The Research Director
Transport, Housing and Local Government Committee
Parliament House
Brisbane Qld 4000

25th July 2013

Dear Sir/Madam,

Parliamentary Inquiry into Cycling Issues

We are the parents of Richard Owain Pollett who died sometime after 1:00pm on 27 September 2011 whilst cycling on Moggill Road Kenmore. He died as a result of appalling injuries sustained when his body went under the back wheels of a fully laden cement truck. Court proceedings against the driver of the truck were issued, and a trial took place in the District Court from 29 April to 6 May 2013. The defendant was found not guilty of "Dangerous operation of a motor vehicle causing death", as well as not guilty of the lesser charge of "Dangerous operation of a motor vehicle". We recognize that, to some extent at least, the present inquiry was brought about in response to public reaction to the outcome of the trial, and we welcome the opportunity to make this submission to the Parliamentary Inquiry.

Impact. The implications of Richard's death are profound and manifold, in respect of the devastating effect his death has had on the lives of others, on the issue of cycle safety, and the extent to which the present laws in Queensland protect cyclists.

The first is perhaps not immediately relevant to the present inquiry, but it does help put our submission into context.

Richard was our only child. His life was cut short when visiting Brisbane to appear as soloist with the Queensland Symphony Orchestra. Richard was 25 when he was killed. He was taken from us at a time when he was most radiant and energised for his future career as a solo violinist. We adored and admired this wonderful young man. We have still not come to terms with the horrific nature of Richard's death.

Our loss is also felt by the music community. As a violinist, Richard had great technical facility and demonstrated extraordinary musical depth, and no doubt he would have achieved much in the musical sphere, and have gone on to make a big impact on the cultural life of Australia. Richard was greatly admired and respected. The depth of feeling in the music community is evidenced by a long list of memorial concerts both in Australia and overseas, radio broadcasts, countless messages of condolence from Richard's colleagues and from prominent musicians around the world, and new works by major Australian composers, including Andrew Ford and Elena Kats-Chernin, written in his memory. There is also a major instrument bequest by Janet Holmes à Court in Richard's name, and memorial scholarships and awards in his name, including *The Richard Pollett Memorial Award* (administered by the Australian Youth Orchestra). This outpouring of grief and love not only recognises the loss of a wonderful artist, but also the loss of someone who possessed great personal qualities that affected positively the lives of all who came into contact with him.

The circumstances of Richard's death. The precise circumstances of Richard's death are not known. Neither the police investigation, nor the trial itself, revealed sufficient information to draw an accurate conclusion (when, where, how and why the incident occurred). We have requested that an inquest be held, and that matter is presently with the Brisbane Coroner. We requested an inquest

because (we have argued) the analysis of the evidence was incomplete, not all scenarios were properly explored, the Coroner's draft findings were at variance with evidence presented at the trial, and elements of the police investigation were shown to be in error.

It is also within the ambit of the Coroner to make recommendations to help reduce the likelihood of similar incidents occurring in the future. The inquest may therefore have some bearing on the present inquiry. However, it may also address important issues that lie outside the terms of reference of this inquiry, including, for example, road design, training of professional drivers, and specialist forensic investigation of cycling deaths.

Implications of the trial for cycle safety in Queensland. Patricia attended all of the trial, and Philip for most of it. We have since obtained audio and written transcripts of the proceedings, and have studied them carefully. Several aspects of the trial have important implications for cycle safety in Queensland. We have a great deal to say about the trial and the investigation, but we will confine our attention here to three matters.

1. *Safe passing distance*. The incident that led to Richard's death unfolded on a stretch of Moggill Road proximate to the entrance to Blacon Street. Please refer to the photograph below.

Evidence was presented in Court to suggest that an overtaking manoeuvre commenced at around the entrance to Blacon Street. There was strong agreement in Court that the distance from the bottom of the upright edge of the kerb to the middle of the centre line separating the two lanes was 3.4 metres at the point where the manoeuvre commenced, going down to 3.1 metres at a point near to where Richard's body lay (this region is marked in blue on the photograph), and that the maximum width of the truck was 2.51 metres. You may be surprised to learn that there was some disagreement in Court about the precise figures. But, if we accept them, Richard would have had between 90 centimetres and 60 centimetres between the truck and the edge of the kerb to work with. We think most cyclists would agree that this is not sufficient room, given the likely "width" of a cyclist of between 60 and 70 centimetres in a natural seating position. (We note that at no time was this "width" mentioned in Court, nor even the dimensions of Richard's bike, such as the width of his handle bars.) We do not believe that the clearance of 30 centimetres, going down to 0 centimetres or less, represents a safe passing distance. This does not even take into consideration the likelihood of lateral wind shear, caused when a heavy vehicle passes. Furthermore, it was alleged that the driver had safely undertaken such manoeuvres in the past. We think this unlikely. We note that, in

his address to the jury, the judge said "as a matter of objective fact it wasn't safe to overtake". It is unfortunate, however, that he implied the agreed 90 centimetres was *clearance*, rather than room for Richard to manoeuvre. He said, referring to the defence barrister's address, "... his client is making a decision to carry out a manoeuvre of overtaking the cyclist on a relatively straight section of the road, and a section of the road which is wider than it is in some other places, and where the cyclist had something of the order of .9 or 1 metre thereabouts room *clear of the truck* [our emphasis] positioned over in the right-hand side of the lane". And, a little later he said "... leaving that extent of *clearance* [our emphasis] ..."

