Submission No 1

INQUIRY INTO ROAD TRANSPORT LEGISLATION AMENDMENT (PENALTIES AND OTHER SANCTIONS) BILL 2018

Organisation: Armstrong Legal

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The Chair and Committee
Standing Committee on Law and Justice
NSW Legislative Council

INQUIRY INTO THE ROAD TRANSPORT LEGISLATION AMENDMENT (PENALTIES AND SANCTIONS) BILL 2018

Dear Chair and Committee Members,

Thank you for the opportunity to provide a submission on Road Transport Legislation Amendment (Penalties and Other Sanctions) Bill 2018.

Below, I have set out a number of concerns:

The principle concern is the implementation of legislation allowing for Novice range, Special range, and Low range PCA offences to be dealt with via infringement notices. The effect would be to remove the prime catalyst for changing the drivers behaviour – being the removal of the court and judicial process.

Victoria has had similar legislation since (approximately) 1994. Their experience shows a recidivism rate of 29% ["The Effect of Sanctions on Victorian Drink-Drivers": Fri, 15 Sept 2016: VicRoads]. Comparable statistics from the NSW Bureau of Crime Statistics and Research [October 2015 to 2016] reveals a recidivism rate of only 8.1%.

To exemplify matters further, the Victorian model provides for mandatory traffic offender education and still they have a recidivism rate in excess of three times greater than NSW, where we currently have a voluntary traffic education program.

Anecdotally, I have seen the effect on traffic offending generally trend upwards since the early to mid-1990's. It used to be unusual to see a traffic record exceed 3 pages, now it is not unusual to see records of 12 pages or more. I believe this is because people see infringement notices as more or a taxation than a punishment and therefore do not recognise their offending as dangerous but rather simply providing an income stream for the State.

I firmly believe outsourcing justice to an administrative function of an infringement notice diminishes the effect of a sanction and does nothing to modify conduct. I am firmly of the view that attendance at court with the threat of a criminal record, the humiliation and embarrassment of having to collect references and admit criminal conduct; culminating in the experience of appearing before judicial officer, is what is necessary to cause offenders to modify their behaviour. In so doing, the roads are safer because people do not re-offend. I believe my point is objectively proven by the experience of the Victorians and their system of issuing infringement notices.

Other potential issues with the legislation are cited below:

1. s.215C, which is the section that allows the Authority to require people to complete a drug or alcohol education program before having their licence returned to them. I have no difficulty with the concept in theory, but there are some problems with how it is drafted and how it will operate in the real world.

<u>Problem 1 – unfairly extending the suspension</u>

2. s.215C(4) automatically extends the suspension period of any person who does not complete the education course in time. The suspension will only be lifted when the person completes the course.

3. It is important to remember that the notification of the requirement to undertake the course will most likely be given separately to the notice of suspension/disqualification. This is in contrast to the similar scheme currently existing, whereby a person with two demerit point suspensions within 5 years is required to complete the traffic offender program course, in which case they are notified in the original suspension letter.

4. The power to require completion of the course rests with the Authority [RMS], not the Court [who imposes the relevant disqualification] or Police [who issue the relevant Penalty Notices]. The process would be:

    a. Police issue penalty notice/Court imposes disqualification.
    b. RMS is notified of penalty notice or disqualification.
    c. RMS issue notification advising person that they need to do the course.

5. It is possible that an administrative delay means that the RMS issues the notification of the requirement to do the course quite a while after the suspension or disqualification begins. Given that for LRPCA offences we are

only working with 3 month suspensions, there is a real chance that the person could receive notification of the requirement to do the course a few weeks or a month before the suspension/disqualification is due to expire. If they are not able to get the course done in that time (say for example they live in the country, or are overseas, or suffer a long illness, or it's Christmas so the course providers take a break, or the courses are booked out....) then the person's suspension/disqualification continues. They are serving additional time off the road due to administrative delay.

6. Taking it further, the person could be serving additional time off the road, even though the deadline to complete the education course has not yet expired. Say for example the RMS adopts a policy of allowing six weeks to get the course done [which is the duration of the PCYC program]. Imagine now that the person is notified of the requirement to do the course only 4 weeks before their suspension is due to expire. When the suspension expires they still have two weeks to comply with the requirement to do the course. However, because of s.215C(4) the suspension continues even though the deadline has not passed and they have not yet defaulted.

Solution

7. A fairer way to deal with this would be that, should the original suspension expire before the deadline to complete the course, the person's licence is reinstated. However, should they fail to complete the course by the deadline, the licence is immediately suspended from the date of default and until they complete the course. The person should be notified of this in the original letter requiring them to do the course. That way people are only punished if they default, not because of delays by the authorities.

