

Transport Legislation (Distracted Driver and Other Matters) Amendment Regulation 2021

Human Rights Certificate

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 41 of the *Human Rights Act 2019*, I, Mark Bailey MP, Minister for Transport and Main Roads, provide this human rights certificate with respect to the *Transport Legislation (Distracted Driver and Other Matters) Amendment Regulation 2021* (Amendment Regulation) made under the *Forestry Act 1959*, the *Nature Conservation Act 1992*, the *Recreation Areas Management Act 2006*, the *State Penalties Enforcement Act 1999* (SPE Act) and the *Transport Operations (Road Use Management) Act 1995* (TORUM Act).

Shannon Fentiman MP, Attorney-General and Minister for Justice, Minister for Women, and Minister for the Prevention of Domestic and Family Violence has granted authority for the preparation of this human rights certificate to the extent the Amendment Regulation is made under the SPE Act.

In my opinion, the Amendment Regulation as tabled in the Legislative Assembly is compatible with the human rights protected by the Human Rights Act 2019. I base my opinion on the reasons outlined in this statement.

Overview of the Subordinate Legislation

Despite significant community education, traditional enforcement efforts and penalties, unlawful mobile phone use on Queensland's roads continues at unacceptably high levels. Road fatality and serious injury statistics highlight the impact of distracted driving on the community. Community feedback on distracted driving has identified that there is a perception that unlawful mobile phone use while driving will not be detected or enforced. This has the effect of people engaging in unlawful road behaviours despite the known risks.

To help address these serious road safety issues, alongside traditional enforcement and community safety education campaigns, amendments are being made to facilitate camera enforcement of mobile phone and driver-related seatbelt offences.

These amendments will further aim to encourage positive behavioural change by increasing the perception and likelihood that unsafe driving will be detected and enforced, thus deterring unsafe driving behaviours.

The Amendment Regulation will:

- provide that it is an offence for the driver of a vehicle to hold a mobile phone in the driver's hand or rest a mobile phone on any part of the driver's body while the vehicle is moving, or is stationary but not parked;

- prescribe the mobile phone offence as a prescribed offence for the purpose of camera enforcement;
- prescribe, for the purpose of camera enforcement, the offences of a driver failing to wear an approved seatbelt properly adjusted and fastened, or failing to ensure that passengers comply with the seatbelt requirements (the driver-related seatbelt offences);
- consolidate and streamline driver-related seatbelt offences;
- provide for a penalty infringement fine for corporations of five times the penalty for an individual in relation to the mobile phone offence and driver-related seatbelt offences;
- prescribe the digital driver behaviour camera system, including operating and testing requirements and the data block for the system; and
- make minor, technical and consequential amendments.

Human Rights Issues

Human rights relevant to the subordinate legislation (Part 2, Division 2 and 3 *Human Rights Act 2019*)

In my opinion the human rights that are relevant to the Amendment Regulation are:

- Right to recognition and equality before the law (section 15 of the *Human Rights Act 2019*)
- Right to life (section 16 of the *Human Rights Act 2019*)
- Property rights (section 24 of the *Human Rights Act 2019*)
- Privacy and reputation (section 25 of the *Human Rights Act 2019*)
- Right to liberty and security of person (section 29 of the *Human Rights Act 2019*)
- Fair hearing (section 31 of the *Human Rights Act 2019*) and rights in criminal proceedings (section 32 of the *Human Rights Act 2019*)

Right to life (section 16 of the Human Rights Act 2019)

The right to life reflects that every person has the right to life and has the right not to be arbitrarily deprived of life.

Ensuring that effective measures are in place to address unsafe driving behaviours and hence road trauma is consistent with the right to life (section 16 of the *Human Rights Act 2019*). This right places a positive obligation on the State to ensure that positive measures are in place to protect life and ensure the physical safety of those who are in danger of harm. That is, it is incumbent on the State to put in place measures to make road use as safe as possible. The amendments are being put in place to make the roads safer by helping to address two of the 'Fatal Five' driving behaviours that account for many lives lost and serious injury on the roads each year.

