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Office of the President

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Our ref: PV/CrLC-KS

Committee Secretary
Transport and Public Works Committee
Parliament House
George Street
Brisbane Qld 4000

By email: tpwc@parliament.qld.gov.au

Dear Committee Secretary

**Transport and Other Legislation (Road Safety, Technology and Other Matters)
Amendment Bill 2020**

Thank you for the opportunity to provide comments on the Transport and Other Legislation (Road Safety, Technology and Other Matters) Amendment Bill 2020. The Queensland Law Society (QLS) appreciates the opportunity to contribute to this Inquiry.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled by members of the QLS Criminal Law Committee and Privacy and Data Law Committee, whose members have substantial expertise in this area.

We note we have been somewhat constrained in the preparation of this submission due to the availability of our volunteer committee members, which is compounded by the various challenges which have emerged as a result of the COVID-19 pandemic.

As such, an in depth analysis of each of the provisions has not been undertaken and it is possible that there are issues relating to fundamental legislative principles or unintended drafting consequences which we have not identified. We note that the comments made in this submission are not exhaustive and we reserve the right to make further comment on these proposals.

We do however, take the opportunity to note our appreciation to the Department of Transport and Main Roads for the opportunity to consult and provide feedback on the preliminary proposals.

Policy objectives of the Bill

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The Explanatory Notes to the Bill state that the objectives are to:

- support the introduction and ongoing operation of a Digital Licence App;
- facilitate camera enforcement of seatbelt and mobile phone offences; and
- make various minor and technical improvements.

Our comments are limited to aspects related to the Digital Licence App and camera enforcement of seatbelt and mobile phone offences.

1. Digital Licence App

We understand the amendments in the Bill seek to 'support the implementation and ongoing operation of a Digital Licence App' by amending existing legislation so that an 'approved digital product' can be produced in place of a physical licence or identification card¹.

We note there is currently a pilot project underway in the Fraser Coast region to trial the digital licence app but that it is intended that the app will comply with the international standard ISO 18013-5. Although, the standard is still under development², we agree that this is appropriate.

Whilst we understand the broader policy objectives of the proposal, we are unable to provide a definitive position at this stage as there is little information as to what the functional and non-functional requirements of the App will look like. Without an overview of those specific requirements, it is difficult to offer a fully informed view on the legal position.

We agree with submissions made by the Office of the Information Commissioner to this inquiry with respect to the need for public release of the Privacy Impact Assessment to ensure transparency, accountability and public confidence in the development and utilisation of the App.

At this stage, we raise the following preliminary matters for consideration by the Committee :

- The need for ongoing consultation with respect to the App's development to ensure sufficient compliance with the recommendations of the Privacy Impact Assessment;
QLS supports the implementation of best practices regarding security. QLS also supports:
 - Investigating the adoption of data minimisation;
 - Transparency around the Department's own de-identification processes; and
 - Transparency around the circumstances when data may be shared with other agencies or entities when there is the potential for re-identification
- The App should allow the user to easily view and update privacy settings in real-time through the App. Consumers may have difficulty identifying how to set and update an App's privacy settings properly and may also have limited understanding of their rights to withhold certain data in differing circumstances. QLS recommends that the App's default setting should reveal minimum information to optimise the protection of privacy and security of information.

¹ Page 2 of Public Briefing – Inquiry into the Transport and Other Legislation (Road Safety, technology and other matters) Amendment Bill, 30 March 2020, Transcript of proceedings.

² <https://www.iso.org/standard/69084.html>

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In this regard, we note the regulation making power in Clause 66 and the transitional regulation making power in clause 67. Although we understand that the purpose of the power is to facilitate a smooth transition into the new scheme, any material that imposes obligations or affects the rights of individuals should properly be included in the primary legislation.

Further, given the potential for decisions to be made by agencies following viewing or scanning of a photo ID stored within the App, QLS highlights the need to ensure that the App (and its' proposed use), is also considered as against the *Human Rights Act 2019* (Qld).

- Contractual arrangements with third party entities will also need to be carefully considered to ensure that all parties comply with privacy obligations with respect to App development, data and personal information storage/security and information sharing.
- We note the concerns raised by the Office of the Information Commissioner with respect to ensuring that a device is not required to be handed over in order for the licence to be inspected.

It is also unclear whether a phone with low image quality due to low battery life or a cracked screen would be an acceptable displaying of or the purported display of evidence of age or identity. Education and information campaigns will be needed to ensure consistency in this regard.