8. Any Notice served on a person, should they be suspended on the roadside, must include documentation noting the requirement to complete the course education course.

Problem 2 – capturing non-drug and alcohol related suspensions

9. s.215C(4) is the words *"any period of licence suspension, cancellation or other licence ineligibility relating to a person required to undertake an alcohol or other drug education program by a notice given under this section is extended..."*

10. My reading of the underlined words is that they relate to any suspension/cancellation etc that the person has, as opposed to only drug or alcohol related suspensions/cancellations etc.

11. This could lead to a situation where a non-drug/alcohol suspension etc gets extended. For example, say a person commits a PCA and also has a medical issue. They go to Court for the PCA, plead guilty, and the Magistrate agrees not to impose any disqualification for the offence. The RMS suspends the person's licence due to the medical issue pending provision of medical reports. The RMS also issues the notice to do the alcohol/drug education course. The person quickly provides satisfactory medical reports, however the medical suspension is not lifted because the person has not completed their alcohol education course yet. As explained above, the suspension could be extended even though the deadline to do the course has not yet expired.

Solution

12. Redraft legislation to make it clear such a provision is intended to relate to suspension as a result of alcohol or drug offending.

Problem 3 – *definition of "drug", "may impair..."* and *"any other substance*

13. s.4(1) definition of "drug" is too broad. The word "may" means the conduct captured is so broad as to be meaningless and subject to abuse. A person attending a dentist who has tingling lips, a person who takes Codral, both may be impaired but not such that their driving is affected.

14. The problem is that *any* drug *may* deprive a person of normal mental faculties – indeed that is often the point. Is there a defence? Are physical faculties described?

Problem 4 – inclusion of MRPCA in interlock for first time offenders

15. Interlock was introduced to address repeat offenders, to put those people on the path to sober driving. The new provision is excessive and also does not give any consideration to the nuances in each case (morning after/traffic record, etc). It would be more appropriate for an interlock scheme to be introduced to give judicial officers that discretion, somewhat similar to the pre-2015 scheme. For example, if a matter is a first offence within 5 years, but there have been multiple PCAs before that 5 year mark. A judicial officer, giving consideration

to all circumstances of a matter, will always be more beneficial than a "one size fits all" provision.

16. From a practical point of view, the interlock program is an onerous one. It costs approximately $2,220 for installation and maintenance over two years. Furthermore, there are only a limited number of providers who are certified to install and maintain interlock devices. This becomes more of a problem in regional areas. I have had at least one client tell me that he has had to travel a few towns over to get to a mechanic to deal with his interlock device. It will pose particular problems for those on Novice range who may be high school students not earning an income and struggling financially.

Solution

17. Interlock should be at the discretion of the judicial officer.

Problem 5 - Less deterrence, more offending

18. If a Novice Range, Special Range or Low Range PCA offence is a fine only and suspension, more people may take the risk. They will not be risking a criminal conviction and record.

19. It is likely that the offence rate will increase with the proposed changes. This is not conducive with the state governments "towards zero" or "stop it or cop it" approach.

Solution

20. Remove the infringement notice provisions from this legislation and continue with Court Attendance Notices.

Problem 6 - Removal of (timely) access to justice / immediate suspensions

21. s.224: The penalty notice recipient could be immediately suspended. In order to regain their licence, they would have to immediately undertake a licence suspension appeal or make a court election. The suspension is only removed if the immediate suspension is successful or if the court election is finalised (either by way of PG and s.9(3) CRO without conviction or hearing and acquittal).

22. An immediate suspension would likely get on 3 to 4 weeks if we do everything as soon as possible (ss.266 and 267). Court elections often takes 8 weeks for the FIRST court date. A hearing will be months away. The person will have served their disqualification before a hearing date has occurred and likely served more than 50% if an election is dealt with quickly at Court.

23. The effect is to substitute a decision of a judicial officer, who brings to bear all their experience and knowledge, for a decision of a police officer, likely acting in accordance with a mandated policy of senior police officers. In circumstances where this offence could be committed as morning after type offences the punishment caused is disproportionate to the offence.

24. Loss of licence is significant. The test for immediate licence suspensions is "exceptional circumstances" which is not defined in the legislation but is in case law. The bar is very high. Work reasons are not exceptional in and of themselves. The new legislation imposes the same test and burden for someone who produces a reading of 0.051, no priors, clean traffic record and has a very high need for a licence as it does for a repeat offender who gets caught for a second and subsequent high range or an aggravated dangerous drive GBH.

25. The time delay from immediate suspension to court may also factor in need to do TOP and/or court suggested adjournment to do such.

<u>Solution</u>

26. Remove the ability for police to suspend driving licence for a "first offence" in the category of low range prescribed concentration of alcohol.

Thank you for your consideration of these issues.

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