Consideration of reasonable limitations (section 13 of the *Human Rights Act 2019*)

Right to recognition and equality before the law (section 15 of the Human Rights Act 2019)

(a) The nature of the right

The right to recognition and equality before the law reflects that every person holds the same human rights by virtue of being a human and not because of some particular characteristic or membership of a particular social group. This right encompasses the right to recognition as a person before the law and the right to enjoy human rights without discrimination. The *Anti-Discrimination Act 1991* defines discrimination as including both direct and indirect discrimination.

Provisions in the Amendment Regulation to support camera-detected driver-related seatbelt offences are written in neutral terms. However, it is noted that they could have the potential to have a disproportionate impact on a person with a disability who has a medical exemption from the seatbelt laws.

In relation to a person with a disability, some indirect discrimination may arise due to the requirement for the person's medical exemption certificate to be presented to the chief executive or to the commissioner. The driver of the vehicle is required to submit the certificate no later than 28 days after receiving a camera-detected seatbelt offence notice. This requirement will also be met if the driver or the driver's unrestrained passenger has already lodged the medical exemption with the chief executive.

This right may also be limited to the extent that the Amendment Regulation imposes a penalty infringement fine for failing to obey seatbelt and mobile phone rules. The requirement to pay a fine for such a behaviour, may adversely and disproportionately impact sectors of the community such as persons of a lower socio-economic status who may have more difficulty paying a monetary sum.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

Any limitation on the right to equality is to ensure efficient enforcement processes which will ultimately reduce unsafe behaviours. In a free and democratic society, there is an expectation and requirement that all drivers conduct themselves safely on our roads and have consideration for the safety of themselves and other road users. Drivers are responsible for wearing their own seatbelts and, subject to specified exemptions, must ensure that their passengers are also appropriately restrained. Drivers are also responsible for complying with the mobile phone rules.

I also note that ensuring that effective measures are in place to address unsafe driving behaviours to reduce road death and trauma is consistent with the right to life (section 16 of the *Human Rights Act 2019*), and the right to liberty and security of a person (section 29 of the *Human Rights Act 2019*). These rights place a positive obligation on the State to ensure that

positive measures are in place to protect life and ensure the physical safety of these who are in danger of harm. That is, it is incumbent on the State to put in place measures to make road use as safe as possible.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

Any limit on the right to equality is to ensure efficient enforcement processes can apply to driver-related seatbelt offences and mobile phone offences, ultimately to encourage safer driving behaviours. The requirement in the Amendment Regulation for the driver to lodge a medical exemption is necessary because it is not possible for a camera to detect whether a driver or passenger is exempt from wearing a seatbelt.

It is not mandated that individuals with a medical certificate, that exempts them from wearing a seatbelt, lodge this certificate with the Department of Transport and Main Roads (TMR).

This would create an undue burden on this group of people. The number of medical exemption certificates is also likely to be very low, considering the requirement threshold for obtaining an exemption under national medical guidelines. In addition, a medical certificate may relate to a temporary condition and be for a period as determined by the person's doctor.

A person of low socio-economic status who may have lesser financial capacity to pay a penalty infringement fine has the same opportunity as all other drivers to observe safe driving behaviours and obey the road rules. This in turn will avoid the impact of a penalty infringement fine (where no medical or other exemption applies).

The road rules are in place for the safety and benefit of all road users equally. Penalty infringement fines are only issued for breaches of the road rules and are not proportionate to socio-economic status. A person who receives a penalty infringement fine who cannot afford to pay the whole fine amount can also seek assistance from the State Penalties Enforcement Registry to pay the fine by instalments or settle the debt through other activities such as a work and development order.

A person may also elect to have a matter heard by a court. If the court finds the person guilty of the offence, it has the ability to take into account multiple factors when handing down the penalty, one of which may include the person's socio-economic status or ability to pay a fine.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose

In my view there are no less restrictive ways available to achieve the purpose of efficiently enforcing driver-related seatbelt offences and mobile phone offences.

Supporting administrative processes will be put in place to reduce any limitation on an individual's rights in circumstances where a driver asserts that an exemption from seatbelt

requirements applied to themselves or to a passenger in the vehicle they were driving, if a camera-detected seatbelt offence notice is issued to them.

It will not be made mandatory for a person to lodge advance evidence of an exemption (medical certificate) as this would create an undue burden on all individuals who have an exemption. However, a person will be able to choose to provide a medical certificate in advance. To further reduce the burden, a person will be able to provide a copy of a certificate so they can retain the original to carry when they are in a vehicle. They will not be required to have the copy certified.