2. *Opportunities to avoid injury or death*. Much was made in the defence barrister's address to the jury, and this was amplified by the judge in his summing up, of the possibility that Richard could have avoided the incident if he felt that the truck was uncomfortably close. We think it should be of great concern to cyclists that this was raised by the defence: that the *onus* is on the cyclist to take evasive action. The defence barrister said "The Crown would say to you this: `Well *surely* [his emphasis] it is not going to be suggested to you that somehow Mr Pollett could have got himself out of Moggill Road and into Blacon street'. Well why not? Do you know–you may be appreciative of this point, I don't know–but there are actually four in total entrances and or exits to Blacon Street". And later he said "... [if] the truck was felt by the rider to be uncomfortably close, of course the rider had the option of simply turning the corner–it's not a sharp one–left into Blacon Street–he could have done that ... so conceivably the bike could have even mounted that part of the island [the kerb was at an angle in parts] if the vehicle had been particularly close to him". We invite you to look at the photograph of Blacon Street and agree that, at a speed of 30 kilometres per hour (the speed at which the one eye witness suggested Richard was travelling), there is really *at most* only one opportunity to exit Moggill Road here safely. However, it was suggested in Court that the overtaking manoeuvre commenced a little further down Moggill Road past this point of relatively safe exit. For us, as Richard's parents, this was distressing to hear, particularly as it was not clarified by the judge in his summing up, but rather was amplified by him. We believe that Richard did not have any realistic opportunity to have safely avoided contact with the cement truck, and even if he did, he was riding lawfully, and had every reason to believe that an overtaking manoeuvre would not have been undertaken if it was unsafe.

3. *Honest and reasonable belief on point of fact*. Section 24 of the Queensland Criminal Code ("Mistake of fact") states that (1) *A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist*. Whilst it is true that the defence of honest and reasonable mistake of fact was used in the present case, it was made clear to the jury on several occasions that it should only apply were they *first* to have found the defendant guilty beyond reasonable doubt of the lesser charge of "Dangerous operation of a motor vehicle". As it turns out, they did *not* find the defendant guilty of dangerous operation.

However, we believe that there was some confusion, even in Court, about how and when Section 24 would apply in the present case. In particular, there was confusion about what was the *point of fact* (or facts), and this may have led to confusion in the minds of members of the jury about whether it applied to the lesser charge. In his address to the jury, the defence barrister argued that the defendant held an honest and reasonable belief that the left lane did not narrow (yes, it is a *fact* that the left lane narrowed some few metres before the point where Richard's body lay). However, there were times in the defence barrister's address, and later when the judge summarised the defence case and when he instructed the jury (see below), where it was said that the matter of reasonable belief concerned whether the defendant had *sufficient room to overtake safely*. It is our understanding that distances are *matters of fact*, but that assertions about what is safe is *opinion*.

This is supported by the judge: (in the absence of the jury) "... so it has to be a mistake about a matter of fact, not a mistake about a matter of opinion about whether what he's doing is dangerous or not".

Shortly after the jury retired to consider their verdict, they asked for direction. The judge said "I have a note from the jury seeking a direction. The note reads as follows. `Your honour, we require guidance on what honest and reasonable means in the context of dangerously operating a vehicle' ". So, it is apparent that the jury was confused about honest and reasonable mistake of fact, and when and how it applied.

We note that the jury had only a very short time together after receiving the judge's instruction before they returned their verdict of not guilty to the lesser charge (for which, we reiterate, the defence of honest and reasonable mistake of fact did not apply).

There is a second provision in Section 24 that (2) *The operation of this rule* [(1) above] *may be excluded by the express or implied provisions of the law relating to the subject*. So, there is the possibility of expressly excluding its application to "Dangerous operation of a motor vehicle causing death". Since the onus lies on the Prosecution to prove that no such belief was held by a defendant, which seems to us to be a very great burden in cases of "Dangerous operation of a motor vehicle causing death", it would seem to us that guilty verdicts would be rather rare. At least the provision of Section 24 needs to be clarified to make it clear that mistaken belief applies to mistaken belief of *fact* rather than of *opinion*.

We hope the Committee will consider these matters and make appropriate recommendations. We have heard arguments for and against minimum safe passing distance legislation. Our present position on this is that such legislation would be helpful, provided it is not generally applied punitively (in the same way that tail gating laws are not). Certainly professional drivers, including drivers of heavy vehicles, will then be cognisant of it. Had the driver of "our" cement truck applied his breaks, recognising that there was not sufficient clearance to pass lawfully, Richard would still be with us.

Finally, we hope also that you will have occasion to contact the Crown Prosecutor to seek opinion on the potential impact of minimum safe passing distance legislation, and in particular if it would have helped him in this case.

Yours faithfully,

Philip K. Pollett

Patricia E.M. Pollett