2. Camera enforcement of seatbelt and mobile phone offences

In relation to the provisions which facilitate camera enforcement of seatbelt and mobile phone offences, we support the policy intent for measures which aim to save lives and reduce road trauma impact in Queensland.

We note there has been increase in the monetary penalty and demerit points lost for phone usage in vehicles from February 2020. It has not yet been determined whether these changes to penalties will be sufficient to deter commission of these offences.

In relation to camera detection of these offences, we hold significant reservations surrounding privacy implications and artificial intelligence (AI) accuracy which are heightened by the proposed reversal of the onus of proof for drivers charged with these offences.

Whilst we accept that Queensland already has Camera Detected Offence Programs (CDOP) for offences such as speeding, disobeying red traffic lights, contravening a 'no trucks' sign, driving motor vehicles carrying placard loads in tunnels and offences involving unregistered and uninsured vehicles, the current proposal differs in its intrusion into the vehicle space.

The use of contractors and third party vendors to assess alleged offences further invades privacy, particularly in cases where there is no offence found to exist. We are pleased to note that it is intended to release the Privacy Impact Assessment publically to ensure transparency of how data will be managed.

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Accuracy

We note that the camera system will use machine learning algorithms to identify a driver holding a phone as opposed to another object for example.

If an automated process (in this case an algorithmic process), is to be used as the basis for an infringement notice, it is QLS's submission that there needs to be average driver-intelligible transparency around this process. If the applied data science says that the object in a driver's lap was a black-cased mobile phone and the driver say it was a similarly sized black hardbound notepad which they threw away before they received the notice, they should have the opportunity to understand and challenge the outcomes produced by the algorithms and the algorithms' biases.

The reversal of the onus of proof

Proposed sections 120D and 120E of the *Transport Operations (Road Use Management) Act 1995 (TORUM Act)* will mean (in the absence of proof to the contrary) that an image or video produced by a photographic detection device can be used as follows:

- a vehicle depicted in the image or video is taken to be evidence that the vehicle was moving, or stationary, but not parked and not reversing;
- the driver or passenger seating position in the vehicle is taken to be fitted with approved seatbelts; and
- the driver or passenger who is depicted not wearing a seatbelt, is taken to be not wearing an approved seatbelt.

The reversal of the onus of proof is not an insignificant matter. Section 4 of the *Legislative Standards Act (1992)* provides the Queensland Government with fundamental principles relating to the creation of legislation in accordance with the rule of law. The principles include requiring that legislation does not reverse the onus of proof in criminal proceedings without adequate justification.

Reversal of the legal burden of proof on an issue essential to culpability in an offence arguably provides the greatest interference with the presumption of innocence, and its necessity requires the strongest justification. In the context of this proposal, there has been no evidence provided to justify an unfair evidentiary burden on the public.

We are particularly concerned that Clause 54, proposed amendment to section 113A of the TORUM Act to provide for a regulation with respect to 'how an image or video made by the device or system is accepted as having detected a *'prescribed offence'*'.

The definition of 'prescribed offence' under section 113 of the TORUM Act 'means an offence prescribed by regulation for this part that is an offence against this Act or another transport Act'. We agree with the submissions raised by the Office of the Information Commissioner that 'types of offences for which this more invasive technology can be used is not sufficiently limited by the proposed amendments contained in the Bill'. This is of particular concern which is heightened by the reverse onus.

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We submit that the legislation should clearly limit the use of the images to seatbelt and mobile phone offences to ensure that only images which are indicative of such an offence are provided to QPS. Police wouldn't normally have access to this kind of material without reasonable suspicion or the appropriate checks and balances being in place.

Human Rights Act and privacy

As set out in the Explanatory Notes 'images will be collected from every vehicle that passes a lane/s that has a mobile phone and seatbelt camera set up'.

The interference with human rights must also be carefully considered and we note in particular, section 25 of the *Human Rights Act* 2019 which states that a person has the right –

- *not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and*
- *not to have the person's reputation unlawfully attacked.*

Our concerns about encroaching on these rights are compounded where data is aggregated and analytics are applied to that data; it would thus be critical that no pictures are on-sold or used by anyone other than the stated purpose.

There are also broader policy issues surrounding over enforcement and the unintended risk of bringing people into the criminal justice system who are unable to pay the associated fines or unable to access legal assistance to defend an infringement notice.³

QLS would appreciate the opportunity for further consultation with the Department on any of these matters going forward and in particular, would appreciate the opportunity to review any draft regulations.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on [REDACTED]

Yours faithfully



Luke Murphy
President

³ Stanley, J, 2019, *The Dawn of Robot Surveillance, AI, Video Analytics, and Privacy* at page 41.