Lodging the certificate will allow a person's circumstances to be considered during the adjudication prior to an infringement notice being issued, particularly where they pass a camera regularly.

A person will also be able to provide a medical certificate after an infringement notice has been issued to support the infringement being waived. In any event, it is expected that the number of individuals impacted will be limited as it is expected that only a small number of medical exemptions from the seatbelt laws are issued.

In relation to breaches of the road rules, penalty infringement fines are a key measure to help deter unsafe behaviours on the roads that puts the lives of all road users at risk. A person can avoid having to pay a fine by observing safe driving behaviours and obeying the road rules.

(e) the balance between the importance of the purpose of the limitation and the importance of preserving the human rights, taking into account the nature and extent of the limitation

For the reasons outlined above, I believe, the potential human right impact to these groups in the community are also considered reasonable and justified. There is a proven road safety benefit to people travelling in vehicles and to the broader community of encouraging increased use of seatbelts by those who are not exempt, and encouraging compliance with the mobile phone rules. There is also clear evidence that complying with the seatbelt rules reduces the incidence of death and serious injury as the result of a crash and that complying with the mobile phone rules reduces the risk of a crash.

In respect of the right to recognition and equality before the law, while the imposition of a penalty infringement fine may disproportionately impact a person from a lower socio-economic group, it is considered that the importance of maintaining the punishment and deterrent effect of penalties for applicable offences outweighs the impact on the right.

Property rights (section 24 of the Human Rights Act 2019)

(a) The nature of the right

Property rights reflect that all persons have the right to own property alone or in association with others (section 24(1) of the *Human Rights Act 2019*), and that a person must not be arbitrarily deprived of the person's property (section 24(2) of the *Human Rights Act 2019*).

Property includes all real and personal property interests recognised under general law and may include some statutory rights.

The human right under section 24(2) of the *Human Rights Act 2019* is limited where a person is unlawfully or arbitrarily deprived of the person's property. In the human rights context, arbitrarily is taken to mean capricious, unpredictable, unjust and unreasonable in the sense of not being proportionate to a legitimate policy objective.

The Amendment Regulation may limit property rights to the extent that it prescribes infringement notice offences that require the payment of a monetary sum. The failure to pay a penalty infringement fine may result in enforcement action taken by the registrar of the State Penalty Enforcement Registry (SPER) against the person, including among other actions, the seizure of the person's property and vehicle immobilisation as provided for in the SPE Act.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The Amendment Regulation may limit the right to property to the extent that it prescribes penalty infringement notice offences for mobile phone and driver-related seatbelt offences. This deprives a person of a monetary sum. The failure to pay a penalty infringement fine may result in enforcement action relating to an unpaid fine, including among other actions, vehicle immobilisation or seizure and sale of property (for example, a vehicle owned by the individual) as provided for under the SPE Act.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

The Amendment Regulation will prescribe penalty infringement fines for mobile phone and driver-related seatbelt offences. This will help encourage safer driving behaviours and address two of the 'Fatal Five' driving behaviours responsible for serious injuries and fatalities on Queensland roads.

Allowing penalty infringement fines to be issued for non-compliance will provide a proportionate response, encouraging compliance with the requirement for drivers to ensure seatbelts are worn by both themselves and their passengers and compliance with mobile phone use laws to address driver distraction on the road.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose

It is considered that there is no less restrictive and reasonably available way to achieve the purpose to regulate the use of mobile phones and the wearing of seatbelts by drivers and their passengers and address unsafe driving behaviours.

Importantly, there are several protections built into the fine enforcement system under the SPE Act which ensure seizure and sale of property or vehicle immobilisation would only occur

infrequently. Importantly, the threshold amount which must be owed to the State Penalties Enforcement Registry (SPER) before vehicle immobilisation can occur is prescribed under the SPE Act and is currently set at \$5,000. In terms of seizure and sale, SPER only undertakes this activity where it has registered an interest over the property to be seized. The SPE Act requires that the total amount owed by a debtor must be more than \$500 for an interest in a motor vehicle or \$1000 if otherwise, before SPER can register an interest over property.

