorists are aware of vulnerable road users and are driving safely. Improving on-road and off-road cyclepath infrastructure is a key part of that as well. That is the evidence I presented at the committee the other week. I was asking the federal government to broaden out their national land transport framework to enable further investment in dedicated cyclepath infrastructure so that both governments could work together to achieve road safety aims to protect vulnerable road users.

THE ACTING CHAIR: Acting Commander Heldon, would there be any challenges for police officers associated with applying strict liability offences in the private member's bill when it has subjective fault elements? Is it okay to expect police officers to make such a high-level judgement on negligence and the extent of harm from a TIN?

Ms Heldon: The short answer is yes, there will be some challenges there, particularly with those subjective elements. TINs are for strict and absolute offences. As I say, you go through a red light, it is a TIN et cetera—those clear-cut kinds of arrangements. When you are adding that element of subjectivity in terms of that judgement on a person's behaviour or actions, there is an additional element that should be, must be,

proven, either in court or for the purposes of issuing that infringement. You need a level of evidence of that, as in those behavioural elements, which is difficult to show in a TIN when you are issuing a TIN. By taking it to court or addressing it in a different way, it allows the person who is being charged to explain their behaviour, but also the police officer to then put before the court the circumstances around that particular incident that has led to it arriving in court.

MS CLAY: The police are already using the negligent driving TIN. That is a new tool. The bit that is added on to this is the actual bodily harm bit, which strikes me as not too subjective. I take the point—it is really well made—that the accused and the police, where there are subjective elements, where there are disputed facts or where it is unclear, would both like to appear in court and explain. But that would probably happen with a TIN anyway because if there was any contest, the individual who had been issued with the TIN would end up in court. I am still struggling to see how it would be a different outcome in reality by having only court prosecution versus a TIN, which may well end up in court if people chose to take it there.

Ms Heldon: In relation to the subjective elements, I am not saying that it is not impossible, clearly, but there are challenges in terms of the success in court for either side. It is not impossible, but there are those additional layers of evidentiary material that are required. Clearly, we have the negligent driving TIN at the moment. As to actual bodily harm, as Minister Steel said, some of those harms can be arrived at later, particularly if it is psychological harm.

A TIN is limited in that it is a short period of time before it is payable or what have you and those harms may not be present immediately. I do not have a definitive answer for you. But I can see how there are some challenges from the police side in undertaking our actions in relation to it because of those additional elements. I do not have a clear answer for you, I guess, is the point, but I can see how, for my members, there could be some challenges there.

Mr Steel: TINs are typically only applied where we have offences that are black and white, where there are really only physical elements present. When you include things like mental elements, fault elements—where there is a very high level of subjectivity that needs to be proven—and then you are talking about offences which have been ratcheted up, we think this is very serious. The more serious the offence, the greater the evidence that needs to be provided to prove that offence by both the police and the DPP. Because we are actually proposing an imprisonment term in the government's bill, it is ratcheting up the higher level and it would be inappropriate to put it into that context.

The existing lower level offence of negligent driving in any other case is a very low-level offence at the moment. It has a very low-level TIN. The PMB is proposing to ratchet up that further for vulnerable road users only, to $1,600. That would still see a higher level of evidentiary burden to be able to prove the offence, plus the criminal code element that has been applied to it that would require even more evidentiary burden. You can see why we are a bit uncomfortable with TIN.

From a legal purist's point of view, you probably would not have a TIN with the existing negligent driving in any other case and it probably should go to court; but we

have kept that in there as a tool for the low-level rungs. For those higher rungs—actual bodily harm, grievous bodily harm, negligent driving occasioning death—that absolutely should be the level of offence, behaviour and culpability that a court should consider when the full evidentiary brief is presented, to be able to consider the fault elements and whether they are made out, as well as the extent of harm that is present.

THE ACTING CHAIR: I do not know that we took any questions on notice, so that will conclude our hearing. Thank you very much for your testimony today and thank you, Mr Bowdery.

The committee adjourned at 12.38 pm.