Other protections include that:

- a person who considers a fine should not have been issued may elect to have the matter heard by a court instead of paying the fine;
- if a fine is not paid within the specified timeframe and the penalty infringement notice is registered with SPER for enforcement action, the person may apply to pay their debt by instalments; and
- individuals who are experiencing hardship can apply to resolve their debt under a work and development order (which can include undertaking relevant courses, attending counselling and treatment programs or completing work with an approved hardship partner).

Authorised officers appointed to issue fines also receive significant training, in accordance with the requirement set out in section 20 of the TORUM Act. This requires that they have the necessary expertise to be an authorised officer, to ensure that fines are only issued in appropriate cases and circumstances. This includes guidelines which provide information and guidance to authorised officers to ensure they can form a reasonable belief that an offence has occurred before a penalty infringement notice is issued or when the severity or complexity of the offence requires that the matter proceed by way of complaint and summons.

(e) the balance between the importance of the purpose of the limitation and the importance of preserving the human rights, taking into account the nature and extent of the limitation

It is important for road safety outcomes that drivers are not using mobile phones in unsafe ways while a vehicle is moving or is stationary but not parked. Likewise, it is important for the safety of persons inside the vehicle that they are appropriately restrained in the event of a crash. The application of penalty infringement fines to mobile phone and driver-related camera-detected offences ensures that there are proportionate and effective enforcement responses where a person uses a phone unlawfully or fails to ensure they, or their passengers on or in the vehicle, are wearing seatbelts. The issue of penalty infringement fines and demerit points for such offences gives the opportunity for the driver to modify their unsafe behaviour before the behaviour escalates where more penalties can apply.

These offences are already prescribed as penalty infringement notice offences.

In the period 1 January 2020 to 30 November 2020, 5,719 penalty infringement fines were issued for the existing mobile phone offence. Approximately 66 per cent of these penalty infringement fines were referred to SPER. Not continuing to prescribe the mobile phone offence as an infringement notice offence is likely to reduce the threat of enforcement action against an offender due to the significant cost to the State of court proceedings relating to offences that aim to protect road safety.

Over the same period, 5,432 penalty infringement fines were issued for the existing driver-related seatbelt offences. Approximately 66 per cent of these penalty infringement fines were referred to SPER. Not continuing to prescribe the driver-related seatbelt offences as infringement notice offences is likely to reduce the threat of enforcement action against an offender due to the significant cost to the State of court proceedings relating to offences that aim to protect road safety.

If this enforcement action is not available, there would likely be reduced deterrence due to the significant cost to the State of court proceedings.

For all the matters mentioned above, a decision to prosecute is made on public interest grounds, including consideration of the costs of prosecution. If there were a reduction in prosecutions due to cost, some offenders may consider that the State is unlikely to issue a complaint and summons to anyone other than the most recidivist offenders thereby reducing the deterrent effect of the offences. This would directly affect the State's ability to ensure road safety, potentially affecting the safety of other road users in the broader community.

For the reasons outlined above, I consider the balance between the importance of protecting road safety and ensuring an effective enforcement system for unlawful mobile phone use and the driver-related seatbelt offences outweighs the potential negative impact on the right, and as a result, I consider any limitation to be reasonable and demonstrably justified.

Privacy and reputation (section 25 of the Human Rights Act 2019)

(a) The nature of the right

The human right under section 25 of the *Human Rights Act 2019* protects a person from unlawful and arbitrary interference with the person's privacy, family, home or correspondence and from unlawful attacks to their reputation. The scope of the right to privacy is very broad. It protects privacy in the sense of personal information and data collection, but also extends to an individual's private life more generally. A policy that involves surveillance of people for any purpose; collection of personal information; and storage, security, retention and access to personal information should carefully consider the proportionality of any limitations on the right to privacy.

The Amendment Regulation includes amendments to facilitate camera detection of mobile phone and driver-related seatbelt offences. This is consistent with the management of other camera-detected offences under the Camera Detected Offence Program (CDOP). Images will be taken of vehicles which will include vehicle registration numbers, as well as images of inside

the vehicle cabin at both a shallow and a steep angle. The collection of images from every vehicle that passes the camera irrespective of whether an offence is being committed may be seen to limit a person's right to privacy and reputation.

It is also recognised that some people may consider the cabin of a vehicle to be private space, even though they are utilising a public road network. Images of this may therefore be seen to infringe on a person's right to privacy and reputation.

It is also acknowledged that a situation may arise where a person driving a car that is registered to someone else commits a camera-detected offence. For example, an employee may be driving a vehicle registered to their employer. The changes in the Amendment Regulation mean the current notification provisions for registered operators will apply to camera-detected mobile phone and driver-related seatbelt offences. In this circumstance, the infringement notice (including the details of the offence and photograph) would be sent to the registered operator for the vehicle rather than the driver, thus potentially limiting the driver's right to privacy and reputation.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

While some may view the amendments as limiting the right to privacy and reputation, by doing so the Amendment Regulation will improve road safety by deterring unsafe driving behaviours.

In a free and democratic society, there is an expectation and a legal obligation for all drivers to conduct themselves safely on our roads and having consideration for the safety of themselves and other road users. From the statistics outlined below, camera-detection has been successful in decreasing other unsafe behaviours.

I also note that ensuring that effective measures are in place to address unsafe driving behaviours to reduce road death and trauma promotes the right to life (section 16 of the *Human Rights Act 2019*). This right places a positive obligation on the State to ensure that measures are in place to protect life and ensure the physical safety of these who are in danger of harm. That is, it is incumbent on the State to put in place measures to make road use as safe as possible.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

The purpose of the Amendment Regulation is to improve road safety by deterring unsafe driving behaviours. In the period 1 January 2020 to 30 November 2020, 21 people lost their lives and a further 1,301 were hospitalised due to serious injuries resulting from driver distraction. Distracted driving on average accounts for approximately 14 per cent of the road toll and almost 20 per cent of serious injuries each year and is one of the 'Fatal Five' road behaviours. Research has shown that using a mobile phone while driving is just as dangerous as driving with a blood alcohol content of 0.07 – 0.10.

Failure to wear a seatbelt (where a seatbelt is available to be worn) on average contributes to 25 per cent of fatalities (one in four) and a further 166 serious injuries per year. This is despite ongoing driver education and indisputable evidence over decades that shows seatbelts are effective at reducing fatalities in the event of a road crash.

Research shows that camera operations to detect speeding have been effective at both reducing crashes which result in death or serious injury and at promoting positive behavioural change through general and specific deterrence. An independent review of Queensland's CDOP using 2016 data found that the CDOP was associated with saving approximately 2,500 casualty crashes in 2016 alone, of which approximately 1,650 would have been fatal and serious injury crashes.

Based on evidence, expanding camera-detection to other life-threatening offences will encourage driver behaviour change and save lives. Therefore, the amendments to facilitate camera detection of mobile phone and driver-related seatbelt offences under CDOP are rationally connected to the purpose of deterring unsafe driving behaviours. Any limit to the right to privacy by introducing camera detection allows for effective enforcement of life-threatening mobile phone and driver-related seatbelt offences. This achieves the purpose of enforcing unsafe driving behaviours and improving road safety.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose

There are no other less restrictive or reasonably available ways to achieve this purpose. The cameras by nature must view inside the vehicle cabin as this is where the unlawful activity takes place.

There is no alternative to taking images inside a vehicle's cabin, or to the technology reviewing images of every vehicle that passes the camera, looking for the prescribed unlawful action. Every vehicle must be captured as to only take images of certain vehicles would unfairly discriminate against some and not others without a clear policy basis.

However, it is also important to acknowledge how the processes will help assist road users to avoid having their human right limited.

A key element in upholding and protecting the right to privacy is that images or video that do not contain evidence of an offence, along with any data associated with the image or video, will be deleted by the system and are not used or transferred to a human for further adjudication.

Section 113A of the TORUM Act provides that a regulation may provide information about how an image or video made by the system is accepted as having detected a prescribed offence and how the system provides for the deletion of images/video and associated information that does not detect a prescribed offence. The Amendment Regulation inserts a new section 208AA into the Traffic Regulation to provide information about these matters in relation to the digital driver behaviour camera system.

The Amendment Regulation provides that the digital driver behaviour system includes functionality that automatically deletes images that do not possibly detect a prescribed offence and do not need to be kept for the proper operation of the system or for testing the system to ensure it is operating correctly.

The Amendment Regulation also provides that an image or video made by the camera system will only be accepted as having detected a prescribed offence if an authorised officer has viewed the image or video and reasonably believes it has detected the offence. This ensures that adjudication of whether an offence has occurred ultimately rests with an authorised officer who has viewed images from the camera system before an offence is confirmed and any penalty infringement notice is issued. An authorised officer is defined under section 20 of the TORUM Act. It includes police officers and officers/employees of the public service who are appointed by the chief executive (provided the chief executive is satisfied they have the necessary expertise). Officers and employees of the public service are subject to the Code of Conduct under the *Public Sector Ethics Act 1994*, as well as to confidentiality requirements under law such as section 143 of the TORUM Act, which prohibits the disclosure, recording or use of information the person gained through involvement in the administration of the Act.

(e) the balance between the importance of the purpose of the limitation and the importance of preserving the human rights, taking into account the nature and extent of the limitation

There is clear research showing that the road safety impacts of failing to wear a seatbelt or unlawful use of mobile phones are significant. Research also shows that camera enforcement of these offences is likely to improve road safety.

Therefore, I believe any impact on individual privacy or reputation is minor and justifiable when balanced against the road safety benefits (the right to life) and protections available to the individual and the community.

Right to liberty and security of person (section 29 of the Human Rights Act 2019)

(a) The nature of the right

The human rights under sections 29(1) and (2) of the *Human Rights Act 2019* are limited where a person is subjected to arbitrary arrest or detention or is deprived of the person's liberty other than on grounds, and in accordance with procedures, established by law.

The Amendment Regulation may limit the right to liberty and security to the extent that it prescribes penalty infringement notice offences. Enforcement action under the SPE Act may, in rare circumstances, result in arrest and imprisonment where a person fails to pay an amount specified in an enforcement order. Importantly, however, the SPER Charter, provided for under section 9 of the SPE Act, preferences the use of other enforcement actions for unpaid fines over arrest and imprisonment to reduce the use of imprisonment for fine default.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The Amendment Regulation may limit the right to liberty and security of persons to the extent that it prescribes penalty infringement notice offences. The registrar of SPER may issue an arrest and imprisonment warrant to a person for failing to pay an amount stated in an enforcement order, after the person fails to pay a penalty infringement fine. Importantly, however, the SPER Charter, provided for under section 9 of the SPE Act, preferences the use of other enforcement actions for unpaid fines over arrest and imprisonment to reduce the use of imprisonment for fine default.

The Amendment Regulation will retain the existing prescription of mobile phone and driver-related seatbelt offences as penalty infringement notice offences. As mentioned above, the purpose of these offences is to increase road safety outcomes and ensure there is an effective system for issuing and enforcing fines to persons who commit the existing offences, which will encourage compliance with the law. These objectives are consistent with a free and democratic society based on human dignity, equality and freedom.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

If these offences were not prescribed as penalty infringement notice offences, and if this resulted in a reduction in prosecutions, the threat of enforcement action against an offender may no longer be credible due to the significant cost to the State of court proceedings in relation to offences that aim to ensure road safety. As previously discussed, this is likely to reduce the deterrent effect of the offences, which would directly affect the State's ability to ensure road safety. This could result in risks to the safety of other road users in the broader community.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose

As discussed above, there are a number of protections built into the fine enforcement system under the SPE Act to ensure that there are supports and options available to assist persons who are experiencing hardship and are unable to pay their fines. In addition, the SPE Charter ensures the powers of SPER to issue arrest and imprisonment warrants are rarely used in practice.

While there may be less restrictive options, it is considered that they would not achieve the purpose of ensuring road safety to the same extent. For example, an option which could potentially be considered less restrictive is to prosecute these offences through a court. Under the *Penalties and Sentences Act 1992*, a court is required to consider the financial circumstances of the offender and the nature of the burden that payment of the fine will have on the offender before imposing a fine. However, the cumulative burden of prosecuting these and other matters in a court means that this option is not feasible and would not achieve the purpose of ensuring road safety.

Therefore, there is no less restrictive and reasonably available way to achieve the purpose of ensuring road safety other than through the issuing of penalty infringement fines as outlined in the Amendment Regulation.

(e) the balance between the importance of the purpose of the limitation and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The existing mobile phone and driver-related seatbelt offences are already prescribed as penalty infringement notice offences.

As previously discussed, a person has several options in relation to a penalty infringement fine to avoid arrest or imprisonment. For example, the person may pay the fine in full, elect for a matter in relation to a penalty infringement notice offence to be heard by a court or apply for approval to pay the fine by instalments. If the person does not act in relation to a fine, the registrar of SPER may take further enforcement action relating to the unpaid amount under the SPE Act. This may, as a last resort, result in the registrar of SPER issuing an arrest and imprisonment warrant under the SPE Act. The SPER Charter makes it clear, however, that the use of other enforcement actions for unpaid fines is to be preferred over arrest and imprisonment. Other enforcement actions may include, among others, seizure and sale of property and vehicle immobilisation.

Having regard to the nature and extent of the potential limitation on the right to liberty and security of persons, I consider that the importance of meeting road safety objectives by ensuring there is an efficient system for issuing and enforcing fines, outweighs the potential limit on the right to liberty and security, which in practice is unlikely to be imposed as a result of enforcement under the SPE Act of unpaid fines.

Fair hearing (section 31 of the Human Rights Act 2019) and rights in criminal proceedings (section 32 of the Human Rights Act 2019)

(a) The nature of the right

The human right under section 31 of the *Human Rights Act 2019* is limited where a person is deprived of the right to have a criminal charge or a civil proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

The human right under section 32 of the *Human Rights Act 2019* is limited where a person charged with a criminal offence is deprived of the right to be presumed innocent until proven guilty according to law or deprived of the right to certain minimum guarantees.

The Amendment Regulation may limit the right to a fair hearing and rights in criminal proceedings to the extent that it prescribes penalty infringement notice offences. This may arise because a person does not have to attend court in relation to a penalty infringement notice offence. However, a person may elect for a matter in relation to a penalty infringement notice offence to be heard by a court instead of paying a penalty infringement fine. A person also has multiple opportunities to elect for a matter in relation to a penalty infringement notice offence

that has been referred to SPER to be heard by a court. Once a person elects for a matter in relation to a penalty infringement notice offence to be heard by a court, the person is afforded all the rights in criminal proceedings guaranteed under the *Human Rights Act 2019*. As a result, the Amendment Regulation arguably does not limit the human rights.

In addition, the Amendment Regulation places an evidential burden upon a defendant to produce an exemption certificate to demonstrate that they, or a passenger, are exempt from wearing a seatbelt. If they are unable to produce the certificate, or a copy of the certificate, the Amendment Regulation places an evidential burden on the defendant to establish that they have a reasonable excuse for not producing the certificate or the copy (section 267(4)). This may limit the right to a fair hearing and the rights in criminal proceedings in respect of the right to be presumed innocent.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The Amendment Regulation may limit the right to a fair hearing and rights in criminal proceedings to the extent that it prescribes penalty infringement notice offences. A person does not have to attend court in relation to a penalty infringement notice offence. However, a person may elect for a matter in relation to a penalty infringement notice offence to be heard by a court instead of paying a penalty infringement fine. If a person elects for the matter in relation to an offence to be heard by a court, the person has access to all of the rights given under section 32 of the *Human Rights Act 2019* so, arguably, the Amendment Regulation does not limit these human rights. However, it is recognised that there may be disincentives to persons electing to have these matters heard in court, including the time, effort and stress involved in court processes and the costs, such as the offender levy, which will be imposed on the person in any case where a court imposes a sentence. This is in addition to any court-imposed fine.

Prescribing penalty infringement notice offences provides several benefits to alleged offenders who decide not to contest the penalty infringement notice. These benefits include not having to attend court or prepare their defence with or without legal representation, as well as giving them certainty about their legal liability. Once a person elects for a matter in relation to a penalty infringement notice offence to be heard by a court, the person is afforded all the rights in criminal proceedings guaranteed under the *Human Rights Act 2019*.

The purpose of these amendments is to protect road safety by ensuring there is an effective system for issuing and enforcing fines to persons who commit these offences, which is likely to encourage compliance with the law. The Amendment Regulation retains the ability for individuals to elect to pay the penalty infringement fine or to elect to have the matter heard by a court, enabling them to choose the option that best suits their individual circumstances. These objectives are consistent with a free and democratic society based on human dignity, equality and freedom.

In relation to the requirement for the driver to produce an exemption certificate to demonstrate that they or a passenger are exempt from wearing a seatbelt, or to adduce some evidence that they have a reasonable excuse for not doing so, the purpose of placing the evidential burden on

the defendant is to ensure the provision allows for all those who are able to bring themselves within the statutory protection afforded to them by the law are given the opportunity to do so. This is done by ensuring that the evidence can be produced by the party best able to satisfy the requirements of the statutory protection.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

The Amendment Regulation will protect road safety by ensuring there is an efficient system for issuing and enforcing fines, which encourages compliance with the law. If the offences provisions are not continued to be prescribed as penalty infringement notice offences, the threat of enforcement action against an offender may no longer be credible due to the significant cost to the State of court proceedings and the reduced likelihood of prosecution in relation to offences that aim to protect road safety.

In relation to the production of exemption certificates, placing the evidential burden on the defendant ensures all those who are able to bring themselves within the statutory protection afforded to them by the law are given the opportunity to do so. This is done by ensuring that the evidence can be adduced by the party best able to satisfy the requirements of the statutory protection.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose

There are various protections built into the fine enforcement system under the SPE Act, including the ability for persons to elect to have the matter heard in court at various stages of the process. In addition, the SPE enforcement system includes a number of protections to ensure that there are supports and options available to assist persons who are experiencing hardship and unable to pay their fines.

Further, authorised officers are provided with extensive training by TMR in respect of issuing fines for false or misleading information offences in appropriate circumstances. This includes guidelines which provide information and guidance for authorised officers in respect of situations where a warning may be an appropriate alternative to issuing a penalty infringement notice or when the severity or complexity of the offence requires that the matter proceed by way of complaint and summons.

There is no less restrictive and reasonably available way to protect road safety. If these and other offences were not prescribed as penalty infringement notice offences, the increased number of prosecutions proceeding by way of complaint and summons may lead to injustices due to the delay in hearing cases. The cost to the State of court proceedings may affect the State's ability to ensure road safety, potentially affecting the safety of other road users in the broader community.

In relation to the production of exemption certificates, it is considered that placing an onus on the defendant to produce the certificate or adduce some evidence about why they were unable

to produce the certificate is the least restrictive reasonably available way of achieving the purpose of the requirements of the offence, to a sufficient standard. Additionally, the limitation is imposed only in respect of the defence. The prosecution will first have to establish the elements of the relevant offence.

(e) the balance between the importance of the purpose of the limitation and the importance of preserving the human rights, taking into account the nature and extent of the limitation

As mentioned above, the amendments have proven road safety benefits. Allowing penalty infringement fines to apply will ensure that there are proportionate and effective enforcement responses where a person unlawfully uses a mobile phone while driving or fails to ensure that they, or their passengers, are wearing seatbelts.

Although this may limit the right to fair hearing and rights in criminal proceedings, there are various protections under the SPE Act which include the option for persons to elect to have their matter heard in court at various stages of the process. In particular, section 15 of the SPE Act requires that all penalty infringement notices must indicate that the alleged offender may elect to have the matter of the offence decided by a court, which promotes awareness that persons may elect for the matter of the offence to be heard by a court at the time the person is issued with a penalty infringement notice. This gives the person the choice between electing to have the matter dealt with under the SPE Regulation or electing to have the matter heard by a court. Without that option, all persons charged under sections 264, 264A, and 300 of the QRRs would be forced to expend the time, effort and stress involved in court proceedings. If found guilty, they would also be required to pay the costs associated with the offender levy and the issuing of the complaint and summons, whether or not they wanted their matter heard before a court. In addition, there are various protections to assist persons who are unable to pay their penalty infringement fines.

Having regard to the nature and extent of the potential limitation on the right to a fair hearing and rights in criminal proceedings, I consider that the importance of meeting the purpose of road safety by ensuring there is an efficient system for imposing and enforcing fines, outweighs the potential impact on these rights.

In relation to the evidential burden relating to the production of exemption certificates, on balance, I consider that the importance of adducing evidence to establish facts, outweighs any potentially negative impact on the right to a fair hearing and the rights in criminal proceedings, particularly the presumption of innocence (to the extent that they are limited).

Conclusion

I consider that the Amendment Regulation is compatible with the *Human Rights Act 2019* because it does limit, restrict or interfere with a human right, but that limitation is reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom.

Honourable Mark Bailey MP
Minister for Transport and Main Roads

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